IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No BZCR2019/001
BZ Criminal Appeal No 7 OF 2017

BETWEEN

HERNAN MANZANERO **APPELLANT**

AND

THE QUEEN **RESPONDENT**

Before The Honourables: **Mr Justice A Saunders, PCCJ**
Mr Justice J Wit, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice A Burgess, JCCJ
Mr Justice P Jamadar, JCCJ

Appearances

Anthony G Sylvestre for the Appellant

Cheryl-Lynn Vidal SC for the Respondent

Criminal law – Practice and procedure – Judge alone trials - Credibility of the accused - Voir dire – Whether judge should recuse after hearing voir dire - Fair trial – Test of fairness – Reasonable apprehension of bias - Belize Indictable Procedure Act Chapter 96

The Appellant, Hernan Manzanero ("Manzanero") was convicted of murder in the Supreme Court of Belize, mainly on evidence given by his common law wife, Daisy Alvarado ("Daisy"). On 28 November 2011, Manzanero and Daisy, along with their 25-day old baby, boarded the taxi of the deceased, Domiciano Quixchan, at Bullet Tree Village. An incident occurred, which resulted in the death of the deceased, and injuries to

Manzanero. Manzanero was subsequently charged with murder. On 7 March 2017, he stood trial before Moore J, sitting without a jury.

Manzanero had given two caution statements to the police. The first was mainly exculpatory and was admitted into evidence. The second statement contained an admission of guilt. A voir dire was held during the trial to assess the admissibility of the second caution statement. After hearing Manzanero's evidence during the voir dire, the trial judge, although finding that Manzanero was not wholly credible, ruled the second caution statement inadmissible.

The Prosecution's case relied almost entirely on Daisy's testimony, that Manzanero used a knife to stab the deceased in his stomach by his ribs and then used a different knife to cut his throat/neck. At the trial Manzanero relied on an unsworn statement from the dock. He denied any responsibility for the attack or the death of the deceased. The trial judge delivered an oral judgment on 3 May 2017 and subsequently delivered a written judgment also dated the 3 May 2017. She found Manzanero guilty of murder.

Manzanero appealed unsuccessfully to the Court of Appeal of Belize, challenging the conviction for murder. The appeal before the Caribbean Court of Justice ("the Court") focused on the voir dire conducted by the trial judge. The critical issue was whether it could reasonably be said that an adverse finding on Manzanero's credibility, made by the trial judge at the conclusion of the voir dire, resulted in Manzanero having been denied a fair trial.

The judgment of the Court was delivered by Saunders, PCCJ and Rajnauth-Lee, JCCJ. The Court held that accused persons should receive from a judge sitting alone, a trial that appears to be no less fair than they would have received at a jury trial. It did not automatically follow that, in a judge alone trial, where a trial judge has made an adverse finding on the credibility of the accused on the voir dire, or has heard evidence which was prejudicial to or indicative of the guilt of the accused, the accused is denied a fair trial if the judge arrives at a Guilty verdict. An appellate court must, however, 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.

In this case, having ruled on the voir dire and proceeded on the main trial, the trial judge analysed very carefully and thoroughly the evidence of the prosecution. She did not arrive at her fact-finding conclusions only on the basis of the credibility of the sole witness for the prosecution. She properly explained why she accepted Daisy's evidence. The trial judge also accurately and faithfully considered the defence, and in particular, the unsworn statement of the accused. She scrutinized the several matters raised in the statement, explaining why she did not accept it. She continued to bear in mind that Manzanero had nothing to prove. She found that the prosecution evidence had made her feel sure and left her without any reasonable doubt that Manzanero intentionally and without lawful justification caused the fatal harm to the deceased. In the circumstances, the trial judge's analysis of the evidence could not be impeached.

In a concurring judgment Jamadar, JCCJ explored the concept of fairness and the issues of actual bias and apparent bias. Jamadar, JCCJ noted that the relevant test which should lead to disqualification in cases of a reasonable apprehension of prejudgment such as this, is: whether there is a real likelihood that the parties or the public could entertain a reasonable apprehension that the judge would not be able to decide the case impartially, in the context of the alleged pre-judgment and in the particular circumstances of the case.

The appeal was dismissed and the decision of the Court of Appeal to affirm Manzanero's conviction was upheld.

Cases referred to

AG v Joseph [2006] CCJ 3 (AJ), (2006) 69 WIR 104 ; *Australian National Industries Ltd (in liq) v Spedley Securities Ltd* (1992) 9 ACSR 309, (1992) 26 NSWLR 411 ; *Coates v The State of Western Australia* [2009] WASCA 142 ; *DeClercq v R* [1968] SCR 902 ; *Erven v R* [1979] 1 SCR 926 ; *Lassalle v The Attorney-General* (1971) 18 WIR 379 ;

Livesey v New South Wales Bar Association [1983] 151 CLR 288, [1985] LRC (Const) 1107 ; *Matter of Ingram* 15 Md App 356 (1972) ; *Nixon v State* 140 Md App 170 (2001) ; *R v Calaney Flowers* [2020] CCJ 16 (AJ) BZ ; *R v Gauthier* [1977] 1 SCR 441 ; *R v Masters* (1992) 26 NSWLR 450 ; *R v Nicholas* [2000] VSCA 49, (2000) 1 VR 356 ; *R v Sussex Justices Ex p McCarthy* (1924) 1 KB 256 ; *Re Q (Children)* [2014] EWCA Civ 918, [2004] All ER (D) 104 ; *Salazar v R* [2019] CCJ 15 (AJ) ; *State v Hutchinson* 260 Md 227 (1970) ; *Thurton v R* [2018] 2 LRC 125

