EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

Criminal Case No. BVIHCR 2023/27

BETWEEN:

REX

v

SELROY HANLEY

Accused

Appearances: Ms. Tracey Vidale, Principal Crown Counsel and Ms. Kendra Powell, Legal Cadette
Mrs. Valerie Gordon, Counsel for the Accused

2025: June 4th

RULING ON NO CASE SUBMISSION

[1] **TEELUCKSINGH J.:** The accused, Selroy Hanley, is indicted on the count of murder, in particular, that on 24th March, 2023, on the Island of Tortola, in the Territory of the Virgin Islands, it is alleged that he murdered Trevon Elliot.

Summary of Evidence

[2] The Crown adduced evidence from six witnesses and tendered the statement of the deceased witness, Trevon Elliot in the trial as PG1.

[3] In that statement, Elliot purportedly identified the accused whom he knew as 'Beast' as the person who, on morning of 30th August, 2022, stabbed him with an ice pick on several areas of his body at Purcell Estate. Later that morning, investigating officer Pheiona George interviewed the witness,

Trevon Elliot, who was warded at the Dr D. Orlando Smith Hospital. Officer George then typed a statement which she compiled from the notes of the interview. The next day, Officer George returned to the said hospital, where in the presence of medical social worker Ingrid Penn, Officer George read aloud and slowly the statement to Trevon Elliot. Officer George testified that she witnessed Trevon Elliot placed X's on each page of the statement. This procedure was confirmed by Ms. Ingrid Penn in her testimony who also affixed a certificate at the end of the said statement and signed.

[4] On 1st September, 2022, a search warrant was executed at the home of the accused located at Purcell Estate where items of clothing such as a long jeans and a neon long sleeved shirt were seized.

[5] The accused was arrested and taken to the Road Town Police station where he participated in an audio-visual interview with Officers George and Hobson. In that interview, he confirmed that one of his nicknames is 'Beast' and when he was shown a photograph of Trevon Elliot, the accused confirmed that he knew him as 'Lofty.' The accused denied stabbing Trevon Elliot and stated inter alia, that at the material time, he was at work on the construction site at the BVI High School.

[6] Trevon Elliot remained warded at the hospital until the day he died on 24th March, 2023. Dr Rotimi Oyetunji, Registrar of Surgery at the Dr. D. Orlando Smith Hospital, gave evidence as to the care and treatment of the deceased whilst at the hospital up until he died.

[7] The pathologist Dr Jacqueline Pender gave evidence as to the cause of death of Trevon Elliot due to delayed complications from multiple stab wounds.

[8] The accused was subsequently charged for the murder of Trevon Elliot.

Submissions

[9] Defence Counsel filed written submissions on a no case on 2nd June, 2025. Crown Counsel responded in writing on 3rd June, 2025.

[10] This Court has given due consideration to the submissions made by the attorneys and the authorities filed therein.

LAW ON NO CASE SUBMISSION

[11] Paragraph D16.54 of Blackstone's Criminal Practice and Procedure 2024 states, "The leading authority on the test for a trial judge in determining whether there is a case to answer is **Galbraith**[1] where Lord Lane stated at pages 1042 paragraphs B – D:

> ***"... how then should the judge approach a submission of 'no case' (1) if there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will of course stop the case (2) the difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury, and where on one possible view of the facts, there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge..."***
>
> First Limb of **Galbraith** (cited at paragraph D16:55 of Blackstone's):
>
> '***...The test of there being 'no evidence that the crime alleged has been committed by the defendant' is intended to convey the same meaning as the words of Lord Parker CJ in his Practice Direction (Submission of No Case) (1962) 1 WLR 227 when he told magistrates that submissions of no case to answer at summary trial should be upheld, inter alia if 'there has been no evidence to prove an essential element in the alleged offence .Such cases may arise, for example, where an essential prosecution witness has failed to come up to proof, or where there is no direct evidence as to an element of the offence and the inferences which the prosecution ask the court to draw from the circumstantial evidence are inferences which, in the judge's view, no reasonable jury could properly draw....'***
>
> Second Limb of **Galbraith** (cited at paragraph D16:56 of Blackstone's)
>
> "...***This approach inevitably involves the court considering the quality and reliability of the evidence rather than its legal sufficiency, and therefore involved the court***

[1] (1981) 2 ALL ER 1060

carrying out the assessment of evidence and witnesses that would otherwise be the exclusive prerogative of the jury. The judgment in Galbraith that it is not appropriate to argue on is submission of no case that it would be unsafe for the jury to convict, which would be an invitation for the judge to impose his own views of the witness' veracity. However, the second limb of the Galbraith test does leave a residual role for the court as assessor of the reliability of the evidence. The court is empowered by the second limb of the Galbraith test to consider whether the prosecution's evidence is too inherently weak or weak for any sensible person to rely on it. Thus if the witness undermines his or her own testimony by conceding uncertainty about vital points, or if what the witness says is manifestly contrary to reason, the court is entitled to hold that no reasonable jury properly directed could rely on the witness' evidence and therefore (in the absence of any other evidence) there is no case to answer...."

D 16.59 (cited at paragraph D16:56 of Blackstone's)

"The correct approach to submissions of no case to answer in prosecutions turning upon identification evidence was laid down by the Court of Appeal in Turnbull (1977) QB 224, namely that, if the quality of the identification evidence on which the prosecution case depends is poor and there is no evidence to support it, the judge should direct the jury to acquit. However, supporting evidence capable of justifying leaving a case to the jury, even where the identifying evidence is poor, need not be corroboration in the strict sense..."

FIRST LIMB OF GALBRAITH – ESSENTIAL ELEMENT OF OFFENCE NOT PROVED: CAUSATION

[12] Counsel for the accused advanced a submission that the case should be withdrawn from the jury on the first limb of **Galbraith**, in that the Crown has failed to prove an essential element of the offence, namely, the cause of death of the deceased. Defence contends that therefore, there is no evidence that the alleged crime has been committed by the accused.

[13] Defence Counsel submitted that on the evidence adduced by the Prosecution as a whole, there was no evidence that the death of the deceased was consequent upon the wounds inflicted by the accused (if correctly identified). Defence Counsel further contended that the Prosecution failed to discharge the burden of proof that the stab wounds inflicted on the deceased were the substantial cause of death.

[14] Defence Counsel submitted that Mr. Elliot died about seven months post injury, that he suffered three cardiac arrests and developed a stage three (3) pressure ulcer. Counsel argues that there are several factors of medical mismanagement that can be described as 'supervening' which interrupted the chain of causation.

[15] Defence relies on the evidence of Dr. Oyetunji that Elliot could not receive the care that he required on admission to the hospital, in that the hospital could not provide the care of a neurosurgeon. There was also evidence from the doctor that whilst on the surgical ward, Elliot was fit enough to travel and to be discharged up to 29th January, 2023, but due to social issues such the absence of a caregiver and lack of financial resources (not being part of the National Health Insurance scheme), Elliot was unable to be discharged and consequently remained throughout in the care of Dr. D. Orlando Smith Hospital.

[16] The Defence contends further, that the lack of medical intervention evident by the decision/plan of medical personnel on 10th March, 2023, not to resuscitate Trevon Elliot, was also responsible for his death, after suffering a third cardiac arrest.

[17] Defence reminds the Court, that pathologist Dr. Pender, testified that the stab wounds had healed at the time of the post mortem. In the circumstances, Defence argued that there is no causal link between the stab wounds allegedly inflicted by the accused and the death of the deceased, Trevon Elliot.

[18] Crown counterargues inter alia that there is no evidence of medical negligence or mismanagement. Dr. Oyetunji was consistent in his evidence that the deceased Trevon Elliot received all the care that the hospital was able to provide.

[19] Furthermore, the evidence of forensic pathologist, Dr. Pender, was that there was no evidence of medical negligence. Dr. Pender opined the cause of death was the stab wound to the neck, in particular the C4 area, which caused delayed complications which in turn led the death of Mr. Elliot.

ANALYSIS AND FINDINGS

[20] In examining this ground, evidence of Dr. Oyetunji and Dr. Pender are relevant to this element of murder namely, causation. This Court considers the entire evidence of both witnesses. For the purposes of the ruling, portions of their evidence will be cited.

(i) Evidence of Dr. Rotimini Oyetungi

[21] Dr. Oyetungi testified that he is the Registrar of Surgery at Dr. D Orlando Smith Hospital. On 30th of August 2022, he was contacted by the emergency physician. He proceeded to the emergency room about 9:10am, where he reviewed, assessed, took over Trevon Elliot's management and deemed him fit to be under surgical care.

[22] On examining Elliot, Dr. Oyetungi found that he ***"had multiple stab injuries and from the stabs, he had sustained a lot of injuries."*** According to the doctor, Elliot ***"had fracture of a fourth cervical vertebra the C4, that is the neck. Also, he became paraplegic, that is paralysis of both lower right and left lower limbs together."*** In evidence in chief, when asked what was the extent of this paralysis, the doctor answered ***"total paralysis, complete paralysis of the lower limbs."***

> ***"Q- was there any paralysis of his hands***
> ***A- yes he has partial paralysis of both upper limbs***
>
> ***Q- when you say partial paralysis of both upper limbs are you able to say what extent was the paralysis of both upper limbs?***
>
> The Dr. testified that "***the extent of the upper limb paralysis, the flexion is up to 50% paralyzed. The extension, that is to stretch, is "a quarter ...is 20% paralysis***." (The witness demonstrated the flexion by raising his arms and extension by uncurling both *arms).*

[23] The doctor testified that Trevon Elliot "***also sustained a chest injury that is the right pneuomothorax."*** He explained that a pneuomothorax is the "***leaking of air from inside the lung into the pleural cavity. The pleural cavity is an empty space between the lung and the wall of the chest that is the space which should be empty at all times under normal circumstances. That space was filled with air, that is called pneumothorax, on the right side of the chest."***

[24] Dr. Oyetungi's other observation was that Elliot had a priapism, which he explained, is an ***"abnormal sustained unrelated erection of the penis."*** This was caused by a complication of the spinal cord injury '***similar to paralysis that is one of the causes, spiral cord injury.'***

[25] On arrival at the ER, the doctor observed Elliot had ***'some abrasion to the left shoulder'*** as well as an '***injury to the left flank.'***

[26] With respect to treatment- "***the pneumothorax was the most life-threatening, I put a chest tube to relieve the pressure to get out the air***." The doctor also explained that the chest tube was placed on the right side of the chest, as that was the area in which the pneumothorax was located.

