SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.9 OF 2006

BETWEEN:

KENT CALDERON

Appellant

and

THE QUEEN

Respondent

CRIMINAL APPEAL NO.10 OF 2006

DEREK DESIR

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Alberton Richilieu, Mr. Lorne Theophilus and Mr. Al Elliott for the Appellants
The Director of Public Prosecution, Mrs. Victoria Charles-Clarke, and Mr. James Wood for the Respondent

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2007: October 29;
November 26.

Criminal Appeal – Murder – Section 170 of the Criminal Code 1992 – Appeal against conviction – whether unsafe or unsatisfactory – Whether direction on specific intent was required – whether failure to give direction on specific intent is fatal to conviction – Accomplices – whether accomplice warning was sufficient – Uncorroborated evidence – whether fatal to conviction – Admission of deposition into evidence – whether prejudicial –

Appeal against sentence – section 1098 of the Criminal Code 2004 – pre-sentence report - whether sentence of life imprisonment appropriate

Early one Saturday morning, the deceased was driving a motorcycle accompanied by a pillion rider, along the highway from Gros Islet town in the direction of Castries, when a car driven by Amon Joseph overtook the motorcycle. While the car was abreast of the motorcycle the pillion rider heard seven or eight shots fired from the car by a person or persons unknown to the pillion rider. One bullet hit the driver of the motorcycle in the region of his pelvis and ruptured the iliac artery, leading to his death. Amon Joseph whom the pillion rider immediately identified was arrested by the police and gave two statements, both denying having been present. At the preliminary inquiry Amon Joseph gave evidence identifying the two appellants as the persons who were present in the car with him. Joseph deposed to hearing a number of shots fired, seeing both men with guns and protesting the shooting. Joseph had initially been charged for murder but the charges were dropped. At the trial Joseph did not testify but his deposition was read in evidence after the prosecution led evidence of his departure from Saint. Lucia and his remaining abroad. Both appellants were convicted of murder and sentenced to life imprisonment. The two appealed on grounds of misdirection by the trial judge on the issue of intent, admitting the deposition of Amon Joseph on insufficient evidence as to Joseph's absence abroad, failing to give an accomplice warning in relation to the evidence of Amon Joseph, and wrongly granting a two month adjournment for the prosecution to try to secure the attendance of Joseph. The two men also appealed on the ground that the imposition of an indeterminate life sentence was wrong in principle and the sentence was excessive.

Held, dismissing the appeals against conviction and sentence:

(1) Although the judge had erroneously directed the jury in terms indicating that intention to cause injury was a sufficient intention on which to convict for murder, whereas section 170 of the Criminal Code 1992, under which the appellants had been charged, required a specific intention to cause death, the final direction that the judge gave to the jury correctly directed the jury that the prosecution must prove an intention to cause death and accordingly;

(i) in view of the overwhelming evidence of an intention to cause death established by the circumstances of the shooting, including the number of shots, the close distance from which the shots were fired and the unprotected target that the deceased provided, the court was satisfied that the jury would have been guided by the final, correct direction in their deliberation, and

(ii) in any event, the evidence was so overwhelming that the court had no doubt that the jury would inevitably have convicted had they been properly directed and the court would apply the proviso to section 35 of the Eastern Caribbean Supreme Court (St. Lucia) Act.

(2) On the facts of this case the judge was right not to treat Amon Joseph as an accomplice to murder because, in view of the evidence as to the unplanned nature of the shooting and Joseph's uncontradicted evidence that he was surprised by the shooting, there was no evidence that was legally capable of establishing that Joseph was an accomplice. Whatever the suspicions and disbelief the jury might have entertained, these were not capable of amounting to more than speculation and could provide no basis for treating Joseph as an accomplice.

(3) There was ample evidence before the judge to prove that Amon Joseph was abroad at the time of the trial. The decision to admit Joseph's deposition into evidence was not challenged on its merits and the directions that the judge gave to the jury on how to treat the deposition in view of the fact that its maker did not appear before them to be tested in cross-examination were fair and more than adequate.

(4) The decision of the judge to adjourn the trial for two months, coinciding with the court's vacation was one that was reasonably open to him and was directly for the benefit of the appellants, to give them the opportunity to cross-examine Amon Joseph.

