TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRAP 2009/003

BETWEEN:

DESHAWN STOUTT

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal

Appearances:

Dr. Joseph S. Archibald, QC, with him, Mr. Duane John Baptiste for the Appellant
Mr. Terrence F. Williams, with him, Ms. Jude Indra Hanley for the Respondent

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2010: September 20;
2011: November 21.

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Criminal appeal against conviction and sentence – Murder – Events leading up to shooting caught on recorded telephone call – Mistaken identity – Whether the learned trial judge failed to properly or fairly put the defence to the jury – Whether the sentence of life imprisonment is automatic for the offence of murder – Whether the learned trial judge adequately directed the jury on the burden of proof in the criminal trial

The appellant, Deshawn Stoutt, was convicted of the murder of Godwin Cato on 16th March 2009 and sentenced to life imprisonment. The deceased was shot three times at Fat Hog's Bay in Tortola, at about 11:00 p.m. on 25th January 2007. He succumbed to his injuries the following day. The events leading to Cato's shooting were captured on recorded telephone as Cato had, just before the shooting, made an emergency 911/999 call seeking police assistance to protect him from a man who was threatening him with a gun. After Cato had made his report to the emergency operator, the recording captured a

dialogue between Cato and another unidentified individual; the two seemed to be in some sort of altercation. This dialogue was interrupted by a series of "explosions", after which the line went dead. The prosecution's case was that Stoutt was the person involved in the altercation with Cato and that this had culminated in Stoutt shooting him. The defence's principal witness, Akiim Penn, claimed he was present when Cato was murdered and that it was not Stoutt, but another man who had shot Cato.

Stoutt appealed against his conviction on several grounds, which included that the learned judge did not fairly put the defence to the jury, failed to assist the jury with evidence relating to vital issues, and omitted certain matters from the summation. Stoutt also appealed against his sentence of life imprisonment.

Held: dismissing the appeal against conviction and sentence and affirming the appellant's conviction and sentence, that:

1. A summation need not traverse all the evidence in a case. Thus, a failure to refer to a particular piece of evidence will not normally be sufficient to make a conviction unsafe. The duty of the trial judge is to put the case, including the defence, fairly before the jury; the judge is not obliged to reiterate all the points made by the prosecution or defence during the trial.

   R v Farr (1999) 163 JP 193 cited; Malcolm Maduro v The Queen (2008) 73 WIR 225 followed.

2. The learned judge gave the jury appropriate directions as to the treatment of the expert evidence heard during the trial and the jury would have had these directions in mind when they, as judges of fact, evaluated the evidence. Taking into account the nature of the Crown's case, the Court cannot discern any prejudice to the appellant resulting from the judge not directing the jury to the answer given by the Crown's forensic expert witness Dr. Peter Lamb, during cross-examination. (per Baptiste J.A., Edwards J.A. dissenting).

3. The remark by the learned judge as to what transpired in Chambers ought not to have been ventilated before the jury. However, the Court is unable to discern consequential prejudice to the appellant flowing from that ventilation. In the circumstances, the matters complained of do not render the conviction unsafe or unsatisfactory.

4. The law as to previous inconsistent statements is well settled. A previous statement made by a witness out of court was evidence only if the witness adopted it, by accepting that it was true when he gave evidence. If the witness did not accept that his previous statement was true, it was not evidence, and was relevant only to the credibility of his account in the witness box. The direction given by the learned judge in relation to this issue was not, therefore, entirely accurate. This however, is not fatal, since Police Constable Roydin Cato's report of other persons harassing the deceased Cato was hearsay, and the only threats

that the deceased had reported were issued by the appellant. In the circumstances, this was not a material irregularity affecting the safety of the conviction. (per Baptiste J.A.).

