

IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C72 OF 2022

BETWEEN:

THE KING

and

LINCOLN DIAZ

Accused

Appearances:

Mr. Robert Lord, Crown Counsel for the King

Mr. Lynden Jones, Counsel for the Accused

2024: November 20; 21; 22; 25; 26; 27

December 19

JUDGMENT

MURDER- JUDGE ALONE TRIAL-DECISION

History of the Matter

- [1] **NANTON, J:** Lincoln Diaz (hereinafter referred to as “the Accused”) was indicted for the offence of Murder, contrary to **Section 117 read along with Section 106(1) of the Criminal Code Chapter 101 of the Laws of Belize**¹, (hereinafter “the Code”) arising out of the shooting death of Orin Velasquez also known as Bredda O’s (hereinafter “the Deceased”) on 27th July, 2020.
- [2] The trial by Judge Alone began with the re- arraignment of the accused on 20th November 2024 before this Court pursuant to **Section 65 A (2)(a) of the Indictable Procedure Act Chapter 96 of the Laws of Belize** ².

The Crown’s Case

- [3] The Crown’s case is that on 27th July 2020 in Ladyville Village, the Accused and an unidentified person robbed Bredda O’s Pizza Hut, a business establishment owned by the Deceased, and during the course of that robbery the Deceased was shot and killed by one of the robbers.

Voir Dire

- [4] During the Case Management of this trial Counsel on behalf of the Accused raised challenges to the admissibility of the written statements alleged to have been given by the Accused namely: the notes of interview under caution and the caution statement.

¹ Chapter 101 Criminal Code of the Laws of Belize Revised Edition 2020

² Chapter 96 Indictable Procedure Act of the Laws of Belize Revised Edition 2020

- [5] In summary the Defence mounted the following objections to the written statements:
- i. The Accused was beaten by Officer Cu and Officer Bowen prior to giving the statements.
 - ii. The Accused was forced to repeat a story that the police officers presented to him.
 - iii. The Justice of the Peace failed to carry out her duties as an independent representative.

[6] The Court held that a Voir Dire or trial within a trial was necessary to determine the admissibility of the interview under caution, and the caution statement as each document contained admissions by the Accused.

[7] The Evidence Act provides as follows:

“90.-(1) An admission at any time by a person charged with the commission of any crime or offence which states, or suggests the inference, that he committed the crime or offence may be admitted in evidence against him as to the facts stated or suggested, if such admission was freely and voluntarily made.

(2) Before such admission is received in evidence the prosecution must prove affirmatively to the satisfaction of the judge that it was not induced by any promise of favour or advantage or by use of fear, threat or pressure by or on behalf of a person in authority.”

[8] The evidential burden rests on the Crown to prove beyond a reasonable doubt that the admissions were freely and voluntarily made by the Accused. In attempting to discharge that legal and evidential burden, the Crown called the following witnesses to give live evidence on the Voir Dire:

- i. Justice of the Peace Jane Sutherland – spoke privately with the Accused and was present during the recording of the interview and the caution statement.
- ii. Inspector of Police Rene Cu – Investigating Officer who interviewed the Accused under caution.
- iii. Police Sergeant Orlando Bowen – Recorded caution statement from the Accused.

- [9] The following exhibits were admitted into evidence:
- i. **RC 1** -notes of interview under caution
 - ii. **RC 2** -video recording of interview under caution
 - iii. **OB 1** -caution statement
 - iv. **OB 2** -video recording of caution statement
- [10] The Crown also relied on the evidence of Police Corporal Allim Lopez, which was admitted by agreement pursuant to **Rule 10 of the Criminal Procedure Rules 2016**, (hereinafter “the CPR”) and **Section 106 of the Evidence Act, Chapter 95 of the Laws of Belize**³, (hereinafter “the EA”). Cpl Allim Lopez arrested and detained the Accused.
- [11] At the close of the Crown’s case on the Voir Dire, the Court advised the Accused of the three options available to him i.e. to remain silent, to give a statement from the dock, or to give evidence on oath and his ability to call witnesses. The Accused opted to remain silent and did not call any witnesses.
- [12] The task of the Court in deciding whether to permit admissions into evidence were comprehensively outlined by our Court of Appeal in **Krismar Espinosa v R**⁴ , per Awich JA:
- “[93] ... A confession which is not voluntary is not admissible in evidence whether the trial is before a judge and a jury, or before a judge alone. Where a confession is challenged in a trial ...the judge must investigate... the circumstances in which the confession was made, and may admit it only when he is satisfied beyond reasonable doubt that, the confession was made freely and voluntarily. That is the common law, and now the statutory law in ss.90 and 91 of Evidence Act, Laws of Belize.*
- [94] There are several levels of consideration of voluntariness in the admissibility of a confession in evidence. First where the judge rules... that, a confession was not free and voluntary and therefore not admissible in*

³ Chapter 95 Evidence Act of the Laws of Belize Revised Edition 2022

⁴ Criminal Appeal No. 8 of 2015

evidence... the so called confession must, and will be excluded from the full trial. ...

[95] Secondly, where the judge decides that, a confession was voluntary, but was obtained by a person in authority or a person charged with the duty of investigating offences or charging offenders, without complying with Judges Rules, he may refuse to admit it in evidence or he may exercise discretion to admit it, depending on whether the circumstances proved warrant it. ...

[96] Thirdly, the judge may not admit a confession in evidence, as a matter of the exercise of the general exclusionary discretion of a judge when he considers that, admitting a particular item of evidence will be unfair to the accused in the circumstances. Generally the discretion is exercised on the ground that, the prejudicial effect of the item of evidence outweighs its probative value."