(5) Although a court should impose a determinate sentence where there was no mandatory sentence of life imprisonment and the court was in a

position to determine the amount of punishment that was commensurate with the offence and necessary to deter others, in the case of a murder with this degree of violence and these offenders who were depicted in the pre-sentence reports as violent and dangerous, it was statutorily permitted (by section 1097 (2) (b) of the Criminal Code 2004) for the judge to sentence them on the expressed basis that they were a danger to society. It was proper in such a case for the sentencing court to decide that the offenders would constitute a serious danger to the public for a period of time that could not reliably be estimated at the time of sentence and, accordingly, the sentence of life imprisonment would not be disturbed.

JUDGMENT

[1] BARROW, J.A.: The two appellants were convicted of the murder of Dillon John and sentenced to life imprisonment. They appealed against both conviction and sentence. The appeals were heard together and the same grounds were argued for both men. The grounds were all grounds of law and there was little, if any, contest as to the facts.

The facts

[2] Miguel Lewis was the pillion rider on a motorcycle that Dillon John was driving from the direction of Gros Islet town towards Castries, at about 1:10 in the morning of Saturday, 26th April 2003. When the men on the motorcycle passed the Rodney Bay Marina, Miguel Lewis looked back and saw a grey or black Nissan motorcar being driven by Amon Joseph coming in the same direction. As the motorcycle continued in the southerly direction, Miguel Lewis kept looking back and observing the said motorcar. He said something to Dillon John and they continued. Miguel had noticed from the Rodney Bay Marina gap that the driver was Amon Joseph. On nearing Julian's supermarket the motorcar drew alongside the motorcycle. While the car was beside the motorcycle the two were about three to five feet

apart. Miguel Lewis then saw a head or a hand come out of the window on the left side of the car and seven to eight shots were fired.

[3] Apart from the driver, Miguel Lewis was not able to see anyone else in the car. After the shots were fired the motorcycle and both men fell to the ground. Miguel said he then saw the car stop and one man run out of the car towards them. Miguel shouted at Dillon to move and he helped Dillon to move. Dillon told Miguel he had gotten hit. They reached the car park of the supermarket and people were there. One of the persons who were there testified to seeing the car and the motorcycle, hearing shots fired, seeing the motorcycle and the men fall, assisting the injured man and calling the police. This eyewitness mentioned seeing the car continuing along and did not mention it stopping. A pathologist testified that Dillon sustained a gunshot wound to the front of the lower right abdomen and died as a result of the bullet passing from right to left through the left common iliac artery that is located at the rim of the pelvis.

[4] When Amon Joseph was first confronted by the police, on the day of the shooting, he told the police in a statement under caution that he was not in Gros-Islet that night, he was watching television at his home at La Toc. In a second statement under caution, the following day, he said that his car was in the mechanic garage from 5:00pm on the Friday. In a witness statement his girlfriend told the police she was in fight with Amon, and she picked up a stone and threw it at Amon's car and broke the back glass. A mechanic testified at the trial that at 2 o'clock in the morning of the shooting, Amon Joseph woke him at his home to leave Joseph's car to replace the rear windscreen, which had a hole in it, and Joseph told the mechanic to tell the police that Joseph had said that his girlfriend broke the glass.

[5] In a statement he gave in the magistrate's court Amon Joseph identified the appellants as the other persons in the car with him at the time of the shooting. In his statement he said he met the two appellants at a street jam in Gros Islet and when he was proposing to leave they said they would ride with him. They went to

two other places where they stayed briefly and left. They travelled in his car. He was driving his car, Calderon was in the front passenger seat and Desir was in the rear seat. While coming out of the Rodney Bay Marina a scooter passed. He drove behind a white car that was behind the scooter, the white car passed the scooter in the area by the Bonne Terre gap, he was a little distance behind when this happened and then when he reached by Julian's Supermarket he overtook the scooter and heard "boom".

[6] Amon Joseph said when he looked in his mirror he saw his back windshield shattered. The tint was holding it so it did not fall immediately. "I say fellas what happening there. Derek Desir told me that Miguel and Dillon – that's Miguel and Dillon. While driving I heard about four to five more shots. I never stopped, I continued driving." When he reached a certain area he saw a silver gun in Desir's hand. He said he told them "fellas don't throw no shots in my car, you know." He saw a silver gun in Calderon's hand also. He said they told him "don't be afraid, let's go – let we go." He said he continued driving towards Castries and by the Bisee Gap he dropped off the two men, he went by the garage man, woke him up and spoke to him and left the car.