[27] Dr. Oyetungi explained that the placement of the tube relieved the pressure and took out the air as it was ***"confirmed by a chest X-ray immediately after the placement; that was the immediate treatment of the pneumothorax. The chest tube was kept in place to take care of any further needs***."

[28] The doctor explains that the priapism if it was not immediately treated as he ***"could have lost the erection forever***." and same was treated with an injection of adrenalin.

[29] According to the doctor, the spinal cord injury was treated with a steroid to prevent further swelling of the spinal cord which would have worsened the spinal injury. The medics also gave Elliot antibiotics to prevent infection of the stab wounds.

[30] Doctor Oyetungi testified that the liver injury was not significant because "***it was surface, the injury was just a graze on the top of the liver."*** He explained the cause of this spinal cord injury and stated that "***he had multiple wounds- the first one was on the neck (witness demonstrated), left side of the neck, it was below the mastoid, ear lobe that is the same level where we saw 4th cervical vertebra fracture on a CT*** scan."

> ***"Q- tell us about the fracture?***
> ***A- 4th cervical vertebra on Mr. Elliot was fractured at the lamina."***

[31] In explaining what the lamina is, the doctor said that ***"the spinal cord has a ring of bony protection around called the vertebra. The vertebra is divided into different parts- the front side, the front- lateral or side, the back or posterior of the vertebra."*** The doctor explained "***the frontal part is like a block, the bone is like a block. It is called the body of the vertebra which protects the cord from the front. The side, there are two- one is the lamina which protects the cord on the side, and another part is the pedicles***." He stated the back, the posterior part of the cord which ***"protects the cord from the back, is called the spine of the veterbra***." According to Dr. Oyetunji, Mr. Elliot's injury was "***at the lamina, the lamina was fractured and the fracture was comminuted, that is broken into many parts."***

[32] Dr. Oyetungi testified that "***one of the fragments was driven inside the canal. ...The canal is the space containing the cord, that is the central space surrounding the vertebra is called the canal, that is a space occupied by the cord.***" He explained what he meant by ***"fragments***" in that the vertebra is a bone and when a bone is broken or fractured, the segment is called fragments.

[33] In evidence in chief, Dr. Oyetungi further testified:-

> ***"Q- what did a spinal cord injury cause in Mr Elliot?"***
> ***A- cause paralysis in him and priapism in him. As I mentioned earlier the partial paralysis of both upper limbs and complete paralysis of the lower limbs, the priapism and partial paralysis of the diaphragm.***"

[34] The doctor explained that the diaphragm is like a wall separating the thorax or the chest from the abdomen, and further stated that there is a partition between the chest and the abdomen. It functions by a nerve called a phrenic nerve, it is the main muscle controlling breathing, respiration and that the other muscles are called "***secondary muscles or accessory muscles which are secondary."*** The doctor further stated that "***partial paralysis of the diaphragm, these are injuries from the spinal cord"*** . Dr. Oyetungi was shown photographs where he identified wounds on Trevon Elliot's body.

> ***"Q- are you able to say whether this wound is consistent with the use of a sharp object like an ice pick?***
> ***A-Yes"***

[35] The doctor was asked by Crown what part of the vertebra was the wound (**as depicted in photo # 802)** to which the doctor stated that it was ***"towards the lateral aspect of the vertebra, the side, either the lamina or the pennicle."***

When shown the following photographs, the doctor identified the wounds depicted in the following photographs:

0803- that is also one of the stab wounds in Mr Elliott's chest, that is on the left side

0805- looks like puncture wound a stab to the plank

0807- looks like the same wound, that is the right side of the flank

0809- the picture looked like when Trevon Elliot was in the emergency room and on his face he had a face mask to administer oxygen to him.

According to Dr. Oyetungi, the reason for the mask was when Trevon Elliot entered the hospital, "***his oxygen saturation was 90 percent, and normally it should be above 95%, because he had an injury to the chest and so that was necessary to supplement."***

[36] The doctor was reminded of his testimony that the diaphragm was the main muscle which controlled respiration and that there was partial paralysis of Mr. Elliot's diaphragm. In explaining the effect of this paralysis, the doctor stated that one of the effects is "***the inability to take in deep breaths, deeper inspiration"*** and another issue was "***the inability to cough, those were two issues with respect to the diaphragm, partial paralysis"***. He was asked why was it needed for Mr. Elliot to cough, the doctor explained that ***"the injury which was sustained was very high up C4, the vertebra was twenty four in number; there are seven in the neck, twelve in the chest, behind the chest and five at the lower back. So twenty four in the number, minus the tail bone***." Elliot's injury was C4, that is number four, which was ***"very very high up in that level every function above that level would be perfect but below that level would be different degrees of deficits."***

[37] Dr. Oyetungi further testified that- ***"...C4 control is one of the levels that supplies the nerve to the diaphragm. The nerve to the diaphragm is called the phrenic nerve. That phrenic nerve has two roots, it takes its roots from two levels C3 and C4. The reason why Mr. Elliott was able to breathe was C3 supplying the diaphragm..."***

[38] The doctor stated that "***C4 was damaged but C 3 was intact. Breathing or inspiration, so he could not breathe, he could not cough***."

[39] Dr. Oyetungi explained that the muscle for swallowing was below the level so they were partially affected. According to the doctor, one of the problems with Mr. Elliot, was that swallowing was difficult for him, and "***sometimes the food would enter into the airway and while we are able to cough, it could push it out'*** but Mr. Eliot ***'could not cough and push it out.'*** Throughout his stay at the hospital, Mr. Elliot could not cough so ***"...that he had recurring pneumonia, from the food going to the airway which he could not stop by coughing out... that was the significance of coughing to prevent aspiration. Aspiration is air and particles going into the airway. Aspiration pneumonia occurred from foreign body going into the lungs either food particles, vomitus or any other thing."***

[40] Dr. Oyetungi testified in evidence in chief: -

> ***"Q- on a morning of the 30th when you saw Mr Elliot were you able to speak to him?***
> ***A- yes he was able to speak fluently"***

Dr. Oyetungi further testified Mr. Elliot stayed at the hospital for six months three weeks and about three days from the 30th of August 2022 to the 24th of March 2023. He was asked by the Crown, if the paraplegia state that Elliot was in on the 30th of August if it ever resolved, to which he answered "***it never resolve ...the bone could not get out, the fragments was buried inside cord we could not get it out, we needed a neurosurgeon to do it we didn't have a neurosurgeon here***..."

The Doctor testified that the paraplegia ***'continued throughout his stay'***

> ***"Q- you said that it was not resolved, did it improve?***
> ***A- no it never improved ...***
>
> ***Q- you spoke of part paralysis to the diaphragm did that improve?***
> ***A- No, it did not improve. Partial paralysis to the diaphragm. There was no improvement..."***
>
> ***"...Q was there any decline in the paralysis to the diaphragm?***
> ***A- no decline to paralysis itself..."***

[41] Dr. Oyetungi explained that the swallowing muscles deteriorated in time because "***every muscle is supplied by a nerve and if that muscle can exercise, the paralysis can improve, if not, then it would be worsening more and more because the muscle would be getting thinner. The diaphragm did not worsen because it was partial.***"

[42] He was asked if he had treated the swallowing muscles which had deteriorated to which he answered at the time Elliot could not swallow, and they had to put a feeding tube into his stomach. The doctors had tried endoscopically, but they found the opening to the esophagus was stenosed, that is, tightly closed, so they could not put the scope from the mouth to the throat, to the stomach, so they had to resort to cut into the abdomen to put a feeding tube directly in Elliot's stomach, since they could not get entry with the endoscopy.

[43] In explaining about the two problems caused as a result of the diaphragm, Dr. Oyetungi indicated that the deceased Trevon Elliot could inspire but he could not take deep exaggerated breaths. He could breathe normally and this was in relation to the diaphragm where there was partial paralysis. Elliot was able to breathe to maintain normal life but he could not take deeper breaths. Dr. Oyetungi was asked by Crown whether any treatment was given to Mr. Elliot while at the hospital, to assist with breathing, to which he answered, that Elliot needed a lot of assistance and treatment when "***he developed pneumonia, recurrent aspiration pneumonia.***"

> ***"Q- was that assistance given to Mr. Elliott***
> ***A- yes"***

[44] When asked by Crown, what was the assistance was given to Mr. Elliot, Dr. Oyetungi said the last aspiration pneumonia was "***...very very severe, he needed to be intubated, that is tube into the trachea and ventilated. He was connected to the ventilator because of the infection in the lung...***"

> ***"...Q- are you able to say how he developed this recurring aspiration***
> ***A- as I mentioned earlier he didn't cough, he didn't control aspiration so some food particles got into the airway in the lung and could not cough to get it out so he developed aspiration pneumonia from the food particles..."***

[45] The doctor continued to be questioned by the Crown as to what does pneumonia cause, to which he answered pneumonia ***"causes the inability of the lung to exchange air, oxygen, the inability to take in enough oxygen and to get rid of enough carbon dioxide, that necessitated intubation and ventilation because the oxygen saturation was low... was decreased and the carbon dioxide was increased."*** The effect that it had on Mr. Elliot was getting him drowsy, his function was very low, he did not function so that he was transferred to ICU and according to the doctor, that caused the demise because the last pneumonia did not resolve in spite of the interventions. He stated that the low oxygen saturation, and Mr. Elliot not functioning led to cardiac arrest on three occasions that stopped the heart. While the doctors were able to resuscitate on the first two occasions-CPR ***"was used but on the 3rd occasion all efforts and CPR causing his demise, his death."***

[46] The doctor also stated "***that every organ or body depends on oxygen to function and every cell every organ depend on oxygen, to function, when oxygen is low, the vital organs are affected- the brain, the heart, the lung and other organs but the critical one is the heart which caused the heart stop beating, cardiac arrest."*** The doctor further explained that apoxia, low oxygen in the blood cause cardiac arrest on three occasions the final one was not successful.

[47] The doctor was asked if it was accurate to say that the pneumonia was as a result of the spinal cord injury, to which he answered, it was a secondary complication of this spinal cord injury, that is ***"...the spinal cord injury did not directly cause the pneumonia, but it caused something, partial paralysis of the diaphragm which caused pneumonia, the inability to cough to prevent the aspiration that is which caused the pneumonia..."***

Cross examination of Dr. Oyetungi

[48] It was asked by Defence Counsel, in the best interest of the patient, Trevon Elliot, what steps were taken to have him flown out of the country, to which the doctor answered that the said day, the 30th August 2022, a referral was made to NHI to get Trevon Elliot into a neurosurgical centre where he could have the needed cervical decompression, that is the removal of the bone fragment in the spinal

cord. When asked under cross, if a hospital medical centre was identified, the doctor answered affirmatively that one was identified by NHI.