- [13] After analysing the totality of the evidence advanced on the Voir Dire, the Court delivered an oral Judgment ruling that it was satisfied beyond reasonable doubt that the notes of interview under caution, and the caution statement were admissible in evidence as the Court was satisfied beyond reasonable doubt that the admissions were free and voluntary, or put another way that neither of the written admissions were induced by any promise of favour or advantage, or by use of fear, threat or pressure by or on behalf of a person in authority.
- [14] The Court also concluded that there were no procedural breaches contrary to **The Guidelines for the Interviewing and Treatment of Persons in Police Detention ("the Guidelines")**, or constitutional breaches, which would trigger the exercise of its discretion to exclude the admissions nor would the Court, under its general exclusionary discretion, refuse to admit the statements on the basis of unfairness.
- [15] The Court thus, admitted the evidence of the interview under caution and the caution statement.

Incorporation of Evidence

- [16] In the judgment of Mitchell and Chatoo TT High Court decision (23 July 2021) referred to in The Criminal Bench Book of Belize Barbados and Guyana page 775- the Trial Judge in that case explained the procedure that had been adopted to incorporate the evidence from the Voir Dire into the main trial. That procedure was held to be appropriate and can significantly reduce trial time without prejudicing the parties.
- [17] The procedure of incorporation adopted by the Court in this case was discussed with the attorneys prior to the commencement of the Voir Dire, and it was agreed by both sides that the evidence on the Voir Dire would be incorporated into the main trial should the Crown's application be successful.
- [18] The Court also made clear that should any witness be required to return on the main trial to give further evidence in chief or for further cross examination, the Court would permit any such witness to be recalled. The only witness who was recalled upon request was the investigator Inspector Rene Cu.
- [19] Following the Court's ruling on the admission of the disputed statements, the evidence from the Voir Dire was thus incorporated into the main trial.

Substantive Trial: The Evidence

Agreed Evidence

- [20] The Crown is grateful to the Parties for their cooperation in the Case Management process through which the triable issues were identified at an early stage. This resulted in a significant reduction in trial time for which the Court is grateful. One effective Case Management tool was the employment of Rule 10 of the Criminal Procedure Rules 2016, (hereinafter "the CPR") and Section 106 of the Evidence

Act, Chapter 95 of the Laws of Belize⁵, (hereinafter “the EA”) which allowed for the statements of the following non-contentious witnesses to be read into evidence by agreement:

1. Robert Henry- Crime Scene Technician, who retrieved exhibits including shell casings and slippers and took photographs of the crime scene. This witness also was present for the post mortem. Photographs were tendered as **RH-a 1-25; RH-b 1-4; RH-c 1-4**.
2. Luis Ortiz – (with redactions of hearsay) present when slippers were retrieved from Monique Franklin’s house.
3. Felipe Miranda –Employee of the deceased, saw the deceased and his son prior to the shooting.
4. Randy Flores –Heard two shots then looked out and saw a male person running from the Pizza Shop, then 15 seconds later saw a second male person run out of the Pizza shop and fell into a drain. Saw the Deceased run out after the second male person with a firearm in his hand, and then heard about 5 more shots. The Deceased shouted for help saying that he got shot. He took the Deceased to the hospital.
5. Detective Constable Jamal Escalera – First responder.
6. Monique Franklin – Neighbour of Deceased, heard shots then looked outside and saw the Deceased outside his shop with a firearm in his arm, and then heard more shots. When she ran outside, she saw the Deceased fall to the ground.
7. William Wade – Crime Scene Technician – took buccal swabs from the Accused.
8. Cpl Kacy Ann Requena – Retrieved firearm belonging to the Deceased
9. Inspector Enrique Aldana – Attempted to conduct identification parade, but Accused refused

⁵ Chapter 95 Evidence Act of the Laws of Belize Revised Edition 2022

10. Sgt Orlando Bowen – present when exhibits were retrieved from the crime scene.
11. Carlos Garcia – saw Deceased after he was shot, saw Lionel on his bike.
12. Emilda Velasquez – wife of Deceased- identified body of Deceased and handed over Deceased’s firearm to the police.
13. Denzel Lamb- saw two male persons in the company of Jamal prior to the shooting.
14. PC Allim Lopez – Arrested and detained the Accused.
15. Hadie Barrett – Justice of the Peace present during recording of statement of Jaheem Velasquez and present when Accused refused to attend identification parade.

Live Witnesses

[21] The Crown called the following witnesses to give live evidence:

- 1) Jaheem Velasquez- eye witness, son of Deceased.
- 2) Ellon Tillet- Identified the Accused as someone who hid in his house after the shooting.
- 3) Inspector Rene Cu – Investigating Officer.
- 4) Ernesto Perez – Permitted video footage to be extracted from his DVR system.
- 5) Edward Ciau – Retrieved video footage relative to the shooting incident.
- 6) Leanne Codd – cousin of Accused – testified as to confession made by Accused.
- 7) Lionel Logan – Saw person he recognised as the Accused leaving the vicinity of the scene.

Exhibits

[22] The following exhibits were admitted into evidence:

- 1) **RC 1**- Notes of interview under caution.

- 2) **RC 2**- Video recording of interview under caution.
- 3) **RC 3**-Post Mortem Examination Report- Deceased died by exsanguination due to external bleeding due to injury of the neck, and due to gunshot wound to the chest.
- 4) **RC 4**-Medical Certificate– cause of death -exsanguination due to external bleeding due to injury of the neck and due to gunshot wound to the chest.
- 5) **EC 1** – video footage taken from Perez Road – showed individuals riding bicycles; however, insufficient clarity for any identification to be made.
- 6) **CE 1** – Firearm report of Mark Wallace – conducted analysis of firearm retrieved from the Deceased and six expended cartridge cases. Found that cartridge cases 1A-D displayed sufficient agreement of class and individual characteristics to determine that they were fired by what was identified as the Deceased's firearm. Cartridge cases 1E and 1F did not display sufficient agreement and were excluded as having been fired by the Deceased's firearm, but were fired from an unidentified 9x19 mm calibre firearm.

The Defence Case

- [23] At the close of the Crown's case, the Court told the Accused of the three options available to him i.e., to remain silent, to give a statement from the dock, or to give evidence on oath and his ability to call witnesses. The Accused opted to give an unsworn statement from the dock in which he denied confessing to his cousin Leanne Codd that he killed the Deceased, and that he did not know that a shooting took place as he was standing outside.

