The Court of Criminal Appeal

His Honour the Chief Justice Joseph Azzopardi

The Hon. Mr. Justice Joseph Zammit McKeon

The Hon. Madame Justice Edwina Grima

Today, Wednesday 12th June 2019

Bill of Indictment No : 08/2016

The Republic of Malta

vs

Rotimi Williams Akande

The Court :

1. Having seen the Bill of Indictment filed against appellant Rotimi Williams Akande, wherein the Attorney General after having premised that :

> In the **First Count of the Bill of Indictment** the accused Rotimi Williams AKANDE, from Nigeria, was granted a residence permit in

Malta as he was employed as a football player by the Gozitan football club S.K. Victoria Wanderers. Whilst in Malta, he met a Nigerian woman: Abiola Olowoshile. Abiola and her partner had a baby: Maleek Opeyemi Olowoshile. The accused Rotimi Williams AKANDE befriended the Olowoshile family, which friendship eventually ended up in an amorous relationship between the accused and Abiola. In fact, Abiola Olowoshile left her partner and father of her son Maleek, and in February 2013 she and her son Maleek (then just a thirteen month old baby) moved in with the accused Rotimi Williams AKANDE at his place in Mellieħa. Soon after, Abiola was pregnant with the accused's baby.

That Abiola Olowoshile worked full-time as a housekeeper in a local hotel. She left home for work every morning at around 06:30am, and returned home after work round about 4:00pm. Since the accused Rotimi Williams AKANDE did not work in the morning, but attended football training sessions in the evening, Abiola Olowoshile used to leave her son Maleek under the care of the accused Rotimi Williams AKANDE while she was at work.

That on the 15th April 2013, Maleek woke up crying at about 06:00am. Abiola fed him a bottle of milk and put him back to bed. Before leaving for work at around 6:30am she prepared food for her son, as she always did, so that when Maleek woke up, the accused Rotimi Williams AKANDE could feed him. When she left for work in the morning of the 15th April 2013, Abiola's healthy fifteen (15)-month old son Maleek was peacefully asleep in his bed. There she left him in the care of her partner the accused Rotimi Williams AKANDE.

That some time that morning while the accused Rotimi Williams AKANDE was alone with his partner's baby Maleek Opeyemi Olowoshile, the accused Rotimi Williams AKANDE decided to kill the baby or put his life in manifest jeopardy. Whether the accused's motive was to 'get rid' of Maleek since Abiola was expecting his own biological son (and Maleek was not his son) or whether he had some other motive remains unknown. However, on that fateful morning, the accused Rotimi Williams AKANDE maliciously with intent to kill the said Maleek Opeyemi Olowoshile or to put his life in manifest jeopardy, grabbed the said baby and shook him so violently that little Maleek's brain sustained extensive haemorrhage and Maleek lost consciousness. The accused Rotimi Williams AKANDE knew perfectly well that a baby could easily be killed by violent shaking, as he had been duly informed about this just five (5) days earlier, when baby

Maleek was admitted to Mater Dei Hospital suffering from similar - albeit milder – injuries (which injuries in fact form the subject-matter of the Second Count of this Bill of Indictment). Hence, when on the 15th April 2013 the accused Rotimi Williams AKANDE once again shook baby Maleek – this time much more violently than the previous occasion, he did so intentionally to kill him or to put his life in manifest jeopardy. The accused Rotimi Williams AKANDE then placed the unconscious and critically injured baby back in bed, and, at around Noon (12:00pm), called his partner Abiola Olowoshile and told her that he had just gone to wake up baby Maleek and found him stiff and unresponsive! Abiola rushed home and called an ambulance immediately.

That upon arrival by ambulance at Mater Dei Hospital, Maleek was certified to be suffering from injuries so grievous that he was in danger of loss of life. In fact, little Maleek was rushed to the operating theatre where the neuro-surgeons performed emergency cranial/cerebral surgery to save his life. It was in fact thanks to the timely intervention by the neurosurgeons that Maleek Opeyemi Olowoshile's life was saved.That following surgery, Maleek remained in a very critical state and in danger of loss of life for a number of days, until he started recovering slowly and was eventually put off the artificial ventilators as he gradually resumed spontaneous/independent breathing.

That despite Maleek's life being saved (thanks to the timely intervention by the neurosurgeons, and hence independently of the will of the accused Rotimi Williams AKANDE), sadly Maleek Opeyemi Olowoshile suffered irreversible brain damage. In fact, a report drawn up by a court-appointed medical expert almost two (2) years after the attempt on Maleek's life shows that Maleek, who was otherwise a healthy child, as a result of the attempt on his life by the accused Rotimi Williams AKANDE now suffers from a permanent disability in that for the rest of his life he has to endure "*loss of coordination, loss of tone..., incontinence of urine and faeces, lack of appreciation of what is happening around him, lack of communication, and inability to live a normal independent life*". In simple terms, little Maleek Opeyemi Olowoshile (who is today four and a half years old) has to spend the rest of his life in a semi-vegetative state.

That by committing the above-mentioned acts with criminal intent, the accused Rotimi Williams AKANDE rendered himself guilty of attempted wilful homicide, namely that during the day of the 15th

April 2013, in Mellieħa, Malta, maliciously, with intent to kill another person (Maleek Opeyemi Olowoshile) or to put the life of such other person in manifest jeopardy, the accused Rotimi Williams AKANDE manifested such intent by overt acts followed by a commencement of the execution of the crime, which crime was not completed in consequence of some accidental cause independent of the will of the the accused Rotimi Williams AKANDE.

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above, accused Rotimi Williams AKANDE of being guilty of attempted wilful homicide, namely that on the 15th April 2013, in Mellieħa, Malta, maliciously, with intent to kill another person (Maleek Opeyemi Olowoshile) or to put the life of such other person in manifest jeopardy, manifested such intent by overt acts followed by a commencement of the execution of the crime, which crime was not completed in consequence of some accidental cause independent of the will of the offender.

Wherefore, the Attorney General, in the name of the Republic of Malta, demands that the accused Rotimi Williams AKANDE be proceeded against according to law, and that he be sentenced to the punishment of imprisonment for a term from seven (7) years to thirty (30) years as is stipulated and laid down in articles 17, 31(1)(a)(b)(i)(ii)1 , 41(1)(a), 211(1)(2), and 533 of the Criminal Code, Chapter 9 of the Laws of Malta, or to any other punishment applicable according to law to the declaration of guilt of the accused.

In the **Second Count of the Bill of Indictment** that the incident referred-to in the First Count of this Bill of Indictment, namely the attempted wilful homicide of 15-month old Maleek Opeyemi Olowoshile by his mother's partner the accused Rotimi Williams AKANDE on the 15th April 2013 was not the only instance of aggression/violence by the accused Rotimi Williams AKANDE on Maleek Opeyemi Olowoshile.

That in fact, just twelve days prior, precisely on the 3rd April 2013 Maleek's mother Abiola Olowoshile had called an ambulance because Maleek had vomited blood, passed diarrhea, stiffened, uprolled his eyes, and was unresponsive. Once at Mater Dei Hospital little Maleek was diagnosed to have a scratch and a bruise on his chest, two broken ribs, bleeding in the retina of the eyes, and a mild

haemorrhage in the brain. Since these injuries suggested deliberate (non-accidental) trauma, and were compatible with the so-called shaken baby syndrome, the Doctors at Mater Dei quizzed Maleek's mother Abiola over the matter. Abiola told the Doctors that she had left Maleek with the babysitter (Abiola referred to the babysitter as a "she", i.e. a female person), and this babysitter had informed her that Maleek had an epileptic fit so she (i.e. the babysitter) had shaken him to try and resuscitate him. The Doctors explained to Abiola that a baby should never be shaken, as this could easily kill or permanently damage the child.

That after informing Abiola about these dangers, they also informed her that they were going to refer the matter to the Police and to Social Workers, as foul play (i.e. deliberate shaking) was suspected. Maleek Opeyemi Olowoshile spent a week in hospital after which he had recovered sufficiently to be discharged. Prior to Maleek's discharge on the 10th. April 2013, the Doctors once again summoned Abiola and made it clear to her that shaking can kill children and hence on no account should children ever be shaken for whatever reason.