[49] Under cross examination, Defence Counsel questioned about a planned evacuation of Mr. Elliott on an aircraft to which he answered, that the plan to evacuate was initiated by those at hospital, detailing his condition and the benefits derived from surgical intervention.

> ***"...Q- in your medical opinion Mr Elliott would be well served by evacuating him to a medical centre to deal with his condition?***
>
> ***A- correct***

[50] The doctor testified that the plan was to take Trevon Elliot to a neurosurgical centre and to repatriate him, that is, to send him back to his country St Kitts. Dr. Oyetungi confirmed that at the time that was a plan of repatriation of Trevon Elliot and aspiration pneumonia had not set in at that time. The doctor explained that Elliot also had no one to take care of him which was a social issue and that the hospital wanted to discharge him. Dr. Oyetungi testified that Mr. Elliott spent some time in the general surgical ward on the 5th floor and then on the last occasion in ICU, he contracted severe pneumonia.

[51] Dr. Oyetungi testified that on one occasion, on 15th January 2023, Mr. Elliot was taken from the Peebles hospital (now renamed as Dr. D. Orlando Smith) to the airport and later returned. He explained that Elliot did not have the '***financial responsibilities'*** to leave the hospital neither did he have anyone – friend or family to take on the responsibility of caring for him.

> ***"...Q- so having read the medical record is it correct that it was determined in November 2022 that Trevon Elliot was well enough to travel.***
> ***A- yes commercially..."***

[52] The doctor added that Trevon Elliot was considered fit to travel provided he would be accompanied by an adult or medical staff member and, in this case, it was decided, possibly a medical staff member. However, in November 2022, the doctor admitted that Trevon Elliot did not go to the airport because there were problems of the reception of Elliot in Saint Kitts.

[53] Defence Counsel questioned whether in November 2022, Trevon Elliott could have been discharged in the community, to which the doctor answered in the affirmative but stated ***"there was nobody to***

take care of him." The doctor further explained that Elliot needed help to feed himself because he could not raise his hand and at least until February 2023, when he was fed, he was able to swallow.

[54] Dr. Oyetungi agreed that from the medical records in November 2022, Trevon Elliot was feeling well, he was able to breathe and was able to swallow, ***"most of the time"*** however, in February 2023 (in particular on 22nd February) his medical condition had changed in that it ***"deteriorated to severity."*** The doctor agreed with Defence Counsel that from August 2022 to February 2023, Trevon Elliot was always in the medical care of Peebles Hospital (renamed Dr. D. Orlando Smith Hospital) that is, ***"throughout his stay."***

[55] Initially, the doctor could not recall if Trevon Elliot had developed a sacral ulcer and was reminded of this condition when he was shown photographs of same during cross examination. Under cross, Dr. Oyetungi agreed with Defence counsel, that with any ulcer, bacteria can seep into the system which can in turn cause a sepsis. The doctor explained that a sepsis is a pathological dissemination of bacteria into the bloodstream, and ***"...if there is no complication to that dissemination, then it is simply referred to as bacterium where there is bacteria in the blood but there is no fever, no sickness and no feeling ill...***" He explained that one of the complications of sepsis is septic shock which is close to fatal. Dr. Oyetungi agreed under cross examination that there was a ***"diagnosis of septic shock"*** relative to Trevon Elliot and explained ***"it was related to the pneumonia."*** He agreed with Defence Counsel that ***"septic shock can lead to heart failure, the failure of any organ or death."***

[56] The doctor agreed that until January 2023, Trevon Elliot was considered well enough to travel to St. Kitts. He was moved to the airport for transport. There was a meeting that was held 29th of January, 2023 to resolve the logistics of transporting him.

[57] Dr. Oyetungi was further questioned:-

> ***"...Q- a new aspiration pneumonia. he contracted a new aspiration pneumonia in February?***
> ***A- yes..."***

Under cross examination, the doctor testified that in January, 2023, Elliot had aspiration pneumonia ***"every now and then ...we treat it for aspiration pneumonia mild ones treated and resolved on the ward..."***

[58] Dr. Oyetungi agreed that on three occasions Trevon Elliot suffered from cardiac arrest while in ICU from 22nd February, 2023 to 23rd March 2023. The doctor agreed that when he suffered the first cardiac arrest, cardio pulmonary resuscitation was applied to bring back the function of the heart and the lung by medical staff and this involved compressing the heart to stimulate it. Dr. Oyetungi agreed that septic shock can cause heart failure. The doctor also agreed under cross, that after the second cardiac arrest, there was a resuscitation by the medical team. He could not recall the month when it occurred, the last one being 23rd of March. He stated that the two previous cardiac arrests would have been days or weeks before the third cardiac arrest in March. The doctor testified in March 2023 that while Mr. Elliott was in ICU ***"he never recovered from paraplegia."***

[59] Under cross examination, Defence counsel reminded the doctor that he gave evidence that the third time Elliott had a cardiac arrest, attempts were made to resuscitate him. Counsel suggested that there were medical records at the Dr. D. Orlando Smith hospital that showed that there was an agreement on the 10th of March 2023 at 12:30 regarding Trevon Elliott- ***"do not resuscitate"*** and that this was following discussions with Dr. Bataycharia, Dr. Nehemiah, Dr. Zabrokski, Social Services Worker, Ingrid Penn with the mother of Trevon Elliot.

[60] Dr. Oyetungi initially stated while that the agreed plan was not implemented, resuscitation involved a ventilator and he was still in the intensive care until the 23rd. The doctor indicated he did not remember such was the final decision and that usually such decisions were made when the patient was in a critical condition. According to the doctor, Mr. Elliott ***"was still ventilated and was fed, he had the care to 23rd. It is a lot of specialists involved in the care"*** and although on 10th March, Elliot was still on a ventilator, the plan was not implemented.

[61] Dr. Oyetungi was again questioned by Defence Counsel when he stated that the plan on the 10th of March 2023 was not implemented, and then asked to correct himself. He stated the medical report which he prepared was very detailed and accurate. The doctor admitted that when he had previously

responded to Defence Counsel, he had 'implied' that Elliot would have ***'received cardiac massaging after the third cardiac arrest, but that was not correct.'*** The doctor clarified after the first two cardiac arrests, Trevon Elliot was resuscitated, but not after the last one because ***"...he was already unconscious at that time. He was totally unresponsive..."*** He explained that ***"at that time there was no benefit, he was already unconscious for more than a day. He was not responding to any stimulation at all, deep pain, severe pain, he was not responding at all, no response and more so the respirator was at the max."***

[62] Dr. Oyetungi testified that he realized he had made a mistake in his testimony. He explained before his testimony, he had just returned from vacation and resumed work when he experienced difficulties in accessing the records. The doctor testified that he was having problems with his password and it was taking several hours to get access the records. The doctor explained that he was unable to upload and look at the records on his laptop before attending Court. After Court that day, he went to another ward to use the computer and it was then he was able to look at the records and noted he had made an error in his testimony.

[63] Dr. Oyetungi was further questioned by Defence Counsel on the plan by the medical team not to resuscitate.

> ***"...Q- is it true to say that DNR was not implemented on Mr. Elliot on the 23rd?***
> ***A- cardiac massaging was not done..."***
>
> ***"...Q- when I put to you yesterday about do not resuscitate, you categorically said, you told this jury that it was not implemented, oh, it was not implemented, but today you are coming to say, well there is certain reason why it was not implemented ?***
> ***A- that's why I correct myself because yesterday I implied that the cardiac massage was incorporated. That was not correct. That's why I came to correct myself now. But the DNR, the most advanced form of resuscitation is intubation and ventilation. So you might massage, you might not... if the patient didn't respond to massaging, intubation. Or you may go ahead and intubate, ventilate. So intubation and ventilation is the most advanced form... of resuscitation is intubation and ventilation..."***
>
> ***"...Q- what I am putting to you there was a plan in place from the 10th of March 2023, do not resuscitate. Yes or no?***
> ***A- yes there was..."***
>
> ***"...Q- look at that document, I am putting to you that the plan for the medical team was to continue supportive care for Trevon Elliot, continue supportive care for DNR.***
> ***A- this is what this is saying..."***

[64] Dr. Oyetungi was shown another document by Defence Counsel on the 20th of March 2023 and asked the following questions –

> ***"...Q- Can you look at that document on the plan, the plan for the medical team, am I correct in saying that the plan on 20th March 2023 for the care of Trevon Elliot was continue supportive care?***
> ***A- Correct..."***
>
> ***"Q-PUT- Trevon Elliot died on 22nd March from cardiac arrest***
> ***A- correct..."***
>
> ***Q- PUT- Trevon Elliott died while in hospital care***
> ***A- the first one that he died of cardiac arrest is not exactly correct. The cause of death was respiratory failure, total respiratory failure. Cardiac arrest was secondary to respiratory failure.... Cardiac arrest is the final end. Every death, death means heart stop, breathing stop. So death means the heart has stopped, breathing has stopped What caused the death, what caused the heart to stop is the cause of death. And in this case it's respiratory failure...***
>
> ***Q- but you didn't incorporate in your report that it was respiratory failure that he succumbed?***
> ***A- .. It's explained there in detail. I have how many pages to explain the respiratory problems. ...***
> ***Q- I am saying to you doctor that you stated that on the 17th of April 2023 "he had another episode of cardiac arrest the midnight of the 23rd March, 2023 to which he succumbed***
> ***A- correct***
>
> ***Q- but you are coming today and you are saying it's respiratory failure it...so I am saying it is not in your report. That's not in your report.***
> ***A- because if I issued a death certificate the cause of death would be in the death certificate. This report is just a clinical indication from the beginning to the end in detail and if you look at all the documentations, you see respiratory failure...***
>
> ***Q- our position is doctor that Trevon Elliot came to the hospital on 30th of August 2022 with stab wounds, yes***
> ***A- yes to the neck... and other areas, stab wounds yes***
>
> ***Q- Whilst in the care of the hospital Trevon Elliot developed or caught certain infections ?***
> ***A- correct pneumonia, specific***
>
> ***Q- when he came on the 30th August he didn't have any of these infections?***
> ***A- the infection was...no... he did not***

Q- whilst this gentleman was in the care of the hospital he got sepsis whilst he was there?
A- yes from pneumonia

.Q- whilst he was care of the hospital, he had a septic shock ?
A- sequent to the sepsis from the pneumonia, sepsis from the pneumonia, a pneumonia septic shock, the pneumonia caused sepsis and sepsis caused septic shock

Q- while in a care of the hospital he also caught or developed a UTI ?
A- yes he developed on a few occasions but that's cleared

Q- so he caught a number of infections whilst in the hospital?
A- yes."