Closing Addresses

- [24] The Parties gave closing addresses, which were carefully considered by the Court.

Analysis

Elements of the Offence: Murder

[25] The Court has derived great assistance from a decision of our Court of Appeal in **Peter Augustine v R**⁶ in defining the crime of Murder, per Carey JA:

“Murder is defined in the Criminal Code as intentionally causing the death of another without justification or provocation (section 117 Cap. 101). It was essential to emphasize to the jury that the specific intent which the prosecution must establish on the charge against him was an intent to kill.”

[26] The Court understands that the Crown must prove to the satisfaction of the Court so that it is sure that:

- i. Orin Velasquez is dead.
- ii. He died from unlawful harm.
- iii. The Accused inflicted the unlawful harm upon Orin Velasquez (either as a principal or was a secondary party to that act).
- iv. At the time when the unlawful harm was inflicted, the Accused had the intent to kill.
- v. There was no lawful justification for the death of the Deceased.

[27] There is no dispute as to items i. and ii and v listed above. The Crown has established that Orin Velasquez is dead, and that he died from unlawful harm. These points were conceded by the Defence during the trial as well as in Counsel’s written closing submissions.

[28] The triable issues in this case are; therefore, specific to the elements listed at iii, iv and v above, and as such the Court will focus on these issues in the course of its Judgment.

⁶ Crim. App. 8/01

Analysis of the Evidence

- [29] The Court has directed itself that the Accused is presumed innocent and has absolutely nothing to prove. The Court has directed itself that the obligation is on the Crown to satisfy the Court, so that it is sure of the guilt of the Accused and if there is any reasonable doubt the Court is duty bound to acquit him.
- [30] The Court has considered all the evidence with the intention of reaching a fair and dispassionate assessment of that evidence. The Court notes that in assessing credit and reliability it must examine inconsistencies, discrepancies, and any implausibility in the evidence of witnesses. The Court notes that if there are inconsistencies and discrepancies the Court must look to see if they are material and if they can be resolved on the evidence. Unresolved inconsistencies or discrepancies would lead the Court to reject that bit of evidence, or all of the witness's evidence entirely. The Court must also consider the cumulative effect of those inconsistencies or discrepancies on a witness's credit and reliability. If the Court finds the evidence of a witness implausible it will reject either that witness's evidence entirely or that particular bit.
- [31] The Court begins firstly with analyzing the evidence on the Crown's case, and if the evidence is strong enough to consider a conviction it would consider the case for the Accused, as is the required reasoning process noted by our apex court, The Caribbean Court of Justice (hereinafter "the CCJ"), in Dioncicio Salazar v R⁷.
- [32] While the Court has considered all of the evidence advanced in this matter the Court finds that the evidence, which directly impact on the triable issues comes from the following sources which will each be analysed below:
- 1) Evidence of Jaheim Velasquez – eye witness
 - 2) Interview under caution of the Accused
 - 3) Caution Statement of the Accused
 - 4) Evidence of Lionel Logan

⁷ [2019] CCJ 15 (AJ)

5) Evidence of Leann Codd

Jaheem Velasquez

- [33] In deciding what facts to accept, the Court placed significant weight to the eye witness testimony of Jaheem Velasquez, a witness whom the Court found to be both honest and reliable. The Court found the witness's evidence to be internally consistent and consistent with other evidence in the case, which the Court also accepted.
- [34] Jaheem described his proximity to the ensuing action and was able to recall the events with sufficient and particular clarity. Under cross examination, there was no attempt by the witness to gild the lily. The witness answered questions that were within his ability to answer and was forthright about the limitations of his account. He was direct about being in fear and attempting to escape. The witness gave an account that was consistent with the circumstances he described. For example, he made no attempt to exaggerate his ability to observe the second robber as he indicated the limitations of his observation of that person as the person ran in and out of the building very quickly.
- [35] He explained the circumstances of his observation of the first robber- these conditions were notably more favourable as he described the length of time, lighting and distance of that observation. He also indicated that he had seen the first robber on a prior occasion and he gave evidence of that sighting. It was evident that those circumstances enhanced his ability to recognise that person as opposed to the first robber.
- [36] The witness also openly explained how the shooting took place and that it was his father, the Deceased, who attempted to disarm the robber and that it was during that struggle between the two men that the first shot was fired. He also plainly stated that he only heard and did not witness the firing of the second shot.

- [37] Overall the Court found this witness to be honest and reliable and the Court had no difficulty relying on his testimony even, after applying the necessary scrutiny and cautions that should be attached to eye witness testimony.
- [38] Having accepted the evidence of Jaheem as truthful and reliable, the Court was able to deduce from his testimony what occurred on the day in question.
- [39] The following extract is taken from the Court's notes of his testimony:

Evidence of Jaheem Velasquez taken on 22nd November, 2024

*At about 7 pm I was at Breda O's Pizza Hut Ladyville 102 Woodpecker Avenue. I was working with my dad, Orin Velasquez. I remember sitting on the freezer. We had just finished orders. I was taking a break, my dad was at the fryer frying orders. I remembered sitting on the freezer while I saw a young man- the freezer is located at the front of the shop by the serving window. The shop is 18 x 15 ft. The fryer is at the right hand side by the entrance door. The entrance door is located at the back of the building. I looked at the door, the entrance door at the back, I saw a young man peeped his head in, he had a gun. At first I saw that I panicked; I tried to run through the front server window at the front, but I was too big. **I was able to see the colour of the gun; the gun was red, yellow, and green. It had rasta colours.** I then went to the front at the entrance door where the young man was standing to my right, and to my left where the money bag was, I saw a young man swiftly came in; this was not the same young man this was robber number two. He swiftly ran in and ran back out with the money bag. He ran in the establishment through the back door, the only entrance and then I remembered. I didn't see his face unfortunately. I saw his body structure his hairdo, robber number 2, he had on small dreads. He was pretty fast. He just ran with the bag and ran out.*

Crown: Robber number 1, the first young man who came in, how would you describe him?