[7] Amon Joseph did not testify at the trial. In the course of the trial, after a number of prosecution witnesses had testified and it had been established that Amon Joseph was absent abroad, the prosecution asked for an adjournment to bring Amon Joseph to testify. On 26th July 2006 the judge adjourned the trial, in view of the imminent court vacation, until 20th September 2006. When the trial resumed counsel for the prosecution applied to have the deposition Amon Joseph had given before the magistrate admitted into evidence pursuant to section 894 of the Criminal Code 2004 on the basis that Amon Joseph was abroad.

[8] The prosecution relied on two witnesses to prove Amon Joseph's absence abroad. One such witness was Amon Joseph's brother, Kimber Joseph, who testified that on 18th May 2006 his brother, Amon, went to America. Kimber Joseph testified he

had last spoken with Amon by telephone about a week before the day on which Kimber was giving his testimony. Kimber also testified that Amon Joseph's house was about 3 minutes away, walking, from where Kimber lived, that he, Kimber, had the keys for his brother's house, that he goes to his brother's house every day and that Amon was not presently at his address. The other witness was a police officer who was an immigration officer at the Hewanorra International Airport and who processed Amon Joseph's departure from Saintt. Lucia on 18th May 2006. This witness produced the original immigration card presented to him at the airport by a person whose identity he verified against the person's passport, No 105726. The card was for Amon Joseph, born 20th September 1976 in Saint. Lucia. That person boarded Air Jamaica flight 093 to New York. The witness also testified that he processed no other person by the name of Amon Joseph that day.

The grounds of appeal

[9] The appeal against conviction was essentially on the grounds that the learned trial judge failed to properly direct the jury on the law as to intention, accomplices and corroboration and that the judge erred in admitting into evidence the deposition of Amon Joseph, which contained highly prejudicial material. Counsel for the appellants submitted there were numerous difficulties with the evidence, which made it incumbent on the trial judge to give full and comprehensive directions on those matters, and that the learned trial judge failed to deal adequately in his summing up with those issues. Counsel argued that the trial judge failed to direct the jury properly and adequately on the issues as they arose on the facts of the case, and that this made the convictions unsafe and unsatisfactory. The complaints lend themselves to separate treatment.

Intent

[10] The appellants argued that the trial judge misdirected the jury by failing to direct on specific intent. Counsel for the appellants referred to Jaganath v The Queen[1], and relied on section 170 of the Criminal Code 1992, under which the appellants were charged. Section 170 states:----

> "Whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse…"

There was no dispute by the prosecution that murder, under the 1992 Code, requires specific intent and that an intention to cause grievous bodily harm, which is sufficient to prove murder under section 85 of the Criminal Code 2004, was not sufficient to do so under the earlier Act, which was the applicable law when this homicide occurred.[2]

[11] The appellants submitted that the trial judge misdirected the jury on intent when he told them:

> "Your approach to the case should therefore be as follows: if, looking at the case of either of any of the accused, you approach the case as should ……. sorry, of any accused men, you are sure that with the intention I have mentioned, that is, to commit the offence of shooting, causing injury, death to the, to the deceased, either of them, you are sure that with the intention I've mention[ed], took some part in committing it, then he is guilty."[3]

[12] At the beginning of his directions on intention the judge had directed the jury:

> "The law says, Mr. Foreman, members of the jury, that if a person does an act voluntarily, that is, if he did so willingly, believing that it would properly - - probably cause or contribute to cause an event, he intends to cause that event, in other words, what the law is saying that if a person voluntarily does an act, in this case, shoots at the two men on the motor

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[1] [1968] 11 WIR 317

[2] Although the appellants were charged under the Criminal Code 1992, with a murder that occurred in 2003, before the Criminal Code 2004 was enacted, it seemed to have been accepted by both sides that the appellants were entitled to the benefit of the provisions in the later code when these were more favourable to the accused

[3] Record of Appeal, tab O, page 22, lines 8 to 13

> scooter, believing that it would probably cause or contribute to cause, in other words, cause injury, he intends them to cause injury or to willfully cause their death, cause injury or death, then they intend to cause their death."[4]