Q- I am putting to you that a certain situation developed in relation to Trevon Elliot being in the care, I am talking about social issue... It was identified initially when he was admitted that he needed a neurosurgeon, yes?
A- correct.

PUT- and there was none available in the hospital... there was no neurosurgeon available?
A- at the moment

Q- and steps were taken to see if they could air lift him out so that he could get the care that he needed
A- correct

Q- but due to certain circumstances with NHI, that's national health insurance
A- his relationship with NHI... his responsibility with NHI

Q- in order to be air lifted you are covered by NHI, I might be covered by NHI, we would be able to use that facility, yes ?
A- correct

Q- but this was a problem for Trevon Elliot?
A- they could not clear him... to take responsibility for his care

Q- the gentleman was not airlifted?
A- We couldn't

Q- and a further situation arose in trying to send him back to his country?
A- yes, correct. when he was well.

Q- well enough to travel?
A- correct."

Q- and a further situation was he could not be discharged back to the community here?
A- He had nobody to take care of him... the family refused

Q- so between the time when Trevon Elliot was put back on the general ward and the 29th of January 2023 when the man was well enough to be discharged he was still just there in the hospital?
A- correct

Q- he could not be discharged to any place or institution in the community?
A- he could not

The doctor also indicated that Elliot could have been discharged into the elderly people home but there was no space in the home so the other option '***is private homes with financial responsibility***.'

"...Q- I am saying to you the hospital was in a bit of a predicament because before the 29th January when this man was well enough to be discharged, he just had to stay there.

A- We made a lot of effort... we contacted relatives in Tortola, in St Kitts, the Ministry of Health in St Kitts, the hospitals in Saint Kitts, Social Services in St Kitts, and his family in St. Kitts..."

"...Q- and there was one time whilst he was in the care of the hospital that Mr. Elliot refused medication
A- on a few occasions he refused. I am not sure significant enough to affect his outcome.

Q- is It correct that apart from him refusing medication there was a time he refused medication or medical care he did not want to be touched?
A- sometimes

[65] The doctor also explained about sometimes a patient would get depressed, such was not the situation all the time. He was asked if he would describe the patient as difficult, to which the doctor explained that "***he never gave them too much trouble.***" According to the doctor, Elliot was a patient with "***a lot of issues***" where sometimes they would just give up and they at the hospital understood and would try to encourage him.

[66] Dr. Oyetungi was further cross examined-

"Q- apart from the stab wounds when he entered the hospital thereafter came a lot of different issues with Mr Elliot
A- yes as I detailed, as I detailed yesterday...

Q- my suggestion to you, is that Mr. Trevon Elliot died as a result of the plan being carried DNR, do not resuscitate.
A- he died from complications from... his stab to the neck

Q- he died because medical personnel at Peebles hospital carried out a plan that was made with his mother his social worker, Dr. Battacharia, Dr. Nehemiah, Dr. Zabrokski. The plan was implemented, that is why the man died.

A- that is not his cause of the death, the cause of death is because we had no more that would have covered him besides what we offered him he died of the problems... we continued every care until the 23rd... advance care, resuscitation, on the ventilator, ...We continued all the treatment ventilation, intubation, suctioning, changing of the tracheostomy tube and everything...."

[67] Under re-examination Dr. Oyetungi indicated the following-

"Q- ***You are going to give an explanation as to his care up to the 23rd***

A- if we recall my testimony yesterday I mentioned because of the cord injury it affects nerve below that level. the C4 causing limb paralysis, partial paralysis of the diaphragm and in dysfunction of swallowing muscles.
Every nerve, every muscle from his neck down to his toe are all affected one way or the other to some degree, including the accessory muscle of respiration as in my report. The assessor muscle as in my report, this includes the rib cage muscles, the rib cage muscles, we call it intercoastal muscles and abdominal muscle. These are called accessory muscles supporting diaphragm and respiration. They are all dysfunctional..."

The Dr. further testified that ***"...the muscles are wasted so he could not breathe on his own. Every attempt to remove the ventilator so that he could breathe on his own, every attempt to disconnect him from the ventilator failed, so he had to be assisted with a ventilator all the time, with the machine , that is what we call 'ventilated dependent' and that is because the muscles for respiration..., they are not functioning and combined so because of that, we need to remove the capsule, change to, the first one, where we first intubated him, it went through the mouth into the trachea, but that shouldn't stay more than 7 days. When we find he has to be on a ventilator for a long time, if you continue that tube, you have complications from his trachea. So we change the tracheostomy, the artificial air pathway. That's the wound you saw...so he would stay like that for life, that was because the muscles of respiration were paralyzed. After the pneumonia cleared, the lung was severely***

destroyed, the lung is not functioning capacity, good enough. It was destroyed. So the ventilator setting was set to the maximum which is 100% delivery."

Q- .... you were telling Mr. Elliott that the ventilator was set at maximum delivery at 100%?
A- he continued to receive all the care that we could give him

Q- on several occasions you were asked about Mr. Elliott being fit to be discharged ... You also said he could have travelled out of the jurisdiction in company with an adult and medical personnel?
A- correct

Q- during this period when you deemed him fit to be discharged, did the spinal cord injury continue?
A- yes. no resolution, no improvement, no deterioration.

Q- you also said that he had recurrent aspiration pneumonia, is that correct?
A- correct

Q- you said some of the smaller less severe aspiration pneumonia was resolved on the ward?
A- correct

Q- you said he developed more severe aspiration pneumonia in February, is that correct?
A- correct

Q- were all as a result of the spinal cord injury?
A- it caused some paralysis in different muscles

Q- what cause paralysis?
A- the injury to the cord

Q- for completeness the injury to the spinal cord was caused by the stab wound to the neck?
A- from our judgment."

(ii) <u>Dr Jacqueline Pender</u>

[68] Dr. Pender testified that she is a forensic pathologist, triple board certified in anatomic pathology, clinical pathology and forensic pathology. On April 21st 2023, Dr. Pender performed the autopsy on Trevon Elliot. She produced the usual diagrams and autopsy report.

[69] During the external examination, Dr. Pender indicated –

> ***"I observed multiple things I can begin with the medical intervention that I identified point I observed that he had a tracheostomy."***
>
> Dr. Pender explained that the tracheostomy is a surgical opening in the front of your neck that was used for his medical ventilation machine.
>
> The signs that there was a tracheostomy was that he had a two cm diameter round the surgical defect. Dr. Pender explained that the defect is ***"a round surgical opening that was in the appropriate position for a mechanical ventilation machine."***
>
> ***Q- you said is that it was in the appropriate position was there anything unusual about that opening?***
> ***A- no***
>
> ***Q- so there was no visible signs of infection per se***
> ***A- no***
>
> ***Q- so you said you observed multiple things and the first thing you told us about is the tracheostomy what else did you observe***
> ***A- I observed that he had a gastrostomy with a tube connected***
>
> Dr. Pender explained that gastrostomy is a tube that enters the stomach for feeding when you cannot swallow. The tube was placed in the left upper abdominal quadrant (witness demonstrated)
>
> ***Q- now doctor was there anything unusual about the placement of that gastrostomy tube?***
> ***A- no***
>
> ***Q- was there any signs of infection?***
> ***A- No***

[70] The pathologist was asked about any visible signs during the full external examination of medical intervention, to which she replied, that the patient had EKG pads on the front of his body which are electric sensors that are hooked up to a machine to monitor the heart and are stickers.

[71] Dr. Pender testified that during her external examination, the patient had a decubitus, more commonly referred, to as a bed sore and it was over his lower back in the region of the tail bone. The pathologist explained that the bed sore looked to be a stage 3 out of four stages of bed sore. It

looked ***"well managed"*** in that ***"it looked dry it looked clean. It did not look infected."*** The bed sore was described by the doctor as a 11 by 10 centimeter in a triangular shape.

> **"Q- in your medical opinion what is the cause of bed sore?**
> **A- his paralysis causing him to be bedridden**
>
> **Q- are you able to give any further explanation?**
> **A- you develop bed sore when you are unable to move your body and they most common over bony surface such as the tailbone which is the most common, it develops because your skin needs blood and oxygen and when your body weight is resting without any movement, it squeezes the blood from that area preventing oxygen to get to the skin and the other lying soft tissues**
>
> **Q- what happens as a result of the loss of oxygen?**
> **A- the skin first dies without oxygen and then it progresses and the soft tissue on the skin begins to die**
>
> **Q- as a forensic pathologist are you able to see upon examining a body whether or not a bedsore is infected?**
> **A- there are 4 main signs that differentiate an infected bad sore from a non-infected, so the <u>first</u> one being whether it is wet or dry. Wet meaning "oozing" or if it appears "dry"**
> **...the <u>second</u> sign is a foul odour when infected, it has a very strong foul odour. When it's not infected, it does not smell.**
> **... the third sign is the edge of the ulcer appears normal skin color- when it's not infected, when it is infected it will be bright red.**
> **...the fourth sign it is either covered in pus which appears creamy or yellow and drips from the wound or it is clean and free of pus**
>
> **Q- how did the bed sore of Mr Elliott appear given those four parameters?**
> **A-all four parameters looked non-infected there was no smell the edges were not red and it was not covered in pus."**

[72] Dr. Pender was asked whether she made any other observation during her external examination to which she answered-

> ***"A- I observe fluid retention and swelling of the hands on the legs and feet and I also observe some scars that he had about the body."***

[73] The doctor stated that she observed scars- starting from the top of the body, the deceased had one scar on his forehead, on the right side of his chest, had a vertical scar on his lower chest, a round scar in the area of belly button, on the left flank, on his left extremity, on the back of his arm close to the shoulder high up, on the front of his wrist and on both his knees and the front of his shins had

multiple irregular scars. He had a scar on the front of his liver and a scar on the back of his liver which identified the location of the stab wound to his liver.

[74] On internal examination, Dr Pender first noticed the advanced disease of Elliot's lungs and the resulting effects it had on his heart; and the accumulation of fluid in his body. In this case, Dr. Pender opined that Elliot had a type of pneumonia called aspiration pneumonia.