Witness: I would describe him as 5'5 medium built, coolie / indian descent, he had a low trim, a tattoo on his right arm, had a red shirt, a dickies pants, a Nike slippers. He was brown skin. The lighting was pretty bright; he was there for about 5-10 minutes. We were face to face, so I was able to see pretty much all of him nothing blocked my view of him – the distance between me and robber number 1 I would say maybe 6 inches away – robber no 1 was in there for a good while I would say at least 5-10 min – I believe I did see him once over the neighbour's yard on a Saturday night – at Monique franklin- she lives next door to the pizza shop. The lighting wasn't good there is only one light in the house I was

able to see the body structure and it fit the body structure of robber 1. At that time I was about 15 feet away I saw from his foot up he was standing just looking outside the building-

Crown: Was anything blocking your view that time?

Witness: Just some coconut trees

Crown: On the night of the incident when you said you saw robber number 1 what was the lighting?

Witness: The lighting was bright, there are two led lightbulbs.

Crown: What part of his body did you see at the store at the time of the incident?

Witness: His feet, his arms, his body, his head.

Crown: Was anything blocking your view in that night?

Witness: No sir.

Crown: When you saw robber number 2 what was the lighting?

Witness: The lighting was bright.

Crown: What part of his body were you able to see?

Witness: I saw his legs from behind his back, his hairstyles. He had in dreads starter dreads at that time it was mini dreads

Crown: You saw his complexion?

Witness: Yes he was brown skinned

Crown: What was his built?

Witness: Medium built.

Crown: Can you give a description of the height?

Witness: He was a lot taller than robber 1. He was about 5'8 he seemed pretty tall

Crown: What type of clothing he had on?

Witness: He had on a t-shirt, the sleeveless one, and a short pants and he was barefooted

Crown: What was the distance between you and robber no 2?

Witness: We were 12 inches away.

Crown: Was anything blocking your view of him?

Witness: No.

Crown: For how long was he in your view?

Witness: He was pretty fast he just ran with the bag and ran out

Crown: Were you able to see if he had any weapons?

Witness: No sir

Court- Were you able to see or he did not have any?

Witness: I didn't see he just ran in quickly and ran out back. Robber number 2 came in swiftly grabbed the bag with money and exited. What happened next -I heard the fence shaking. The fence that borders Monique Franklin house and our establishment. Then after that, when he already went with the bag Robber number 1 was still in the establishment. My dad came from the fryer and said "it's finished you already have the money bag you can leave". Then he was flashing the gun at me this time – robber number 1- (witness demonstrates by pointing) flashing the gun to my chest.

Court – Do you mean pointing?

Witness: Yes. Then he said "who is at the back of the house?" There is a wooden structure to the back of our structure which is abandoned, he was asking "who was at the back?" and my dad replied "nobody deh back there" he was telling us "let's go the back" –he had his hand on my shoulder like let's go the back of the establishment my dad brushed him off and tried to take the gun, was wrestling with him that's when I heard the first shot it struck my dad to the neck and I saw blood spraying, and that was when I ran out of the building. I heard another shot that's when I ran out of the building.

Crown: You said the first robber was coolie or Indian would you be able to give the race of robber number 2

Witness: Creole

Crown: You said his complexion.

Witness: He was brown

[40] The Court notes that Jaheem Velasquez was not called upon to make an identification in Court, or otherwise, of either of the robbers. There was thus no identification of the Accused as any of the robbers by Jaheem Velasquez.

[41] A further limitation of this witness' evidence was that he ran out after the first shot was fired by the robber, but before the incident had completed. He therefore, did

not give testimony of his father having discharged his firearm although other witnesses attested to that fact. The agreed evidence of Monique Franklin and Randy Flores establishes that the Deceased ran outside the Pizza Shop with a firearm in his hand and; thereafter, they heard more shots. This evidence is supported by the independent expert evidence of firearm expert Mark Wallace.

- [42] This discrepancy can be explained by the simple fact that witness Jaheem Velasquez had already made good his escape when his father began firing shots. According to Jaheem Velasquez, his father and the first robber were struggling when he ran. This discrepancy was thus easily explained, and did not affect the Court's view of the witness's credibility.

Lionel Logan

- [43] In summary, Lionel Logan stated that on 27th July 2020 around 7:00 p.m. he was on Perez Road when he saw two persons about 20 feet away from him double riding on a bicycle. There were lights in the road from the lamppost, and he was able to see the face of one of the persons without obstruction. At that time, he saw the person for a few seconds. He then saw Bredda O's son run out into the street and he heard several gun shots. The second time he saw the riders, he came face to face with the persons on the bike, and it was then he recognised one of the riders to be the Accused, whom he knew to be the cousin of the mother of his child, Leanne Codd. At that time he was about 5-6 feet away from him and was able to see his face for a couple seconds without obstructions. The area was lit by lampposts. He described the person as being light brown skin wearing a "short lee dreadlocks" hairstyle. He said that he had last seen the Accused the weekend prior at Leanne Codd's family house.

Crown: When you see d man double ride where dey gone?

Witness: Inna d neighbour house by the side, the neighbour at the side of Bredda O's, just know as Monique

Crown: They went over the fence?

Witness: They went over Bredda O's fence

Crown: How long after you saw the men jump d fence did you hear the bangs?

Witness: Not too long. I never reach nowhere too far and then I hear.

Crown: How many bangs?

Witness: 4 or 5 at least 6 or 7

[44] This evidence is important as Lionel Logan is the only witness that positively identifies the Accused as being on the scene of Bredda O's establishment on Perez Road immediately before the shots are fired. While other witnesses gave similar and consistent descriptions, he is the only witness who identified the Accused and places him directly on the scene (apart from the Accused himself, whose evidence the Court will later consider).

[45] The Court approaches the identification evidence of Lionel Logan in the following manner based on the guidance of the Jamaican Privy Council decision of **Beckford and Anor. v R**⁸, per Lord Lowry:

"The first question for the jury is whether the witness is honest. If the answer to that question is 'Yes', the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely is he right or could be mistaken?"