Legislation referred to

Belize - Belize Constitution, Rev Ed 2011, Cap 4, ss 6(2), 7, Criminal Procedure Rules 2016, Indictable Proceedings Act, Rev Ed 2011, Cap 96, ss 65A, 65B, 65C, 65D; **Saint Lucia -** Criminal Procedure Rules 2008, r 11.5(k); **Saint Vincent and the Grenadines -** Interviewing of Suspects for Serious Crimes Act 2012; **Singapore -** Criminal Procedure Code, Rev Ed 2012, Cap 68, ss 279(1), 279(8)

Other Sources referred to

Belize Code of Judicial Conduct and Etiquette 2003; The Bangalore Principles of Judicial Conduct 2002; Commentary on the Bangalore Principles of Judicial Conduct (UNODC), September 2007; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Transcript of Proceedings, *R v Manzanero* (Supreme Court of Belize, Indictment No C102/2013, 17 March 2017); Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

JUDGMENT
of
The Honourable Mr Justice Saunders, President and
The Honourable Justices Wit, Rajnauth-Lee and Burgess

Delivered by
The Honourable Mr Justice Saunders and The Honourable Mme Justice Rajnauth-Lee

and

CONCURRING JUDGMENT
of
The Honourable Mr Justice Jamadar
on the 6th day of October 2020

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS, PCCJ AND THE HONOURABLE MME JUSTICE RAJNAUTH-LEE, JCCJ:

Introduction

[1] This matter concerns the trial judge's role in non-jury trials and the maintenance of fairness in that trial process. The Appellant, Hernan Manzanero ("Manzanero") was convicted of murder in the Supreme Court of Belize, mainly on evidence given by his common law wife, Daisy Alvarado ("Daisy"). The appeal focuses on a voir dire (or trial within the trial) conducted by the presiding judge during the course of Manzanero's trial. The critical issue before the Caribbean Court of Justice ("the Court") is whether it can reasonably be said that an adverse finding on Manzanero's credibility, made by the trial judge at the conclusion of the voir dire, resulted in the accused having been denied a fair trial. It is on this point that Manzanero challenges the decision of the Court of Appeal to affirm his conviction for murder.

Factual Background

[2] On 28 November 2011, Manzanero and Daisy, along with their 25-day old baby, boarded the taxi of the deceased, Domiciano Quixchan, at Bullet Tree Village. An incident occurred, which resulted in the death of the deceased, and injuries to Manzanero. Shortly after the occurrence of this incident, Manzanero was taken into custody and within days he was charged with murder. On 7 March 2017, he stood trial before Moore J, sitting without a jury, in the Supreme Court of Belize.

[3] Manzanero had given two caution statements to the police. The first was mainly exculpatory and was admitted into evidence. The second statement contained an admission of guilt. A voir dire was held during the trial to assess the admissibility of the second caution statement purportedly voluntarily given by him. After hearing Manzanero's evidence during the voir dire, the trial judge, although finding that Manzanero was not wholly credible, ruled the second caution statement inadmissible. The trial judge continued with the main trial and ultimately found

Manzanero guilty of murder and sentenced him to life imprisonment with eligibility for parole after 25 years.

[4] Manzanero appealed to the Court of Appeal of Belize, challenging the conviction for murder. The Court of Appeal comprising Sir Manuel Sosa P, Ducille JA and Campbell JA, dismissed the appeal and affirmed the conviction and sentence of the trial judge.

[5] Manzanero now appeals to the Court to set aside the judgment of the Court of Appeal, quash his conviction and order a re-trial of his case. Having considered the submissions made before us, we are of the view that this appeal must be dismissed. The trial judge's analysis of the evidence and her fact-finding were fair and impartial and we are satisfied that Manzanero received a fair trial.

The Trial and the Judgment of the Trial Judge

The Voir Dire

[6] On the 7 March 2017, when the trial began, the Defence indicated that a challenge would be made to the admissibility of the second caution statement on the basis that it was not made voluntarily, but was obtained by oppression and threats. The second caution statement had been taken by Police Constable Alfonso Guy upon the instructions of Superintendent Reymundo Reyes.

[7] At the voir dire, which commenced on the first day of the trial, Supt. Reyes testified that on 28 November 2011, he and other officers went to San Antonio Village Police Station, and took two statements from Daisy over the course of two days. He stated that Daisy was very cooperative with the investigation. Supt. Reyes further testified that on 30 November 2011, after reading Manzanero's first caution statement, and while Manzanero was being held in detention, he asked that Manzanero be taken out of the cell. Supt. Reyes told Manzanero that his caution statement did not align with the statements taken from Daisy. Supt. Reyes testified that after an interview of approximately 15 minutes, Manzanero said, "I kill the taxi

man and I will tell you what happened". Supt. Reyes then instructed PC Guy to record the second caution statement.

[8] Manzanero testified at the voir dire under oath that he voluntarily gave a statement of the events which happened in the presence of his brother, the police officer and a Justice of the Peace. This was captured in his first caution statement. Manzanero, however, stated that he was later approached by another police officer, who took him to the conference room to be questioned by Supt. Reyes alone. There, he said, Supt. Reyes punched him several times on his side and his ribs. He said he was hauled and pulled by his shirt. He stated further that Supt. Reyes threatened to arrest Daisy and to have his newborn baby taken away by social services if he (Manzanero) did not give a second caution statement which admitted his involvement in the killing of the deceased. Manzanero testified that he was in pain from his injuries and fearful about Daisy and his baby because he believed that Supt. Reyes would carry out his threats.