5. PC Cato's evidence relating to what the deceased had told him concerning persons who were harassing and attacking him (the deceased), was relevant hearsay evidence and therefore not admissible to prove the existence of the fact that the deceased was threatened by persons other than the appellant. Consequently, that evidence would attract the questioned jury directions of the trial judge, even where PC Cato admitted, after refreshing his memory, that the deceased did make those representations. (per Edwards J.A.).

6. The learned judge did assist the jury as to how to deal with the direct evidence of the defence's principal witness, Akiim Penn. The judge gave the jury clear guidance as to how to approach Penn's direct evidence and reminded the jury of the defence's arguments and their value.

7. It was clearly open to the jury to find that the unidentified man in the altercation with the deceased, which was captured on the recorded telephone call, was the appellant. The suggestion of prejudice or unfairness to the appellant arising from this finding is not well founded.

8. The Court is not properly positioned to exercise its discretion under section 30(2) of the Parole Act, 2009 in relation to the sentence imposed on the appellant by the learned trial judge. However, the appellant may apply to the High Court for a review of his sentence in accordance with section 30(1) of the Parole Act, 2009.

JUDGMENT

[1] BAPTISTE, J.A.: About 11:00 p.m. on 25th January 2007, Godwin Cato ("Cato") was shot three times outside Johnny's Bar, along the main road, at Fat Hog's Bay in Tortola and succumbed to his injuries the following day. On 16th March 2009, Deshawn Stoutt ("Stoutt") was convicted of Cato's murder and was sentenced to life imprisonment. Stoutt appeals his conviction and sentence.

Background

[2] The events leading to Cato's shooting were captured on recorded telephone as Cato had, just before the shooting, made an emergency 911/999 call seeking police assistance to protect him from a man who was then and there threatening

him with a gun. Cato identified the man as the same person he had reported the previous year for threatening him with a gun. Cato's report was interrupted by a series of explosions. It may be useful at this point to cite portions of the transcript of the call made by Cato to the 911 or 999 operator and to the police:[1]

> "Yes hello good evening, my name is Godwin Cato
> …
> [A]bout from last year I made a complaint to the police department in East End of a gentleman who threatened me with a gun, now tonight this gentleman has threatened me with a gun, I'm at a bar here in East End, the new bar Johnny's Bar, that open"

The operator then says: "…hold on for the police please, hold on" and puts Cato on to the police. The police operator from the Road Town Police Station then comes on. Cato says to the police operator:

> "Yes hello, my name is Godwin Cato. I want to ----- an emergency please, couple months ago last year I made a complaint to the Police station in East End concerning a gentleman who pulled me over with a gun, tonight I'm at a bar here at Johnny's this gentleman has pulled me over again with a gun, I'm here asking for assistance please."

The police operator says: "Hello, hello, hello" but there is no reply. However, background voices are heard including that of Cato. Cato is heard saying: "Daddy, you flat my tire, you nuh, I looking to get a ride, you nuh daddy." The other voice says: "[Y]ou get me fuck up, you nuh." Cato says: "[D]addy, you can't cut my hair, you nuh" Cato says: "I need to get a ride." The other voice says: "You think this is a game de man. You playing a game with me" Cato says: "No ain't no game." The other voice says: "I will show you what I feeling." Cato says: "This is no game daddy." There is then a short pause followed by a gunshot ("bang"), then two more gunshots, ("bang", "bang") in quick succession. Then Cato says: "Hello", then the call ends.

[3] Police Inspector Howe by sheer happenstance passed on the scene shortly after the shooting and met Cato lying wounded on the road. There were drops of blood

[1] See Transcript of 999/911 Telephone call received at 22:56 hrs on 25th January 2007, pp. 1-2.

and a machete on the scene. The forensic evidence indicated that the blood could not have come from Stoutt and most likely came from Cato. Inspector Howe inquired of Cato what happened and Cato told him:[2] "somebody in there," (gesturing with his head towards Stoutt's residence in the green building on the opposite side of the road) "shoot me same person who pulled the gun on me last year". After the shooting, Stoutt fled to St. Thomas in the United States Virgin Islands. Stoutt admitted that he entered St. Thomas illegally, although he is a United States citizen. Stoutt had initially stated that he had travelled to St. Thomas on the ferry. On 30th January 2007, Stoutt surrendered to the police in Tortola, nursing a wound to his right shoulder, claiming that it had been inflicted by Cato. The medical witnesses differed as to the age of the wound. The Crown's medical doctor opined that the wound was a day or two old and could not have been five days old, while Stoutt's medical doctor opined that the wound was four to six days old when Stoutt was arrested.