[46] The first step of this analysis requires the Court to determine whether, Lionel Logan is an honest witness. In its determination of his credibility, the Court carefully analysed his testimony and found that no material inconsistencies, discrepancies or implausibility arose during his testimony, which caused the Court to doubt his honesty or credibility. The Court found that Mr Logan to be a forthright and straightforward witness. There was no apparent attempt to deceive or mislead the

⁸ (1993) 42 WIR 291 at page 298

Court. The witness readily explained the limits of his observation, and that he did not directly witness the commission of the offence.

[47] The Court also found that his testimony is supported in some measure by other accepted evidence in the case, such as the admissions made by the Accused, which will be examined below, and some parts of Jaheem Velasquez' testimony examined above. This strengthens the Court's view on Mr. Logan's honesty and credibility.

[48] The next step of the analysis requires the Court to examine closely the circumstances in which Lionel Logan's identification was made, and to consider any specific weaknesses to determine whether he is or may have been mistaken. The Court notes that there was no identification procedure adopted in this case due in large measure to the fact that the Accused refused to attend an identification parade. Notwithstanding, the Court finds that an identification parade would not have served a useful purpose as the witness was identifying someone with whom he was familiar. He described his acquaintance with the Accused and this fact was never disputed or challenged by the Defence.

[49] The Court reminds itself of the need for caution in accepting identification evidence, because of its inherent challenges and that mistaken identification has led to miscarriages of justice in the past. The Court also notes specifically that although a case of recognition evidence may be more reliable than identification by persons unknown to the suspect, errors can be made even in the recognition of close friends or relatives. Therefore, the fact that Lionel Logan knew the Accused does not mean that he cannot be mistaken.

[50] Bearing those challenges in mind, the Court has considered carefully the circumstances of the recognition (outlined above), and the Court finds that the circumstances were sufficiently strong to allow the witness to make a reliable identification, and the Court finds as a fact that the witness did make a proper

identification of the Accused as the person he saw getting a ride on a bicycle after the witness had heard shots.

Notes of Interview/Caution Statement

- [51] This brings the Court to the evidence of admissions alleged to have been made by the Accused through the notes of interview under caution and the caution statement.
- [52] The Court finds as a fact that both the interview under caution and the caution statement were freely and voluntarily given by the Accused. Before arriving at this conclusion, the Court carefully analysed the testimony of the witnesses –Justice of the Peace, Jane Sutherland, Sgt Orlando Bowen, and Inspector Rene Cu- who were called by the Crown in regard to the procedure adopted reference the recording of these statements. The Court generally found that the testimonies of these witnesses were internally consistent and that they were not materially undermined by each other nor as a result of cross examination. The testimony of Inspector Cu was supported by the evidence given by Jane Sutherland, and similarly the testimony of Sgt Orlando Bowen was largely supported by the evidence of Jane Sutherland.
- [53] While there were some deficiencies in the evidence of the Justice of the Peace- such as her failure to ask certain questions of the Accused when she had a private moment with him – the Court did not conclude that the Accused was thus deprived of his constitutional rights nor that there were any breaches that affected the fairness of the processes.
- [54] The Court also placed reliance on **RC 2** and **OB 2** – which were the video recordings of the interview process and the caution statement respectively. The video evidence allowed the Court an opportunity to observe the circumstances in which the statements were obtained from the Accused. The Court found that in each video recording, the Accused appeared to be calm and cooperative. His behaviour did not suggest that he was under any form of duress, or fear of force, or threat of force,

nor did he state that he was under any such pressure when asked. His demeanour did not at all suggest that he was someone who had been beaten or compelled. On both occasions, he was asked to raise his t-shirt and there was no evidence of any beatings or any marks of violence observed by the persons present including the Justice of the Peace. The Court also had an opportunity to make its own observation on the recording of the caution statement, and there was no evidence of apparent physical injuries on the Accused.

- [55] During the interview process the Accused's answers did not seem at all rehearsed as had been suggested in cross examination by the Defence. In fact, had he been rehearsed one might have expected him to give evidence more favourable to the Crown rather than the partly exculpatory evidence that he gave.
- [56] In his caution statement, which was notably more concise, the Accused gave a generally consistent account to the account he gave at the interview stage.
- [57] In his interview under caution, the Accused stated that he saw when Jamal gave the "*coolie young buay*" the "*rasta gun*" which he said was sprayed with green red and yellow paint. The Accused was armed with a pocket knife. The "*coolie buay*" jumped the fence, and then he jumped the fence as well. He said that he stayed by the door and the "*coolie buay*" took the bag of money. The Accused said that he saw "*the coolie buay*" and the Deceased "*rumble*", because the Deceased was trying to get the gun from him and then the Deceased turned and the "*coolie buay*" shot him two times in the chest. The Accused said that when he turned his back he heard more gun shots. Then after he saw the "*coolie buay*" drop to the ground. The Accused said that he ran into a young lady's yard and then after a while Eggy gave him a ride on his bike.
- [58] At first the Accused tried to distance himself from the robbery entirely. For example, the Accused never admitted to being the robber who took the bag of money, but

after further questioning by Inspector Cu, he stated that his purpose for going into the establishment was to rob.