That a mere five (5) days after being so discharged from hospital, Maleek Opeyemi Olowoshile was once again admitted to Mater Dei Hospital, this time fighting for his life, after the accused Rotimi Williams AKANDE had attempted to end his life as described in the First Count of this Bill of Indictment.

That Police investigations revealed that Abiola Olowoshile had no female babysitter, as she had told the Doctors, and that while she was at work she left Maleek with her partner the accused Rotimi Williams AKANDE. Same investigations further revealed that it was the accused Rotimi Williams AKANDE who had shaken Maleek prior to Maleek's admission to hospital on the 3rd. April 2013 and caused him the above-mentioned grievous injuries.

That by committing the above-mentioned acts with criminal intent, the accused Rotimi Williams AKANDE rendered himself guilty of causing grievous bodily harm, namely that during the day of the 3rd. April 2013 and in the preceding days, in Malta, by several acts committed by him, even if committed at different times, which constitute violations of the same provisions of the law and were committed in pursuance of the same design, without intent to kill or put the life of any person in manifest jeopardy, caused harm to the

body or health of another person (Maleek Opeyemi Olowoshile) or caused such other person a mental derangement in that it caused permanent functional debility of any organ of the body, or any permanent defect in any part of the physical structure of the body, or any permanent mental infirmity.

That moreover this crime was committed on a person under fifteen years of age, and living in the same household as the offender.

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above, accused Rotimi Williams AKANDE of being guilty of causing grievous bodily harm, namely that during the day of the 3rd. April 2013 and in the preceding days, in Malta, by several acts committed by him, even if committed at different times, which constitute violations of the same provisions of the law and were committed in pursuance of the same design, without intent to kill or put the life of any person in manifest jeopardy, caused harm to the body or health of another person (Maleek Opeyemi Olowoshile – a person under fifteen years of age and living in the same household as the offender) or caused such other person a mental derangement in that it caused permanent functional debility of any organ of the body, or any permanent defect in any part of the physical structure of the body, or any permanent mental infirmity.

Wherefore, the Attorney General, in the name of the Republic of Malta, demands that the accused Rotimi Williams AKANDE be proceeded against according to law, and that he be sentenced to the punishment of imprisonment for a term from eighteen (18) months to thirty (30) years as is stipulated and laid down in articles 17, 18, 31, 214, 216(1)(a)(i)(iv), 216(1)(d), 218(1)(a), 222(1)(a), 202(h)(v), 202(k), 208AC(2)(a) and 533 of the Criminal Code, Chapter 9 of the Laws of Malta, or to any other punishment applicable according to law to the declaration of guilt of the accused.

In the **Third Count of the Bill of Indictment** that as explained in the previous two (2) counts of this Bill of Indictment, the accused Rotimi Williams AKANDE started a relationship with Abiola Olowoshile, with the latter soon becoming pregnant with his baby. Abiola, however, had a baby from her previous relationship: Maleek Opeyemi Olowoshile.

That since Abiola worked full-time and the accused Rotimi Williams AKANDE did not work but attended football training sessions in the evening, Abiola Olowoshile used to leave her son Maleek under the care of the accused Rotimi Williams AKANDE while she was at work.

That as explained in detail in the previous two (2) counts of this Bill of Indictment, while Maleek Opeyemi Olowoshile – then a fifteen (15)-month old baby – was under the direct responsibility of the accused Rotimi Williams AKANDE, the accused persistently ill-treated him.

That as explained in the previous Counts of this Bill of Indictment, on the 3rd. April 2013 Maleek Opeyemi Olowoshile was admitted by ambulance to Mater Dei Hospital suffering from a scratch and a bruise on his chest, two broken ribs, bleeding in the retina of the eyes, and a mild haemorrhage in the brain - the so-called *shaken baby syndrome*. Although Maleek's mother Abiola tried to cover up for the accused Rotimi Williams AKANDE by inventing the babysitter story, investigations revealed that Abiola employed no babysitter and that Maleek's injuries were inflicted by the accused Rotimi Williams AKANDE while baby Maleek was left in his care. Maleek Opeyemi Olowoshile spent a week in hospital after which he had recovered sufficiently to be discharged. Prior to Maleek's discharge on the 10th. April 2013, the Doctors once again summoned Abiola and made it clear to her that shaking can kill children and hence on no account should children ever be shaken for whatever reason. From her end, Abiola passed on this information to the accused Rotimi Williams AKANDE.

That notwithstandingly, a mere five (5) days after being so discharged from hospital, precisely on the 15th April 2013, Maleek Opeyemi Olowoshile was once again admitted to Mater Dei Hospital by ambulance, this time suffering from fresh injuries to his brain so grievous that he was in danger of loss of life. In fact, little Maleek was rushed to the operating theatre where the neuro-surgeons performed emergency cranial/cerebral surgery and saved his life. Whilst medical investigations excluded that Maleek's injuries may have been accidental or the result of complications following his previous admission to hospital, and confirmed that Maleek had once again been shaken very violently subsequent to his discharge from hospital, Police investigations revealed that Maleek's injuries were once again inflicted by the accused Rotimi Williams AKANDE while

baby Maleek was left in his care. Despite Maleek's life being saved thanks to the timely intervention by the neuro-surgeons, sadly Maleek Opeyemi suffered irreversible brain damage and a permanent disability in that for the rest of his life he has to endure "*loss of coordination, loss of tone..., incontinence of urine and faeces, lack of apreciation of what is happening around him, lack of communication, and inability to live a normal independent life*". In simple terms, little Maleek Opeyemi Olowoshile (who is today four and a half years old) has to spend the rest of his life in a semi-vegetative state.

That by committing the above-mentioned acts with criminal intent, the accused Rotimi Williams AKANDE rendered himself guilty of ill-treatment or neglect of a child under twelve years, namely that during the day of the 15th. April 2013 and in the preceding days and weeks, in Malta, by several acts committed by him, even if committed at different times, which constitute violations of the same provisions of the law and were committed in pursuance of the same design, whilst having the responsibility of Maleek Opeyemi Olowoshile - a child under twelve years of age – by means of persistent acts of commission or omission, ill-treated or caused or allowed the ill-treatment by similar means of the said child Maleek Opeyemi Olowoshile.

Wherefore, the Attorney General, in the name of the Republic of Malta, on the basis of the facts and circumstances narrated above, accused Rotimi Williams AKANDE of being guilty of ill-treatment or neglect of a child under twelve years, namely that during the day of the 15th. April 2013 and in the preceding days and weeks, in Malta, by several acts committed by him, even if committed at different times, which constitute violations of the same provisions of the law and were committed in pursuance of the same design, whilst having the responsibility of Maleek Opeyemi Olowoshile - a child under twelve years of age – by means of persistent acts of commission or omission, ill-treated or caused or allowed the ill-treatment by similar means of the said child Maleek Opeyemi Olowoshile.

Wherefore, the Attorney General, in the name of the Republic of Malta, demands that the accused Rotimi Williams AKANDE be proceeded against according to law, and that he be sentenced to the punishment of imprisonment for a term not exceeding three (3) years as is stipulated and laid down in articles 17, 18, 31, 247A, and 533 of the Criminal Code, Chapter 9 of the Laws of Malta, or to any other punishment applicable according to law to the declaration of guilt of the accused

2. Having seen the judgment of the Criminal Court of the 7th July 2017 wherein after having seen the verdict whereby the jury for :

The First Count.

By (8) counts in favour and (1) against found the accused guilty of the charge brought in the first count of the bill of indictment.

The Second Count.

By (8) counts in favour and (1) against found the accused Rotimi Williams Akande guilty of the charge of grievous bodily harm that can give rise to danger of loss of life or any permanent debility of the health or permanent functional debility of any organ of the body; or any permanent defect in any part of the physical structure of the body; or any permanent mental infirmity aggravated by the fact that the crime was committed on the person of another person living in the same household as the offender or who had lived with the offender within a period of one year preceding the offence and by the fact that the harm is committed on the person of a child under nine years of age.