[9] After hearing both sides, Moore J gave an oral ruling on the admissibility of the second caution statement. She held that conducting a second interview was not in itself improper. As to the evidence about the voluntariness of the second statement, she stated:

> I have considered carefully the prosecution evidence and accept a great deal of it but not all; likewise, I listen[ed] closely to the sworn testimony of the Accused and accepted parts of it as well but not all of his evidence. Although I did not find the Accused to be wholly credible I did on one crucial element believe him when he said he feared that his then common-law wife Daisy Alvarado would be charged with murder and their new born baby taken by social services if he did not provide the second caution statement. This has the ring of truth to it and I accept it as true. I believe it would in the circumstances be natural for the Accused to be afraid for the wellbeing of his child and the mother of his child.[1]

[1] *R v Hernan Manzanero* (The Supreme Court of Belize) Indictment No C102/2013, Transcript 17 March 2017, 362, 363. See also Record of Proceedings 390, 391.

It was on the basis of the above finding that the trial judge held the second caution statement to be inadmissible.

The Case for the Prosecution on the Merits

[10] After the voir dire, the trial continued. The Prosecution's case relied almost entirely on Daisy's testimony. She testified that on 28 November 2011 at about 9:00 in the morning, she and Manzanero boarded a taxi in Bullet Tree along with their baby. The taxi was driven by the deceased. She said it was the third time they had used that taxi. Manzanero had told her that they had to wait for that particular taxi, and to ignore others that had passed them. Daisy said that Manzanero was sitting in the back seat behind the taxi driver and used a knife to stab the deceased in his stomach by his ribs and then used a different knife to cut his throat/neck. She stated that Manzanero was very angry and had previously shared with her that he wanted to kill the taxi man. Daisy further testified that the deceased and Manzanero struggled outside the taxi, and the deceased managed to take the knife away and cut Manzanero's face. She said she walked away in fear, and that Manzanero later instructed her to say the attack was caused by two black persons in a robbery. She said that he threatened to kill her and the baby if she refused to repeat his story. She therefore repeated this story to her pastor, her parents and initially the police.

The Case for the Defence on the Merits

[11] Manzanero relied on an unsworn statement from the dock. According to him, when the taxi passed through the village of San Antonio, two males of dark complexion stopped the taxi and, on the way out of San Antonio, at knife point, they compelled the taxi driver to take another road. He further stated that these men ordered the taxi driver to hand over his money and inflicted injuries on him. Manzanero stated that one of the men, in attempting to stab him (Manzanero) several times, cut him on the left side of his face. He denied any responsibility for the attack or the death of the deceased.

The Decision of the Trial Judge

[12] The trial judge delivered an oral judgment on 3 May 2017. She was impressed with Daisy's evidence. She found that Daisy stood steadfast during a skillful and lengthy cross examination. She believed that Daisy had initially lied about who was responsible for the attack because she was afraid of Manzanero. The judge carefully examined the case for the prosecution and found that the prosecution had proved the elements of the offence of murder. She considered Manzanero's defence and came to the conclusion that his account of the events did not withstand scrutiny. The judge was satisfied that the prosecution had proved beyond a reasonable doubt that Manzanero had inflicted harm on the deceased without justification and with the intention to kill him. She therefore found him guilty of murder. The trial judge delivered a written judgment sometime later that was also dated 3 May 2017.

The Judgment of the Court of Appeal

[13] The Appellant appealed to the Court of Appeal of Belize on three grounds:

1. That the trial judge erred in law by not properly addressing her mind to Daisy's evidence;

2. That the trial judge erred in law by finding Manzanero guilty of murder before considering his case; and

3. The trial judge's summation was weighed in favour of the prosecution and consequently the trial judge failed to outline Manzanero's case with equal emphasis which resulted in an unfair trial.

[14] Ducille JA (with whom Sir Manuel Sosa P and Campbell JA agreed) delivering the judgment of the Court of Appeal, found no fault with the judgment of the trial judge and dismissed the appeal.

[15] The Appellant now appeals to this Court on the ground that the trial judge's adverse conclusion of Manzanero's credibility at the voir dire, resulted in his being denied

a fair trial. Counsel submitted that the judge may have factored into her decision on the main trial her adverse findings on Manzanero's credibility made at the voir dire stage. Counsel therefore submitted that Manzanero did not receive a fair trial. It is a submission that raises issues regarding fairness to an accused in the context of a judge sitting alone who conducts a voir dire.

[16] At the hearing before us, Mr Sylvestre promptly conceded that he had not raised this issue before the Court of Appeal. The Director of Public Prosecutions ("the Director") in her oral submissions was equally quick to indicate that she did not object to this new issue being argued. She submitted, however, and correctly in our view, that, in fairness to the Court of Appeal, Mr Sylvestre should have framed this as an issue which was being raised before this Court for the first time.

Bench Trials in Belize

[17] In 2011, Belize enacted legislation which allows trial judges to conduct criminal trials without a jury in relation to certain offences, including murder, and also in special circumstances. Section 65D of the Indictable Procedure Act provides:

> Where a trial is conducted without a jury, the judge shall have the power, authority and jurisdiction which he would have had if the trial had been conducted with a jury, including the power to determine any question and to make any finding which would have been required to be determined or made by a jury.[2]

[18] Judge alone trials are inherently no less fair than jury trials, but given the structure of the criminal trial process, the concept of a judge sitting alone as trier of fact introduces certain novelties. For example, although the judge must adjudicate the guilt or innocence of the accused only on admissible evidence, the judge may be required, as was the case here, to receive and deliberate on inadmissible evidence. Further, at and for the sole purposes of a voir dire, the judge may have to assess the credibility of an accused who, at the main trial, may wish to elect to exercise his/her