[4] Stoutt did not testify at his trial but gave a lengthy interview to the police denying that he shot Cato and explained that he had been chopped by Cato while running away. Stoutt stated that he went to the Peebles Hospital but was turned away. That bit of evidence was rebutted by the Crown whose witnesses showed that no one was turned away from Peebles Hospital. The defence case was primarily based on the testimony of Akiim Penn ("Penn"). Penn testified that he was present at the shooting, he heard someone scream out, saw Stoutt running towards and past him, apparently injured and then a third man (not Stoutt) appeared from a nearby building and shot Cato. Before being shot, Cato was not speaking to anyone. Penn also testified that Cato had struck Stoutt with a cutlass on his right shoulder. In cross-examination it was suggested that Penn was lying to assist Stoutt. Penn was unaware that the incident had been tape recorded, but, after hearing the tape, agreed that his version of events conflicted with the taped version. That was particularly so as the tape had the first gunshot following shortly after a verbal quarrel between Cato and another man. Penn had claimed that

[2] See Record of Appeal – Vol. 1, Tab 4, p. 40.

there was no such quarrel. Although Penn admitted hearing this quarrel just before the first shot on the tape, he claimed that his version ought to be preferred. Penn further claimed that Cato's hands were "down" and "at his side" when he was shot. That position was inconsistent with the autopsy findings.

Crown's case

[5] The Crown's case is that Cato positively identified the person who had threatened him with the gun, to the 911 operator and to the police operator. Stoutt is the person who was involved in the altercation with Cato on the night of the 25th January 2007, outside Johnny's Bar which culminated in Stoutt shooting Cato. All of this arose out of a traffic accident between Cato and a relative of Stoutt on 9th October 2006 in the East End area when Cato made a report to the police at the East End Police Station that he was just involved in a traffic accident in the area of the Long Look Clinic and because he told the other driver he was going to report the same the driver threatened him. On the following day, 10th October, while driving on the Greenland Public Road, Stoutt, who was driving a grey Suzuki jeep, approached Cato and pointed a gun at him and told him if it were not for people in the area, he would kill him. Cato reported the incident to the police. In his signed statement to the police, Cato had represented that the man who pulled the gun at him was not the driver of the car in the accident but was a relative of the driver who had been present. Cato described the man who pulled the gun as being 5ft 4in, with braided hair and bulging eyes. Cato had made no other reports to the police. Stoutt admitted to PC Trumpet that he had been the driver of the Suzuki at the time in question and had an altercation with Cato but denied having a gun but claimed to have put his hand beneath his shirt. The owner of the Suzuki gave unchallenged evidence that Stoutt had the Suzuki at the time in question.

[6] The Crown's case was therefore based on the conclusion that Stoutt was the man Cato referred to on the 911 tape as threatening him just before the fatal gunshots were heard. That conclusion derives its force and effect from the following circumstances.

Cato had described the man as the same man who had threatened him with a gun; a reference to an incident in Greenland to which Stoutt admitted his presence to PC Trumpet but denied having a firearm. With respect to the incident at Greenland, Cato had given the license plate number of his assailant's vehicle which coincided with the licence plate number of the vehicle that Stoutt admittedly drove that day. Cato had also identified the man as someone with whom he had an argument regarding an accident with Stoutt's cousin. Stoutt admitted to that accident and argument by stating that:[3]

> "Some person had something, right, with my cousin and them, with the accident. And I tell him, 'me son look' -- Me ain't saying nothing."