The Third Count.

By unanimous vote found the accused not guilty of the charge brought against Rotimi Williams Akande in the third count of the bill of indictment.

The Court declared Rotimi Williams Akande **guilty** :

1. **of attempted wilful homicide**, namely that on the 15th April 2013, in Mellieħa, Malta, maliciously, with intent to kill another person (Maleek Opeyemi Olowoshile) or to put the life of such other person in manifest jeopardy, manifested such intent by overt acts

followed by a commencement of the execution of the crime, which crime was not completed in consequence of some accidental cause independent of the will of the offender.

2. **<u>of grievous bodily harm</u>** that can give rise to danger of loss of life or any permanent debility of the health or permanent functional debility of any organ of the body; or any permanent defect in any part of the physical structure of the body; or any permanent mental infirmity aggravated by the fact that the crime was committed on the person of another person living in the same household as the offender or who had lived with the offender within a period of one year preceding the offence and by the fact that the harm is committed on the person of a child under nine years of age.

And after having seen sections 17(b), 31(1)(a)(b)(i)(ii), 41 (1)(a), 211 (1)(2), 214, 216 (1)(a)(i)(ii)(iii)(iv)(d), 222 (1)(a), of the Criminal Code (Cap. 9 of the Laws of Malta), condemned the said Rotimi Williams Akande to a term of imprisonment of 14 years.

Furthermore condemned him to pay the sum of one thousand and six hundred and forty four Euro and six cents (€1644.06c) being the sum total of the expenses incurred in the appointment of Court Experts in this case in terms of Section 533 of Chapter 9 of the Laws of Malta, which sum was to be paid within fifteen days, in default of which said sum would be converted into a prison term in accordance with the law.

3. Having seen the appeal application filed by accused Rotimi Williams Akande on the 28th July 2017 wherein he requested this Court to annul the appealed judgment by declaring the said judgment to be null and void and to order that the appellant be tried afresh. Alternatively, to vary the appealed judgment as regard to the merits of the case, whereby whilst affirming that the applicant is not guilty of the third count brought against

him, reverse the finding of guilt on the first and second counts, consequently acquitting him of both counts. Alternatively, to vary the appealed judgment as regards the punishment inflicted, and instead apply a lesser and more appropriate punishment.

4. Having seen the reply of the Attorney General.

5. Having heard oral submissions by the parties.

6. Having seen the minutes of the hearing of the 13th February 2019 wherein the accused withdrew the first grievance put forward in his appeal application.

7. Having seen all the acts of the case.

Considers :

8. The verdict reached by the jury in this case was based on a finding of guilt for the offences of attempted willful homicide and grievous bodily harm committed by appellant on a one year old child entrusted to his care. The injuries sustained by the victim were linked by the Prosecution to what is commonly known as shaken baby syndrome, also clinically labelled as shaken-impact syndrome or abusive head trauma, such injuries being diagnosed on a child under the age of two years after being violently shaken.

9. From the acts of the proceedings there emerge two separate incidents to which the first and second counts of the bill of indictment refer. These incidents occurred in the space of just about a week one from the other, the first incident raising the alert by the medical practitioners who were entrusted with the treatment of the child to the symptoms of the shaken baby syndrome, even though the injuries sustained by the child in the first incident were not of a serious nature and healed without consequence ; in the second incident, however, the same child sustained grievous irreparable injuries leading to permanent brain damage.

10. Appellant however finds himself aggrieved by the verdict reached based on the conclusion that the injuries sustained by the minor were a result of the shaken baby syndrome, the material act of "shaking" being attributed to. He insists that at no moment in time whilst in his care did he shake the child who suffered seizures on both occasions. It is appellant's firm view that the medical findings of the court appointed medico-legal expert and the doctors entrusted with the treatment of the child victim wrongly diagnosed the condition as one having the symptoms of the shaken baby syndrome, a condition which has been the subject of medical controversy and disputes over the years and which has led to a reversal of convictions both in the United States and in the United Kingdom.

11. Having withdrawn his first grievance appellant criticizes the verdict reached as one based on a wrong application of the law to the facts of the case and this with regard to the finding of guilt for the first and second counts to the bill of indictment, finding objection also with the appreciation of the facts of the case carried out by the panel of jurors. He contends that a finding of guilt has to be one based on proof beyond reasonable doubt, such proof being blatantly lacking in this case. Not only is there doubt as to the medico-legal findings linked to the injuries sustained by the child but, he sustains, there is also even more doubt as to the intentional element

behind the two offences which appellant was found guilty of, the legal elements at the basis of both offences having not been proven by the Prosecution.

Considers :

12. The First Count in the Bill of Indictment deals with the offence of attempted wilful homicide. The Prosecution alleges that the crime was committed on the 15th April 2013 when the child was admitted to hospital suffering from a severe brain haemorrhage. The doctors entrusted with the treatment of the child found no pathological or genetic cause for the trauma and consequently diagnosed what is known as the "shaken baby syndrome". Since this was the second time the child was admitted to hospital suffering similar, yet even more serious medical symptoms, when compared to those determined on the first occasion of the 3rd April 2013, the medics attributed these symptoms to non-accidental trauma to the head resulting from a rapid acceleration and deceleration of the brain probably caused by violent shaking, taking into account that no external signs of injury were visible.

13. It results from the evidence that after six o clock in the morning of the 15th April 2013 the child was in the appellant's sole care and custody, the mother having already left for work around that time when the child was in perfect health. This fact led the police to conclude that the injuries sustained by the minor could only have been caused at the hand of appellant, there being no direct witness to the incident, appellant as already pointed out denying continuously both when arrested and interrogated by the police at length, and also throughout his testimony during the trial that

he had shaken the child. He alleges that the baby suffered repeated fits and then became unresponsive.

14. The only evidence that results from the acts on which the Prosecution founded the charge of attempted wilful homicide and that of grievous bodily harm lies solely in the forensic findings of the court appointed expert, of the medical practitioners, and of the consultants involved in the treatment of the minor who reach the conclusion that the injuries were extensive and non accidental, the symptoms being compatible with the triad manifested in the shaken baby syndrome.

Considers :

15. The offence of wilful homicide is envisaged in Section 211 of the Criminal Code. The elements of the offence are laid out in subsection 2 wherein it is stated that :

> **A person shall be guilty of wilful homicide if, maliciously, with intent to kill another person or to put the life of such other person in manifest jeopardy, he causes the death of such other person.**

16. The law contemplates both the **positive direct intention** to kill and also the **indirect intention** that result when the *actus reus* is such that a reasonable man could reach the conclusion that his actions were likely to result in the death of his victim.

17. **Professor Sir Anthony Mamo** underlines these considerations :-

" .... from the point of view of wickedness, having regards to the consequences ensuing there is nothing to distinguish between a man who with the positive clear intent of killing proceeds to do an act which in fact causes death, and the man who, although without positively desiring to kill, yet does an act which inherently and obviously is likely to kill and in fact causes death. The knowledge that the act is likely to kill, or the recklessness whether death clearly forseen as probable, shall ensue or not is properly treated by law on the same footing as the positive intention to kill."

18. In both cases the intention to kill whether direct and positive or indirect has to result, the perpetrator therefore, by his actions clearly signifying his will to cause the death of his victim or proceeds towards the material act of the offence knowing fully well that his actions could lead to the death of his victim, being aware of the risks undertaken by him in completing the act.

"The Criminal Law of Scotland fil-kuntest tal-kuncett ta' "*recklessness*" (li fil-ligi Skocciza "*is advertent and involves foresight of the risk*" u li ghalhekk hu tista' tghid identiku ghall-kuncett taghna ta' intenzjoni pozittiva indiretta) tghid hekk[1]:

"When the reasonable man is used as a test of subjective recklessness the position is that if the reasonable man would have foreseen the risk, it will be accepted as a fact that the accused foresaw it, unless there is strong evidence to the contrary. But if the accused can show that in fact he did not foresee the risk, then it is illogical to characterise him as reckless on the ground that a reasonable man would have foreseen it. As Hall says, 'In the determination of these questions, the introduction of the "reasonable man" is not a substitute for the defendant's awareness that his conduct increased the risk of harm any more than it is a substitute for the determination of intention, where that is material. It is a method used to determine those operative facts in the minds of normal persons'.