- [59] The Accused described *“the coolie buay”* as short with puffy hair and a tattoo on his right hand between his wrist and his finger. He said that he had not known him before. That day was the first time he met the *“coolie buay”*.
- [60] The Accused said that Jamal sent *“coolie buay”* to rob Bredda O’s, and it was after the Deceased and *“coolie buay”* had a fight that he shot Bredda O’s.
- [61] In his caution statement the Accused similarly admitted that he saw Jamal give the *“rasta gun”* to the *“coolie bway”* and then the *“coolie bway”* jumped the fence and ran into Bredda O’s shop. The Accused said that he heard some rumbling and when he turned his back he heard two gunshots. He saw the coolie boy ran and dropped on the floor, and that he (the Accused) was already over the drain when he got a ride from Eggy. He eventually made his way to Jamal’s house where he saw Jamal talking to the *“coolie bway”*.
- [62] The Court having carefully reviewed the contents of each document found as a matter of law that the notes of interview and the caution statement are mixed statements as they include both inculpatory and exculpatory information. While the Accused accepted that he was a party to a common design to rob Bredda O’s establishment, and stated that he knew that his accomplice was armed with a gun, and that he himself was armed with a knife, he denied being the shooter, and at one point stated that he had already exited the business place when the shooting occurred.
- [63] As fact finder, the Court can act on as little, or as much of the Accused’s statements that the Court accepts as true. There is no obligation to accept everything in a mixed statement and it is up to the tribunal of fact (whether judge or

jury) to do so based on what is believed by them, R v Duncan.⁹ For example, the Court rejects the Accused's account that it was his accomplice who grabbed the money bag. The Court found that evidence inconsistent with the testimony of Jaheem Velasquez, who stated that it was the second robber who ran in took the bag and ran out. The Court finds that this was an attempt by the Accused to minimise his role in the criminal enterprise.

[64] On the other hand, it may well be that the incriminating parts of the statement are more likely to be true; otherwise there would be no need for the Accused to say them, and thus these portions may carry more weight than the exculpatory parts. The Court acknowledges that the Accused's account of how the incident unfolded, in which he placed the blame for the shooting entirely on his accomplice, and distanced himself from the robbery need not be treated as true as he may have been deliberately trying to minimise his role in the criminal enterprise. Similarly the Accused may not necessarily have been honest when he told the police that he went to the establishment solely to rob.

[65] However, having reviewed all the evidence in this case and in particular the evidence of Jaheem Velasquez analysed above, whom the Court considered to be an exceptionally honest, reliable and convincing witness, the Court finds that it accepts the part of the Accused's account; in so far, as it is supported by Velasquez' testimony, which the Court has already accepted as true. The Accused and Jaheem Velasquez were the only two persons who were able to give direct accounts of the shooting of the Deceased and their accounts were largely consistent with each other on significant material points. Additionally, part of the Accused's admissions are also consistent with the testimony of Lionel Logan's also examined above – such as him getting a ride from Eggy.

⁹ (1981) 73 Cr. App. R 395.

[66] The Accused also admitted to being in possession of a black pocket knife, which he disposed of near the scene, and a black pocket knife was retrieved by CST Robert Henry.

[67] The Court; therefore, accepted some material portions of the Accused's admissions as contained in the written statements under caution.

Leann Codd

[68] Leann Codd testified that the Accused is her cousin. She said she had a conversation with him when he visited her home on 28th July 2020. During that conversation, she said that the Accused confessed to her that he had shot Bredda O's. The following extract is taken from the testimony of Leann Codd:

Witness: He say he meh tell the person with who he gone fi do it, but he never want do it.

Crown: And what if anything else did he say?

Witness: He say he di take di gun from the young man and shoot Bredda O's.

Crown: Did he say anything else?

Witness: No.

Crown: Did he say what he did after he shot Bredda O's?

Witness: No.

Under Cross Examination

Defence Counsel: Put that Lincoln told you the other gentleman went to rob the place and shot the person- the coolie guy?

Witness: No, sir they never say nutting bout coolie. I never know about that they say Lincoln

Court: Who is the "they" you are speaking about?

Witness: The police, the police man told me.

Defence Counsel: *You agree that someone told you that someone tell you Lincoln was who did this prior to you talking to him, Lincoln?*

Witness: *Yes, sir.*

Defence Counsel: *Put – you talk to Lincoln to help the police.*

Witness: *No, sir.*

Defence Counsel: *You fabricated your story to help the police?*

Witness: *No.*

Defence Counsel: *Put Lincoln never said he shot Bredda Os.*

Witness: *Yes, he told me.*

[69] It is obvious that this account is directly and materially inconsistent with the account the Accused gave in his interview under caution and his caution statement. Leanne Codd's account is also inconsistent with the evidence of Jaheem Velasquez, although less directly so – since Jaheem did not identify the shooter.

[70] The Court will state plainly that it was not impressed with Ms. Codd as a witness. Apart from the discrepancies highlighted above, there were portions of Ms. Codd's evidence that gave the Court significant disquiet and caused it to doubt the veracity of her testimony. Firstly, while confessions by the guilty to family members are not impossible or even that rare the Court found it difficult to believe that the Accused confessed to the most serious offence of killing to Ms. Codd in the random manner suggested by Ms. Codd. There was nothing in the evidence advanced to suggest that the Accused and Ms. Codd were particularly close, or any evidence that would suggest a level of familiarity or confidence that might explain such a confession. The boastful nature of the confession described by Ms. Codd is also inconsistent with the evidenced behaviour of the Accused post offence, and his otherwise consistent stance that the "coolie buay" was the shooter.

[71] The Court also measured Ms. Codd's testimony against the account given by Jaheem Velasquez. Mr. Velasquez, although he never identified the shooter, gave

a full description of the shooter, whom he similarly described as the “*coolie boy*”. His description of the first robber also materially aligns with the Accused’s description of his accomplice. Mr Velasquez also described the second robber as a tall brown skinned creole male with “*starter dreds*”. The Court was able to observe the Accused’s appearance from the video recorded interview and caution statement, both of which were recorded a few months after the incident. The Accused, at that time, wore a short dreadlocked hairstyle and was indeed brown skinned and of Creole descent. It is by no means speculative to deduce from the combined effect of Mr Velasquez’ testimony and the Accused’s own admissions that he was not the “*coolie boy*” who shot and killed the Deceased, but rather he was second robber i.e. the Creole boy with the “*starter dreads*” who ran into the establishment, took the money bag and ran back out.

[72] The Court is also especially sceptical of the veracity of Ms. Codd’s testimony in light of her admission that she had spoken to the police prior to giving her statement, and that it was the police that suggested to her that the Accused and not the “*coolie boy*” had done this (i.e. the Murder). Notwithstanding, this admission, Ms. Codd denied fabricating her account.

