IN THE COURT OF APPEAL OF BELIZE A.D. 2023

CRIMINAL APPEAL NO. 9 of 2017

BRIAN CLARK **FIRST APPELLANT**

AND

THE KING **RESPONDENT**

CRIMINAL APPEAL NO. 10 of 2017

DONOVAN CASILDO **SECOND APPELLANT**

AND

THE KING **RESPONDENT**

BEFORE

The Hon. Madam Justice Hafiz Bertram	-	President
The Hon. Madam Justice Woodstock-Riley	-	Justice of appeal
The Hon Mr. Justice Foster	-	Justice of appeal

L Banner for the first appellant
A Sylvestre for the second appellant
C Vidal SC, Director of Public Prosecutions, for the respondent

Hearing: 26 October 2022

Date of promulgation/handing down: 23February 2023

REASONS FOR JUDGMENT

HAFIZ BERTRAM P

Introduction

[1] This is a joint Appeal of Brian Clark ('Clark') and Donovan Casildo ('Casildo') who were convicted of the offence of murder on 28 July 2017, by the learned trial judge, Justice

Moore ('the trial judge'), sitting alone. They were convicted for the murder of Sylvan Roberts Jr. ('the deceased') on scientific and circumstantial evidence. Blood and fingerprints were found on the scene of the crime. The fingerprints as proven by the scientific evidence matched that of Clark. The DNA evidence matched blood extracted from Casildo and blood stains found on a window curtain at the crime scene.

[2] The Appeal of Clark challenged the fingerprint evidence on the basis that he was denied a fair trial. The Appeal of Casildo challenged the admissibility of the blood evidence on the basis that the trial judge who heard the *voir dire* proceeded to hear the substantive trial and this resulted in unfairness of the trial process. Casildo's argument was that he did not consent for his blood to be extracted and tested.

Factual Background

[3] The case for the Prosecution was that on the night of 23 December 2011, intruders broke into the home of the deceased in Santa Elena Town as he slept with his family. They were awoken by the sound of breaking glass and the deceased went into his living room to investigate. As he did so, he was fatally shot in the living room. The intruders broke a window in the living room and entered the home through that window. The curtain from the same window fell to the floor. Casildo and Clark were indicted on 23 December 2011, for the murder of the deceased. On their arraignment, both Appellants pled not guilty.

[4] Clarke had given an oral admission and a caution statement to the Police. Casildo's blood was extracted for testing to determine if he was present at the crime scene. A consolidated *voir dire* was held to determine the admissibility of the blood evidence from Casildo, and the oral admission and caution statement from Clark. After the hearing, the trial judge ruled that the blood evidence was admissible in the main trial and excluded the oral admission and caution statement from Clark.

[5] The trial judge thereafter continued to hear the substantive trial and found both Appellants guilty of murder. Clark who was a minor at the time of the offence was sentenced to detention at the Court's pleasure to a term of 18 years. Casildo was sentenced to life imprisonment with the eligibility of parole in 25 years.

[6] Both Appellants appealed their convictions in 2017 and on 26 October 2022, this Court heard their joint appeals. At the conclusion of the hearing of the appeals, the Court dismissed the appeals of Clark and Casildo and affirmed their convictions. We were satisfied that both Appellants received a fair trial. The Court promised to give its reasons in writing and we do so now.

The Voir dire

Evidence for the Prosecution in the voir dire

[7] The witnesses for the consolidated *voir dire* were Superintendent Reymundo Reyes, Sergeant Everon Teck, Desol Neal, Justice of the Peace (JP Neal), Detective/Corporal 1203 Daniel Requena, Dr. Maria Goncalves (Dr. Goncalves), Detective/Corporal Leonard Puc. The Appellants, Clark and Casildo gave unsworn statements.

[8] Superintendent Reyes testified that on 23 December 2011, he was informed that a person had been killed at Santa Elena town. As a result, he went to San Ignacio Police Station where he met Corporal Teck and Detective Requena. He then left the Station and went to a house located on San Benito Street, Santa Elena Town, and on arrival he met some police officers outside of the residence who were guarding the scene. They all waited for the Scenes of Crime Technician, Mr Filiberto Pott. Upon his arrival, Superintendent Reyes went inside the house where he saw some red substance suspected to be blood on top of a sofa that was in the living room. On the floor beside the sofa, he saw some red substance suspected to be blood. He saw a broken window and broken glass on the floor inside the house and a red and cream curtain by the window that was broken with what appeared to be a red substance suspected to be blood. He also gave evidence as to the investigation which led to the detention of Casildo. During cross-examination, Superintendent Reyes testified that he did not accompany Casildo to the hospital to seek medical treatment for the open cut wound he had on his wrists.

[9] Sergeant Teck testified that he detained Clark on 29 December 2011. He was 16 years old at the time, a minor and as such he invited Clark's mother to the Police Station. He informed Clark of the reason for his detention and of his constitutional rights. On 30 December 2011, Clark was interviewed in the presence of his mother, Erma Clark, and JP Neal. He testified that Clark volunteered to give a statement and DC Requena assisted him in recording

the statement. In relation to Casildo, Sergeant Teck during cross-examination denied taking him to the hospital.

[10] JP Neal testified that she went to the Police Station and DC Requena informed her that Clark would like to give a statement under caution. At the time, he was present with his mother, Ms. Clark. She stated that after the statement was taken and read over, Clark, his mother and herself signed the statement.

[11] DC Requena testified that on 28 December 2011, he was at the Criminal Investigation Branch (CIB) at San Ignacio Police Station and Sergeant Teck requested him to escort Casildo to the San Ignacio Community Hospital to treat an injury, a cut, that he had on his right wrist. He obtained two copies of medico legal forms, filled in the date, his observation of the cut, signed the forms and escorted Casildo to the hospital. There he met Dr. Goncalves and he informed her of Casildo's injury and handed her the medico legal form. Dr. Goncalves certified the injury as wounding and wrote her observations on the form. Casildo refused treatment for the cut on his wrist and Dr. Goncalves documented the refusal on the forms as well. He further testified that thereafter he requested a blood specimen from Casildo and explained to him that it is a procedure to do so. That it would be sent to the National Forensic Lab for testing to clarify if he was present at the murder scene which is an ongoing investigation. He testified that Casildo consented to give his blood for testing. DC. Requena further testified that he filled out the consent form for blood specimen, dated it, filled in Casildo's name and explained to him the purpose of the document and invited him to sign below. Also, he invited Dr. Goncalves to sign below Casildo's signature and she did so. Thereafter, the doctor proceeded to extract blood from Casildo which she placed in two glass tubes and gave it to him. During vigorous cross-examination, DC Requena testified that Casildo did not refuse to give a blood sample.

[12] Dr. Goncalves is a general medical practitioner and had been practicing medicine for 30 years. She testified that on 28 December 2011, she had been working at the emergency room at the San Ignacio Community Hospital when the police went there with a patient, Casildo, whom she knew as he would visit the hospital for treatment and she would treat him. She treated him about three or four times in the outpatient clinic. She further testified that the police handed her a Medico Legal Form in respect to Casildo. She examined a cut on his wrist and he was mannerly. She showed him the cut on his wrist was infected and wanted to dress it but

he said 'no'. She also asked him if he would take a tetanus shot and he said 'no'. Dr Goncalves further testified that *we* took blood from Casildo but, before that, *we* took the consent form from the police which we sign. (The Doctor and Casildo signed the form). She testified that D.C. Requena had shown her and Casildo the form. He also asked Casildo if he would agree to give the blood. She testified that she saw Casildo sign the form as it was in front of 'us'. She explained that at the Emergency Unit, she worked with a team. Further, she had withdrawn the blood in a room and a nurse was with her. After she took the blood, she gave it to DC Requena. She testified that Casildo was quiet and cooperative when she took the blood. She was shown the consent form which she signed along with Casildo, and identified the form as the one which she signed. The form was admitted by the court into evidence for the *voir dire* and marked as Exhibit "MG1." Dr. Goncalves pointed out to the trial judge and the attorneys the place where Casildo signed. She identified Casildo in the dock. Further, she said that DC Requena wrote on the form.