[1] Ir-Repubblika ta' malta vs Brian Vella – App.Sup. – 28/11/2011

"Since evidence of the accused's state of mind must normally consist of objective facts from which the jury will draw an inference as to his state of mind, the more careless the accused's behaviour the more likely it is that he will be regarded as reckless, since the more likely it will be that he foresaw the risk involved. A man who kills another by punching him on the jaw may be believed when he says that he did not foresee the risk of death; but a man who kills another by striking him on the skull with a hatchet will be hard put to it to persuade a jury that he did not realise that what he was doing might be fatal. In Robertson and Donoghue Lord Justice-Clerk Cooper directed the jury that 'In judging whether...reckless indifference is present you would take into account the nature of the violence used, the condition of the victim when it was used, and the circumstances under which the assault was committed'. All these are objective factors affecting the degree of the carelessness of what the accused did, viewed as something likely to cause death. The jury proceed by way of syllogism to infer from these objective factors that the accused was subjectively reckless, and the major premise is that a reasonable man would have foreseen the risk. So they argue: all reasonable men would foresee the risk of death as a result of what the accused did; the accused is (ex hypothesi) a reasonable man; therefore the accused foresaw the risk.[2]"

19. Having thus premised, however :

"(a) Murder requires intention and nothing less will suffice, i.e. it is a crime requiring specific intent, and, while foresight of virtual certainty may be evidence of intention, it is not to be equated with it.

(b) Grievous bodily harm should be given its ordinary and natural meaning, i.e. really serious bodily harm and is not restricted to harm likely to endanger life. (Cunningham (1982) AC566)...

(c) Murder, like any other crime requiring proof of intention, involves proof of a subjective state of mind on the part of accused.[3]"

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[2] Gerald Gordon, op. cit. para. 7.53, pp. 245-246.

[3] Blackstone's Criminal Practice 2015 B1.12

20. Now appellant finds objection to the verdict reached by the jury since he is of the firm opinion that from the evidence found in the acts not one of these intentions results. The Prosecution, on the other hand, affirms that since there was a repetition of the first incident on the second occasion, the resultant consequences being far more grievous and irreversible, this in itself is indicative of appellant's intention to kill the child entrusted to his care, or at least the intention to put his life in manifest jeopardy.

21. This Court has examined extensively the acts of the proceedings, both those found in the compilation of evidence, and also those that were brought forward during the trial by jury, and this in order to establish whether the verdict reached was a safe and satisfactory one. Blackstone opines that :

> **"The case of Cooper [1969] 1 QB 267 continues to provide guidance on how the word 'unsafe' should be interpreted in determining a criminal appeal. In that case, Lord Widgery CJ explained that if the overall feel of a case left the court with a 'lurking doubt' as to whether an injustice may have been done, then a conviction will be quashed, notwithstanding that the trial was error-free. Lord Widgery said (at p. 271 C-G): '[This is] a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 [which somewhat widened the court's powers to quash a conviction] it was almost unheard of for this court to interfere in such a case. 'However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question,**

whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it'[4]."

22. From the acts of the proceedings in their entirety, the following determining facts can be elicited :

i) Appellant was in a relationship with a certain Abiola Olowoshile. The relationship had been ongoing for a year prior to the tragic incident. Abiola had a child Maleek from a previous marriage with a certain Sahid which relationship had turned sour and ended, Abiola alleging violence as a cause for the break-up. During her testimony in fact she alleges that Sahid was even violent towards the child even mentioning an incident which occurred when the child was a month old when he was thrown down on a chair by her husband.

ii) Abiola Olowoshile and appellant had started to live together after a while, with appellant entrusted with the care of the child during the day, as the mother had to work in the mornings, whilst appellant worked after five in the afternoon as a professional footballer. These facts were never verified by independent witnesses, but result only from the testimonies of appellant and Abiola.

iii) The child was well looked after, with Abiola trusting appellant with the child's care. At the time of the incidents, the child was one year three months old.

[4] Ir-Repubblika ta' Malta vs John Camilleri – 24/04/2008

iv) On the 2nd April 2013, the child was in the care of appellant, when he starts to suffer from bouts of vomiting and diarrhoea, and has two seizures. Appellant allegedly tries to stop these fits by thumping on the chest and inserting four of his fingers in the child's mouth. When so doing, appellant alleges that he was bitten by the child during the fit. He calls the mother and when she arrives home from work they take the child to a doctor who diagnoses a gastric virus and is sent back home. The mother confirms in her testimony that she saw the bite marks on appellant's finger at the time, although when he is examined by the medico-legal expert Dr. Mario Scerri after the incident of the 15th April 2013, such injury was not visible.

v) On the 3rd April 2013, the symptoms persist. The mother does not go to work and takes the child to hospital. Now, appellant alleges these facts occurred on the morning of the 3rd April when he was alone with the child and Abiola was at work when the child was again sick and had the seizures. On the other hand, Abiola states that she did not go to work on the 3rd April 2013 since the child was still unwell and when he started to vomit again and she saw signs of blood in his vomit, she called an ambulance and took the child to hospital, contrary to what appellant states that the mother was at work and he called her to come home and call for an ambulance. There is therefore a discrepancy between the two versions as to the timeline of events. Furthermore the doctor is not identified by either one of them and therefore was not brought to testify with regard to the alleged symptoms manifested by the child, prior to the first admission to hospital.

vi) The child is admitted to hospital and examined. Tests are then carried out, which exclude any pathological reason for the symptoms. On the basis of a CT scan and other medical tests, two of the triad of symptoms usually linked to the shaken baby syndrome are diagnosed : the child was suffering from a mild contusion in the brain with haemorrhagic changes in the right frontal region, and the presence of bleeding was determined over the surface of the brain between the membranes which cover the brain. There was no sign of encephalopathy. No traumatic changes to the skull were visible, however retinal haemorrhages were diagnosed together with minor injuries consisting in a small scratch under the chin and a small bruise on the chest were observed. Child protection services and the police were alerted and a magisterial inquiry is launched, with Dr.Mario Scerri being appointed as medico-legal expert. When questioned by the doctors at hospital, the mother lies. She states that on this occasion, the child had been in the care of a babysitter, who she does not name. Later she admits that appellant had been with the child, who informed her that when the child had suffered the seizures he had shaken him in an attempt to resuscitate him. Although there was a suspicion of child abuse, the police did not interrogate appellant or the mother. After the incident, appellant was not approached for an interview by the police, the social workers or the doctors. Court expert Dr. Mario Scerri did give an appointment to both the mother and appellant, as part of the *in genere,* for the 12th April 2013. However by mistake they both went to Qawra police station instead of the place established by the court expert. A second appointment was scheduled for the 15th April 2013 which did not materialise as on that day the second incident occurred.

vii) The mother and appellant are given the benefit of the doubt since the child seems otherwise healthy and well looked after. Consequently the conclusion reached by the medics and social workers was that the cause of the injuries could have been accidental with appellant

panicking and shaking the child when he was having a fit. The child recovers and after a week is discharged from hospital, and returned to the care of the mother and appellant. The mother is warned not to shake the child for any reason, and to place the child on his side if there is another fit.

viii) At this point the mother alleges that she had observed that the child's head is enlarged when compared to the rest of his body and although otherwise healthy and feeding well she had noticed in the days after being discharged from hospital that the child was lethargic and not as energetic as before.

ix) On the 15th April 2013, Abiola leaves for work early in the morning, the child being in perfect health, nothing untoward being observed. Appellant states that he bathe and fed the child, and put him to sleep. At around eleven appellant states that he checked on the child observing that he was still asleep and making grunting sounds similar to snoring. At noon, he checks on him again since he has remained asleep for too long. When he examines the child, he observes that Maleek has started to stretch and realises that he is having a seizure once again and puts him on his side as instructed by the doctors. He calls the mother in a panic state from a neighbouring apartment, since his phone was out of charge. He informed the mother that the child was unresponsive and asks her to come home. When the mother arrives she picks up the child who remains comatose, calls an ambulance and the child is taken to hospital once again, unconscious and with fixed dilated pupils.