[2] Indictable Procedure Act, Rev Ed 2011, Cap 96, (BZ) s 65D.

constitutional right to silence or his right not to subject himself to cross-examination. Attention should therefore be given to ensuring that accused persons receive from a judge sitting alone a trial that appears to be no less fair than they would have received at a jury trial. This Court considered the importance of the constitutional requirement that a criminal trial needs to be fair in the case of *Dioncicio Salazar v The Queen*[3] where the trial judge sat without a jury. Wit JCCJ, delivering the Reasons of the Court in *Salazar*, noted that in the case of a bench trial before a professional judge, safeguards to ensure a fair trial are directly to be found in, for example, the requirement for a written judgment of the trial judge,[4] which must serve the purpose of enabling the parties to the trial and the public to understand the reasons for a conviction or acquittal as the case may be.[5]

[19] In the case of *Thurton v R*[6] the Court of Appeal of Belize made it clear that the essence of the constitutionalised fundamental right to protection of the law, and in particular, the right to a "fair hearing" was fairness, not trial by jury.[7] The court remarked that the objective of criminal proceedings was to arrive at a verdict by a fair trial.[8] In addition, the court observed that there was no rule that in a trial by a judge without a jury, the judge should not hold a voir dire. It was a matter for the discretion of the trial judge.[9]

[20] The function of a voir dire is to 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 noted in the Canadian case of *Keith Bruce Erven v The Queen*[10] citing its earlier decision in *The Queen v Gauthier*[11] the voir dire procedure was similar whether the trial was before a jury or before a judge alone. Dickson J explained that the "courts have formulated strict standards governing the admissibility of statements in order to safeguard carefully the rights

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[3] [2019] CCJ 15 (AJ).
[4] Indictable Procedure Act (n 2) s 65C (1).
[5] See *Salazar* [25]-[27]. See also *R v Calaney Flowers* [2020] CCJ 16 (AJ) BZ
[6] [2018] 2 LRC 125.
[7] Ibid [15].
[8] Ibid [32].
[9] Ibid [41].
[10] [1979] 1 SCR 926.
[11] [1977] 1 SCR 441.

of an accused person. The principles focus on the jury trial, but they apply equally to a trial by a judge alone."[12]

[21] One of the principal differences between a judge alone trial and a jury trial is that in the former the judge decides everything. The issues arising at any voir dire, as well as all the issues of fact and of law in the main trial, are all naturally for the judge when the latter sits without a jury. In a jury trial, the judge does not decide issues of fact in the main trial. Since the jury, in a jury trial, is not privy to anything that transpires during the course of a voir dire, even if a judge, in a jury trial, were to make unfavourable findings of fact against the accused at the voir dire, the accused could still feel comfortable in the knowledge that the jury would be unaware of suchfindings and so could not possibly factor them in their deliberations as they contemplated their verdict. The key question posed by these proceedings is this. 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 has had to make adverse findings on the credibility of the accused?

Did Manzanero Receive a Fair Trial?

[22] If, during a judge alone trial, on every occasion the judge makes unfavourable findings about the credibility of the accused at a voir dire, that judge is deemed to be too prejudiced against the accused to continue on with the main trial, judge alone trials will become unworkable and impractical. Unless of course a rule is instituted that all voir dire hearings are to be held before a different judge prior to the commencement of the main trial. But sometimes, especially if the case is not carefully and thoroughly managed, the need for a voir dire arises at a trial almost spontaneously.

[23] When pressed to define the principle he was seeking to uphold in this matter, Mr Sylvestre recognised the impracticality of a rule that stated that once a trial judge finds facts at a voir dire unfavourable to the accused, or is privy to confessions or

[12] *Erven* (n 10) 932.

admissions indicative of the guilt of the accused at a voir dire, the judge is then so compromised that she ought not to continue with the trial. So, counsel sought to tailor and limit the principle for which he was advocating to the facts of this case. He submitted that the principle should be that, whenever the sole evidence in a case linking the accused to the commission of the crime, hinges on whether the trial judge believed the accused or a single prosecution witness, there being no other evidence relied on by the prosecution, the judge should not proceed with the main trial if the judge has heard or been privy to evidence at the voir dire which is prejudicial to the accused or indicative of the guilt of the accused.

[24] Citing *Livesey v New South Wales Bar Association*[13] and *In re Q (Children)*[14] Mr Sylvestre suggested that this case should be determined on the basis of bias. *Livesey* reiterates the principle that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the question involved. The case of *In re Q* concerned a judge who, at an earlier case management hearing, had made his views on the credibility of a party known to an extent that, it was said, demonstrated judicial bias. Manzanero has a constitutional right to a fair hearing by an independent and impartial court.[15] In our view, the case before us is better assessed in the context of the broader concept of fairness which naturally imports both bias and an appearance of bias.

The Test of Fairness

[25] The State cannot and does not promise any accused either a perfect trial or a trial judge that is not susceptible to human frailties. Nevertheless, the justice system must continually strive to promote a trial process that is transparent and fair and a judiciary that is independent, impartial, competent, efficient and effective. Already, there is a high level of accountability on the part of judges who conduct criminal trials. Trials are held in open court to allow the public to observe at first-hand how

[13] [1983] 151 CLR 288, [1985] LRC (Const) 1107.
[14] [2014] EWCA Civ 918, [2004] ALLER (D) 104.
[15] Belize Constitution, Rev Ed 2011, Cap 4, s 6(2).

the judge goes about the business of conducting the trial. Unlike the case with juries, judges must state their reasons in writing for all to scrutinise. If the judge errs, there is in Belize a right given to both the convicted person and the prosecution to appeal to three judges of the Court of Appeal.[16] There may even be a possibility for a further appeal to at least five judges of this Court. These mechanisms must be complemented with judicial appointment mechanisms that are fair, transparent, and merit-based, and the institution of periodic judicial education to upgrade judicial skills.