Donovan Casildo - Unsworn statement from the dock in the voir dire

[13] Casildo in his defence at the *voir dire* made the following unsworn statement:

> "They took me from my house handcuffed to the station where they see an infection on my hand, on my right wrist, so the officer Daniel Requena, asked me if I wanted any treatment to my right wrist. I told him no. Likewise he wanted to take a blood sample from me which my answer was no, so ….. take me to the Community Hospital in San Ignacio where at the front desk I saw Miss Maria, the same lady that was here today. She didn't ask me anything at all at that time. .. The three officers took me in a room straight to the back on the left hand side, where they took off one of the cuff off my hand, my left hand, and had handcuffed my right hand to a chair inside of the room. Then the other two other officers hold down my left hand, telling me that they wanted to take out some blood from me, told me they wanted to take out some blood from me. While the other officer went to the front then bring a male person who I know is a nurse, so he tied a glove on my hand without my consent. …. Took out a needle out of a pack and he injected it in my vein and began to suck blood out. He suck out two little tubes of blood then Mr. Reyes asked him if he can get another tube for him, so it's three. And while they already done that they bring a paper for me to sign and I didn't want to sign, so they took me on the way out back, out back to the hospital where Mr Reyes took this

paper to Ms. Maria in front of a desk where he wanted me to sign again, which my answer was no and he then signed. From there we went back to the police station where I was pending investigation for murder … then they gave me a charge and remanded me to the Hattieville Prison.

Brian Clark – Unsworn statement from the dock in the voir dire

[14] Clark in his defence at the *voir dire* made the following unsworn statement:

"On 24th of December 201, I was sleeping at my grandmother's house, Miss Rosalyn Clark and about 1:00 o'clock in the morning the CIB team went to my residence. Mr. Reyes, Requena, and Teck, so many other police take me to the police station without my mother present. Mr Teck then took my fingerprint as I reached the police station. Then they mi want make I give a statement, which do not have no knowledge about. Mr. Reyes then start to slap me inna my face, Requena start to punch me in the side of my ribs and Mr. Teck started to choke me. Like I said I have no knowledge about the crime so I did not give them any statement. They let me go on the 26th in the morning. Then on 29th the same officers Mr. Reyes, Requena, and Teck and other officers came to my home, Take me to the police station again. Then after that, my ma reach deh. When my ma reach deh da the station, Requena, Reyes and my mother, we all went to the Benque Police Station… where I sleep the night. Mr Requena and Mr. Reyes then came back in the morning without my mother present. On the way back they ker me through a pave road by a river. Mr. Reyes then took out two cement blocks and a rope, he started to buss shots by my ears and then he told me to give a statement or else he will make I go missing. Then I decided to give the statement and ker me to the police station whereby I decided to give the statement. Mr. Requena then called my mother and called the JP, so they can come and witness the Caution statement. At no time, they didn't mek I speak privately with the JP or my mother. That's all I have to say, Your Honour."

Ruling by the trial judge on the voir dire

[15] The trial judge after the consolidated *voir dire* hearing found that the blood was lawfully extracted from Casildo and therefore it was admissible as evidence in the main trial. She found

the Prosecution's evidence to be credible, in particular, that of Dr. Goncalves. In relation to Clark, the trial judge excluded the oral admission and the caution statement made by him as evidence in the murder trial as he was a minor and his parent was not present which was in breach of his constitutional rights. The trial judge stated:

> "…. Ultimately, I found the evidence of Detective Requena along with the evidence of the Doctor with respect to the signing of the Consent Form and the subsequent extraction of blood from the first accused (Casildo) compelling and credible. I am convinced from their combined testimony but especially from the evidence of Dr. Goncalves that the extraction of blood from the first accused was done with his informed consent after he and the doctor had signed the Consent Form provided by Detective Requena. I do not believe that the Doctor came to this court and lied, when she could have easily and understandably say that she did not recall what happened that day in the emergency room. I do not accept that Superintendent Reyes went to the hospital with the first accused. Nor did he forge the signature of the first accused on the consent form for the blood withdrawal in front of Dr. Goncalves or at all. I found that to be farfetched and quite unbelievable. I also find no merit in the story that the police held down the first accused so that the nurse could forcibly draw blood from him as the first accused says happened …
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> I am of the opinion based on all of the aforementioned that likewise the blood evidence before me was not unfairly obtained and I therefore exercise my discretion to admit it. And therefore, exercising my discretion to admit it will not result in an unfair trial for the first accused. I have no doubt whatsoever that the first accused signed the consent form for blood withdrawal in the hospital in the presence of Dr. Goncalves, and did in fact consent to have his blood extracted before it was drawn from him. Accordingly, I find that the blood was lawfully extracted from the first accused and therefore it is admissible as evidence in this trial. (pages 508 - 509 of the Record)
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> With respect to the admissibility of the oral admission and the written caution statement of the second accused, (Clark) I … exercise my discretion to exclude the oral statement and the caution statement made by the second accused as evidence in this murder trial. That is the ruling."

The case for the Prosecution in the main trial

[16] There were no eyewitnesses to the shooting of the deceased. The Prosecution relied mainly on scientific and circumstantial evidence to prove its case against the Appellants. The trial continued after the *voir dire* and the Prosecution called eleven witnesses to prove the case, including Sergeant Everon Teck, the investigating officer, the scenes of crime technician, Filiberto Pott, DC Daniel Requena, Sergeant James Cayetano, the exhibit keeper, Eugenio Gomez, a forensic analyst at National Forensic Science Service, Assistant Commissioner, Keith Lino, Police Officer, Osman Mortis who is a fingerprint analyst, Mr. Compton Beecher, an expert in DNA, and Dr. Hugh Sanchez who did the post mortem.

Evidence relevant to the appeal

[17] The Prosecution's case was that Casildo acted together with Clark to inflict harm on the deceased. They relied mainly on a DNA match between the blood extracted from Casildo and a blood stain found on a window curtain at the crime scene. The scenes of crime technician, Mr. Pott, collected what appeared to be blood on two swabs from the home of the deceased shortly after the shooting. He wore gloves to collect the suspected blood using sterile cotton swabs damped with distilled water. One swab was taken from the living room and the other from the floor of the bedroom. He also collected a red and white or cream coloured curtain laying on the floor beneath a broken glass window in the living room. Further, Mr. Pott collected from Dr. Sanchez a test tube of blood which was taken from the deceased at the post-mortem examination. The cotton swabs, the curtain, and the sample of blood from the deceased were taken to National Forensic Science Service (NFSS) Lab.

[18] Sergeant Teck gave evidence similar to that in the *voir dire*. He testified as to what he observed at the crime scene where the deceased was killed. Further, the crime scene technician, Filiberto Pott, briefed him that some fingerprints were found on the broken glass window which were lifted from the crime scene and forwarded to Sergeant Mortis in Belmopan City. He stated that he was briefed by Mr. Pott that the fingerprints matched that of Clark. He also gave evidence that when Casildo was detained he observed an injury to his right wrists. He therefore directed DC Requena to escort Casildo to the San Ignacio Community Hospital for medical attention and directed him to get a blood sample from him. He further testified that when DC Requena returned from the hospital, he gave him the Medico Legal Report Form and

the Consent Form which was signed by D.C. Casildo and Dr. Goncalves. He also testified of the arrest of both Clark and Casildo for the crime of murder of the deceased.

[19] DC Requena gave evidence similar to that in the *voir dire*. That is, Casildo consented to give blood for the purpose of sending the specimen to the NFSS Lab. He filled out the consent form and signed it. Casildo and Dr. Goncalves signed the form as well. DC Requena handed the blood to the San Ignacio Police Station exhibit keeper which was then sent to the NFSS lab. A Medical Legal Form in relation to Casildo's injury and refusal of treatment was completed by Dr. Goncalves and given to Detective Requena. (See Exhibits DR1 and DR 2).

[20] Mr. Gomez, the forensic analysts, who works at NFSS Lab testified that he has a Bachelor of Science degree in biology. He tested the curtain and the swabs and found human blood. He recommended that the blood samples be sent abroad where there is a capacity to analyse DNA and he personally took the samples to Mr. Beecher in Jamaica for DNA analysis.

[21] Mr. Beecher testified that he received two canisters from Mr. Gomez, each containing test tubes of blood. One test tube contained blood allegedly from Casildo and the other allegedly from the deceased. He also received the curtain and swabs with blood stains allegedly taken from the crime scene. He cut three portions from the curtain and found that two of the stains match the DNA profile from the blood sample of the deceased. The other sample matched the DNA profile in all 13 areas tested, of the blood sample from Casildo.