x) Upon being admitted to hospital the child undergoes several tests which clearly indicate that he is suffering from an acute extensive right-sided haematoma in the brain with extensive ischemic changes

throughout the entire cortex, as well as the left frontal and cerebellar areas. There is heavy haemorrhaging in the right side of the brain, with the midline structures markedly displaced to the left due to the swelling. The doctors diagnose the child with severe head trauma, in this case the triad of symptoms linked to shaken baby syndrome are once again present.

xi) The child is operated, a craniotomy being performed in order to remove the blood from the brain and reduce the swelling, however the prognosis is very poor and he is certified as being in danger of loss of life. Old healing fractures in 6th and 7th ribs result from an MRI conducted on the child which had not resulted in the X-rays carried out during the previous admission to hospital.

xii) The child suffers irreversible brain damage and after several months in hospital he is discharged with a 95% permanent disability. To date he is fully dependant and has been admitted to Dar tal-Provvidenza where he still resides. The child has lost his vision, barely hears, is incontinent and barely moves. He is confined to a pushchair and has no awareness of his surroundings.

xiii) Appellant denies repeatedly that he shook the child both on the 3rd April 2013 and also on the 15th April 2013. He states that some weeks before the first incident the child had fallen from the bed and hit a wall socket, which incident the mother confirms in her testimony but never mentions to the doctors upon the first admission to hospital.

23. These facts, combined with the medico-legal findings, and the testimony of all the medics involved, led the jury to a finding of guilt with a quasi-unanimous verdict of the offence of attempted wilful homicide.

However the task entrusted to the jurors was not so much to establish whether the diagnosis was correct but most importantly to decide whether an inference could be drawn from such testimonies as to appellant's state of mind, and consequently come to a conclusion beyond a reasonable doubt that he intended to kill the child or at least to put the life of the child in manifest jeopardy.

24. The medical and forensic findings however had to be determining in this case for a finding of guilt since it is only on the premise that the injuries suffered by the victim were the result of non-accidental trauma to the brain brought about by violent shaking that the Prosecution proceeded to charge appellant with having intentionally and voluntarily attempted to put the life of the child in manifest jeopardy. Had the medical diagnosis been otherwise, and had another cause for the severe brain trauma been found, appellant would not have been charged with causing the said trauma. In fact in his appeal application appellant is of the strong belief that these medical findings have been disputed over the years by medical experts around the world, leading to various convictions both in England and in the United States based on shaken baby syndrome being reversed, the medical findings having been deemed to be unsafe.

25. The diagnosis of shaken baby syndrome has traditionally been based on a triad of symptoms resulting in damage to the blood vessels which run between the surface of the brain and the cerebral cortex when the head is vigorously shaken, the bridging veins being stretched beyond their elasticity and break. As a consequence blood fills the subdural space.

26. Medical experts in such cases have relied on three symptoms when reaching the conclusion that the victim was violently shaken : bleeding behind the eyes, bleeding on the surface of the brain, and brain swelling.

Doctors have taken the view that the syndrome results during violent shaking, when blood vessels in a child's brain may break, causing widespread bleeding in the back of the eyes. Paediatricians say they have found retinal haemorrhages in 85 per cent of babies who were shaken. This occurs because young children have proportionally bigger and heavier heads than adults and weaker neck muscles. Their brains are also immature and more susceptible to injuries. Thus acceleration and deceleration changes cause swelling of the brain.

27. When a child is shaken or thrown, the head twists and whips back and forth, creating shearing forces in the brain. This can cause tears to the bridging veins and nerve cells and trigger bleeding and swelling[5].

28. In the case under this Court`s review the triad of symptoms being described were in the second incident of the 15th April accompanied by cerebral **ischemia**, (cerebrovascular **ischemia**) "which is a condition in which there is insufficient blood flow to the **brain** to meet metabolic demand. This leads to poor oxygen supply or cerebral hypoxia and thus to the death of **brain** tissue or cerebral infarction / **ischemic** stroke.[6]"

29. However for more than a decade a growing movement of doctors has questioned the science behind Shaken Baby Syndrome and this since it has medically been established that accidents and a series of diseases can in some cases produce identical conditions in infants. These theories in fact were put forward to all the doctors testifying in the case when questioned under cross-examination, such line of questioning seeking to establish

[5] www.aans.org

[6] en.wikipedia.org

whether an underlying medical condition could have brought about the injuries suffered by the minor[7].

30. The child, Maleek, underwent a series of medical tests so as to exclude any pathological cause. The blood tests were normal thus excluding a possibility of blood clothing. No other genetic causes, metabolic disorders, or vitamin insufficiency were found to exist. The symptoms were neither compatible with a possible aneurism, child stroke, leukaemia or thrombocytopenia being a deficiency in blood platelets. No external signs of injuries were detected, no fractures to the skull or the spine, bruising or other lacerations.

31. From an examination of his medical file, it results that the child was born to an HIV positive father, although the mother was HIV negative and what is known as a BCG vaccine (administered to TB and HIV risk patients) was administered when the child was about five months old. The child had been admitted to hospital on one previous occasion on the 27th March 2012 suffering from bronchiolitis and was discharged a couple of days later[8]. Minor routine interventions on the tongue and genital organs were performed which however have no link to the incidents of the 3rd and 15th April.

32. Although the mother states that appellant had shaken the baby during the first incident on the 3rd April, having been told this directly by appellant himself, appellant denies this stating that he had thumped him on the chest and put four of his fingers in the baby's mouth to avoid

[7] www. nacdl.org/uploadedFiles/files/resource_center/topics/post_conviction/Harris.pdf

[8] Vide document exhibited a fol.171 of the records

suffocation. He continues to deny shaking him during the second incident. There is consequently no other evidence pointing towards the shaking of the child as having caused the trauma to the brain, the medical findings as portrayed in the testimony of all the medical practitioners entrusted with the care of the child during both his stays in hospital and the findings of the medico-legal expert Dr. Mario Scerri concluding however that the injuries were non-accidental and caused by a force exerted on the head similar to violent shaking.

33. The Court must point out that the only witness in this case who could legally tender an opinion is the court appointed expert. Now the medico-legal expert, although highly qualified in the field of forensic medicine, however lacked a specialisation both in neurology, in ophthalmology and in paediatric medicine. It would definitely have been vital in this case had the forensic expert been assisted by other expert opinion in the specialisations just referred to, taking into account the diagnoses of shaken baby syndrome having been contested strongly by the accused.

34. It is the firm opinion of the Court that it was of utmost importance in this case that the medical conclusions be completely watertight being the only piece of evidence pointing towards the guilt of the accused, no other circumstantial evidence being brought forward by the prosecution.

35. In fact even in this regard the Court feels that the Police were very slack in the investigations carried out especially after the second incident, when a repetition of the first incident occurred with the consequences being far more serious. The Court inquires why the crime scene was not preserved, no scene of crime officers were appointed by the Inquiring Magistrate to carry out the necessary searches in the apartment where the

child had been allegedly injured. Vital evidence could have been gathered from the crime scene, thus presenting a clear picture to the Court as to the place where the child was being looked after, and what had actually transpired during that morning. The garnering of evidence which would have supported or discredited appellant's version of events was therefore crucial, for example as to exact location of the bed where he was allegedly placed by appellant during that morning, evidence as to whether the child could have been violently slammed down on the same bed rather than shaken, being another cause for non visible external signs resulting in trauma to the head. Also witnesses indicated by appellant and the mother which could have discredited or strengthened their version of events were never brought to testify, like the doctor who allegedly examined Maleek the evening before he was admitted to hospital on the 3rd April, the neighbours who appellant allegedly called upon in a state of panic on the morning of the 15th April when Maleek was unresponsive and comatose, asking that he make a phone call to the mother when he realizes that his mobile is without credit. Neither appellant nor the mother were questioned by the police after the first incident of the 3rd, although it was evident that the mother had initially lied as to the person entrusted with the child's care. Even though a magisterial inquiry had been launched, no other expert apart from Dr. Mario Scerri was appointed. Such evidence being thus lacking, great weight is placed on the medico-legal findings as already pointed out as the only material piece of evidence in this case.