[26] The Court has not made an exhaustive study of how the question posed in these proceedings is treated in other common law countries but the way in which certain jurisdictions address the matter is of some interest. Canadian jurisprudence accepts that there is no reason why a judge who hears a voir dire should be regarded as automatically being incompetent to hear the main matter even if the voir dire discloses evidence that is indicative of the guilt of the accused. But in *Gauthier*,[17] Spence J, agreeing with Pigeon J, emphasized that when a judge sitting without a jury has conducted a voir dire as to the admissibility of an accused's statement, has ruled on that statement, and has proceeded with the main trial, that judge, in determining the guilt or innocence of the accused, must exclude from his or her mind all evidence given at the voir dire, and especially the evidence of the accused if the accused testified on the voir dire.[18]

[27] More to the point is the Canadian case of *Gerard William DeClercq v Her Majesty The Queen*.[19] In that case, at the voir dire to determine the admissibility of an inculpatory statement, the trial judge adopted a robust approach in the questioning of the accused. Over the objections of the Defence, the judge asked the accused if the impugned statement he had made was true. The accused answered that the statement was substantially correct. The accused was later convicted. On appeal, it was argued that the trial judge ought not to have asked the accused that question on

[16] Indictable Procedure Act (n 2) s 65C (3).
[17] *Gauthier* (n 11).
[18] Ibid. p. 443.
[19] [1968] SCR 902.

the voir dire as the answer was used to find him guilty of the offence. Rejecting the appeal, the majority of the Supreme Court found that the question put to the accused related to the admissibility of the statement and was not determinative of his guilt. The Supreme Court was satisfied that there was no attempt by the trial judge to use the evidence in the voir dire as a means of determining the guilt of the accused. But the court recognised that it would have been improper for the trial judge to use evidence on the voir dire to arrive at a conviction in the main trial.

[28] Singapore fully abolished jury trials in 1969. Legislation in that jurisdiction stipulates that the judge must conduct an ancillary hearing where there is an objection to the admissibility of evidence and before the judge continues with the trial.[20] The ancillary hearing is conducted by the same judge who conducts the trial. Singapore introduced an extremely sensible statutory provision which allows the trial judge, after hearing evidence in the main trial, to revisit and even reverse, if necessary, the decision on the admissibility of challenged evidence. Where the judge reverses an earlier decision to admit evidence, the judge must disregard such evidence in deciding whether to call upon the defence and/or when determining the issue of guilt.[21] It is therefore recognized in Singapore that, even if the trial judge is privy to inculpatory evidence during the course of the ancillary hearing, the trial judge possesses the necessary professionalism to disregard that evidence when determining the guilt of the accused.

[29] The case of *State of Maryland v Hutchinson*[22] heard by the Court of Appeals of Maryland is useful to our discussions on the fairness of the trial process. In the trial of murder and rape of a young child allegedly committed by the accused, the trial judge indicated that he was bound by the ruling of the previous trial judge that a confession allegedly given by the accused had been made voluntarily, and that the confession was therefore admissible. Extensive evidence was led by the prosecution in support of their introduction of the confession. Throughout the trial,

[20] Criminal Procedure Code, Rev Ed 2012, Cap 68, s 279(1).
[21] Ibid s 279(8).
[22] 260 Md 227 (1970).

the trial judge overruled several objections made by the accused's counsel as to the admissibility of the confession. Eventually, and towards the end of the trial, the trial judge ruled that the confession was inadmissible. The trial judge stated that he was completely disregarding the confession in his consideration of the guilt or innocence of the accused. The accused was, nevertheless, found guilty on both counts. On appeal to the Court of Special Appeals the decision was reversed, and the case remanded for a new trial. The court took the view that given the facts of the case, "mere knowledge of the substance of the confession by the trier of fact necessarily tended to deprive appellant of his constitutional right to a fair trial." On further appeal to the Court of Appeals, however, the decision of the previous appellate court was reversed. The Court of Appeals observed "it is clear that we have consistently reposed our confidence in a trial judge's ability to rule on questions of admissibility of evidence and to then assume the role of trier of fact without having carried over to his factual deliberations a prejudice on the matters contained in the evidence which he may have excluded." This case has been cited with approval on many occasions.[23]

[30] The above authorities align with our views on the test of fairness in a judge alone trial where the judge has conducted the voir dire. 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. Of course, it is open to a judge who has heard inculpatory evidence at a voir dire, and who feels personally too compromised to adjudicate the main trial fairly, to say so and to stop

[23] See, for example, *Matter of Ingram* 15 Md App 356 (1972), and *Nixon v State* 140 Md App 170 (2001) (both from the Court of Special Appeals of Maryland).

the main trial, so that it may begin afresh before a new judge. But we would expect such circumstances to be rare.

Has the Test of Fairness Been Met in this Case?

[31] In determining whether the test of fairness has been met in this case, an appellate court is entitled to consider the following: the judge is an experienced professional trained to exclude from her mind any prejudicial material or inadmissible evidence to which she has been privy in assessing credibility or deciding other disputed issues;[24] having been made privy to a confession statement, the second caution statement, the judge ruled, for good reason, that this statement was inadmissible because it appeared to be the product of threats; the judge disbelieved Manzanero on the voir dire on one issue, that he had been beaten, but she also believed him on another issue, that he had made the second caution statement because of threats which involved Daisy and the baby.