[22] Dr. Goncalves and Superintendent Reyes who gave evidence in the *voir dire* did not give evidence in the main trial. The trial judge upon the inquiry of the Prosecutor as to whether Dr. Goncalves should be called again to testify, stated that was not necessary.

Defence of Casildo – Unsworn statement in the main trial

[23] Casildo gave an unsworn statement from the dock and he did not call any witnesses. He stated that on the 28th of December 2011, he was at home when the police arrived there, searched his area and house and thereafter handcuffed him. He was taken to the police station. Police observed a cut on his right wrist and asked him if he wanted medical attention for the injury. He stated that he told him "no". He then said:

"they showed me a paper, a consent form, asked me if I wanted to give blood to help them in the investigation, which I told them "no", I didn't want to do that. … They took me to the hospital, San Ignacio Hospital. There they ker me in a room in the back of the hospital, call the female nurse in front, and when I reached the room the Officer removed the handcuffed from behind me, one of the handcuffs and handcuffed me to a chair inside the room. There is when Mr Requena and Mr Teck hold down my other hand, my left hand, and Mr Reyes went to hail a male nurse in the front. They both come back when the male nurse tied gloves on my hand, on my left hand, while the two other officers got my hand hold down. … then he took out a needle out of a pack. And when he took out the needle out of a pack he then injects it in my vein. And when he did that Mr. Reyes asked him for another one, a third one. And from there they handcuffed me back behind my back, walked me out …. To the front door of the hospital. And on my way walking out, cross the desk that the female nurse was there. Then Mr. Reyes asked me if I wanted to sign the consent form and I tell him "no". And then he signed the paper, I couldn't say that is when he forged my name on the paper because I was on my way out of the hospital. ….

There was a time after I was remanded to the Belize Central Prison, three to four months after when forensic personnel, two male and one female, They took me out for a visit in front of the Belize Central Prison. …. They asked me if I wanted to participate give them a blood sample, another blood sample, to help them in their investigation And, I told him no because I need a lawyer or someone to instruct me. So I asked her why is the reason that they want my blood sample when the police have already get one from me by force… And then she spoke to me and told me that the blood they have received from the police have spoilt. And the reason why she wanted to get another blood sample from me on my behalf is because she wanted to test my blood with another blood that they find on a curtain from the crime scene. …. And then she told me if I don't help them by giving them my blood she will get it by force still. And from there I got up from where I was seated and the Prison Officer handcuffed me and escort me back to my building."

Defence of Clark - Unsworn statement in the main trial

[24] Brian Clark in his unsworn statement stated:

> "On the 24th of December 2011 from around 1:00 o'clock in the morning, police Mr. Requena, Mr. Ryes, Mr Teck and other police went to my home whereby I was sleeping in my room. They took me out of my bed, handcuff me, take me to the police station. When I reached the police station, Mr Teck put me straight in the CIB room without my mother present. He took my fingerprints in the presence of Mr. Reyes and Mr. Requena whereby they started to beat me to give a statement that I have no knowledge about. I did not give them no statement because I have no knowledge about what they are talking about. …. They released me from the police station on the 26th of December 2011. …. and on 29th they arrived back at my residence, at my home, carry me to the police station, handcuffed me without my mother's presence, carry me straight into the CIB room once again. They started to question me then my mother come to the police station.
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> They bring me da Cayo in the morning to the police station. They escort me to the judge to take my fingerprint in front of the judge. They took my fingerprint in front of the judge. Ker (take) me downstairs at the CIB room. Then they called my ma to witness the caution statement. After that they charged me, then they send me in front of the judge whereby they read the charge in front of me, send me to the Hattieville Prison in the Wagner's Youth Facility. I just want to say that I am innocent of this crime. I have no knowledge about this crime."

The judgment of the trial judge

[25] The trial for both Appellants concluded on 30 June 2017 and the trial judge reserved judgment. On 28 July 2017, the trial judge gave an oral judgment, reading from pertinent parts of a prepared judgment which was later handed down bearing the same date.

[26] The trial judge carefully analysed the Prosecution's evidence from Filiberto Pott, Dr. Sanchez, Inspector Mortis, Diana Roberts, Eugenio Gomez and Mr. Beecher, and felt sure that each element in the offence of murder had been proven. That Sylvan Roberts is dead and that he died of harm. That it was Casildo and Clark who acted jointly to unlawfully cause harm to

the deceased with the intention to kill him. The trial judge was of the view that this was the inescapable conclusion from the totality of the evidence which she accepted as true.

[27] Little to no weight was given by the trial judge to the unsworn statements of Casildo and Clark. She felt sure of the guilt of both Appellants from the Prosecution's evidence which she carefully reviewed and analysed. The evidence she relied upon comprised of DNA and fingerprint evidence. There was a painstaking examination by the trial judge of the scientific and circumstantial evidence in the trial of both Appellants.

[28] The trial judge was satisfied to the extent that she was left with no reasonable doubt that Casildo acted jointly with Clark to intentionally and unlawfully cause the death of the deceased. Therefore, she found him guilty of murder. Likewise, she was equally sure and had no reasonable doubt that Clark acted jointly with Casildo to intentionally and unlawfully cause the death of the deceased and found him guilty of murder.

The findings of the trial judge relevant to the Appeal

Findings in relation to Casildo

[29] In the main trial, the trial judge considered the reliability of the DNA analysis given by Mr. Beecher before she accepted it in evidence. In her analysis of the evidence, she was satisfied as to the integrity of the source, collection, storage, transmission and testing of the blood taking from Casildo at the San Ignacio Community Hospital. She also found the evidence credible about the integrity of the source, collection, storage, transmission and testing of the blood on the curtain and the blood on the swab from the crime scene. The trial judge accepted the evidence of Mr. Gomez who found the presence of human blood on the swabs and curtain collected at the scene. Also, she accepted the evidence of the DNA expert, Mr. Beecher who conducted the DNA testing at CARGEN in Jamaica. She was convinced of the reliability of the Crown's DNA evidence in all of its aspects.

[30] The trial judge also considered the circumstantial evidence in the case against Casildo and found he was present at the crime scene. She concluded from the circumstantial and scientific evidence that the only reasonable inference to be drawn was that Casildo bled on the curtain while present at the crime scene. She assessed all the evidence and found that the only

reasonable conclusion to be drawn was that Casildo was present at the scene on the night of the shooting and participated in causing the death of the deceased.

Findings in relation to Clark

[31] The trial judge found that the latent fingerprints lifted from the crime scene matched the fingerprints taken from Clark at the Magistrate's Court. She analysed the evidence and found that Clark jointly participated in the crime that resulted in the death of the deceased

The Appeal of Clark

[32] By Notice of Appeal filed on 9 September 2022, Clark filed one ground of appeal which is that he did not receive a fair trial as guaranteed by the Constitution of Belize. The ground had four components and were argued separately. These are:

(i) The integrity of the latent fingerprints that were lifted from the crime scene which linked Clark to the crime of murder was called into the question and therefore there was the possibility that the exhibits were contaminated, altered or compromised.

(ii) Clarke's fingerprints were taken on 30 December 2011 in violation of section 48(1) of the *Summary Jurisdiction Procedure Ac*t, Chapter 99 of the Substantive Laws of Belize, Revised Edition 2000 and therefore the trial judge should have exercised her discretion and excluded the evidence.

(iii) The most important piece of evidence, the Fingerprint Form with Clarke's finger prints that were taken by Sgt. Mortis was not disclosed to him nor his Attorney. Furthermore, they were not tendered into evidence during the trial, and despite not being a part of the case, it was considered by the trial judge as part of the evidence.

(iv) On several occasions the trial judge descended into the arena and made the trial unfair.

Ground 1: The integrity of the latent fingerprints which linked Clark to the crime

[33] The complaint under this ground was that the latent fingerprints that were lifted from the crime scene which linked Clark to the crime of murder of the deceased was called into question and therefore there was the possibility that the exhibits were contaminated, altered or compromised. Mr. Banner referred to the evidence of Mr. Pott who testified that he lifted five latent prints on the outside of the broken window. Four of the prints were placed by him on one typing sheet and the other one on another typing sheet. The Prosecution tendered the typing sheets into evidence and the court admitted the typing sheets as Exhibits 'FP1' and 'FP2' respectively. Mr. Pott labelled each sheet with the date and place of the incident, the type of crime and his name and signature. Thereafter, Mr. Pott handed over the Exhibits to Sergeant Mortis, the finger print analyst. The gravamen of the complaint was that the evidence of Sergeant Morris' was that he received only one typing sheet. Further, there was no evidence as to how Mr. Pott sealed the envelope and if he placed any description on it. Also, the evidence is not clear as to when the exhibits were returned, to whom they were returned, and in what condition. Counsel submitted that the fingerprints were not in a sealed envelope in court. Further, there were two typing sheets and there were markings (numbering) on them, which none of the witnesses could explain.