> ***"Aspiration pneumonia you see when someone has paralysis of the muscles that control breathing, swallowing and coughing. When those muscles are weakened and not working properly, then food or drink can, as some say, go down the wrong tube and the food and drink enters the lung instead of the stomach..."***
>
> ***"Q- In your expert opinion, are you able to say what was the cause of this aspiration pneumonia?***
> ***A- Aspiration pneumonia – for Mr. Elliott, it was due to a traumatic injury to the spinal cord in his neck.***
>
> ***Q- When you say a traumatic injury, what do you mean by that?***
> ***A- The spinal cord connects to your brain and it travels down the spine and gives orders to each part of your body. When it is injured, in this case by a stab wound, and it becomes unable to send messages as it should, resulting in paralysis.***
>
> ***Q- Are you able to say where exactly that traumatic injury was?***
> ***A- In the region of the third and fourth cervical vertebrate.***
>
> ***Q- But where was the injury, are you able to say?***
> ***A- On external examination, there was no scar. It had healed completely.***
>
> ***Q- And when you say healed completely, do you mean externally and internally, or externally alone?***
> ***A- Externally and internally, there was no signs of haemorrhage because many months had passed, there were no signs I could tell with my eyes.***
>
> ***Q- Does that also include the trauma to the spinal cord?***
> ***A- in order to get to the spinal cord you would have to cut through all the bones, the vertebra in the neck, I did not remove the spinal cord.***
>
> ***Q- in relation to the pneumonia,you indicated earlier today that the pneumonia was as a result of the traumatic injury to the spinal cord. Do you recall that?***
> ***A- Yes. The number one cause of death in people with injuries to the spinal cord of the neck is aspiration pneumonia.***

Q- Did you have, did you make any other observations during your internal examination?
A- The severity of his lung disease and that he was in heart failure due to the lung disease."

[75] Dr. Pender further explained ***"Well, in a normal heart and lung, the lungs are like sponges, very low resistance, ready to accept the blood that the heart pumps. So the heart is essentially a pump. With each beat it pumps the blood into your lungs to collect oxygen when you breathe in. When you have such severe lung disease as Mr. Elliott had, the lungs are completely full of fluid and infection. So as the heartpumps, essentially the blood backs up...The heart is a muscle pump and as the blood has nowhere to go, it builds up in the heart and the heart becomes weaker and weaker and it dilates bigger and bigger until it fails."***

[76] Dr. Pender observed that the tracheostomy was removed and she could see that it had the surgical tracheostomy opening. The doctor was further questioned in chief:-

"Q- Was there anything unusual from the surgical trachea opening in your observation?
A- No.

Q- You said that you internally examined the organs during your Internal examination, is that correct?
A- yes

Q- you spoke of a gastrostomy being placed in the stomach?
A- Yes

Q- was there anything unusual observed during your internal examination of the stomach.
A- ***No it was appropriately positioned.***"

[77] With respect to other observations, Dr Pender noted that:

"Mr. Elliott had fluid accumulation in his chest cavities, around his heart, in his abdominal cavity as a result of the heart failure.... the blood becomes backed up in the blood vessels and the liquid portion of the blood leaks out of the blood vessels."

[78] Dr. Pender's findings on autopsy were as follows:

1. ***Anasarca is generalized fluid accumulation throughout the entire body, in the body cavities and the soft tissues.***

2. ***cerebral edema, which is swelling of the brain which is caused by this fluid retention from the heart failure and is also commonly seen on people that are on mechanical ventilation. Sometimes referred to as respiratory brain. Sign of mechanical ventilation in this case was tracheostomy***

3. ***Pericardial effusion of 100ml which meant It was an accumulation of 100 milliliters of fluids surrounding his heart***

4. ***cardiac dilatation which means the heart was dilated due to heart failure***

5. ***bilateral plural effusions with 700 milliliters of fluid in the right chest cavity, 320 milliliters of fluid in the left chest cavity that meant his chest was filled with fluid and he was essentially drowning from inside***

6. ***bilateral lobar pneumonia and acute respiratory distress syndrome which is a description of the infection and end stage disease of both his lungs***

7. ***bilateral pulmonary edema which means both lungs were filled with fluid it was right lower lobe adhesions of his right lungs which was as a result of the injury or infection that forms the scar tissue that is formed on the lung***

8. ***peritoneal effusion of 500ml which means there was an accumulation of 500 milliliters of fluid in his abdominal cavity also as a result of the heart failure and fluid accumulation that was caused by that was esophageal stenosis which meant his esophagus was narrowed and that is the tube that connects your mouth to your stomach- the most common cause is reflux but they can be other causes from his medical records, Dr Pender opined that it appeared he had that upon being admitted on a hospital so she found it to be unrelated***

9. ***punctuate indentations of the liver scars from the stab wounds***

10. ***sacral decubitus also it was the bed sore***

11. ***the tracheostomy***

12. ***the gastronomy***

[79] The Pathologist stated that she found no evidence of medical negligence and the cause of death was due delayed complications of the stab wound.

[80] Under cross examination, Dr Pender was specifically asked if she reviewed the medical records from the 30th August 2022 up until the time of Elliot's death March 24th 2023 to which she responded:

"I am sure there was quite a stack but I was only provided with a few pages."

Q: from your review of the medical records which had particulars of Mr Elliott, on your review did you see a section where cancer was ticked

A- no

Q- from your autopsy examination you said there was a condition that he had prior to entering the hospital do you remember that
A- yes."

[81] Dr. Pender responded further that the esophagus stenosis is where ***"the esophagus is narrowed, that is the tube that connects your mouth to your stomach."***

"Q- would make it difficult to swallow?

A- I'm not sure it was severe enough for him to have difficulty swallowing
Defence questioned the Pathologist if Elliot had any small scar just below the hairline...", to which Dr. Pender answered ***"I could not find a scar, it was healed I took a picture of that area, I couldn't see a scar."***

[82] Dr. Pender was asked by the Defence about ***"delayed complications"*** and explained ***"delayed complications is by protocol of several months have passed from the injury or even several years it is considered a delayed complication because it took so long, it was not immediate"***
Dr. Pender further explained by "***immediate***", she meant if ***"someone had bled out and died."***

"Q- In your opinion, doctor, can complications arise from not taking the medication or not receiving the proper medication?
A- What type of medication?

Q- It doesn't matter. I am talking generally. You said delayed complications, right, so I am asking, in your medical opinion, can complications arise from not having the proper medication?
A- It's complications of the injury.

Q- Yes, can it arise of not having proper medication?
A- Of not having proper medication?

Q- Yes.
A- I am not sure I understand the question.

Q- Okay. You said delayed complications as a result of the stab wounds, all right. So when you talk of complications, my understanding of complications may be different medically. So I am saying, having a medical injury, can complications arise as a result of not having the right medication? If you don't know, say you don't know.

A-So if the medication needs to be taken because an injury occurred, the underlying cause of death will always be the injury.

Q- Dr. Pender, I am going to ask you this in another way, all right. The injury occurred, say In August and I refused point blank to take any medication perhaps because of religious reasons. Do you understand what I am saying?
A-Yes.

Q- Can the complications then arise because I refused to take the medication?
A-I am sure.

Q- Say that again.
A-I am sure, if you refuse to take medications that you need, because you had an injury, things can go wrong... If you do not take medications that you need, because you need them after suffering an injury, it could result in a bad outcome. But If the medications are only needed because you had the injury, the underlying, the cause of death is always the underlying event that started the chain of subsequent events that leads to death. So anything that happens after an injury, the cause of death will always be the underlying injury."

[83] Dr Pender further testified that ***"I am not sure exactly where the stab wound was, because there was no scar. It was at the level of C3, C4, which is about halfway up your neck."***

LAW ON CAUSATION

[84] This Court found the following cases instructive:-

(i) In **Smith** (1959) 43 Cr Appeal R 121, the appellant had stabbed a fellow colleague with a bayonet. Afterwards the victim had been dropped twice on his way to receive treatment and was then given treatment which was subsequently shown to be incorrect. He died. Parker CJ opined at page 6, paragraph 4,

> "***It seems to the court, that if at the time of death, the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wound is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming to make the original wound merely part of the history can it be said that the death does not flow from the wound***".

He further opined that what needed to be proved was that the original wound or injury was "***a continuing, operating and substantial cause of death of the victim***" although it need hardly be added that "***It need not be substantial in order to render the assailant guilty".***

[85] (ii) In **Richard Tadeusz Malcherek Anthony Steel** (1981) 1 WLR 690, it was held that if the victim died despite medical treatment of skilled practitioners, the original assailant still remained responsible for the death from the initial injury. The facts were that the appellant, Malcherek, stabbed his estranged wife in her abdomen nine times during an argument. She was taken to the hospital and the surgeon removed blood and a part of the intestine which had been damaged. For several days after her surgery medical personnel were confident that she would survive. Five (5) days later she suffered a pulmonary embolism and was found to have a large blood clot in her pulmonary artery. The court accepted that this was a common complication of major abdominal surgery. The clot was removed and her heart began beating again. However the period for which her heart had stopped beating was 30 minutes. She suffered severe brain damage. Five days later she died. It had been argued that the act of a doctor in disconnecting a life support machine had intervened to cause the death of the victim to the exclusion of injuries inflicted by the appellants.

[86] In rejecting this submission Lord Lane CJ after considering **Jordan** (1956) 40 Cr App. R 152 and **Smith** (supra) said at page 696:

> "***In the view of this Court. if a choice has to be made between the decision in Jordan (supra) and that in Smith) (supra) which we do not believe it does (Jordan being a very exceptional case) then the decision in Smith is to be preferred ...***"

[87] Later in the same judgment Lord Lane CJ. said (ibid.):

> ***"...There is no evidence in the present case that at the time of conventional death, after the life support machinery was disconnected, the original wound or injury was other than a continuing, operating and indeed substantial cause of the death of the victim, although it need hardly be added that it need not be substantial to render the assailant guilty. There may be occasions, although they will be rare when the original injury has ceased to operate as a cause at all, but in the ordinary case if the treatment is given bona fide by competent and careful medical practitioners. then evidence will not be admissible to show that the treatment would not have been administered in the same way by other medical practitioners. In other words the fact that the victim has died despite or because of medical treatment for the initial injury given by careful and skilled medical practitioners will not exonerate the original assailant from responsibility for the death."***

[88] Lord Lane further stated at page 697:-

> ***"...Where a medical practitioner adopting methods which are generally accepted comes bona fide and conscientiously to the conclusion that the patient is for practical purposes dead, and that such vital functions as exist — for example, circulation — are being maintained solely by mechanical means, and therefore discontinues treatment, that does not prevent the person who inflicted the initial injury from being responsible for the victim's death. Putting it in another way, the discontinuance of treatment in those circumstances does not break the chain of causation between the initial injury and the death. Although it is unnecessary to go further than that for the purpose of deciding the present point, we wish to add this thought. Whatever the strict logic of the matter may be, it is perhaps somewhat bizarre to suggest, as counsel have impliedly done, that where a doctor tries his conscientious best to save the life of a patient brought to hospital in extremis, skillfully using sophisticated methods, drugs and machinery to do so, but fails in his attempt and therefore discontinues treatment, he can be said to have caused the death of the patient..."***

[89] The judge did not leave the question of causation for the jury's consideration. The Court of Appeal held that in that case of ***Malcherek Steel*** the initial assault was the reason for the medical treatment being necessary. The medical treatment being normal, the original assailant would not be exonerated from responsibility.