[32] Further, having ruled on the voir dire and proceeded on the main trial, as revealed by her written judgment, the trial judge analysed the evidence very carefully and thoroughly. She did not arrive at her fact-finding conclusions only on the basis of the credibility of the sole witness for the prosecution, Daisy. The trial judge properly explained why she accepted Daisy's evidence. She kept uppermost in her mind that it was dangerous to rely on Daisy's "uncorroborated testimony", and she approached Daisy's evidence with "exceptional caution". She bore in mind that Daisy had an interest of her own to serve and that that might have caused Daisy to be untruthful to the court.

[33] The trial judge also accurately and faithfully considered the defence, and in particular, the unsworn statement of the accused. She noted that the unsworn statement was consistent with the exculpatory caution statement which the accused had provided to the police. She therefore scrutinized the several matters raised in the statement, explaining why she did not accept it. In particular, she noted that the

[24] *Coates v The State of Western Australia* [2009] WASCA 142.

deceased's taxi was not a large vehicle and there was no answer to the question why the deceased would pick up two extra passengers when he already had a fare. The trial judge also found it curious that two men, intending to rob the deceased, would get into a taxi already occupied by a family, which included a young man, Manzanero, who was capable of fighting back. "Why not wait until the family had reached their destination and then carry out the felonious deed?" the trial judge asked. She further questioned why the robbers would wish to leave adult witnesses behind. The trial judge also considered the question: "where did they disappear to?" The investigating officer had testified that he had investigated this possibility and found no evidence of the two persons whom Manzanero had described. The two persons would have been on foot and would have had blood on them, based on what Manzanero had described. In addition, the trial judge frontally considered the important question: why would Daisy lie to the court? The judge did not believe that the police had concocted the story and told Daisy what to say. In relation to Daisy's evidence in court, the trial judge said; "I believe she said what she saw that day, she said what happened".[25]

[34] The trial judge continued to bear in mind that Manzanero had nothing to prove. She carefully considered that even if she did not accept his unsworn statement as true, and even if he had fabricated a defence, that did not mean that he was guilty. The judge reminded herself that even if she found that Manzanero was lying, that could not be a factor in determining his guilt. She concluded that the burden was on the prosecution to make her feel sure of the guilt of the accused in order to convict him. She found that the prosecution evidence had made her feel sure and left her without any reasonable doubt that Manzanero intentionally and without lawful justification caused the fatal harm to the deceased.[26]

[35] In the circumstances, we are of the view that the trial judge's analysis of the evidence cannot be impeached. We are left in no doubt whatsoever that her fact-

[25] *R v Hernan Manzanero* (The Supreme Court of Belize, 3 May 2017**)** Indictment No C102/2013, [46].
[26] Ibid [47].

finding was fair and impartial. She came to the conclusion of Manzanero's guilt not only on the basis of the credibility of the sole prosecution witness, Daisy, but on the objective evidence, carefully analyzed, and highlighted at [33] above. We are therefore satisfied that no fault can be found with the verdict of guilty arrived at by the trial judge and that Manzanero received a fair trial.

Closing Observations

[36] In closing, we wish to make some observations. Firstly, as mentioned earlier, at the conclusion of the trial on 3 May 2017, the trial judge gave a full and reasoned oral decision. Later, she produced a written judgement also dated 3 May 2017, which was in effect a sanitised and more extensive version of her oral judgment. This is a practice to be eschewed. If the trial judge, at the conclusion of the trial, is confident about her verdict, then the better practice is simply to give the verdict with written reasons to follow. Those written reasons should be produced as soon as possible thereafter. Alternatively, the trial judge could deliver an oral judgment which may only be tidied up subsequently for elementary slips involving syntax, grammar and the like.

[37] Secondly, in her oral judgment at the end of the trial, the trial judge referred to the voir dire proceedings and adverted to the evidence that was adduced during the voir dire. In the course of so doing, she repeated that she had accepted parts but not all of Manzanero's sworn testimony, and that she did not then find him to be wholly credible. Although, under the present criminal justice architecture, it would appear that both the Prosecution and the Defence, with the judge's concurrence, may agree to incorporate into the main or substantive hearing testimony or other evidence adduced during the voir dire, absent such agreement, in principle, only the result of the voir dire, that is, the decision either to include or exclude the challenged evidence, is relevant to the main trial. In the course of rendering judgment on the merits, it was therefore possibly not the best practice for the judge to hark back to her voir dire credibility findings. It is significant to note, however, that Mr Sylvestre submitted before us that even if the trial judge, in her oral judgment on the main

trial, had not adverted to the evidence and her findings on the voir dire, his client's challenge to the fairness of the trial would still have been made.

[38] Effective case management as introduced by the Criminal Procedure Rules[27] can play a key role in enhancing the fairness and efficiency of criminal trials. The Director of Public Prosecutions submitted that nothing in the law of Belize prevents the voir dire from being conducted by a judge who will not be the trial judge. Interestingly, the Criminal Procedure Rules of Saint Lucia[28] make provision for the setting down for hearing by a judge, as a pre-trial proceeding, any legal issues that must be resolved prior to trial. One such issue is the determination of the admissibility of disputed evidence such as confessions and admissions. Such pre-trial hearings are sometimes done in Saint Lucia by a judge who is not the trial judge. When it is obvious that the voluntariness of a confession will be contested, the resolution of that issue before the trial date, can save time at the trial. But more importantly, it can preserve and strengthen the rights of an accused who, at the trial, wishes to exercise his right to silence. Beyond this, police departments in jurisdictions like St Vincent and the Grenadines have invested in the electronic recording of statements from accused persons containing confessions and inculpatory admissions. This development[29] has had the dramatic effect of boosting public trust and confidence in the police and practically eliminating the need for voir dire hearings.