36. This is being premised since even were the Court to embrace the medico-legal findings, thus establishing that the material act leading to the commission of the crime results, however the intentional element had to be proven beyond a reasonable doubt - the voluntary, positive, wilful and deliberate intent to kill or to put the life of the minor in manifest jeopardy as opposed to the generic intent to cause harm or the involuntary or accidental cause of the injuries which resulted from the material act.

37. From the evidence gathered in this case the following results :

a) Both the mother and appellant himself present a picture of appellant as an attentive, kind and doting carer. There is not one shred of evidence indicating any incident of violence towards the mother or the baby in the months they co-habited with appellant.

b) No signs of external injuries were found on the child after the incident of the 15th April, the scratch and slight bruise on the chest of the child and the fractured ribs are linked to the first incident of the 3rd April where appellant alleges that he hit the child on the chest during one of his seizures and vomiting incidents.

c) No witnesses are brought forward attesting to the character of appellant as being a violent person.

d) Even were the Court to embrace the mothers' version that appellant told her he had shaken the child, this does not *ut sic* constitute evidence of the positive intention required for the purposes of article 221 of the Criminal Code. Nor does the fact that the mother lied about appellant's involvement in the incident having at first put the blame on a hypothetical babysitter point towards a homicidal intent

38. The Court is therefore of the opinion that the verdict reached by the jury in this case is unsafe and highly unsatisfactory and this with regard to the finding of guilt for the first count to the bill of

indictment, the intention required for the crime of homicide clearly not proven beyond a reasonable doubt. Although as will be pointed out actual harm was caused to the child during the time he was entrusted to appellant's care, however it is not possible to infer from the evidence found in the acts that appellant wanted to kill the child or proceeded towards the carrying out of the material act fully aware that this could cause his death or at least could put his life in manifest jeopardy.

39. Nonetheless there is no doubt that Maleek Olowoshile sustained grievous injuries on the 15th April when he was in the sole care of appellant. The injuries were described as non-accidental in nature both by the medico-legal expert and all the medical practitioners who testified and were involved in the care of the child. The massive haemorrhage suffered in the brain leading to swelling and the ischemia could only have been brought about by a severe violent impact to the brain, the injury being described as acute meaning that a chronic cause was excluded. Thus it was concluded that such a violent impact could not have been accidental when no other explanation was forwarded by the child's care givers giving a plausible cause for the resultant extensive damage.

40. The reason for the diagnosis as already pointed out was established on the grounds that blood test carried out were normal, no other pathological cause having been determined. No genetic causes were established, metabolic dysfunction, vitamin insufficiency and other dietary disorders having been excluded. Combined to these medical tests, the bleeding in the brain was found to be acute with extensive ischemia, the resulting brain damage not limited to one side although extensive on the right hand side of the brain. Moreover bilateral retinal haemorrhages were found indicating massive head injury, Dr. Jan Janula in his testimony

excluding eye disease as a possible cause. These injuries were found to be fresh and not linked to the incident which had occurred a week earlier on the 3rd April.

41. Dr. Janula states this in his testimony:

> **"I found the condition of the eye is much worse, I mean the condition of the background of the eye, that is the retina and the optic nerve, so there was much more haemorrhages and there was severe swelling of the optic nerve which is usually sign of intra cranial that means high pressure inside the head." …. ` It was not an eye injury, it means the situation in the back of the eye was showing that there is serious problem inside the head, which in this case was bleeding inside the head."**

42. Paediatric Consultant Dr. Simon Attard Montalto testified that :

> **"The injury was of significant bleeding inside the brain itself and also on the outside of the brain pressing on to the brain with very widespread, what we call ischemic changes, changes means lack of blood supply to the brain. … and it was a widespread injury effecting most of the right side but also the back of the brain, what we call the celleberum and the degree of injury is difficult to explain without having some element of significant force. It just does not happen spontaneously. … This was bleeding with a significant insult to brain blood supply and the assumption was that this could say be compatible again with a shaking injury.**
>
> **In medicine nobody can ever be hundred per cent sure. It's on a balance given everything else in this scenario. … And given ..we have looked at other things and there is nothing else to explain it, we are left with that as the most likely diagnosis. But if you ask me can you be hundred percent sure, I can never be hundred percent sure about anything."**

So yes there are other scenarios that can cause a catastrophic insult to the brain but they are a lot less likely than a traumatic insult in this case."

43. He further clarifies that aneurism, child stroke, and congenital malformations are very unlikely in the scenario, excluding also metabolic disorders and blood clotting, infectious diseases and auto immune conditions. In fact Maleek Olowoshile was a healthy thriving child prior to incident with no medical pathology present which could have been linked to the massive injury to the brain.

44. Even Dr. Mariella Mangion, who was the first paediatrician to examine Maleek on both occasions when he was admitted to hospital excludes any other possible cause for the grievous injuries sustained by the minor child. In fact from her testimony it results that being specialised in child abuse cases she was aware of the controversies surrounding the shaken baby syndrome and the various theories being put forward by medical experts in the field. She however insists on the diagnosis and in fact dates the fractured ribs visible on the MRI scan of the 15th April as healing injuries which were caused at the time of the first incident, since the fractures had not been detected on X-ray when the child was admitted on the 3rd April. Had these injuries resulted from the accident which appellant and the mother mention when the child fell off the bed around a month prior to the first incident, these would have been visible in her opinion, upon first admittance to hospital since callus formation of the bone would already have set in.

45. Dr. Michael Spiteri, emergency consultant who was the first to examine Maleek upon his admittance to hospital on the 15th April, in his testimony presents a very clear picture of the injuries sustained by the minor and the cause thereof. In fact, rather than attributing the injuries

specifically to a shaking act, he states that these were the result of trauma to the head brought about by a movement tantamount to rapid acceleration and deceleration to the brain. This conclusion was reached since the injury in the brain was non-symmetrical in nature signifying that an extreme force necessarily had to be exerted on the part of the brain where the injury resulted, in this case the right hand side of the brain - assymetrical swelling indicative of application of extreme force on the right hand side. This injury could not have been compatible with a fall, in his opinion, since the CT scan would have revealed markings on the skin where the injury occurred and also no skull or spine fractures were present. Not only but he clearly testifies that extensive acute injuries to the right hand side, extending to the left together with damage to the left cerebellar lobe accompanied with ischemia is very highly unlikely to have occurred spontaneously. He concludes that these extensive injuries to the brain are all indicative of non-accidental trauma similar to massive deceleration forces on the brain in adults involved in motor vehicle accidents. He is also of the opinion, when questioned upon cross-examination, that the injury to the 6th and 7th ribs on the right hand side, which injuries resulted in the MRI scan carried out and diagnosed as healing fractures visible from the callus formation on the bones, would have been painful and therefore could not be linked to the incident mentioned by appellant and the mother when the child allegedly fell off a bed, since, he states that the child would have been very miserable as a consequence, something which was never reported by them. This would also have been accompanied with bruising.

46. Furthermore the medical findings show a significant difference between the CT scan of the 3rd and the 15th April resulting in a deterioration of the brain, the second CT scan indicating that the blood cloth was acute and therefore instantaneous and could not have been either chronic or a worsening of the first injury. No structural abnormalities on the CT scan

indicating genetic disorders were observed, the fractures in the ribs not resulting from congenital defects since the other ribs were normal.

47. Dr. Yasmina Djukic, the neuro-surgeon perfoming the craniotomy together with Dr. Sean Agius, also testifies that the injuries were compatible with a whiplash movement and a rapid acceleration and deceleration of the brain. She further states that the injury diagnosed on the 15th was a fresh injury. She is of the opinion that it is found in the same area where the first injury was sustained, although more serious second time around, because after the first bleed the same part of the brain would have been very vulnerable to any other force since the vessels would have been impaired in that area of the brain during the first incident. The neurosurgeon concludes that since the blood cloth on the right hand side of the brain was acute in nature this could only be compatible with a severe insult to the right hand side of the brain, the damage being so extensive as to extend also to the left hand side and the cerebellar area. She also states that this could not have been either spontaneous or chronic as suggested by the defence.