[90] (iii) In **David William Cheshire** (1991) 93 Cr App. R 257, the appellant was convicted of murder after he shot Trevor Jeffrey after an argument at the Ozone Fish and Chip Shop. Jeffrey received bullet wounds in his abdomen and thigh. During his stay at the hospital, he developed respiratory problems and a tracheotomy tube was inserted into his throat. He died approximately six weeks after being shot from a rare condition in which his windpipe had become narrowed near the site of the tracheotomy scar. The forensic pathologist gave the cause of death as "cardio-respiratory arrest due to gunshot wounds of the abdomen and leg." The appellant argued that the doctors who had treated the deceased the week before his death ought to have diagnosed the clinical condition from which he was suffering.

[91] Beldam L.J. said at p. 253: ***"In the criminal law, and in particular in the law of homicide, whether the death of a deceased was the result of the accused's criminal act is a question of fact for the jury, but it is a question of fact to be decided in accordance with legal principles explained to the jury by the judge..."***

[92] Reference was made to the case of **Evans and Gardiner**[2] where the deceased was stabbed in the stomach by the two applicants. After operation the victim resumed an apparently healthy life but nearly a year later, after suffering abdominal pain and vomiting and undergoing further medical treatment, he died. The cause of death was a stricture of the small bowel. This was deemed not to be an uncommon condition flowing from the operation to deal with the stab wound inflicted by the applicants.

It was contended that the doctors treating the victim for the later symptoms ought to have diagnosed the presence of the stricture, that they had been negligent not to do so and that operation would have saved the victim's life.

[93] The Supreme Court of Victoria held ***"that the test to be applied in determining whether a felonious act has caused a death which follows, in spite of an intervening act. is whether the felonious act is still an operating and substantial cause of the death."*** It concluded at page 528 of that case: ***"... But in the long run the difference between a positive act of commission and an omission to do some particular act is for these purposes, ultimately a question of degree. As an event intervening between an act alleged to be felonious and to have resulted in death and the actual death, a positive act of commission or an act of omission will serve to break the chain of causation, only if it can be shown that the act or omission accelerated the death, so that it can be said to have caused the death and thus have prevented the felonious act which would have caused death from actually doing so."***

[94] Later in the judgment the Court said at page 531: ***"...In these circumstances we agree with the view of the learned trial judge expressed in his report to this court that there was a case to go to the jury. The failure of the medical practitioners to diagnose correctly the victim's condition, however inept or unskillful. was not the cause of death, it was the blockage of the bowel which caused death and the real question for the jury was whether that blockage was due to the stabbing."***

[95] Bedlam LJ in giving judgment further cited Goff LJ in Pagett, reviewed the cases Smith and Malcherek and Steel (ibid) and opined: (page 257 – 258):

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[2] (No. 2) [1976] 1 V.R. 523

"....what we think does emerge from this and the other cases is that when the victim of a criminal attack is treated for wounds or injuries by doctors or other medical staff attempting to repair the harm done, it will only be in the most extraordinary and unusual case that such treatment can be said to be so independent of the acts of the accused that it could be regarded in law as the cause of the victim's death to the exclusion of the accused's acts. Where the law requires proof of the relationship between an act and its consequences as an element of responsibility, a simple and sufficient explanation of the basis of such relationship has proved notoriously elusive. In a case in which the jury have to consider whether negligence in the treatment of injuries inflicted by the accused was the cause of death we think it is sufficient for the judge to tell the jury that they must be satisfied that the Crown have proved that the acts of the accused caused the death of the deceased adding that the accused's acts need not be the sole cause or even the main cause of death it being sufficient that his acts contributed significantly to that result. Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the accused unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant. It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the accused's acts can fairly be said to have made a significant contribution to the victim's death. We think the word 'significant' conveys the necessary substance of a contribution made to the death which is more than negligible...." (my emphasis)

[96] (iii) In **R v Blaue** (1975) 61 Cr. App. R 271 a girl of Jehovah's Witness beliefs was stabbed four times by the appellant. One of the stab wounds pierced her lungs. She was told that a blood transfusion would save her life but refused on the basis of her religious beliefs. In this case it was emphasized that ***"the issue of cause of death in a trial for either murder or manslaughter is one of a fact for the jury to decide."*** Lawton LJ said at page 274: ***"It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death."***

[97] (iv) In **Pagett** 76 Cr. App. R. 279, the accused was charged with the murder of a 16-year old girl whom he had taken hostage and used as a human shield in an armed stand-off with the

police. She was shot by police, instinctively responding to shots fired by the accused. The accused was charged with her murder and convicted of manslaughter. In the course of his summing-up the judge directed the jury that if they found certain facts that he specified to be proved then the accused would have caused or been a cause of her death. These facts included that the accused had fired first; that his shots had caused the officers to fire back; that in firing back, the officers had acted in reasonable self defence or in the performance of their duty as officers or both. In the appeal it was argued amongst other things that the judge should have left it to the jury to determine as an issue of fact whether the accused's act in firing at the officers was a substantial or operative or imputable cause of the death.

[98] Goff LJ gave the judgment of court (Goff LJ, Cantley, Farquharson JJ) and following he said at page 287 – 288:

"***...In cases of homicide, it is rarely necessary to give the jury any direction on causation as such. Of course, a necessary ingredient of the crimes of murder and manslaughter is that the accused has by his act caused the victim's death. But how the victim came by his death is usually not in dispute. What is in dispute is more likely to be some other matter: for example, the identity of the person who committed the act which indisputably caused the victim's death; or whether the accused had the necessary intent; or whether the accused acted in self-defence, or was provoked. Even where it is necessary to direct the jury's minds to the question of causation, it is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his act contributed significantly to that result. It is right to observe in passing, however, that even this simple direction is a direction of law relating to causation, on the basis of which the jury are bound to act in concluding whether the prosecution has established, as a matter of fact, that the accused's act did in this sense cause the victim's death. Occasionally, however, a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a causa sine qua non of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim's death, thereby relieving the accused of criminal responsibility. Such intervention, if it has such an effect, has often been described by lawyers as a novus actus interveniens ...***"

"***...Now the whole subject of causation in the law has been the subject of a well-known and most distinguished treatise by Professors Hart and Honorâ, Causation in the Law.***"

"***...Among the examples which the authors give of non-voluntary conduct, which is not effective to relieve the accused of responsibility, two which are germane to the present case, viz. a reasonable act performed for the purpose of self-preservation,***

and an act done in performance of a legal duty. There can, we consider, be no doubt that a reasonable act performed for the purpose of self-preservation, being of course itself an act caused by the accused's own act, does not operate as a novus actus interveniens. If authority is needed for this almost self-evident proposition, it is to be found in such cases as Pitts (1842) C. & M. 284, and Curley (1909) 2 Cr. App. R. 96.In both these cases, the act performed for the purpose of self-preservation consisted of an act by the victim in attempting to escape from the violence of the accused, which in fact resulted in the victim's death. In each case it was held as a matter of law that, if the victim acted in a reasonable attempt to escape the violence of the accused, the death of the victim was caused by the act of the accused. Now one form of self-preservation is self-defence; for present purposes, we can see no distinction in principle between an attempt to escape the consequences of the accused's act, and a response which takes the form of self-defence. Furthermore, in our judgment, if a reasonable act of self-defence against the act of the accused causes the death of a third party, we can see no reason in principle why the act of self-defence, being an involuntary act caused by the act of the accused, should relieve the accused from criminal responsibility for the death of the third party ... No English authority was cited to us, nor we think to the learned judge, in support of the proposition that an act done in the execution of a legal duty, again of course being an act itself caused by the act of the accused, does not operate as a novus actus interveniens ... as a matter of principle such an act cannot be regarded as a voluntary act independent of the wrongful act of the accused ... Where, for example, a police officer in the execution of his duty acts to prevent a crime, or to apprehend a person suspected of a crime, the case is surely a fortiori. Of course, it is inherent in the requirement that the police officer, or other person, must be acting in the execution of his duty that his act should be reasonable in all the circumstances: see section 3 of the Criminal Law Act 1967..."

[99] Goff LJ went on to say: *"The principles which we have stated are principles of law ... It follows that where, in any particular case, there is an issue concerned with what we have for convenience called novus actus Interveniens, it will be appropriate for the judge to direct the jury in accordance with these principles. It does not however follow that it is accurate to state broadly that causation is a question of law. On the contrary, generally speaking causation is a question of fact for the jury ...But that does not mean that there are no principles of law relating to causation, so that no directions on law are ever to be given to a jury on the question of causation. On the contrary, we have already pointed out one familiar direction which is given on causation, which is that the accused's act need not be the sole, or even the main, cause of the victim's death for his act to be held to have caused the death... In cases where there is an issue whether the act of the victim or of a third party constituted a novus actus interveniens, breaking the causal connection between the act of the accused and the death of the victim, it would be appropriate for the judge to direct the jury, of course in the most*

simple terms, in accordance with the legal principles which they have to apply. It would then fall to the jury to decide the relevant factual issues which, identified with reference to those legal principles, will lead to the conclusion whether or not the prosecution have established the guilt of the accused of the crime of which he is charged..." **(emphasis mine)**

[100] In **R v Mellor** (1996) 2 Cr. App. R.245, on January 15, 1994 at 11:15pm, the victim, a 71-year-old man with a history of hyper-tension and some degree of heart trouble, was attacked. He sustained bruising to the eyes, a damaged nose, chest pain, and a pain in the shoulder. The victim was taken to the hospital at 24 minutes past midnight on January 16. He died at 3.15pm on January 17, less than two days after the attack. A post mortem was carried out by Dr. Williams. He found the cause of death to be aspiration pneumonia resulting from a combination of the fracture to the facial skeleton and the fracture to the ribs and especially dislocation of the jaw bone. He found that the left lung had fluid due to infection in it. There was no sign of heart failure. A second post mortem was carried out in Dr. Williams's presence by Dr. Tapp, instructed on the appellant's behalf. Dr. Tapp was not called as a witness. The Crown's witness, Professor Matthews in his evidence, said that Mr. Sims died from a combination of aspiration pneumonia with a significant cardiac element. The complications followed the infliction of the head and chest injuries.