[73] Now it is entirely possible –although implausible based on the Court’s reasoning highlighted above- that the Accused in fact told Ms. Leann Codd that he was the shooter, but that he lied when he did so. Either way, the Court is not satisfied beyond a reasonable doubt that there is any truth to the statement which Ms. Codd attributes to the Accused i.e. that he (the Accused) was in fact the shooter. The Court is thus unable to place any value on Ms. Codd’s testimony and rejects her evidence entirely.

Findings of Fact

[74] Having considered the totality of the evidence advanced by the Crown, the Court has determined the following facts to be true:

- i. The Accused and another unidentified male went to the Bredda O's establishment with the common intention to rob.
- ii. The unidentified male was armed with a firearm.
- iii. Before embarking on the robbery, the Accused knew that the unidentified male was armed with a firearm.
- iv. The Accused was armed with a pocket knife.
- v. The unidentified male entered the establishment visibly armed with a firearm.
- vi. The Deceased and his son Jaheem were present within the building when the unidentified armed male entered.
- vii. The Accused was the second male who entered the establishment.
- viii. The Accused grabbed the bag of money, which was located to the right of Jaheem, and the Accused quickly ran back out of the establishment
- ix. The Deceased verbally confronted the unidentified male.
- x. The Deceased tried to disarm the unidentified male and they got into a scuffle for the weapon.
- xi. The unidentified male fired shots, which struck the Deceased.
- xii. Jaheem Velasquez ran out of the room after the first shot.
- xiii. The Deceased at some point was also armed with his own firearm
- xiv. The Deceased also discharged his firearm.
- xv. When Jaheem was outside of the building he heard a second shot
- xvi. The Deceased died from gunshot injuries to the neck and chest.

[75] Based on the evidence accepted by the Court, the Court is satisfied beyond reasonable doubt that it was the unidentified male who shot and killed the Deceased, and as such the Accused was not the shooter. This; however, does not absolve the Accused from responsibility as he may be held to be liable as a secondary party to the murder on the principle of joint enterprise.

Joint Enterprise

[76] Having accepted the facts outlined above, the Court must now consider the issue of joint enterprise. From the evidence accepted by the Court, the Court will now examine whether the evidence establishes beyond reasonable doubt that the Accused is a secondary party to the murder i.e. that he assisted or encouraged the principal to commit the acts with the specific intent to kill.

[77] The Court finds of great assistance the recent decision of the Court of Appeal in *Eli Avilia Lopez and Anor. v R*¹⁰, which carefully considered this issue, per Bulkan JA:

[40] ... In this jurisdiction the mens rea for murder is an intention to kill, nothing less. Whereas at common law an intention to cause grievous bodily harm also suffices, in Belize a higher, more exacting standard, applies. Similarly, in cases where there is a deviation from the common plan leading to an undesired (or unusual) consequence, the mens rea required for accessorial liability is that of intention. Section 21 of the Criminal Code of Belize stipulates (inter alia):

“(1) Where a person abets a particular crime, or abets a crime against or in respect of a particular person or thing, and the person abetted actually commits a different crime, or commits the crime against or in respect of a different person or thing, or in a manner different from that which was intended by the abettor, the following provisions shall have effect, namely-

(a) If it appears that the crime actually committed was not a probable consequence of the endeavour to commit, nor was substantially the same as the crime which the abettor intended to abet, nor within the scope of the abetment, the abettor shall be punishable for his abetment of the crime which he intended to abet in the manner provided by this Title for the punishment of crimes which are not actually committed.

(b) In any other case the abettor shall be deemed to have abetted the crime which was actually committed, and shall be liable to punishment accordingly.”

[41] This provision governs the situation where, in the course of carrying out a common plan, there is an escalation by one of the parties and another (undesired) crime is committed. Three scenarios are envisaged – where the crime committed was not a probable consequence or substantially the same as the crime planned nor

¹⁰ Crim. App. 22-23/18

within the scope of the common plan. In any of those situations, section 21(1)(a) explicitly stipulates that the accomplice is only liable for such crime as s/he intended to abet. In any other scenario, presumably in cases of minor variations, the accessory would be liable for the crime actually committed. However, the accessory can only be held liable for the different crime where s/he intended to assist in its commission. The threshold set here is not foresight but intention. Thus the “wider principle” asserted in Chan Wing-Siu, by which “a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend”, is at odds with the legislative framework governing criminal liability in this jurisdiction. ...

[44] Having acknowledged the reality that plans can change, but that an agreement is still needed, the trial judge then notes that there is no need for a pre-arranged plan if the actors are there taking part in its execution. In his words: “A plan or agreement does not require any formality, since an agreement to commit an offence may arise on the spur of the moment.” Here again, the trial judge was perfectly correct, merely re-stating a longstanding principle for which there is copious authority. ...

[46] Another critical point made by the learned trial judge in the passage quoted above is that “An agreement can be inferred from the behaviour of the parties.” Once again, there is nothing objectionable about this, which merely reflects an evidential approach common to criminal practice and procedure. Since persons do not usually announce or explain their reasons for acting, there is no choice but to deduce their intention from the surrounding circumstances. What is important, however, is that at all times the trial judge remained mindful that in order to establish guilt, the prosecution had to prove the existence of an agreement between the perpetrators. Further, as to the required mental element, he ended this passage by asserting that “essence of joint responsibility is that each defendant shared the intention to commit the offence”. Intention, not foresight, was the threshold he deemed necessary.” (emphasis added)

[78] In order to convict the Accused as a secondary party on the principle of joint enterprise, the Crown must prove beyond a reasonable doubt the following:

- i. Orin Velasquez is dead.
- ii. The death of the Deceased was caused by the principal without justification or provocation.
- iii. The Accused provided some assistance or encouragement to the principal.
- iv. The Accused intended to assist or encourage the unjustified and unprovoked killing of the Deceased.

v. The fact of an agreement can be inferred from the circumstances.