[34] Counsel pointed out that in cross-examination, Mr. Pott accepted that the exhibits should be returned sealed and then unsealed in court and since that was not done in this case, there is a possibility that it was tampered with or its integrity was compromised. As such, Mr. Banner argued that the integrity of the exhibit was called into question as there was a break in the chain of custody between the time when the fingerprints were lifted at the crime scene to when they were produced in court. Counsel submitted that since the Crown did not fill the gaps the prints ought not to be admitted, as shown in ***Damian Hodge v The Queen***,[1] or alternatively the trial judge should not have given it much weight.

[35] The learned Director submitted that the evidence was clear, through the chain of custody established by Crime Scene Technician Pott and Fingerprint Expert, Sergeant Mortis, that the same prints lifted from the window by Pott at the scene and placed on 'FP1', were the same prints that were analyzed by Mortis and which he determined to be a match to the

[1] HCRAP 2009/001, Territory of the Virgin Islands

fingerprints of Clark. Senior counsel submitted that once this evidential burden had been met, the learned trial judge could have admitted the evidence and relied on it. She relied on the decision of the Caribbean Court of Justice in ***Grazette v The Queen***.[2]

[36] The Director further submitted that any discrepancy in relation to 'FP2' or what may have occurred with the envelope in which the prints were first received, after the analysis, was therefore not material. Hence, the trial judge was justified in concluding as she did, that, she did not "*find either of these flaws to be fatal*" and that "*the issues raised by the learned defence counsel, do not abrogate from the integrity of the prints taken from the second accused".* Counsel referred the Court to paragraphs 66 to 68 of the judgment of the trial judge where she dealt with the flaws raised by counsel for Clark.

[37] At the trial, the trial judge addressed the submissions by counsel for Clark in relation to (a) integrity of the finger prints and (b) the prints were taken in violation of Clark's constitutional rights. She stated that she addressed these submissions previously. This included the absence of the envelope and no explanation was given for the absence of the envelope. The judge said at paragraph 117:

> "[117] …. . As mentioned by me earlier in this judgment, the absence of the envelope does not give me any doubt about the integrity of the prints, the continuity of the prints taken from the crime scene, or the analysis and comparison of the prints. There is no evidence of contamination and I have no reason to doubt that the latent prints are those lifted from the crime scene by Mr Pott and compared to those of the second accused by Mr Mortis. I can find no reason not to give full evidential weight to the latent prints and the analysis of them compared to the prints of the second accused. In this regard, I have directed myself based on the authority below.
>
> [118] See **Hodge and the Queen** (an OECS Crim Appeal from the Virgin Is, at para 12 saying that gaps in continuity of an exhibit will not necessarily be fatal "...unless they raise a reasonable doubt about the exhibit's integrity."); the

[2] [2009] CCJ 2 (AJ).

Canadian case of **R v Larsen**, 2001 BCSC 597, para 65; and **Bowen v PC Ferguson**, Sup Ct Claim No. 112 of 2014.

> '[65] In short, there is no specific requirement as to what evidence must be led or by whom to establish continuity. There is also no specific requirement that every person who may have had possession during the chain of transfer should himself or herself give evidence. If there is a gap in continuity and if the trier of fact is not satisfied beyond a reasonable doubt that substances taken from the accused were the substances analysed, the evidence may still be admissible but the weight given to the exhibit and the evidence would be affected. The weaker the evidence regarding continuity and the stronger the evidence suggesting contamination, the lower the weight that should be given to the evidence or analysis thereof. **R v Larsen**'."

[38] This Court reviewed the evidence of both Crime Scene Technician, Pott and Fingerprint Expert, Sergeant Mortis and was of the view that the trial judge properly analysed the evidence. The fingerprints taken at the scene of the crime were the same fingerprints analysed and found to be that of Clark. Mr. Pott's evidence was that he handed over the two typing sheets with the latent prints from the scene to Sergeant Mortis of the Police Information Technology Unit (PITU) on the 26 December 2011. He testified that he received them back from Sergeant Mortis on 12 January 2012, although the chain of custody form, which was not tendered into evidence, states the latent prints were returned on 8 December 2012. Mr Pott agreed that the date on the chain of custody form was erroneous and that he was mistaken when he signed the form with this incorrect date on it.

[39] Sergeant Mortis testified that he received the latent prints on 26 December 2011 from Scenes of Crime Technician, Mr. Pott. He saw a match between number one and two of the latent prints provided by Mr Pott and the left middle and left little finger of Clark's prints, provided by the investigating officer. Mr Mortis testified that after seeing the match, he asked the police to apply to the Magistrate Court pursuant to *section 48 (1) of the Summary Jurisdiction (Procedure) Act,* for fingerprints to be taken of the suspect in Magistrate Court for transparency so that the match could be confirmed. Further, the AFIX system once again

showed a match between the latent prints from the scene and two of the fingerprints taken from the second accused in the Magistrate Court.

[40] Mr. Pott testified that the Exhibits of the latent prints were placed in an envelope and sent to Mr Mortis. Mr Mortis testified that he received one neutral paper in an envelope but could not say what happened to the envelope. Mr Pott identified 'FP1' as the paper on which he placed the latent prints lifted from the scene and handed these over to Mr Mortis. He identified 'FP1' as the paper received from either Mr Pott or the investigating officer. He could not recall which one of them gave him the latent prints. He identified the exhibit as the latent prints which he scanned and entered into the AFIX system which matched the prints from the second accused which he received on the 26 Dec. 2011.

[41] This Court accepted that there were discrepancies in relation to the date on the chain of custody form through which the fingerprints were sent by Pott to Mortis and back to Pott. Also, the envelope with the exhibits were not in the court and the Crown did not explain the absence of same. However, we are satisfied that these flaws had not caused the latent fingerprints of Clark to be contaminated, altered or compromised. "FP1" contained the latent prints lifted at the scene by Mr Pott and then compared to the fingerprints taken from Clark by Mr. Mortis. As such, the Court sees no basis to interfere with the trial judge's assessment of the evidence as shown at paragraphs 66 to 68 of her judgment, quoted in full below:

> "[66] Three issues arose in relation to the fingerprint evidence. There is an erroneous date, as mentioned, on the chain of custody form through which the fingerprints were transmitted from Mr Pott to Mr Mortis and back to Mr Pott. Additionally, the envelope in which exhibits 'FP1' and 'FP2' were originally contained when Mr Pott handed these exhibits to and received them from Mr Mortis was not in court and its absence was not explained. However, I do not find either of these flaws to be fatal.
>
> More importantly, the question arose whether the fingerprints taken from the second accused were done so in violation of his constitutional rights. The learned defence counsel Mr Banner for the second accused submitted that the second accused's mother was not present when his prints were taken in Magistrate Court. In support of his submission, he pointed out that the name of the mother was not written on the Magistrate Court book, a document that is not in evidence but was viewed during the

trial and that the mother did not sign the form when the prints were taken from the second accused in Magistrate Court.

On this significant issue, I accept the evidence of Sergeant Teck, Mr Lino, and Mr Mortis who all said that the mother of the second accused (described as an adult female) was with him in court when the fingerprint application was made and granted, and when the prints were taken by Mr Mortis in front of the Magistrate. Shortly after the application was made, the mother was present with her son, the second accused, in the Police Station located downstairs beneath the courtroom. I accept that the presence of the mother should have been recorded; however, this failing does not detract from the actual fact that she was present and based on Mr Lino's evidence was visible and vocal on behalf of the second accused.

[67] I have directed myself that I must be sure of the integrity of the source, collection, storage, transmission, and testing of the latent print lifts from the scene, and of the fingerprints of the second accused in order to accept the Crown's fingerprint evidence.