[13] The Director accepted, in oral argument, that the judge "may have misstated the law" in those instances, by referring to an intention to cause injury, but the Director argued that the final direction with which the judge left the jury was correct. The judge directed in that instance:

> "Now, as I told you on the question of intention, let me repeat. You cannot say the Prosecution cannot prove positively what they intended, but I said, you, as member[s] of the jury, can infer from their intention what they intended to do. So, if they at close range, fired guns or shots at the deceased, then you will have to ask yourselves, what intention they had, if they had intention to kill the deceased or both men on the motorcycle. And if you come to the conclusion that they had the intention, then the prosecution would have proved that they intentionally caused his death, having regard to the evidence of Dr. King and the evidence in the Deposition of Amon Joseph."[5]

[14] In my view, the evidence as to the manner in which the shots were fired – seven to eight shots, fired from three or four feet away, at a completely exposed human target – was so overwhelming that the intention of the shooters was to cause death that I am satisfied that the final direction on intention the judge gave to the jury was the one that guided the jury's deliberation. Even if I were not so satisfied I am, in any case, satisfied that had the jury been properly directed as to intention the jury would inevitably have found that the persons who participated in the shooting had the specific intent to kill. I would therefore rely on the proviso in section 35(1) of the Supreme Court Act[6] to dismiss the ground of appeal that the judge misdirected on intention, notwithstanding that the court might be of opinion that the point raised by that ground might be decided in favour of the appellants..

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[4] Record of Appeal, tab O, page 11, lines 17 to 23
[5] Record of Appeal, tab O, page 22, line 23 to page 23, line 5
[6] Eastern Caribbean Supreme Court (Saint Lucia) Act, Chapter 2.01

Accomplice

[15] The premise of the appellant's complaint, that the judge erred by failing to warn the jury of the danger of convicting on the uncorroborated evidence of Amon Joseph, is that Joseph was an accomplice. Section 1169 of the Criminal Code 1992 permits the jury to convict on such evidence but obliges the judge to give the jury due warning of the danger of convicting on such evidence. Counsel urged that the judge should have directed the jury as to who was an accomplice within the meaning of section 81 of the Criminal Code 1992 and as to the reasons why it was dangerous to convict on the uncorroborated evidence of an accomplice. The need for such directions was the greater, counsel submitted, because of the fact that the evidence of the accomplice was received by way of deposition.

[16] Contrary to the submission of counsel, the judge did not decide that Amon Joseph was an accomplice; rather, the judge recognized that the two accused might say he was an accomplice and, on that basis, the judge proceeded to give a warning. This is what the judge told the jury:

> "But, now, I must also…it is my direction that I think it is necessary to warn you also that you exercise caution before you act on the Deposition evidence of Amon Joseph. I give you this warning for two reasons. One, he was charged with the, … the accused…the two accused may very well say that he was an accomplice, that is, Sergeant Defrietas told you he was charged with, with the offence of murder. However, if you accept what is in the Deposition, there is no doubt that Amon Joseph was in the motorcar with the two accused when the shots were fired. That is, if you accept the evidence in the Deposition. If you accept the evidence also, is that he tried, after the incident to cover up…what happened. He took the car to his mechanic and told him…that he should say to the police, if they ask him any questions, that it was his girlfriend who damaged his…car by throwing a stone in the back windscreen. For these reasons, you approach…Amon Joseph's evidence in the Deposition with caution. You must determine… whether you can rely upon it, if you are satisfied…its truthfulness you may rely on it."[7]

[7] Record of Appeal, tab O, page 16, line 20 to page 17, line 9

[17] In Davies v DPP,[8] on which counsel for the appellants relied, Lord Simon LC explained that the question whether a person was an accomplice or not, for the purpose of deciding whether to give a warning, was to be left to be answered by the jury when there was evidence on which the jury could make that decision, but that there were cases, of which Davies was one, where the judge must decide that there was no such evidence and therefore decide that there was no need to give a warning.[9] The material facts in Davies were that one group of boys attacked another group and in the course of the melee a knife was drawn and a boy was fatally stabbed. There was no evidence that the boy who gave evidence against the appellant knew that a knife was going to be used. The trial judge did not treat him as an accomplice and gave no warning and the House of Lords upheld his decision on the basis that there was no evidence that the witness was an accomplice to murder.