CONCURRING JUDGMENT OF THE HONOURABLE MR JUSTICE JAMADAR, JCCJ:

[39] Fairness is to justice, as heat is to baking. They bring both to completion, assimilating all constituent parts ideally into a single wholesome end. Fairness thus functions teleologically in relation to the notion of justice. It is essential.

[40] The single issue to be determined in this appeal concerns the fairness of the substantive trial. In particular, whether the appellant could have received an

[27] Criminal Procedure Rules 2016 (BZ).
[28] Criminal Procedure Rules 2008 (LCA) r 11.5(k).
[29] Interviewing of Suspects for Serious Crimes Act 2012.

impartial hearing at that trial, in light of articulated adverse findings about his credibility made by the trial judge at the hearing of a voir dire in the course of determining the admissibility of an alleged confession.

[41] I agree that in the final analysis it has not been sufficiently demonstrated that the appellant did not or could not receive a fair and impartial hearing. I therefore also agree that this appeal should be dismissed. For the purposes of this concurring opinion, I adopt the statement and analysis of facts set out in paragraphs [6] - [12], and [31] - [35] of the main judgment of Saunders PCCJ and Rajnauth-Lee JCCJ above. And as well, with their articulation and analysis of the law and relevant principles as set out at paragraphs [17] - [21], and [25] - [30] of that judgment.

[42] However, there is one aspect of the law related to the fairness of a judge alone criminal trial that I would like to offer some further thoughts on. It is referred to in paragraph [24] of the main judgment in a comment on the case of *Livesey v New South Wales Bar Association*, to wit:

> Livesey reiterates the principle that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the question involved.[30]

Following this it is stated 'In our view, the case before us is better assessed in the context of the broader concept of fairness which naturally imports both bias and an appearance of bias.'[31]

[43] I unreservedly agree that the concept of fairness includes issues of both actual bias and an appearance of bias. This is well known and uncontroversial. What may be somewhat more challenging are the practical implications of the *Livesey* principle, accepted as sound in the main judgment. These prompt the writing of this opinion.

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[30] [2020] CCJ 17 (AJ) BZ at [24]
[31] Ibid [24]

[44] Several Australian authorities following *Livesey* also confirm, that in so far as there is an allegation of the reasonable apprehension of bias, through say a prejudgment on facts and/or credibility arising out of a preliminary hearing such as a voir dire (as has been advanced in this appeal), a judge should not continue to sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that they might not bring an impartial and unprejudiced mind to the resolution of the questions involved in it.[32] There are very good jurisprudential reasons for this principle being adopted in Belize and other Caribbean states.

[45] First, the right to a fair trial and an impartial hearing enjoy constitutional status. Caribbean constitutions, whether through due process or protection of the law clauses, guarantee a fair trial by an independent and impartial tribunal. As early as 1972, the Court of Appeal in Trinidad and Tobago identified core aspects of due process in the context of criminal law, one of which was trial by an independent and impartial court.[33] In Belize, both of these are guaranteed under its protection of the law clause in relation to criminal and civil proceedings.[34] Second, this principle reflects the fundamental notion in the international law of human rights, that in a criminal trial there is a right to 'a fair … hearing by a competent, independent and impartial tribunal …'[35] Wherever there is any uncertainty, ambivalence or ambiguity in local laws, consideration of core international principles is now a legitimate aid to interpretation and application.[36] It is desirable that, when appropriate, local laws are interpreted and applied in alignment with accepted and subscribed to international norms and principles.

[46] Third, there is the well-settled legal principle that justice must not only be done, but must also manifestly appear to be done.[37] Particularly in the context of fairness,

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[32] Livesey (n13) at 293-4. Also see, Australian National Industries Ltd v Spedley Securities Ltd (1992) 9 ACSR 309; R v Masters (1992) 26 NSWLR 450; and R v David Michael Nicholas [2000] VSCA 49.
[33] *Lassalle v The Attorney-General* (1971) 18 WIR 379, at 391 (per Phillips JA).
[34] Belize Constitution, Rev Ed 2011, Cap 4, s 6(2) and s 7. As well, the Constitution guarantees as fundamental rights both the presumption of innocence (s 6 (3) (a)) and the right to silence (s 6 (6)).
[35] International Covenant on Civil and Political Rights (adopted 16 December 1966) entered into force 23 March 1976 999 UNTS 171, Art 14. See also, Universal Declaration of Human Rights (adopted 10 December 1948), Art 19: 'Everyone is entitled … to a fair … hearing by an independent and impartial tribunal …'.
[36] *AG v Joseph* [2006] CCJ 3 (AJ), at [56], [80].
[37] *R v Sussex Justices Ex p McCarthy* (1924) 1 KB 256, at 259 (per Lord Hewart CJ).

appearances matter, and perceptions are important. Fourth, all judicial codes of conduct based on the Bangalore Principles of Judicial Conduct[38] include impartiality as a fundamental principle and value.[39] In 2003 Belize promulgated its Code of Judicial Conduct and Etiquette and judicial officers agreed 'freely and voluntarily … to be guided and bound by the values and principles'[40] contained in it. Impartiality is one such value, whereby 'A judge shall perform his or her judicial duties without … bias or prejudice.'[41] The Belize code also states 'a judge shall disqualify himself or herself in any proceedings in which there might be a reasonable perception of a lack of impartiality …'.[42]

[47] An essential quality of fairness is impartiality. Alternatively, there can be no fairness in law without impartiality. Partiality is thus the antithesis of fairness.