[68] Having carefully reviewed Mr Pott's evidence of dusting and lifting the latent prints at the scene, I am sure of the source and collection of those prints. I am also sure of the integrity of the storage and then transmission of the latent prints to the PITU and also of Mr Mortis' comparative analysis of the latent prints with the fingerprints of the second accused taken at Magistrate Court. Additionally, I am sure of the integrity of the source, collection, storage, transmission, and testing of the fingerprints of the second accused which were ultimately compared to the latent prints. I have discussed earlier in this judgment the process by which the fingerprints were taken from the second accused. The issues raised by the learned defence counsel, do not abrogate from the integrity of the prints taken from the second accused, in my view."

[42] The Court agreed with the conclusion of the trial judge that the issues raised by learned counsel for Clark did not abrogate from the integrity of the fingerprints taken from Clark. The test done by Sergeant Mortis were comparisons of the latent fingerprints on the broken window with that of the fingerprints taken before the Magistrate at the Magistrate's Court. The ground was therefore without merit.

Ground 2: **Whether fingerprints taken before a Magistrate at the Magistrate's Court should have been excluded by the trial judge as a result of an irregularity.**

[43] The issue raised by Mr Banner is that Clarke's fingerprints were taken on 30 December 2011 in violation of section 48(1) of the ***Summary Jurisdiction (Procedure) Act***,[3] and therefore the trial judge should have exercised her discretion and excluded the evidence. Section 48(1) provides:

> "Where any person not less than fourteen years of age who has been taken into custody is charged with an offence before a court, the court may, if it thinks fit, on the application of a police officer not below the rank of assistant inspector, order that the prints of that person be taken by a police officer or other person named in the order."

[44] There is no dispute that Clark was not charged when the application was made for his fingerprints to be taken, in breach of section 48(1). But, it was our view that this irregularity did not automatically exclude the positive fingerprint evidence. The issue for this Court was whether the trial judge properly exercised her discretion when she admitted the evidence.

[45] Learned counsel Mr. Banner submitted that the trial judge addressed her mind to the fact that the application was made contrary to law but the trial judge was of the view "*that once the evidence was relevant, and she had no discretion, therefore, it must be admitted."* Counsel further submitted that he disagreed with that view because a judge has a discretion to admit or exclude evidence.

[46] The Director accepted that Clark's fingerprints had been taken before he was charged with the offence, which was contrary to section 48(1) and therefore constituted an irregularity. In relation to the submission by Mr. Banner that the trial judge stated that she had no discretion, the Director submitted that counsel had misquoted the basis of the judge's decision. That the trial judge did not indicate that she did not have a discretion and was bound to admit the evidence. The Director further argued that the trial judge would have had to consider whether

[3] Chapter 99 of the Substantive Laws of Belize, Revised Edition 2000,

the probative value of the evidence outweighed its prejudicial value and whether it was fair in the proceedings to admit the evidence.

[47] This Court had carefully scrutinized the judgment of the trial judge and had done our own assessment of the evidence and arguments before the court. The trial judge was clearly concerned that the fingerprints of Clark were taken before he was charged. She agreed with Crown Counsel that it amounts to an irregularity and that the fingerprint evidence was relevant but did not say she had no discretion to exclude it. She considered fairness and prejudice to the accused, Clark, and whether there was evidence of *oppression, trickery or bribery.* The findings of the trial judge had to be read in context with the submissions made by Crown Counsel. At paragraph 102, of her judgment she stated:

> [102] The guidance is that evidence collected in non-compliance with the law or regulations, as appears to be the case here, does not preclude the court from accepting and considering that evidence once it is relevant, as the learned Crown Counsel submitted. Therefore, I should not and will not exclude the fingerprint evidence in this case because of "imperfections" or "irregularities" in the way the evidence was obtained unless I am of the view that it would be unfair to the accused. In accordance with the learning, I warn myself to view the irregularity in the context of the trial as a whole."

[48] Before making that finding, the trial judge considered submissions from Crown Counsel and the guidance from ***Donald Phipps v the Queen***.[4] At paragraphs 100 and 101, the trial judge stated:

> "[100] I was concerned about whether those prints taken in the Magistrate Court on the 30th of December 2011 could and should be considered since they were clearly taken before the second accused was charged with an offence. The Learned Crown Counsel Mr Montero submitted that this was an irregularity but that the irregularity should not stop the case because as long as the evidence was relevant the Court could admit it once it had not been obtained by trickery, threats, bribery, or oppression. He helpfully cited **Callis v Gunn** as authority

[4] **[2012] UKPC 24**

for the proposition. Learned Crown Counsel further submitted that the finger print evidence is relevant. The Court cannot help but agree. The Crown Counsel also said that the finger prints from the second accused were not obtained through oppressive (oppression), trickery or bribery. This is also true."

[101] The remaining issue is the impact of taking the prints in non-compliance with **section 48 of the SJ Procedure Act.** The Privy Council case emanating from Jamaica of **Donald Phipps v the Queen** [2012] UKPC 24 was of assistance to me in resolving this final issue. The relevant portion of that judgment at paragraph 20 says:

> "The Board is unable to accept Mr Rhodes' criticisms. It is of course the judge's duty to ensure that evidence is presented as fairly and impartially as possible. Where irregularities occur, it is the judge's responsibility to consider their significance in the context of the trial as a whole, and take appropriate action. In most cases the giving of a suitable warning to the jury will be sufficient to ensure that no material prejudice results. That is what the judge did in this case. Mr Rhodes was unable to refer us to any authority to support the proposition that an irregularity, such as the Court of Appeal acknowledged to have occurred in this case, required the trial to be abandoned. This ground of appeal must be dismissed."

[49] The above paragraphs clearly showed on what basis the evidence was admissible. The trial judge agreed that relevancy is a consideration but only if the "*finger prints from the second accused (Clark) were not obtained through oppression, trickery or bribery*."

[50] Mr. Banner also submitted that the finger prints taken on 26 December 2011, were in violation of his constitutional rights as a minor. That his mother was not present when the Police took those prints. The trial judge at paragraph 95 of her judgment found that the mother was present when Clark was processed at the Police Station. We have no reason to interfere with this finding which was made after considering the evidence of three witnesses present at the Magistrate's Court.

[51] The Court was of the view that the irregularity was not sufficient in this case to exclude the finger print evidence. The ground had no merit.

Ground 3: Non disclosure of fingerprint form

[52] Mr. Banner's ground as framed was that the most important piece of evidence, the Fingerprint Form with Clarke's fingerprints that were taken by Sergeant Mortis was not disclosed to him nor his Attorney. Furthermore, they were not tendered into evidence during the trial, and despite not being a part of the case, it was considered by the trial judge as part of the evidence. Learned counsel referred to the evidence of Sergeant Mortis who testified that when he took Clark's fingerprints on 30 December 2011, he completed a "Finger Print Form" and he placed the eight fingers and two thumbs on it which he and Clark signed. He submitted that the Form was never disclosed to Clark in his trial bundle and it was not tendered into evidence.

[53] Mr. Banner argued that according to the best evidence rule, if an original document is available in a person's possession, it must be produced. Further, it was not disclosed to Clark. Also, the Prosecution did not give an explanation as to the reason why the Form was not produced. He submitted that secondary evidence cannot be given by producing a copy. Learned counsel argued that Sergeant Morris cannot say for certain that the exhibit that was tendered through him was the fingerprint of Clark. Further, the only way the Crown could connect the evidence, was to produce the original fingerprint form that had both signatures of Clark and Sergeant Morris.

[54] For those reasons, Mr Banner submitted that to ensure there is a fair trial, there must be full disclosure of the Crown's case to Clark. Since that was not done, it prevented Clark from having a fair hearing as the fingerprints and fingerprint form were the most important evidence in this case.

[55] Learned counsel further argued that Clark's right to fair hearing was also violated when the trial judge asked Sergeant Morris to show her the Fingerprint Form. She mentioned that it was not part of the evidence but referred to it multiple times during the hearing. Counsel submitted that the trial judge fell into error by looking at the fingerprint form and took into account highly prejudicial hearsay evidence.

[56] The Court was of the view that this ground had no merit. We agreed with the submission of the Director that the judgment of the trial judge showed that she did not rely on any evidence that had not been admitted during the proceedings. Further, the fingerprint analysis evidence led by the Crown in support of its case came from the comparison of the prints taken by Sergeant Mortis before the Magistrate, with those prints lifted from the scene of the crime and not from the Fingerprint Form. The Fingerprint Form was therefore of little significance.