Cato correctly indicated Stoutt's house to Inspector Howe. The Crown's case was also based on the following: indication of guilt from Stoutt's flight to St. Thomas; the falsity of Stoutt's claim that he was chopped just prior to the shooting; Stoutt's lies as to being turned away from the hospital, and how he got to St. Thomas; and the falsity of Penn's claim that a third party shot Cato; the emergency tape describing Cato as being confronted by the man who had threatened him with a gun at Greenland.

Appellant's case

[7] Basically, Stoutt's case is that he did not shoot Cato. He does not own a gun and never pulled a gun at Cato on the 10th October 2006 or on the fatal night in question. Further, he was never involved in an accident with Cato, citing Cato's report that the man who pulled the gun at him was the same person he had an accident with. The defence contends that the Crown's case was one of mistaken identity and the Crown brought no evidence to show that Stoutt's voice was on the 911 tape. The defence further contends that in an atmosphere of threats against Cato by several persons, there was a live issue as to whether Cato was killed by someone other than Stoutt. Stoutt's main witness, Penn, gave direct testimony

[3] See transcript of Interview of Marcus Stoutt at Road Town Police Station on 30th January, 2007, p. 24, lines 6-9.

describing the person who shot Cato. Penn stated that the person was about 6ft tall and big built and fired five shots, one of which struck Cato in his abdomen, killing him. The defence case was also that spent shells found on the hillside of the road from which area Penn described the shooting by the killer and the number of shots fired, directly contradicted the Crown's case of a "bang, bang, bang" recorded shooting. Another aspect of the defence concerned the likelihood of blood getting on the machete if someone had shot Cato in the abdomen and on his arm as indicated by the doctor, while carrying the machete in his hand.

Grounds of Appeal

[8] Stoutt's grounds of appeal can be addressed under the categories of putting the defence, the burden of proof and the mandatory sentence of life imprisonment. Grounds 1, 2, 3, 4, 7 and 8 deal with putting the defence. The allegations are that the learned judge: (1) did not fairly put the defence; (2) omitted vital elements of the defence's case; (3) failed to assist the jury as to how to deal with Penn's evidence; (4) omitted certain matters from the summation; (7) failed to assist the jury as to the evidence of Penn and the evidence of the pathologist; and (8) failed to direct the jury that the prosecution did not put to Penn the grounds on which he was to be disbelieved. Grounds 5 and 6 deal with the burden of proof and Ground 10 deals with the mandatory life sentence.

General observations of the summing up

[9] Before delving into Stoutt's complaints, it may be useful to make some general observations about the summation. The learned trial judge gave the usual directions on the standard and burden of proof. This included directions as to the right to silence and a reminder of the defence case. Specific directions were given as to the statements made by Cato to Inspector Howe. These included a reminder of the burden of proof and the possibility that Cato could have been mendacious. The judge advised the jury that they were supreme on the facts and that although she could not review all the evidence, they ought not to consider as unimportant,

anything that she omitted. The learned judge advised the jury as to the drawing of inferences and as to circumstantial evidence. The learned judge instructed the jury how to treat inconsistencies and discrepancies and gave examples of possible discrepancies in the Crown's case. The learned judge repeatedly reminded the jury of the defence evidence and submissions and reminded them in detail about Stoutt's interview. There was also a lengthy reminder of Penn's evidence and the evidence of the defence's medical expert. The jury was given a full Turnbull warning, a Lucas direction and the standard directions pertaining to expert evidence.