[48] In my opinion, the relevant test which should lead to disqualification in cases of a reasonable apprehension of prejudgment such as this, is: whether there is a real likelihood that the parties or the public could entertain a reasonable apprehension that the judge would not be able to decide the case impartially, in the context of the alleged pre-judgment and in the particular circumstances of the case. What is to be noted, is that bias, prejudice, or partiality in a judicial officer is a state of mind, indicated by a predisposition to decide an issue or a case in a particular way that arises out of a closed judicial mind that is not (or no longer) open and receptive to objectively, impartially, and fairly considering all of the evidence.

[49] By setting the threshold at the level of a "real likelihood" and the relevant standard as "could" (and not say, "might"), the intention is to ensure that the proof of apprehension must reach that level of probability and not that of, say, a mere possibility, or of a reasonable suspicion. The test is objective and is also to be

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[38] The Bangalore Principles of Judicial Conduct, 2002 (The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002).

[39] In 2002 the United Nations Human Rights Commission (UNHRC) published the Bangalore Principles of Judicial Conduct (n 38) and in 2007 added a Commentary (Commentary on the Bangalore Principles of Judicial Conduct, UNODC, September 2007) that elaborated each value. Impartiality is one of the six core Bangalore Principles and values.

[40] Belize Code of Judicial Conduct and Etiquette (2003), 1

[41] Ibid, 5 (4.1)

[42] Ibid, 6 (4.6)

applied from the perspective of an informed, fair-minded, and reasonable public observer who is representative of the society at large.[43] Such a hypothetical observer is assumed to know that a professionally trained judicial officer is ordinarily acknowledged to be impartial, independent, and capable of putting aside from their deliberations, evidence heard and/or findings made in prior proceedings in the same case, and of deciding the main case before them only on the evidence properly admissible in the main proceedings. In cases of disqualification (as here), the inquiry is not whether there is or was in fact bias (conscious or unconscious), prejudice, or prejudgment – it is whether a reasonable, fair-minded, and properly informed person would apprehend that there could be, such as to result in a closed judicial mind. Thus, a judge may in fact be impartial in circumstances that nevertheless create a reasonable apprehension of bias, prejudice, or prejudgment.

[50] However, I am also of the view that generally:

> The fact that a judge has decided an issue in a particular way, and is likely to decide it in the same way when it arises again, does not amount to prejudgment which may require disqualification in order to avoid an apprehension of bias. The reasonable apprehension which should lead to disqualification must be that the judge will not decide the case impartially or without prejudice or bias, not simply that he or she will decide the case adversely to one party.[44]

One key factor in prejudgement cases is therefore the determination of a real and reasonable likelihood of closed-mindedness.

[51] In this matter it is understandable that the appellant could have been concerned. The statement that was ruled inadmissible at the voir dire included an alleged confession from him that, 'I kill the taxi man and I will tell you what happened.' Further, the trial judge in her oral judgment in the main proceedings referred to the evidence and her findings at that voir dire, possibly suggesting that she had considered them and/or thought them somehow relevant. This would therefore have included her finding that:

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[43] See also, Commentary on the Bangalore Principles of Judicial Conduct, UNODC, September 2007, Impartiality, paras 52-54.
[44] *Masters* (n 32)

> Although I did not find the Accused to be wholly credible I did on one crucial element believe him when he said he feared that his then common-law wife Daisy Alvarado would be charged with murder and their new born baby taken by social services if he did not provide the second caution statement. This has the ring of truth to it and I accept it as true.[45]

Indeed, in her oral judgment in the main proceedings the trial judge referred to the fact that she had only accepted parts but not all of Manzanero's sworn testimony and that she had not found him to be wholly credible during the voir dire proceedings. This raises the question following the voir dire: What did the judge believe about the appellant's credibility generally, and as well in relation to his alleged confession? And further, did these opinions unfavourably bias, or prejudice the judge's mind? Clearly, there was an adverse finding in relation to the appellant's credibility, even if only partially so.

[52] What is at stake in this case is public confidence in the criminal justice system, as well as the confidence of the accused in the proceedings. These are essential considerations in a democratic society. This broader public interest concern is rooted in the overarching need for societal trust and faith in the integrity of the administration of justice.

[53] That being so, the crucial question remains whether an informed, fair-minded, and reasonable observer would, in all of the circumstances, have formed an objective opinion that there was a real likelihood that the trial judge could not be impartial. That is, that the trial judge's mind was so closed because of an adverse prejudgment on credibility that it could not be impartial. In my opinion it has not been shown to have been so in this case.

[54] In this regard, I adopt the reasoning and analysis in the main judgment at paragraphs [31] - [35]. This analysis ably explains why it cannot be objectively determined that the trial judge did not have an open and receptive mind in relation to the totality of the evidence in this case. In fact, what the record and evidence show is that both at

[45] *Manzanero* (n 1) at 362

the voir dire and in the main proceedings, the trial judge carefully and thoroughly considered all of the relevant evidence, and in particular during the main proceedings, that of the defence including the appellant's unsworn statement. The appellant's doubts and fears must be objectively justified. This has not been demonstrated to the requisite standard in this case.

Disposition

[55] It is the judgment of this Court that the appeal stands dismissed and the decision of the Court of Appeal to affirm the conviction of the Appellant is upheld.

/s/ A Saunders

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The Hon Mr Justice A Saunders

/s/ J Wit

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The Hon Mr Justice J Wit

/s/ M Rajnauth-Lee

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The Hon Mme Justice M Rajnauth-Lee

/s/ A Burgess

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The Hon Mr Justice A Burgess

/s/ P Jamadar

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The Hon Mr Justice P Jamadar