[57] Further, as submitted by the Director, the fingerprints taken from a suspect in custody are not ordinarily provided to the suspect and there is also no indication that any request for the same was made by Clark. Therefore, we agreed with the Director that Clark's conviction was not affected by this issue and was not a basis to conclude that he did not have a fair trial.

Ground 4 – The trial judge on several occasions descended into the arena and made the trial unfair.

[58] Mr Banner submitted that several times during the trial, the judge descended into the arena by asking questions of the Crown's witnesses to clear up the evidence. He argued that the judge went beyond what is permitted to clear up evidence.

[59] The learned Director in response directed the Court to Section 65(7) of the **Evidence Act**[5] which provides:

> "(7) The judge may, of his own motion at any stage of the examination of a witness, put any questions to the witness he thinks fit in the interests of justice."

[60] Learned senior counsel argued that section 7 existed long before the advent of judge only trials. That as the trier of fact, the section takes on even more prominence as the judge has to, at all times, satisfy herself that she is properly seized of the material upon which she will adjudicate upon the guilt or innocence of the accused before him. The Director relied on

[5] Cap 95, Laws of Belize, Revised Edition 2020

the judgment of this Court, ***Forbes and others v The Queen***,[6] where this Court, faced with a similar submission in relation to questions asked by the trial judge, pointed out at paragraph 48,

> "[48] The **Garcia case** and the **Roches case**, as submitted by the Director, are distinguishable from the instant matter, as in those cases the judge elicited inadmissible evidence. In the present case, the judge asked clarification questions in order to assess the evidence to determine its reliability. The trial judge's questions, in our view, did not amount to any unfairness in the trial process."

[61] She argued that the references made by Clark, in similar vein, merely demonstrated the judge's attempts to ensure that she would have, ultimately, been able to properly determine the issues in the case and assess the evidence before her. Further, he has not shown that the judge acted improperly, beyond her jurisdiction or unfairly and that there was any consequent miscarriage of justice.

[62] The Court had reviewed the pages of the record relied upon by the Banner, pages 545 – 548, Pott's evidence, 555-557, 594 – 597, 941 – 942, and was of the view that the trial judge did not go beyond clarification questions, as shown below.

<u>Questions by the trial judge to Mr. Pott</u>

[63] Pages 545 – 548 concern the condition of the envelope with the fingerprints as can be seen from the very first question as follows:

> "I would still like to know about the sealing of this exhibit and the Chain of Custody, it appears that it says condition of exhibit packaged and sealed when it came from you and went to Mr. Mortis and then when it came back from Mr. Mortis to you it seems to have a different package and sealed. Do you recall when you received it back what its condition was?

[64] The trial judge had to ensure that the finger prints were not compromised. She also gave Mr. Banner the opportunity to re-examine Mr. Pott.

[6] Criminal Appeals Nos 20, 21 and 24 of 2018

Questions to Cpl Teck - Pages 555-557 – loose fence

[65] The questions put to Corporal Teck by Crown Counsel, Mr. Montero Jr., concern the crime scene and the trial judge gave her observation as to a gap in the evidence. She said:

> "It seems that the witness left out something rather significant in the sequence of events that happened earlier on Saturday, December 24th and I think you would want to ask him about that. If you go back to your notes from Mr. Pott in his examination-in -chief, if you just look for what happened on that date. You see what I'm referring to, Mr. Prosecutor.

Mr. Prosecutor then said: "Not as yet, My Lady." The trial judge then said:

> "Perhaps you could just ask your witness about anything else he observed on the scene that he asked his scenes of crime to take photographs of."

[66] The trial judge was referring to the evidence that was already before the court of the loose area of the fence at the deceased residence. Corporal Teck had directed Mr. Pott to take photographs at the scene of the crime which he did and this included photographs of the loose fence. In the view of the Court, the trial judge was entitled to point out gaps in the evidence. There was no prejudice caused to the accused, Clark.

Questions to Corporal Teck - Pages 594 – 597 - Presence of Clark's mother

[67] The trial judge said:

> "So, Mr. Teck, I was just trying to sort out this issue with whether the mother was present or not, could you explain to me it what happened that morning, we're talking about the 30th."

The questions that followed showed that the trial judge wanted to satisfy herself that Clark's mother was present when his fingerprints were taken at the Police Station. She is entitled to do so in the interest of justice as Clark was a minor at the time.

Questions to Insp. Mortis - Pages 941 – 942 – Comparison of manual and latent prints

[68] The questions asked by the trial judge was to clarify her understanding of comparison of manual prints and the latent prints lifted from the crime scene. After learning that this was done, the trial judge then asked if the application was made to the Magistrate's Court to which the answer was 'yes'. The issue raised thereafter by the trial judge was to clarify a point raised earlier by defence counsel as to why there were no signatures on Exhibit "OM2". The answer to that question by Insp Mortis was "Because the signature Your Honour, would be on the actual fingerprint that we took in the Court." The questions that followed by the trial judge was in relation to whether the witness had a copy of the fingerprint and the signature and the trial judge wanted to see it. In the view of the Court, the above questions were asked to satisfy the defence and the trial judge, that on the fingerprint form where the fingerprint was placed, there was a signature as well.

[69] The Court was of the view that all the questions asked by the trial judge did not cause any unfairness to the accused, Clark. As in the case of ***Forbes and others v The Queen***, in the instant matter, the judge sought to clarify issues before her in order to assess the evidence to determine its reliability.

Disposition

For those reasons, the appeal of Clark was dismissed and his conviction affirmed.

The Appeal of Donovan Casildo

[70] The Appellant, Casildo filed two grounds of appeal, but pursued only the first ground. That is:

> "The learned trial judge conducting of the *voir dire* and hearing of the substantive trial, resulted in the Appellant receiving an unfair trial."

[71] The evidence linking Casildo to the murder of the deceased was DNA evidence from blood extracted from him, blood from the deceased and blood on a curtain in the house where the deceased was shot. At the trial below, Casildo challenged the admissibility of the blood into evidence on the basis that he did not freely consent to the blood being extracted from him.

At the close of the *voir dire*, the trial judge admitted the evidence, finding the witnesses for the Prosecution credible that Casildo gave consent for his blood to be extracted.

[72] Learned counsel, Mr. Sylvestre argued that the trial judge at the end of the *voir dire* found the Prosecution witnesses credible and the Appellant's version "*far fetched and unbelievable*," and consequently admitted the blood sample extracted from the Appellant into evidence. Further, at the main trial, Casildo advanced the same case as in the *voir dire*. He referred to Vol. 5, page 1278 of the Record where the trial judge stated:

> "The First Accused felt comfortable enough to refuse medical treatment while at the hospital. I believe he could have and would have refused consent to the extraction of his blood had he wished. I believe that he consented freely for his blood to be taken by the doctor, a doctor whom he previously knew and previously knew him. …"

[73] Mr. Sylvestre contended that Casildo's grouse was that given the finding of facts made by the trial judge in the *voir dire*, and his case in the main trial, he could not be said to have received a fair trial. Further, the specific circumstances of Casildo's case in the trial below required a different trial judge to conduct the main trial. Learned counsel further submitted that the admissibility of the sole evidence connecting Casildo to the crime was determined in the *voir dire*. That is, whether the blood extracted from the Appellant was given freely, voluntarily and with his consent. That this was the same issue that was later canvassed in the main trial, by the same judge who conducted the *voir dire*. He submitted that the evidence of the Prosecution in the main trial on this issue was the same as in the *voir dire* and likewise the evidence of Casildo was the same as in the *voir dire* determined by the trial judge. Further, the factual and legal conclusions of the trial judge in the main trial were therefore the same as in the *voir dire*.

[74] Mr. Sylvestre relied on paragraph 18 of the CCJ judgment, ***Manzanero v Queen***,[7] where the Court stressed the importance for accused persons to receive in a judge alone trial, a trial that is no less fair than in a jury trial. He also relied on paragraphs 20 and 21 of that judgment where the CCJ explained at paragraph 20 that: " The function of the *voir dire is to*

[7] [2020] CCJ 17 (AJ) BZ

determine the admissibility of challenged evidence while the function of the main trial is to determine the guilt or otherwise of the accused based on the admissible evidence." As counsel stated, the CCJ explained the interplay of the *voir dire* procedure and the right to a fair trial in a non-jury trial. At paragraph 21, the CCJ explained the differences in the judge alone trial and a jury trial.