Putting the defence

[10] The grounds of appeal relating to putting the defence call for a reminder of the duty of a judge. A judge has the fundamental duty of ensuring a fair trial. A judge is duty bound, in the interest of fairness of the trial process, to put squarely before the jury the nature of the defence arising at the trial. A judge has the undoubted obligation to put the defence case fully, clearly, fairly and cogently to the jury so that they would be positioned to properly consider and appreciate the issues raised on behalf of the defendant. While the judge has to summarise the arguments and evidence, he is not obliged to refer to every submission that may have been made by defence counsel. In Daniel Dick Trimmingham v The Queen,[4] the Privy Council recognized that there are few cases in which a judge's summing up could not be criticized in some respects and submissions advanced that the content or wording could have been improved upon. At the end of the day, an appellate tribunal has "to look at the thrust of the directions and consider if they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide."[5] Lord Carswell stated that the Board must determine whether, if there has been any

[4] [2009] UKPC 25.
[5] Per Lord Carswell in Daniel Dick Trimmingham v The Queen [2009] UKPC 25 at para. 12.

defect, there has been any miscarriage of justice which requires their intervention. This statement is also applicable to this Court.

[11] I will now consider the primary arguments with respect to Grounds 1 and 2. Ground 1 alleges that the judge erred in law in failing to put the defence case adequately to the jury. Dr. Archibald, QC, learned counsel for Stoutt, referred to the evidence of the Crown's forensic expert witness Peter Lamb, who, having tested Stoutt's blood and Cato's blood for DNA, concluded that the blood found on the machete was that of Cato only. Dr. Archibald, QC referred to the cross-examination of Lamb and to the answer he gave when he was asked about the likelihood of blood getting on the machete if someone had shot Stoutt in the belly and on his arm (as indicated by the doctor) while carrying the machete in his hand. Lamb's response was:[6]

> "The type of bloodstaining [sic] that is present on the side of the machete it is difficult to ascertain what the action was which actually created it.
> And so it is possible that that could be a reason for the bloodstaining [sic] being present."

Dr. Archibald, QC stated that that answer was part of the defence case and complained that the learned judge did not direct the jury towards that evidence. Further, during Lamb's cross-examination, the learned judge stated to the cross-examiner:[7]

> "When we were dealing with the chamber matter I thought you said that you were not going to be cross-examining this witness."

Dr. Archibald, QC submitted that this remark from the bench allied with the omission from the summation of Lamb's evidence quoted above, constituted a material irregularity which seriously prejudiced the defence and makes the conviction unsafe and unsatisfactory.

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[6] See Record of Appeal – Vol. 1, Tab 6, p. 57, lines 12-14 and 16-17.
[7] See Record of Appeal – Vol. 1, Tab 6, p. 54, lines 17-19.

[12] Mr. Williams, the learned Director of Public Prosecutions, pointed out that the Crown's case was that it was Cato who bled on the machete, not Stoutt and Stoutt was not the donor of any DNA found on the machete. Mr. Williams quite correctly stated that a summation need not traverse all the evidence and that failure to refer to a particular piece of evidence will not normally be sufficient to make a conviction unsafe. Mr. Williams referred to R v Farr[8] in which the appellant submitted that his conviction was unsafe for numerous reasons one of which was the summation was inadequate in that it failed to put the salient features of the defence and was unbalanced and unfair. It was held by the Court of Criminal Appeal that a judge was under no obligation when summing-up to rehearse all the evidence or all the arguments. It was not essential that a judge should make every point that could be made for the defence. Similarly, in Malcolm Maduro v The Queen,[9] it was held that it was unnecessary for a trial judge to traverse all the evidence in a case or point out every possible weakness or discrepancy in the prosecution case.