[18] In the instant case there was no evidence that could prove that Amon Joseph was an accomplice to murder. His own evidence was that the use of the guns came as a surprise to him and he protested what had happened. The only other piece of evidence as to Amon Joseph's involvement in the occurrence came from Miguel Lewis who, after telling of Amon Joseph driving the car abreast of the motorcycle, said:

> A. "Well, it was pretty close, about four, four feet or about five feet or three feet away, it is pretty close, like the person could of just hit us on the bike with the car, but they didn't choose to hit us."

That observation by Miguel Lewis is telling in favour of Amon Joseph: that Joseph chose not to participate in causing harm to the deceased by doing what he could obviously and easily have done. There was no evidence, direct or circumstantial, that contradicted his evidence that he was not expecting the shooting. Miguel Lewis's testimony as to how the shooting occurred is conclusive that it was entirely spontaneous and, therefore, provides some support for Amon Joseph's evidence

[8] [1954] 1 ALL ER 507
[9] At p 514 F to G

that the shooting came as a surprise to him. On that state of the evidence, even if the jury would have been minded not to believe Joseph, and to suspect that he might have been an accomplice, there was no evidence to support such a conclusion, and it would have been entirely speculative to treat him as an accomplice. The comparison with Davies is distinct; in that case the boy denied knowing that a knife would be used and in this case Amon Joseph denied knowing that guns would be used. In neither case was there evidence, of any kind, to provide a legally acceptable basis for the jury to treat the witness as an accomplice. It bears emphasizing that whatever the jury might have been disposed to suspect of Amon Joseph, if it had been left to the jury to decide, on the state of the evidence it would have been a bare suspicion unsupported by any evidence and it would have been legally impermissible to conclude that Amon Joseph was an accomplice. As this court decided in Lorne Parsons v R[10] presence at the commission of a crime is not sufficient for a jury to infer complicity; there must be something more from which participation could be inferred. In this case, had the three men in the car gone looking for the other two, the situation would have been different. Instead, according to both Miguel and Amon Joseph, it was purely coincidental that the car and the motorcycle happened to be on the same stretch of road at the same time.

[19] In my view there was no obligation, pursuant to section 1169 of the Code of 1992, for the judge to give any warning. The fact that the judge gave a warning was entirely proper and the warning that he gave helped in a significant way to make the trial fair. On the view that I have taken it is unnecessary to consider whether, as has been submitted, the abrogation of the accomplice warning as an obligatory requirement that has been effected in England by section 32 of the Criminal Justice and Public Order Act 1994 has effect in Saint. Lucia, in relation to the 1992 Code. It is sufficient to note that the Criminal Code 2004 does not oblige the court to give such a warning but it must also be noted that this does not relieve the court of the duty to warn the jury to take care in dealing with evidence that may be

[10] British Virgin Islands Criminal Appeal Nos 2,3,4 of 2006 (judgment delivered on 13th February 2007)

unreliable for any reason, including those reasons that underlay the giving of the accomplice warning. For the reasons I have stated I would dismiss the ground of appeal that complains that the judge failed to give an accomplice warning.

Deposition

[20] In deciding to admit the deposition of Amon Joseph the judge gave full consideration to the requirement as well as the operation of section 894 of the Criminal Code 2004. Section 894 (1) provides that:

> "A deposition taken at committal proceedings may be produced and given in evidence at the trial of the person against whom or for whom it was taken, if it is proved, to the satisfaction of the Judge –
>
> …
>
> (c) that the deponent is absent from the State or cannot be found after diligent search…;
>
> (d) …
>
> (e) if the deposition purports to be signed by the Magistrate by or before whom it purports to have been taken; or
>
> (f) if is proved to (sic) by the person who offers it as evidence that it was taken in the presence of the accused person or the prosecutor, as the case may be ..."