[101] The Defence contended that he was not the attacker. It was further argued inter alia that this was a case of medical negligence and that the substantial cause of the victim's death was not the beating he had received, but due to the failure to administer adequate oxygen in time amounted to negligence or incompetence in the care of the victim in hospital as shortly before the victim died, ***"a dosage of 28 per cent oxygen was administered and an arterial blood gas specimen was sent for analysis at 8.50 a.m. The analysis report was timed 10.11 a.m. but no increased intake of oxygen was given to Mr. Sims."*** Dr. Brearley, the appellant's expert, was of the opinion that ***"100 per cent intake of oxygen should have been given and that this omission amounted to sub-standard care.'*** Mr. Hill, another expert called by the appellant, said that the cause of death was broncho pneumonia from rib fractures.

[102] The appeal was dismissed. The Court relied on and cited portions of the judgments of Bedlam LJ in **Cheshire** and Goff LJ in **Pagett** (supra) stating that it was clear that "...**the question for the jury was whether they were satisfied that the accused's acts significantly contributed to the victim's death. That was the question for the jury in the present case**. **What the Crown had to prove in the present case was that the injuries inflicted by the appellant significantly contributed to Mr Sims' death.**" There was no onus whatever on the Crown to negative medical negligence. Equally, there was no onus on the appellant to establish medical negligence. **However, if negligence was established it was a factor to be taken into account by the jury in deciding whether the Crown had established that, notwithstanding this negligence, the injuries inflicted by the appellant had significantly contributed to Mr Sims' death.** In the event of a jury being sure that medical negligence has been negatived by the Crown as a significant contributory cause of death, the medical negligence factor would be out of the equation..." In that case, the Court found that although passages in the summing-up had been confusing and appeared to transfer the burden of proof onto the defence to establish medical incompetence, the evidence against the appellant was overwhelming.

ANALYSIS AND FINDINGS ON CAUSATION IN THE PRESENT CASE

[103] This Court has considered the legal submissions made by both attorneys and the authorities cited therein. This Court also examined the evidence in this case on this issue, particularly the evidence of Dr. Oyetungi and pathologist Dr. Pender relative to acts of the assailant (identified by Trevon Elliot as the accused) and the eventual cause of death of Trevon Elliot with the intervening medical treatment administered at Dr. D. Orlando Smith Hospital.

[104] Based on the authorities cited, the question for the jury in this case is whether they are satisfied that the accused's acts significantly contributed to the victim's death. This is a question of fact for the jury which is to be decided in accordance with legal principles explained to the jury by the trial judge. The jury will have to be directed that the accused's act need not be the sole, or even the main cause of the victim's death for his act to be held to have caused the death.

[105] This Court reminds itself of what was earlier cited in **Pagett**, (supra) where ***"...in cases where there is an issue whether the act of the victim or of a third party constituted a novus actus interveniens, breaking the causal connection between the act of the accused and the death of the victim, it would be appropriate for the judge to direct the jury, of course in the most simple terms, in accordance with the legal principles which they have to apply..."***

[106] In the circumstances, this Court is of the view that there is evidence from which a jury properly directed could draw the reasonable inference that it was the original stab wounds inflicted by the accused were, if not the direct and sole cause of death, at least a significant contributory factor. Limb No. 1 of **Galbraith** will not be upheld on this ground.

ISSUE: WHETHER THERE IS EVIDENCE THAT THE ACCUSED HAD THE REQUISITE MALICE AFORETHOUGHT FOR MURDER

[107] Defence counsel contended that there is no evidence in this case from which malice aforethought can be inferred in this case and in such circumstances the no case submission should be upheld on limb No. 1 of Galbraith.

[108] Crown Counsel contended that the deceased indicated in his statement that he was stabbed multiple times in several areas on his body. Crown led evidence from the Dr. Oyentungi and Dr. Pender as to the number and the location of these stab wounds from which an inference may be drawn by the jury at to the Accused's intention, namely an intention or to do grievous bodily harm.

LAW

[109] Section 161 of the **Criminal Code** 2013 of the Virgin Islands states that ***"a person who of malice aforethought express or implied causes the death of another person by an unlawful act or omission commits murder."***

161 (3) ***For the purpose of this section, malice aforethought shall be deemed to be established by evidence proving—***

a) ***an intention to cause the death of or to do grievous bodily harm to any person, whether such person is the person actually killed or not; or***

b) ***knowledge that the act or omission causing death will probably cause the death of or grievous bodily harm to some person, whether or not such person is the person actually killed, although such knowledge is accompanied by indifference whether or not death or grievous bodily harm is caused, or by a wish that it may*** **not be caused.**

ANALYSIS AND FINDINGS ON THE QUESTION OF WHETHER THE ACCUSED HAD THE REQUISITE MALICE AFORETHOUGHT

[110] This Court agrees with the Crown's submissions that it will be open to the jury to infer what was the intention of the assailant at the time when he used a sharp instrument such as an ice pick to inflict multiple stab wounds on Trevon Elliot in various areas of his body – including his neck, which according to Dr Oyetungi fractured the fourth cervical verterbra C4, resulting in paralysis of right and left lower limbs and a partial paralysis of his diaphragm and that of his upper limbs. Additionally, Elliot sustained chest injury- a right pneumothorax which was a potentially life-threatening injury and had to be treated immediately by the hospital and a priapism, a complication of spinal cord injury. Dr Oyetungi testified that Elliot had sustained ***"multiple stab wounds"*** and ***"from the stabs he had sustained a lot of injuries."***

[111] To infer what was the intention of the assailant, the jury would be invited to consider any words and actions of the assailant immediately before, during and after the attack, and to take into consideration as well the number of injuries inflicted on Elliot and the location of such injuries.

[112] In the circumstances, the no case submission on the basis of the first limb of **Galbraith** will not be upheld on this ground.

WHETHER THE EVIDENCE OF OFFICER GEORGE IS VAGUE, INCONSISTENT AND UNRELIABLE?

[113] Defence counsel contends the evidence of witness Pheiona George who recorded the statement of Trevon Elliot is not credible and unreliable and that the no case submission should be upheld on the basis of the second limb of Galbraith Under cross examination, Officer George admitted that an important part of the identification evidence contained in the statement of Trevon Elliot, namely that the assailant 'Beast' was at a distance of about six feet when Elliot is said to have first observed him, there is no such corresponding notation in the notes of George when she first interviewed the witness Elliot on 30th August, 2022. The Defence submits this material discrepancy affects her reliability and credibility as a witness which consequently in turn affects the reliability of the Crown's only evidence in this case – the statement of deceased witness Trevon Elliot.

[114] Crown Counsel submits that Officer George's evidence has not been undermined and, in any event, the issues of credibility and reliability are to be weighed by the jury. The Crown further argues that where on one possible view of the facts, there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury - per **Galbraith.**

LAW

[115] In **R v Barker**[3] where Lord Widgery CJ observed:

> ***"It cannot be too closely stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury."***

[116] Barton J (sitting with Griffith CJ and O'Connor J) stated in the Australian case of **Peacock v R**[4]**:**

> **"....But the case is undoubtedly capable of the inference of guilt, albeit some other inference or theory be possible, it is for the jury, properly directed, and for them alone, to say not merely whether it carries a strong probability of guilt, but whether the**

[3] (1977) 65 Cr App Rep 287 at page 288
[4] (1911–12) 13 CLR 619 at page 651

inference exists actually and clearly, and so completely overcomes all other inferences or hypotheses, as to leave no reasonable doubt of guilt in their minds."

[117] In the case of **R v Monteleone**[5], Lacourciere JA of the Ontario Court of Appeal said (at page 497):

> ***"In my opinion, there was sufficient prima facie evidence to justify a dismissal of the motion for a directed verdict of acquittal. The weight to be given to the evidence and the inferences to be drawn from it were for the jury alone. If they accepted the opinion of the Crown's experts and drew adverse inferences from all the circumstances including the respondent's extraordinary statement to Ins Maclean, the inference of the guilt of the respondent was one which a reasonable jury properly directed might make. The question whether a reasonable jury would make a finding of guilt on this evidence is not a question of law for this court."***(my emphasis)

Evidence of Pheiona George (surrounding the recording of the statement of Trevon Elliot)

[118] Officer George testified inter alia that on 30th August, 2022 at 9:25 am, she visited the Dr. D. Orlando Smith Hospital and was accompanied by Scenes of Crime Officer Kimba Smith. She had a conversation with persons who worked at the front of the said hospital and was directed to the emergency room where she met Trevon Elliot. She stated she did not know Trevon Elliot before that day. That morning she observed that Trevon Elliott had on a breathing tube over his mouth and nose, a neck brace and was lying on the bed. The doctors were also attending to him.

[119] Officer George then spoke to Trevon Elliot in the presence of Officer Alfred. Officer George indicated that Elliott responded that she was able to hear his responses and that he spoke normally in that she asked him questions and he answered in English.

[120] In evidence in chief of Officer George the following transpired -

> ***"...Q- did he respond?***
> ***A- yes***
>
> ***Q- will you able to hear his responses?***
> ***A- yes***
>
> ***Q- how he spoke?***
> ***A- I would say normal***
>
> ***Q- what does that mean?***
> ***A- I asked him questions and he answered in English***

[5] (1982) 67 Can CC (2d) 489

Q- did you understand what he said to you?
A- yes

Q- did you have any difficulty in hearing?
A- no

Q- did you do anything when he spoke?
A- I wrote what*exactly what he said on a notebook, my notebook

Q- how long this conversation lasted?
A- I would say about 30 minutes

Q- what if anything happened after you spoke to him?
A- before the conversation I witnessed scenes of the crime officer taking pictures of him

Q- so when you're having this conversation how far were you from him?
A- I was standing right next to his bed..."