[75] Learned counsel argued that the trial judge in the instant matter in rejecting Casildo's unsworn statement in the *voir dire* and accepting the version of the Prosecution's witnesses, had made a finding on Casildo's credibility. He referred to the statement made by the trial judge that Casildo's version was "*far-fetched and unbelievable".* Further, that the situation was further compounded by the fact that the trial judge, as things turned out, in the main trial made a determination on the same facts as she did in the *voir dire*, that is, whether she believed Casildo freely and voluntarily consented to the extraction of his blood.

[76] The learned Director referred the Court to paragraphs 22, 23, 30 and 31 of the ***Manzanero*** judgment which we found useful for the determination of this ground and not only the paragraphs relied on by learned counsel Mr. Sylvestre. The Director submitted that the *voir dire* was held to determine the admissibility of the blood evidence. The issue for the judge in adjudicating on the guilt or innocence of Casildo was whether she would rely on that evidence that had been admitted and if so, the effect of that reliance. We could not find fault with this submission. See paragraph 20 of ***Manzanero*** which states the function of the *voir dire* and the function of the main trial.

[77] Learned counsel further argued that throughout the course of a trial, a judge sitting alone is called upon to make decisions in relation to the admissibility of evidence and thereafter, to determine the value of that evidence. She correctly submitted in our view that a decision on the first issue does not mean that there has to be a positive decision on the second and having decided that issue, the judge does not have to decide it again at the end of the trial.

[78] The Court having reviewed the judgment of the trial judge disagreed that the issue of consent was determined again by the trial judge in the main trial. Further, we were of the view that the ***Manzanero*** judgment is applicable to the instant matter, contrary to the argument of Mr. Sylvestre. In our view, the issue in the ***Manzanero's*** judgment was one of fairness. Ultimately, this Court had to consider whether the trial judge was fair and impartial in her

analysis of the evidence of the Prosecution and the defence of Casildo as shown in his unsworn statement.

Whether Casildo received a fair trial

[79] Casildo has a constitutional right to a fair hearing by an independent and impartial court.[8] Mr. Sylvestre's submissions raised issues of fairness to Casildo in the context of a judge sitting alone who conducted the *voir dire* and thereafter proceeded to hear the substantive trial. This Court therefore, had to ensure that Casildo received a fair trial in the judge alone trial which is no less fair than he would have received in a jury trial (paragraph 18 of ***Manzanero*)**. See also the case of ***Dioncicio Salazar v The Queen***.[9] See further para 21 of ***Manzanero*** where the CCJ posed the question in these terms: "*In a judge alone trial, for the purpose of the main proceedings, is the trial conducted by a professional judge tainted with unfairness when, during a voir dire, the judge had to make adverse findings on the credibility of the accused*?

[80] Adverse findings by a trial judge on the credibility of an accused does not necessary mean there is unfairness. The CCJ in ***Manzanero***, gives guidance in that regard at paragraph 30:

> "[30] ….. The mere fact that a trial judge has made an adverse finding on the credibility of the accused on the voir dire, or has heard evidence which is prejudicial to or indicative of the guilt of the accused, does not lead to the inescapable conclusion that the accused has been denied a fair trial. In a judge alone trial where the trial judge has conducted a voir dire, an appellate court must be satisfied that the trial judge, in determining the guilt of the accused, did not carry over to her deliberations on the main trial any adverse findings on the credibility of the accused, or was not improperly influenced in arriving at a Guilty verdict by evidence which was prejudicial to or indicative of the guilt of the accused, and not ultimately admitted into evidence……"

[8] Belize Constitution, Revised Edition 2020, Cap. 4 s6(2)
[9] [2019] CCJ 15 (AJ)

[81] In the instant matter, the *voir dire* was held to determine the admissibility of the blood evidence. The finding of the trial judge in the *voir dire* in relation to Casildo's consent for his blood to be extracted was based on the credibility of the Prosecution witnesses, Dr. Goncalves and Detective Requena who testified that Casildo consented for his blood to be extracted. In the substantive trial, the trial judge did not hear evidence from Dr. Goncalves again as at that stage she was not determining the issue of admissibility of the blood evidence. She was analysing the reliability of the admissible evidence and the weight to place on it.

[82] Mr. Sylvestre referred to the statement made by the trial judge that Casildo's version was "*far-fetched and unbelievable.* That statement was made by the trial judge when she considered the issue of forgery of Casildo's signature and it was not carried over to the main trial in her deliberations to find Casildo guilty. Further, she found no merit in Casildo's story as stated in his unsworn statement that the police held him down so that the nurse could forcibly draw blood from him. In the end, it was the credibility of the Prosecution witnesses, in particular, Dr. Goncalves which led her to admit the blood evidence. She stated that she did not believe that Dr. Goncalves lied to the court when she could have easily and understandably have stated that she did not recall what happened in the emergency room when Casildo was taken there.

[83] In the view of the Court, having considered the trial judge's assessment of the evidence in the main trial, she had not considered the issue of admissibility of the blood evidence again. Since it was not a jury trial, in our view, there was no need to hear evidence and determine the issue of admissibility of the blood evidence again for the obvious reason that she had heard the evidence already and found it admissible. She specifically mentioned that there was no need to call Dr. Goncalves to testify in the main trial.

[84] Learned counsel, Mr. Sylvestre referred the Court to page 1278 of the Record where the trial judge stated in the main trial that Casildo *"felt comfortable enough to refuse medical treatment while at the hospital. I believe he could have and would have refused consent to the extraction of his blood had he wished. I believe that he consented freely for his blood to be taken by the doctor, a doctor whom he previously knew and previously knew him. ..."* At this time, when the trial judge made the above statement, she was not deliberating on the admissibility of the blood evidence. She was considering the case for the defence and the reliability of the evidence which she admitted. For the defence, she considered Casildo's

unsworn statement. He called no witnesses. The judge specifically directed herself that Casildo had nothing to prove and even if she gave little to no weight to his statement it does not mean that she would convict him because she did not believe him. The reason being that accused persons have been known to tell untruths at trial for reasons other than guilt so she cannot rely on her disbelief of Casildo's statement to convict him. The trial judge directed herself that it is the Prosecution's evidence that she may rely upon which must make her feel sure of Casildo's guilt.

[85] The trial judge in making the comment which learned counsel complained about above, was considering whether she could rely on the admissible evidence based on the unsworn statement by Casildo in the main trial that he was forced to give blood and submissions by counsel for him that consent was given in coercive conditions, that is, Casildo was handcuffed to a hospital bed, the emergency room was crowded and the police officers were armed with guns. The trial judge was cognisant that if consent was given in coercive conditions, then that would negate the consent. However, she found that there was no evidence that the emergency room was in fact crowded at the time and that Det. Requena testified that his gun was concealed and he could not say if the other officer had a gun or not. The trial judge did not accept any of the submissions that consent was given in coercive conditions thus did not find that the consent should be negated. It was directly as a result of the analysis of the evidence by the trial judge on the coercive conditions that the trial judge made the statement above.

[86] In the main trial, the trial judge also considered the submissions by counsel for Casildo at the time that Dr. Goncalves may have known the deceased, his wife and brother-in-law because they worked at La Loma Luz Hospital and that San Ignacio is a small community. On this submission the trial judge said:

> "The doctor had not been asked when she testified during the *voir dire* if she knew the deceased or his family members thus there is no evidence of whether she knew them or not. But even if the doctor knew the deceased and his family without more it would be an enormous leap to jump to the conclusion that she lied about the first accused consenting to have his blood extracted on that basis alone. I cannot accept an invitation to speculate about this"

[87] This Court was satisfied that the trial judge in finding Casildo guilty did not carry over to her deliberations on the main trial any adverse findings on the credibility of Casildo. Further, she was not improperly influenced in finding him guilty by evidence which was prejudicial to or indicative of his guilt, evidence which was not ultimately admitted into evidence.