[21] Counsel for the appellants, sensibly in my view, did not argue against the merits of the decision to admit the deposition of Amon Joseph but, instead, contended that there was no evidence for the court to be satisfied that the Amon Joseph who gave evidence at the Preliminary Inquiry in these proceedings was one and the same person as the Amon Joseph who left the country on the Air Jamaica flight number 093 on the 18th May 2006 or that he went abroad and remained there. At the trial the judge rejected a similar submission[11] and reminded counsel that the absence of the witness was a matter on which he, the judge, needed to be satisfied. The judge gave a ruling in which he reviewed the evidence as to the absence of the witness and pronounced that he had no doubt that the requirements of the section were satisfied.[12] Counsel's argument that there was

[11] Record of Appeal, tab J, page 65, lines 14 to 16, page 69, lines 11 to 12 and 21 to 25.
[12] Record of Appeal, tab M, page 9, line 8

no evidence to satisfy the judge that the conditions imposed by section 894 were met is a hopeless one because the evidence of Kimber Joseph and the immigration officer was eminently capable of satisfying the judge and it was almost as hopeless to submit that the judge ought not to have relied on this evidence.

[22] There was more potential in counsel's argument that by admitting Amon Joseph's deposition into evidence the appellants suffered a miscarriage of justice. The thrust of this argument was that Amon Joseph had been a co-accused; that on his arrest he gave two conflicting statements to the police; and that the appellants were left at a disadvantage because the jury did not have the benefit of hearing the evidence of Amon Joseph tested in cross examination and seeing his demeanour in court.

[23] It will always be the case that the admission of the deposition of an absent witness results in that disadvantage to the accused. This was a concern that the judge fully addressed in his ruling in deciding how to exercise his discretion in balancing competing requirements in ensuring that the trial was fair. It should be noted, in this regard, that the fairness of a trial requires not only fairness to the accused but fairness overall, and in our system of justice it is accepted[13] in terms of overall fairness that there may be some disadvantage to the accused, just as there may be some disadvantage to the prosecution, so long as a fair trial is possible. In this case the judge took great care to warn the jury of the need to be careful about relying on evidence that might have been unreliable both because of its source and because it was not tested by cross-examination.

[24] This is what the judge told the jury:

> "You would have – you will have to decide from the evidence, Mr. Foreman, members of the jury, whether it was these two Accused or one of them who a .. are responsible for the death, in other words, who caused the death of Dylan John. The main witness, in this case, for the prosecution is Amon Joseph. Amon Joseph gave evidence before the

[13] See, for example, Grant v R, Privy Council Appeal No 30 of 2005 at paragraph 17 (1), in particular (judgment delivered 16th January 2006)

> Magistrate's Court, but he did not appear before you at this trial. You have heard the evidence he gave before the Magistrate, read to you. The law makes provisions that where a witness gave a Deposition before the Magistrate and that witness is absent at the trial, the trial judge may, in his discretion, allow that Deposition be tendered and read to you if certain conditions are satisfied. In my discretion, I allowed the Deposition to be tendered in evidence, because the conditions were satisfied.
>
> I must now instruct you how you should approach the Deposition evidence of Amon Joseph, because remember, he did not appear before you, you did not see him he was not cross-examined. So, he did not appear before you, I must, therefore, warn you that you had not … you did not have the benefit, sorry, of hearing the evidence of Amon Joseph tested in cross-examination, and you should take that into consideration when considering how far you may rely on that evidence in the Deposition. . Is that clear or shall I repeat? "[14]

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[25] In response to the question whether his direction was clear or should he repeat the direction, the foreman of the jury asked the judge to repeat. The judge repeated and told the jury, further:

> "Amon Joseph gave evidence, sworn testimony, sworn evidence before the Magistrate, however, he did not appear before you, his Deposition was read before you, so that is evidence that you can act upon. I must, however, warn you that you had not had the benefit of hearing Amon Joseph evidence, of seeing him, and he was not tested in cross-examination, so, you should take that account in determining … in considering how you can safely rely on that evidence. Is that clear? In other words, he was not tested in cross-examination, you did not see him, you were not able … one of the things we were supposed to do, is to tell … to say whether a witness is telling the truth or not, as I said to you before, you will have to judge that person's demeanour, the way the person behaved, the way the person answered questions, well, that not done. So, in deciding how you rely on that evidence, whether you can rely on it, is whether … is the fact that you take into consideration that you did not see him, you only heard what he had to say before the Magistrate. Is that clear? So, you'll take that into consideration.
>
> And you … you'll take that into consideration, particularly in light of the fact that the evidence is that he gave more than one Statement to the police. He admitted in evidence on oath before the Magistrate, that he lied to the police when he gave the first Statement. You will have to determine whether the evidence he gave in, in the Deposition is true, you