48. Finally medico-legal expert Dr. Mario Scerri, after examining the child, his medical history, and having contacted all the medical practitioners involved in the care of Maleek, established that the injuries sustained by the child were compatible with a non-accidental head injury which could have been brought about by violent shaking.

49. Dr. Mario Scerri concludes :

> **"The supporting evidence to arrive at that plausible diagnosis of shaken baby syndrome or non accidental injury is to the effect that examinations had been, that history was obtained, there was no history of febral convulsions, that the**

investigations were carried out, there are no indications that the child might have any coagulation defect, any evidence of blood diseases, or any Vitamin K deficiencies or glucose metabolism which is inadequate, and once this is ruled out ehe, you arrive to that conclusion."

50. For this Court what is relevant at law is whether the injuries sustained by the child were of such a nature as to lead to the wilful (*dolo*) nature of the offence. Furthermore a thorough examination of the circumstances surrounding the symptoms diagnosed is vital in order to infer the intention of the person accused with inflicting the injuries.

51. In the case in re **R vs Harris and others** (2005 EWCA Crim 1980) which dealt with convictions based on the shaken baby syndrome, the Criminal Division of the Court of Appeal in the United Kingdom stated :

"We turn then to the inferences which it is proper to draw. We do so with great caution, mindful both of the gravity of the matter and that (as already underlined) the mere presence of the 'triad' does not automatically or necessarily lead to a diagnosis of NAHI and/or a conclusion of unlawful killing. All the facts of the individual case must be taken into account."

52. This assertion is well-founded in that it is not the duty of the Court to establish whether the diagnosis of non-accidental head trauma or shaken baby syndrome is correct from a medical point of view but whether from all the evidence of the case it is both legally and factually justifiable to infer that the accused being the sole carer of the minor child could have caused such an injury and whether the intention to harm or kill is proven.

53. It is undoubted that in this case there is evidence of the presence of the so-called "triad"; namely, encephalopathy, subdural haemorrhages and

retinal haemorrhages. There is also evidence which shows that the child had been admitted to hospital on a previous occasion exhibiting the same symptoms although to a lesser degree. In that instance there was evidence of external injuries although minor in nature. Moreover evidence was brought forward of fractured ribs which on the 15th April, date of the second admission to hospital were healing thus indicating that they had been caused some time prior to this date. Appellant had been the sole carer of the minor during both incidents when there were episodes of vomiting and diarrhoea combined with seizures indicating brain damage. The child was otherwise healthy suffering from no pathological condition affecting his health and had not suffered any form of accidental trauma prior to the incidents. All medical tests were carried out to exclude any other cause for the injuries sustained. Although appellant repeatedly denies shaking the child or of abusing him in any other manner, it is possible to infer the contrary from the evidence wherein it results that the appellant had admitted to the mother that he had shaken the child during the incident of the 3rd, and inserted four of his fingers in the little child's mouth, a gesture which in the firm opinion of the Court rather than preventing suffocation, would cause it. There is also clear evidence of fractures in the sixth and seventh ribs of the minor indicating the use of force, which injury is not compatible with any version of events as described by appellant and the mother. The medical conclusion reached is that the injuries were of a non-accidental nature resulting from violent trauma to the head caused by a violent acceleration and decelaration to the brain against the skull.

54. This diagnosis could be safely reached on the following clinical observations, which the Court has no reason to question or contradict :

a) the blood haemorrhage was assymetrical, that is, it was confined to one side of the brain being the right hand side, thus excluding

other possible causes of haemorrhaging due to chronic or pathological causes, excluding spontaneous haemorrhaging.

b) the blood cloth was acute and not chronic meaning that it was instantaneous and had therefore occurred in the hours preceding the child's admission to hospital.

c) The injury was a fresh injury and not linked to the previous insult to the brain occurring on the 3rd April although found on the same side.

d) The injury was so vast and extreme that there was ischemia leading to a shift in the midline structure of the brain to the left, damage being found also to the left hand side and the cerebellum area.

e) The child had previously suffered a fracture in the 6th and 7th ribs which were healing upon his admission on the 15th April thus indicating a previous trauma, although this cannot be precisely dated. This trauma must have caused pain to the child although neither the mother nor appellant report that the child complained of any such pain.

f) Prior to his first admission to hospital the child had been healthy no previous health problems being reported indicating some pathological or genetic disorder. He was well fed and responsive to his surroundings to the extent that both appellant and the mother report that he had been a healthy, happy and playful child.

g) Prior to his second admission to hospital he had fully recovered from his first injury, was responding well, and was also feeding well to the extent that the mother herself states that prior to leaving for work at six o'clock in the morning of the 15th the child looked healthy and had also had his feed.

55. These findings taken all together lead to the conclusion of fact that an extreme force must have been applied to the child on the right hand side of the head thus causing the resulting severe trauma to the brain. Not only but also in the incident of the 3rd April and in the preceding days, it can be safely concluded that external force was exerted on the child and this from the injuries diagnosed relating to this period of time.

> ***"The clinical history is perhaps the most important clinical tool available to the clinician and to reject the carer's version of events in favour of another requires the highest possible level of medical evidence. After all, the Doctor is effectively accusing the carer of lying.[9]."***

56. The Court is of the opinion that the evidence, although not sufficient to lead to a finding of guilt for attempted homicide, however points towards the lesser offence of grievous bodily harm, the generic intention to cause harm having been proven, the injuries inflicted being non-accidental in nature as concluded by the medico-legal findings and all the evidence resulting from the testimony of all the specialists, consultants and medical practitioners involved in the care of the minor child. Combined with these findings there is evidence of external injuries found upon the child consisting of scratch marks, bruises and fractured ribs indicating the use of force on a previous occasion. Not only but there are discrepancies in the

[9]www.ncbi.nlm.nih.gov/pmc/articles/PMC2066025/

testimonies of the mother and appellant linked to the time-line of events surrounding the incident of the 3rd April. Also Abiola Oloshowile changes her initial statement wherein she states that appellant had admitted to her shaking the child during the first incident, which statement she then denies when giving evidence during the trial. After her testimony, it then transpires from the testimony of inspector James Grech that she was being threatened by appellant before testifying during the trial. She however tries to minimize the allegations she had reported to the inspector, when called to the witness stand once again, attributing the alleged threats received by appellant to the fall out which occurred in their relationship. In fact she testifies that appellant had fathered two children with her since his arrest and she had miscarried another child prior to the commencement of the trial. The Court finds that the testimonies of the two people directly involved with the care of the minor child is full of half truths and cannot attribute credibility to their version of events. What is proven and this beyond a reasonable doubt is that in both incidents the minor child suffered injuries which were compatible with non-accidental trauma resulting from the use of force and this when the child was in the sole care of appellant from which the Court can infer his generic intention to harm the child, such evidence, however being insufficient to point towards the positive intention whether direct or indirect to kill.

57. In re **R v Stacey** [2001] EWCA Crim 2031, a "shaking" case, the Court said thus: "

> **48. Other grounds of appeal having been examined, and in the end abandoned, that leaves only the question of whether the jury was entitled to find that she intended to do really serious harm. We are troubled about that. One brief period of violent shaking by a frustrated mother and child-minder was all that was required to explain this death. Apart from the bruises to the neck, no other injuries were found. As the judge said, an intent to do serious bodily harm may be quickly formed and soon regretted; but so may a less serious intent, simply to**

stop a child crying by handling him in a way any responsible adult would realise would cause serious damage or certainly might do so. That would only provide the mental element necessary for manslaughter.