[88] The above was not the only consideration by the trial judge in determining reliability of the blood evidence. She considered the Prosecution's evidence as to how the blood was handled and stored after it was extracted from Casildo and thereafter sent to Jamaica for the DNA to be analysed. The blood from the curtain and from the deceased and Casildo were analysed by Mr. Compton Beecher of Caribbean Genetics (CARIGEN) a University of the West Indies owned DNA company. Mr. Beecher who is a forensic scientist was deemed an expert in the area of forensic science and DNA, by the trial judge. He explained to the court what is DNA and how the testing is done. Mr. Beecher testified that during his analysis, he cut out three portions of the curtain, (Exhibit Q2 being the curtain) and the three pieces being B DNA 1, B DNA2 and B DNA 3 respectively. His findings in his report were that the DNA profiles on B DNA1 and B DNA 3, the stains on two of the curtain swatches, matched the DNA profile from the blood sample of the deceased. The DNA profile from the blood found on the other swatch of the curtain B DNA2 matched the DNA profile in all 13 areas tested of the blood sample from Casildo.

[89] The trial judge also heard evidence from Mr. Beecher as to the integrity of the DNA in all of the samples which had been preserved and allowed him to generate the profiles. He testified that he calculated the random match probability of B DNA 2 and Exhibit "C" which was Casildo's blood sample using two different population databases. Further, he said that there are 6 billion people on earth and this meant it would be extremely rare to find someone else who had the same DNA profile as what had been found in Casildo's blood and in B DNA2 the curtain swatch from the scene of the crime. Having heard all this evidence, the trial judge directed herself as follows:

> "I have directed myself that I must be sure of the integrity of the source, collection, storage, transmission and testing of the reference samples, specimens and items before I can accept the DNA analysis and evidence from the expert witness. In reviewing the evidence, I am fully satisfied of the integrity of the

source, collection, storage, transmission and testing of the blood taken from the deceased during the post-mortem exam. Likewise, I am sure of the integrity of source, collection, storage, transmission and testing of the blood taken from the first accused (Casildo) at the San Ignacio Community Hospital…… Likewise, I have no doubt of the source and collection of the blood of the first accused (Casildo) taken from him by Dr. Goncalves that was witnessed by the Det. Requena who was given the test tube by the doctor and later delivered it to the exhibit keeper in San Ignacio. … in terms of storage both vials of blood were stored, properly refrigerated by Mr. Pott and Sgt. Cayetano. Mr. Pott and Sgt. Cayetano each testified that they transmitted the blood samples in their custody to NFSS exhibit manager Mr. Moh. Mr Gomez of the NFSS lab testified he received both blood samples from Mr. Moh and later travelled to Jamaica with both samples. He also took the other items and handed everything over to Mr Beecher who conducted DNA analysis on all items."

[90] The trial judge having considered the above evidence stated that she did not doubt the integrity of the DNA testing. She found that:

> "I also accept as true evidence about the integrity of the source, collection, storage, transmission and testing of the blood on the curtain and the blood on the swab from the crime scene. It is the blood from the scene that was compared with the blood of the deceased and that of the first accused (Casildo).

[91] In relation to the expert evidence of Mr. Gomez and Mr. Beecher who were both deemed expert witnesses, the trial judge directed herself that this designation does not mean that she must accept their evidence. However, she had to carefully examine their evidence as she would with the evidence of non-experts and then decide whether to accept same. The trial judge with that direction in mind said:

> "I accept the evidence of Mr Gomez who found the presence of human blood on the swabs and curtain collected at the scene. I also accept the evidence of the DNA expert Mr Beecher who conducted the DNA testing at CARIGEN in Jamaica."

[92] The trial judge then directed herself to issues of chain of custody as well as the integrity of the stained items, the curtain and the blood samples, which are questions of fact for her as the trier of fact. She relied on the case of ***Garland Marriott v The Queen*** in which there was useful guidance that a judge should point to all discrepancies and other weaknesses in DNA identification evidence just as in the case of ***Turnbull*** where a judge is required to point out weaknesses in eye witnesses identification to a jury. She stated that the DNA identification is identification evidence.

[93] Further, she considered other aspects of the evidence in order to determine whether the evidence could be relied upon by her. This included questions from Casildo's attorney about (a) length of time the curtain remained in a room to air dry and (b) the questions put to Mr Beecher about the quantity of blood stains on the curtain and whether the stains were smudges, spots or smears. The trial judge after considering this evidence said:

> " As trier of fact, after reviewing all of the crown's evidence along with the defence challenges to that evidence in the weaknesses or purported weaknesses in the evidence, the same case of **Marriott** states that, "***It is the duty of the trier of fact to ensure that the DNA evidence in all its aspects was reliable.***" **I am convinced of the reliability** of the Crown's DNA evidence in all of its aspects…" (emphasis mine)

[94] As shown above, in the main trial the trial judge thoroughly analysed the reliability of the DNA evidence before relying on it.

Circumstantial evidence

[95] The DNA evidence was not the only evidence relied upon by the trial judge as she considered the circumstantial evidence against Casildo. She reminded herself that in order to convict Casildo she must "*be sure that the facts proved are not only consistent with his guilt but also inconsistent with any other reasonable conclusion only on this last hypothesis may I safely convict the accused. August v R.*" She analysed the circumstantial evidence which included (a) the cut on Casildo's wrist; (b) No explanation as to how and when he received the cut; (c) Portions of testimony from the wife of the deceased who testified that the curtain was about a week old at the time of the incident; (d) The curtain had been hanging on the window

that was broken during the incident; (e) Mr. Roberts evidence that the curtain was in good condition; (f) Mr. Pott and Sgt. Teck found the curtain on the floor beneath the broken window with suspected blood stains; (g) Once the blood on the curtain was confirmed as human blood it was sent to Jamaica for DNA testing and the results matched the DNA profile of Casildo.

[96] The trial judge assessed all the strands of circumstantial evidence, which she accepted as true and found that Casildo was present on the night of the shooting of the deceased. She found that it was:

> *"*...reasonable to conclude from the circumstantial and scientific evidence and indeed it is the only reasonable inference I can draw that while present the first accused bled onto the curtain from the cut on his wrists. The first accused was one of the masked men that Mrs. Roberts saw at her home the night her husband was killed. There is no evidence of any other plausible explanation for the genetic material of the first accused blood to be on the curtain at the crime scene. Therefore, I have drawn the reasonable an indeed in my view the only conclusion I can reach is that the first accused while present at the scene participated in causing the death of the deceased."

[97] This Court has no reason to interfere with the careful and thorough analysis of the evidence by the trial judge. She found Casildo guilty not only on the credibility of the Prosecution's witnesses but on a careful analysis of the blood evidence to determine its reliability and the circumstantial evidence in the case linking Casildo to the crime.

[98] Learned counsel, Mr. Sylvestre also relied upon ***R v Mushtaq***[10] to argue that the Casildo received an unfair trial because the same trial judge who made a factual determination on the *voir dire* as to credibility, made the same determination on the same facts in the main trial. In that case, the issue was the admissibility of a confession statement by the trial judge in a *voir dire* and the directions to be given to the jury on the reliability of that statement. Counsel referred the court to paragraphs 3 and 4 of that judgment Lord Hutton stated at paragraph 3:

> " 3. The law is clear that where a judge has ruled on a voir dire that a confession is admissible the jury is fully entitled to consider all the circumstances

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surrounding the making of the confession to decide whether they should place any weight on it, and it is the duty of the trial judge to make this plain to them."

[99] At paragraph 47, Lord Rodger was of the opinion that the safeguard to protect the right to a fair trial and the right against self-incrimination is attained by adopting the following procedure:

> " 47. In my view, therefore, the logic … requires that the jury should be directed that, if they consider that the confession was, or may have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it…."

[100] The Court was of the firm view that the trial judge in the instant matter had not determined the consent issue again. Further, as shown above she fully analysed the blood evidence to determine its reliability.

[101] The Court had also considered the submission of Mr. Sylvestre, referring to paragraph 38 of ***Manzanero*** that there are circumstances where the main trial may have to be conducted by a judge other than the one who conducted the *voir dire*. We cannot say that in the instant matter, that there was any prejudice or unfairness to Casildo. We are satisfied that the trial judge, in determining Casildo's guilt, did not carry over to her deliberations on the main trial any adverse findings on his credibility.

[102] The Court was of the view that Casildo had not been denied a fair trial because the trial judge conducted the *voir dire* and thereafter proceeded to hear the main trial. We were satisfied that the trial judge was fair and impartial. She had not relied on any prejudicial or inadmissible evidence to find Casildo guilty of the crime of murder.

Disposition

[103] For all those reasons, the Appeal of Casildo was dismissed and his conviction affirmed.

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HAFIZ BERTRAM, P

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WOODSTOCK-RILEY, JA

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FOSTER, JA