[14] Record of Appeal, tab O, page 14 line 13 to page 15 line 5

> have to determine that. And in determining whether it is true, whether you can rely on it, whether you can act on that Deposition is a fact that you take into consideration, you had not seen him. So, having taken that into consideration, it's a matter for you, having heard … seen the … heard the evidence read to you what weight you give to it, whether you can accept it, it's a matter whether you accept it, what weight you give to it. Is that clear? It does not say that you must give no weight to it, you will have to decide that, you will have to decide that. You'll have to decide …determine that, as judges of the facts.
>
> Mr. Theophilus, in his address to you on this, you may, you may recall what he said. Mrs. Trotman also addressed you on this and you try to remember what they told you. If you are satisfied that you can rely on that … on the testimony of Amon Joseph, then, of course, you will act on it. If you are satisfied that you can rely on the testimony, having said what I said to you, you had not see him in … he did not appear before you, he was not tested in cross-examination, but if you are satisfied that you can rely on it, then, of course, you must act on it. If you are … if you cannot rely on it, or you, you say it is not true, or if you have any reasonable doubt as to whether you can rely on it, then you reject it. The Statement is an exhibit in court and you may take it with you when you retire."[15]

[26] It was at the end of that direction that the judge went on to give the accomplice warning, reproduced in paragraph [16], above. There has been no argument from counsel for the appellants that the judge did not give a direction of the sort that is generally regarded as fair in this well-known situation where evidence against an accused is given by the use of a deposition at the trial and in my view the judge's direction was more than adequate. I would accordingly dismiss this ground of appeal.

Adjournment

[27] A remaining complaint of counsel was as to the adjournment of the trial that the judge granted the prosecution to try to obtain the attendance of Amon Joseph. It was an issue on which the judge heard argument and made a decision. Counsel for the appellants submitted to this court that the break of two months was "somewhat prejudicial" to the appellants. Counsel did not identify any prejudice

[15] Record of Appeal, tab O, page 15 line 10 to page 16 line 19.

that the appellants suffered and I would dismiss this complaint as purely argumentative. So, too, would I treat counsel's assertion that no reasonable judge would have made the decision to adjourn the trial for the duration of the court vacation. The perspective offered by the Director is that the trial judge adjourned the trial, in view of the nearness of the court vacation, to ensure that all possible opportunity was taken to make Amon Joseph available for the defence to cross-examine. There is much force in the argument that this decision was taken to assist the appellants rather than facilitate the prosecution. The prosecution had already satisfied the conditions to have the deposition admitted in evidence and had no need, therefore, for the witness to be brought, although it was their duty to try to bring him. The judge expressly guided himself, in deciding to adjourn the trial to enable efforts to be made to bring Amon Joseph to testify, by adverting to section 894 (3) of the Criminal Code 2004[16], which provides that he should consider whether "the ends of justice require that the witness should be examined personally before the jury." It was a decision that, on appeal, the judge would, quite probably, have been robustly criticized for not making, had he proceeded otherwise.

[28] In my view none of the grounds of appeal against conviction succeeds and I would dismiss the appeal against conviction.

Sentence

[29] In the appeals against sentence counsel for the appellants contended, in their written submissions, that the trial judge exercised his discretion on wrong principles and/or failed to exercise his discretion in accordance with sections 1097 and 1098 of the Criminal Code 2004 to the extent that the sentences of life imprisonment, apart from being imposed on the wrong legal basis, were unreasonable and excessive having regard to all the circumstances of the case. In

[16] Record of Appeal, tab K, page 25 line 23

oral argument counsel focused on the contention that the sentences were excessive in all the circumstances.

[30] The maximum sentence for the offence of non-capital murder[17], as stated in Section 87(2) of the Criminal Code 2004, is life imprisonment and it is a general principle of sentencing that the maximum punishment for an offence must be reserved for the worst instances of the offence.[18] Recent sentences for murder that this court has substituted have included imprisonment for 12 years and 22 years.[19] The lengths of those terms of imprisonment are meaningless in themselves but they serve to establish the proposition that life imprisonment for murder is by no means automatic or the norm or the starting sentence. A great deal depends on the particular facts. In this case the judge received a pre-sentence report, as is required by section 1098 of the Criminal Code 2004 before the court forms any opinion as to the length of the custodial sentence that is commensurate with the seriousness of the offence or, where it is a violent offence, before the court imposes a sentence for such longer term as in the opinion of the court is necessary to protect the public from serious harm from the offender.[20]