[79] As our Court of Appeal indicated in Lopez, an agreement between principal and secondary party can be inferred from the behaviour of the parties and persons do not usually verbally announce or explain their reasons for action. The Court also notes that it is permitted to use winks, nods and knowing looks to infer the existence of an agreement as has been the standard approved direction in cases from our Court of Appeal in Ryan Herrera and Anor. v R¹¹, and Jeremy Harris and Anor. v R¹²:

“An agreement to commit an offence may arise on the spur of the moment. Nothing needs to be said at all. It can be made with a nod and a wink, or a knowing look. Indeed, an agreement can be inferred from the behaviour of the parties to the crime.”

[80] The next question is whether Accused No. 1 had the specific intention to kill the Deceased.

[81] The Court has derived great assistance from a judgment of our Court of Appeal in Gareth Hemmans v R¹³, on the question of intent, per Hafiz-Bertram JA, as she then was:

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

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

“9. A court or jury, in determining whether a person has committed an offence-

(a) shall not be bound in law to infer that any question specified in the first column of the Table below is to be answered in the affirmative by reason only of the existence of the factor specified in the second column as appropriate to that question, but

¹¹ Crim. Apps. 22 and 23/09

¹² Crim. Apps. 1-2/04

¹³ Crim. App. 12/16

(b) shall treat that factor as relevant to that question, and decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

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

[54] Mr. Sylvester contended that there is nothing on the record to show that the trial judge considered sections 6 and 9 of the Criminal Code, which sets out the statutory matters which should be taken into account in relation to proof of intention to kill. In the view of the Court, the judge was not required to set out sections 6 and 9 in his judgment or use the formula as set out therein, provided that he makes it clear that the appellant intended to kill Mr. Zaiden. The question to be asked is whether the trial judge arrived at the conclusion of intent to kill by looking at all the facts and circumstances which were disclosed in the evidence.”

[82] The Court finds the following circumstances disclosed on the accepted facts as relevant to the determination of this issue:

- i. The Accused went to the Bredda O's establishment with the intention to rob the occupants.
- ii. The Accused was aware that his accomplice was armed with a firearm.
- iii. The Accused was himself armed with a pocket knife.
- iv. The accomplice entered before the Accused with the firearm in hand.
- v. While the accomplice confronted the occupants, the Accused ran quickly into the building grabbed the bag of money and just as quickly exited the building
- vi. Jaheim Velasquez heard the fence rustling which suggests that the Accused had already began making his escape before the shots were fired.
- vii. The accomplice fired the first shot when the Deceased confronted and attempted to disarm him.
- viii. A struggle ensued between the Deceased and the shooter during which the Deceased was shot.
- ix. The Deceased also fired shots from his own firearm at the gunman.

- [83]** Based on the circumstances outlined above, the Court finds it difficult to conclude beyond a reasonable doubt that the Accused was a party to a joint enterprise to kill. It is very clear that the Accused intended to rob- he said so himself- and his actions by running into the establishment grabbing the money bag and running back out are consistent with an intention to rob.
- [84]** The Court notes that intention is a state of mind that can only be resolved by inference or an admission by the Accused. In this case, the Accused denied involvement in the shooting at all. The Court understands that the evidence of an intention to kill in the absence of direct evidence can only be inferred from surrounding circumstances and that to convict the Accused of murder the Court must find that the Crown has proven such an intention to kill to the standard that this Court feels sure.
- [85]** As is often the case- the Crown has not advanced direct evidence of intention- but it submits that specific intent i.e. intention to kill -can be inferred from the circumstances such as the fact that the Accused proceeded to rob Bredda O's with the knowledge that his accomplice was armed with a deadly weapon. The Court has considered that this fact may suggest foresight that the Accused knew or at least suspected that if it came to his accomplice might have used that deadly weapon. The Court acknowledges that in some circumstances this knowledge and foresight may very well constitute probative and compelling evidence from which an intention to kill can be inferred. However based on the circumstances of this particular case the Court is unable to draw the inference that the actions of the Accused suggest that the shooting and killing of the Deceased was what the Accused desired and intended.
- [86]** Before the shooting even took place, the Accused ran in - effected his part of the criminal enterprise by taking possession of the money and ran back out. Jaheem then heard the fence rumbling which suggests that the Accused was already in the process of fleeing through the fence – a fact which the Accused also admitted.

[87] It is against this backdrop, taking into account all of the evidence and the reasonable inferences that can be drawn from that evidence- the Court finds itself unable to conclude beyond a reasonable doubt that firstly, the Accused was part of a common design to kill, even one that arose in the spur of the moment, and secondly, that the Accused formed the requisite mens rea for murder i.e. a specific intent to kill.

Availability of Manslaughter

[88] At common law, where an offence consisted of several ingredients, the jury could convict of any offence the elements of which were included in the offence charged, subject to the rule that on an indictment for felony the jury could not convict of a misdemeanour: See Taschereau, The Criminal Code of Canada, p. 819; Archbold, Criminal Pleading Evidence and Practice (1979), 40th ed. pp. 452-3.

[89] The power of the jury at common law to convict of an included offence was, in the case of certain offences, enlarged by statute. In Belize the Indictable Procedure Act Cap 96 section 126-135 expressly categorises offences for which verdicts for lesser included offences are available. On a charge of murder the fact finder could find the Accused guilty of manslaughter if those elements are proven.

[90] For the sake of completeness, the Court also wishes to state that from the facts accepted before, during, and after the offence, the Court is similarly not satisfied so that it is sure that the Accused intended any lesser harm that would make him liable for the lesser offence of Manslaughter as there is no evidence that he caused death by intentional or unlawful harm.

[91] The Court should also state that it did not convict of the offence of robbery notwithstanding its findings of fact as the Accused was not indicted for the count of

robbery as he could not have been in light of Section 65A (3) of the Indictable Procedure Act.

Disposition

[92] After a full consideration of the case for the Crown, the Court finds itself in reasonable doubt that the Accused had the specific intent to kill. The Crown has not discharged its burden of satisfying the Court of the Accused's guilt beyond a reasonable doubt. The Court finds him NOT GUILTY and discharges him.

Candace Nanton

High Court Judge

Senior Courts of Belize

Dated: 31st January 2025