49. Even allowing for the jury´s obvious advantage in seeing the appellant give evidence, we have been unable to discern anything which, in our judgment, would have made it safe for the jury to convict this appellant of the more serious charge. In our judgment, the less serious charge was the only safe verdict. If the jury had had the additional benefit of hearing the fresh medical evidence we have heard, they might well have come to the same conclusion."

58. To conclude, in the light of all the evidence produced although it was safe for the jury to infer that serious harm had been caused to the minor child Maleek Olowoshile at the hands of appellant since he was his sole carer at the time of both incidents, and his factual account of events cannot explain the injuries sustained, however in the absence of proof of the positive intention to kill or to put the life of the child in manifest jeopardy it was unsafe for the jurors to reach a guilty verdict for the charge of attempted homicide, the generic intention to cause harm being the only *mens rea* which could be elicited from the acts of the proceedings appellant having to answer for the resulting consequences of his actions by application of the principle *dolus indeterminatus, determinatur ab exitu*. The reason being that in the crime of bodily harm a generic intention to injure is sufficient, the offender being answerable for the harm which has actually ensued.

59. The offence of grievous bodily harm is contemplated in article 214 of the Criminal Code, the harm being caused by appellant during the second incident falling within the parameters of article 218(1)(a) of the Criminal Code the injuries sustained by the minor child being permanent in nature as concluded by the medico-legal expert Dr. Mario Scerri.

"Fil-ligi taghna, ghall-fini tar-reat ta' offiza volontarja fuq il-persuna, hi mehtiega l-intenzjoni generika li wiehed jaghmel hsara. Jekk l-intenzjoni ta' l-agent tkun li jaghmel hsara, zghira kemm hi zghira dik il-hsara li jkollu f'mohhu li jaghmel, hu jrid iwiegeb ghall-konsegwenzi kollha li effettivament jirrizultaw bhala konsegwenza diretta ta' l-ghemil tieghu. Dawk il-konsegwenzi jistghu jkunu gravi (artikolu 216), gravissimi (artikolu 218) jew adirittura l-mewt (artikolu 220). Bi hsara wiehed jifhem anke s-semplici sensazzjoni ta' ugigh li tigi minn daqqa minghajr il-htiega ta' lezjoni fit-tessuti. L-artikolu 214 tal-Kap.9 meta jitkellem dwar "... hsara fil-gisem jew fis-sahha ta' persuna .... jew dizordni f'mohha ...." isegwi kelma b'kelma d-disposizzjoni tal-artikolu 372 tal-Codice Zanardelli. ....

Fi kliem iehor anke s-semplici ugigh ikkagunat minn daqqa jew percossa tammonta ghal hsara (fil-gisem jew fis-sahha) fis-sens ta' l-artikolu 214 tal-ligi taghna. Huwa proprju ghalhekk ukoll li min, bl-iskuza, tal-korrezzjoni, isawwat u per konsegwenza iwegga' tfal, jista' jkun hati ta' dan ir-reat. Wahda mill-kwistjonijiet dibattuti fit-tul u xi kultant anke b'mod akkanit, specjalment taht ir-regim tal-Codice Zanardelli kienet jekk id-daqqa ta' harta ghandhiex titqies bhala lezjoni personali (jigifieri offiza fuq il-persuna) jew ingurja. Il-Qorti osservat li din il-kwistjoni tirrisolvi ruhha verament f'wahda ta' fatt. Jekk mill-kumpless tac-cirkostanzi pre-ezistenti, konkomitanti u sussegwenti ghall-att materjali jkun jirrizulta li dak l-att materjali sar bl-intenzjoni li wiehed jikkawza imqar ftit sensazzjoni ta' ugigh, allura hemm l-animus nocendi u wiehed ikun qieghed fil-kamp ta' l-offiza volontarja fuq il-persuna.[10]"

60. Having thus concluded the Court must necessarily vary not only the verdict reached but also the punishment inflicted by the First Court. Now the punishment at the time of commission of the offence for the crime of grievous bodily harm was that of a term of imprisonment between nine (9) months to nine (9) years, which term has to be increased by one degree and this according to article 222(1)(a) of the Criminal Code, the minor child

[10] Il-Pulizija vs Emanuel Zammit- App. Inf – 30/03/1998

being entrusted to the care of appellant and living under the same roof with him[11].

> ***L-artikolu 218 tal-Kodici Kriminali li jitkellem dwar l-offiza "gravissima" jipprovdi ghal piena minn minimu ta' disa' xhur sa massimu ta' disa' snin. Din il-gamma hekk wiesa' hi certament intiza sabiex il-Qorti tkun tista' tiehu kont tac-cirkostanzi partikolari ta' kull kaz u dan hu aktar importanti li jkun hekk in vista tal-principju dolus indeterminatus determinatur ab exitu, meta allura jista' jkollok persuna li riedet taghmel ftit hsara izda spiccat trid twiegeb ghall-hsara kollha li effettivament ikkagunat[12].***

Therefore, since the injuries sustained by the minor have resulted in permanent brain damage as confirmed in the third report filed by the medico-legal expert Dr. Mario Scerri to the extent that the child is today fully dependant and has no quality of life, appellant will have to answer to the consequences resulting from his actions, the punishment which will be inflicted therefore, will be closer to the maximum envisaged by law rather than the minimum, although appellant's clean criminal record will be taken into account.

Considers :

61. Having reached the conclusion that the generic intent to cause harm has been proven by inference from all the circumstances of the case, the guilty verdict reached with regard to the second count to the bill of indictment will be confirmed by the Court, the injuries sustained in the first

[11] The punishment was increased by means of Act XIII of 2018 to a term of imprisonment from 5 to 10 years.

[12] Il-Pulizija vs Emanuel Zammit, above-cited

incident falling within the scope of article 216(1)(a) of the Criminal Code, and not as originally charged in the bill of indictment, the child suffering an injury to the brain as well as fractures to the ribs which the medico-legal expert and the doctors and professionals who testified although not being able to affix a precise date to the occurrence of the said injuries however date it to the 3rd April or the days preceding this date, which time-frame falls squarely within that indicated in the accusatorial part of the second count to the bill of indictment.

For the reasons above, the Court :

1. Upholds the appeal with regard to the finding of guilt on the First Count of the Bill of Indictment. Revokes the verdict of the jury wherein appellant was found guilty of the crime of attempted wilful homicide of the minor child Maleek Olowoshile. Varies the said verdict and finds appellant guilty of the offence of grievous bodily harm, in terms of article 214, 218(1)(a) and 222(1)(a) of the Criminal Code, and thus with having on the 15th April 2013, in Malta, without intent to kill or put the life of Maleek Opeyemi Olowoshile in manifest jeopardy, caused harm to the body or health of the said person being a person under fifteen years of age and living in the same household as the offender, consisting in mental derangement and permanent functional debility of the body or any permanent defect in the physical structure of the body or permanent mental infirmity.

2. Confirms the verdict and the judgment of the First Court wherein the accused was acquitted from the third count to the bill of indictment and found guilty of the second count meaning the

offence of grievous bodily harm that can give rise to danger of loss of life or any permanent debility of the health or permanent functional debility of any organ of the body, or any permanent defect in any part of the physical structure of the body, or any permanent mental infirmity aggravated by the fact that the crime was committed on the person of another person living in the same household as the offender or who had lived with the offender within a period of one year preceding the offence and by the fact that the harm is committed on the person of a child under nine years of age as contemplated in article 216(1)(a) of the Criminal Code.

3. Varies the punishment inflicted and after having seen article 214, 216(1)(a), 218(1)(a), 222(1)(a), 31 and 17(b) of the Criminal Code condemns appellant Rotimi Williams Akande to a term of imprisonment of ten (10) years. Confirms the rest of the judgment regarding the payment of the sum of one thousand and six hundred and forty four Euro and six cents (€1644.06c) being the sum total of the expenses incurred in the appointment of Court Experts in this case in terms of Section 533 of Chapter 9 of the Laws of Malta, which sum is to be paid within fifteen days, in default of which said sum would be converted into a prison term in accordance with the law.

His Honour the Chief Justice Joseph Azzopardi

The Hon. Mr. Justice Joseph Zammit McKeon

The Hon. Madame Justice Edwina Grima