[31] Counsel made submissions to the judge at the sentencing hearing, for the holding of which the judge adjourned the conclusion of the trial, on the contents of the pre-sentence reports. Each man, based on interviews with persons from their communities, was depicted in the report as violent and dangerous. Counsel presented arguments as to why the judge should not rely on the reports. Neither man gave evidence or called witnesses at that phase of the trial. The judge was therefore left, apart from the facts presented in the course of the trial, with only the contents of the report, to which to give such weight as he thought fit, to assist in

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[17] As noted earlier the appellants were charged under the Criminal Code 1992, which does not distinguish between capital and non-capital murder, but both sides proceeded, it appeared, on the basis that the appellants were entitled to the benefit of such of the provisions in the Criminal Code 2004 as were more favourable to the appellants.

[18] Peter Hughes v R,, Newton Spence v R. Criminal Appeals Nos 91 of 2001 and 20 of 1998

[19] Respectively, Michael Sylvester v R., Grenada Criminal Appeal No. 6 of 2006 (oral decision delivered 28th March 2007); and Fazal Sayed v R., Grenada Criminal Appeal No 5 of 2006 (oral decision delivered on 19th September 2007)

[20] Section 1097 (2) (b) of the Criminal Code 2004

forming his opinion as to the length of the sentence that was necessary to protect the public from serious harm from the offenders. In his very brief sentencing remarks, after acknowledging the credit to which the accused were entitled for having no previous convictions, the judge specifically identified the basis of his sentence as being "to protect society from persons like you".

[32] In some jurisdictions that have established different categories of murder, the use of a firearm to kill places a homicide in the category of capital murder.[21] While that is not the law in St. Lucia such a law demonstrates that the use of a firearm to commit murder may reasonably be viewed in our Caribbean common law jurisprudence as a worst-case instance of murder. The judge referred to the senselessness of this murder and the seeming lack of motive for it. He could, as well, have mentioned that shooting seven or eight times at a completely exposed victim displayed an intention that established murder not because the act was criminally reckless or inferentially intentional but because it manifested a determination to murder, and a desire for that result. I can find no error in principle or in law with the judge considering this as one of the worst cases of non-capital murder.

[33] Counsel for the appellants cited no authority for the proposition and did not argue the point that it was wrong to impose an indeterminate sentence of life imprisonment in this case. In support of that argument one could point to the recognition that:

> "In general it should be said that a life sentence when it is other than mandatory, as was the case here, is to be reserved for cases where the defendant is someone in respect of whom there is some relevant factor which cannot be determined at the time when the judge is passing sentence. The usual example of that will be some mental condition which affects the degree of risk which the release of the defendant into the community will present. Where there is no such imponderable feature, and where the question is simply that of punishment and the necessity to deter

[21] Section 102 (3) (b) of the Criminal Code, Chapter 101 of the Laws of Belize 2000, discussed in Patrick Reyes v R, Privy Council Appeal No. 64 of 2001, at paragraph 4

> others, these matters can be gauged at the time of sentence, and so as a rule an indeterminate sentence would be inappropriate."[22]

[34] An indeterminate sentence will be appropriate, however, in the case of a murder that was committed with the degree of violence such as was used in this case and in the case of offenders whom pre-sentence reports show to be violent and dangerous persons, as was shown in this case. In such a case it may be proper for the court to decide that the offender would constitute a serious danger to the public for a period of time which could not reliably be estimated at the time of sentence.[23] As was earlier noted the judge specified that he was sentencing the appellants with reference to the danger to the society that they posed. The judge was entitled to do so. I would therefore dismiss the appeal against sentence, as well.

Denys Barrow, SC
Justice of Appeal

I concur.

Sir Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh A. Rawlins
Justice of Appeal

[22] R v Callistus Bernard and others, Grenada Case No 19 of 1984, Sentencing Judgment of Belle J delivered 25th July 2007, at paragraph 28, citing R v Gurmail Singh Basra (1989) 11 Cr. App. R. (S.) 527
[23] A-Gs Ref (No. 32 of 1996) [1997] 1 Cr App R (S) 261