[121] Officer George indicated that Trevon Elliot was just lying there and complaining of pain. The officer observed that Elliot had what appeared to be small wounds. Officer George could not remember the exact location of the wounds but she wrote it down.

[122] On 31st August, 2022, at around 1:00 p.m., Officer George visited Dr D. Orlando Smith Hospital in company with social medical worker Ingrid Penn and Officer Alfred. In her evidence in chief, Officer George stated the following-

"Q- did you know Miss Penn before that date
A- no
Q- where did you meet Miss Penn on that date
A-at the Dr. D. Orlando Smith hospital."

[123] Officer George testified in her evidence in chief that she met Mr. Elliott that day in the ICU room where he was on the bed and unable to move.

"...Q- you said you read Trevon Elliot' s statement to him how did you come about it?
A- statement was as a result of the notes of Mr. Elliot the day before, a compilation of the notes

Q- when you read the statement was anyone else present?
A yes

Q- who was present?
A- social worker Ingrid Penn and PC Alfred

Q- where you in relation to Mr. Elliott when you read the statement?
A- I was standing beside the bed

Q- where was Miss Penn?
A- Miss Penn was also standing beside his bed. Officer Alfred was standing beside his bed as well

Q- how you read the statement to Mr. Elliott?
A- I read the statement very slow

Q- what was your tone of voice at that time?
A- my tone of voice was as I am speaking right now

Q- did you complete reading that statement
A- yes"

Officer George also testified that Mr. Elliot was asked to sign his name.

"Q- did he sign his name
A- he signed an x."

[124] Officer George testified that Trevon Elliot was unable to move and when asked how he was able to sign this X, she testified that " ***we placed the statement next to him, myself and the social worker, and he was able to hold on to the pen and placed an X next to areas where it asked for his signature.***"

"...Q- what areas he placed an x
A- based on my recollection, he placed an x to the top of the statement on page 1, to the bottom of the statement on page 2, and the end of the statement on page 3."

[125] Officer George also testified that "***I placed my signature as well, I place my signature to the end of the preamble on page three."***

[126] Officer George also stated that the medical social worker wrote a note to the bottom of page 3 of the statements, signed her name and dated it. Officer George testified that statement was recorded on a police statement form, on three pages, and it was a typed statement. The officer indicated that she typed that statement. PG1- and in the trial that statement of Trevon Elliot was tendered into evidence.

[127] Under cross examination of Officer George:

"...Q- at the time when you spoke to the gentleman and he answered you did not make a recording?
A- I made notes of what he said

Q- the scenes of crime officer, Kimba Smith, was present?
A- I don't recall she been present when I was taking the notes

Q- any other officer present?
A- yes officer Alfred

Q- when you were speaking to this gentlemen did you have a recording device?
A no

Q- when you were speaking to the gentleman Mr. Elliott did you have a body cam?
A- no

Q- what about officer Alfred?
A- no

Q- what about officer Alfred did she have a recording device?
A- no

Q- did she have a body cam?
A- no

Q- officer Alfred was present throughout?
A- yes

Q- did officer Alfred give a witness statement?
A- no

Q- all we have is what you say what the gentleman say what you took down in note form
A- yes

Q- as IO did you think it was important to get some corroboration as to what was being said that morning?
A- at the time no, because I knew I was going to type out the statement and read it to him in the presence of other persons and I would request a statement from that person after reading that statement.

Q- you took a statement from the gentleman on the bed did you read those notes to him?
A- while I was writing I read it to him

Q- did you get it signed off?
A- he was unable to sign

Q- did you get officer Alfred to sign off what she witnessed?
A- on my notebook

Q- when you saw the gentleman that morning you didn't see big cuts on him?
A- I didn't see any big cuts on him

Q- apart from lying there he was sufficiently okay for you to take a statement from him?
A- I was able to have a conversation with him to which he spoke and I understood what he said

Q- when did you transcribe those notes?
A- later the said day

Q- did you add anything to the notes?
A-no

Q- how many pages of notes did you take that morning?
A- two or three I can't remember

Q- did you take some short notes and then longer notes?
A- yes

Q- and the notes you took were all done in the room in the hospital?
A- some notes were done on the scene

Q- I am interested in the notes you took relative to Trevon Elliot
A- all notes what he said to me were recorded at the hospital

SUGGESTED- you added, you put on things that were not there in Mr. Elliott's statement
ANSWER- don't understand

Q- the second page on the top, the first paragraph the second sentence where the statement says "I believe I was just a few feet away from Beast like about 6 ft or less."

SUGGESTED-you incorporated that you added that to the witness statement
ANSWER- he said that to me

Officer George was asked if she had a notebook with her where she took notes of what Trevon Elliot said to her and then put it in his statement, to which she answered yes

Q- look to see if you see the words anywhere in those notes incorporated in the statement "I believe I was just a few feet from beast like about six feet or less"
(witness looks at her notes)
A- those words are not there

Q- you agree that was added to the witness statement?
A- but he said that to me

Q- in the witness statement that you typed up from your notes you said Mr Elliot said " I don't smoke weed"
SUGGESTED- you added those words
ANSWER- it might not be in my book I added it on the statement based on what he said to me... It is not in my book

SUGGESTED- those words to make him seem like a choir boy
ANSWER- that is not true"

[128] The Crown also relied on the evidence of **Ingrid Penn**, medical social worker, relative to the circumstances surrounding the signing of the statement of Trevon Elliot. Penn testified that she is employed with the BVI Health Authority Dr D. Orlando Smith Hospital as a medical social worker.

[129] Ingrid Penn testified that on 30th August, 2022, one of the physicians called her office. She then went to the emergency room of the said hospital and had a conversation with a physician. She later met patient Trevon Elliot at the hospital who was lying on a bed and observed that he was in pain. Prior to that day, Ms. Penn did not know Trevon Elliot. On 31st August, 2022, Penn was called by ICU nursing. She then met Officers George and Alfred for the first time.

[130] Ms. Penn testified that the officers had a conversation with Trevon Elliot. Officer George stood at the head of the bed, Officer Alfred stood beside her while Officer Penn stood on the opposite side of the bed. She heard Officer George read statement slowly to the patient and stopped at intervals. Mr. Elliot appeared to be listening.

[131] Ms. Penn noted that he could not raise his right hand. She observed that while statement was being read, he listened. Officer George then spoke to Trevon Elliot and he placed an "X" on the statement. Penn testified that she placed some information at the bottom of the said statement, stating she saw Mr. Elliot place an "X". Penn then signed and dated. Her purpose was to witness Mr. Elliott's signature. Social Medical Worker Penn testified that neither she nor Officer George forced Mr. Elliot

to place his signature on the pages of the statement. Elliot then marked an "X" on the top of the first page, on the bottom of the second page and on the bottom of the third page of the statement.

ANALYSIS AND FINDINGS ON INCONSISTENCIES AND RELIABILITY OF OFFICER GEORGE

[132] In this case before me, the credibility and reliability of the Prosecution witness Pheiona George, in particular, surrounding the circumstances of the recording of and signing of the statement of Trevon Elliot and his signing same, are issues within the province of the jury whose function is to determine where the truth lies.

[133] Furthermore, in the absence of any electronic recording of this statement- whether by a body cam or otherwise, the Crown sought to call evidence of medical social worker, Ingrid Penn, in support of Officer George's testimony relative to the events as they transpired on 31st August, 2022. The evidence of George as to the reading aloud and slowly of the typed statement of Trevon Elliot and as to his eventual signing with an "X" on each of the pages of the statement were supported to an extent by the testimony of Penn. Both Ms. Penn and Officer George testified that Trevon Elliot was not forced to sign the statement. There was also evidence that these persons did not know each other before that day.

[134] The jurors, as fact finders, are free to accept all of what any witness has said, accept part of what a witness has said, reject part of what a witness has said and likewise, the jurors are free to reject everything that a witness has said-.In this case this applies to the evidence of Pheiona George and Ingrid Penn as it relates to the circumstances surrounding the recording of the statement of Trevon Elliot and whether the contents of the said statement accurately reflected what Elliot told the Officer on 30th August, 2022.

[135] In these circumstances, the no case submission on the basis of second limb of Galbraith will not be upheld.

IS THE IDENTIFICATION EVIDENCE IN THE UNCORRBORATED HEARSAY STATEMENT OF TREVON ELLIOT TOO TENUOUS TO BE BEFORE THE JURY?

[136] Defence counsel submitted that the statement of Trevon Elliot is hearsay and is not supported by any forensic evidence. Furthermore, the identification evidence contained therein, is too tenuous to be left to the jury. There was also no identification procedure held in this case which makes the evidence unreliable.

[137] Crown counsel contended that it is possible to ensure a fair trial and to protect the interests of the accused by giving directions and warnings about acting on untested paper evidence. The court can identify to the jury area of potential weaknesses, contradictions, areas where cross examination might have been useful.

LAW AND ANALYSIS

[138] This issue in this ground was addressed on identification in my Ruling delivered on 8th May, 2025. I continue to rely on the said Ruling in which several cases were cited including the case of **Barnes and Desquottes.** The quality of the evidence of Trevon Elliot was also considered and this Court opted not to exercise its discretion to exclude the statement. I found and continue to be of the view that the id evidence as contained in statement of Trevon Elliot is prima facie of reasonable quality though the only evidence in the case.

[139] The interests of the accused will be protected by warning and directions. The jurors will be alerted to the dangers of acting on untested evidence and be warned. The potential weakness of the identification/ recognition evidence will be drawn to the juror's attention. The evidence in this case as discussed in the previous ruling, is one of recognition. Both the deceased and the accused admit seeing each other in the area prior to 30th August, 2022. This Court also relies on the case of Privy Council case of **Ronald John**. It is in these circumstances of recognition evidence, there was no need for the police to conduct an identification parade or any form of identification procedure.

[140] This Court is not of the view that the identification evidence contained in statement of Trevon Elliot is so tenuous nor is it manifestly unreliable so as to take case away from the jury, I find that there is evidence such that a reasonable jury properly directed might on one view of the evidence convict. As indicated, appropriate directions and warnings will be given to the jury, inclusive of the direction pursuant to section 112 of the **Evidence Act** of the Virgin Islands.

[141] I am not of the view that the evidence is so poor that it would be unsafe to leave the case for accused with the jury. In the circumstances the no case submission is overruled.

[142] I wish to thank both attorneys for their thorough submissions.

Angelica Teelucksingh
High Court Judge

By the Court

Registrar