[13] I agree that a summation need not traverse all the evidence and that a failure to refer to a particular piece of evidence will not normally be sufficient to make a conviction unsafe. In directing the jury, the learned judge reminded them that they were supreme on the facts and that although she could not review all the evidence, they ought not to consider anything that she omitted as being unimportant. The learned judge gave the jury appropriate directions as to the treatment of expert evidence. The jury would have had the directions in mind when they, as judges of facts, evaluated the evidence. Further, taking into account the nature of the Crown's case, I do not discern any prejudice to Stoutt resulting from the judge not directing the jury to the answer given by Lamb in cross-examination. The remark by the learned judge as to what transpired in Chambers ought not to have been ventilated before the jury. I am, however, unable to discern consequential prejudice to Stoutt flowing from that ventilation. Different considerations may follow if it were a case where the learned judge

[8] (1999) 163 JP 193.
[9] (2008) 73 WIR 225.

forbade cross-examination of a witness based upon counsel's statement in Chambers that he was not going to cross-examine a particular witness. In the circumstances, the matters complained of do not render the conviction unsafe or unsatisfactory.

[14] Dr. Archibald, QC took exception to the learned judge's direction that:

> "…what was said in a statement to the police or to the Magistrate in the court below is in no way a part of the evidence at this trial. You must, therefore, put its contents out of your mind when you consider the evidence in this case."

The above direction arose in the following circumstances. Cato's brother, Police Constable Roydin Cato, had denied in cross-examination that Cato had told him several persons in East End had threatened him, but admitted that on one occasion Cato told him he had problems with some guys at East End. PC Cato also denied that Cato had told him that if the boys at East End continued to harass him he might have to defend himself. After refreshing his memory from his written statement to the police, during cross-examination, PC Cato agreed that the written statement contained the truth of the matter and that Cato had told him that:[10]

> "The guys was [sic] still harassing him. He told me one time that if the guys continue to harass him and attack him, he may have to defend himself..."

Dr. Archibald, QC stated that PC Cato's evidence was part of the defence's case and submitted that in the context of this case it was wrong in law to deny the jury's consideration of this vital piece of evidence as to whether in an atmosphere of threats by several men to kill Cato, whether there was a live issue as to whether Cato was killed by someone else other than Stoutt. Dr. Archibald, QC submitted that this was a material irregularity affecting the safety of the conviction.

[15] Mr. Williams contended that the directions on inconsistency followed well settled guidelines and appropriate directions were given as regards the treatment of

[10] See Record of Appeal – Vol. 1, Tab 5, p. 69, lines 9-11.

inconsistencies. With respect to the suggestion that persons other than Stoutt had been harassing Cato, Mr. Williams pointed out that PC Cato's report of other persons harassing Cato was hearsay and in any event, the only threats Cato (the deceased) reported were threats made by Stoutt.

[16] The law as to previous inconsistent statements is well settled. A previous statement made by a witness out of court was evidence only if the witness adopted it that is, accepted that it was true when he gave evidence. But if the witness did not accept that his previous statement was true, it was not evidence, and was relevant only to the credibility of his account in the witness box. The direction given by the learned judge was not, therefore, entirely accurate. This however, is not fatal, for, as Mr. Williams pointed out, PC Cato's report of other persons harassing Cato was hearsay, and the only threats Cato (deceased) reported were issued by Stoutt. In the circumstances I do not consider there to have been a material irregularity affecting the safety of the conviction.

[17] Dr. Archibald, QC also stated that the defence case was also that spent shells from a 9mm gun plus a slug were found on the hillside of the road from which area Penn described the shooting by the killer, and the number of shots fired, which directly contradicted Cato's case of a bang, bang-bang, recorded shooting. Dr. Archibald, QC complained that the learned judge did not adequately assist the jury with this aspect of the defence case. I reiterate here that the duty of the trial judge is to put the case, including the defence, fairly before the jury. The judge is not obliged to reiterate all the points made by the prosecution or defence.

[18] Dr. Archibald, QC complained that the learned judge painstakingly went through the evidence of the prosecution in the summing-up but failed to give any analysis or direction to the jury on certain vital aspects of the accused's 40 page interview in which he denied having a gun or shooting Stoutt and in which he had asserted that Cato had cut him with a machete causing him to run away. Dr. Archibald, QC submitted that the judge had a duty to invite or assist the jury to consider the significance of certain favourable facts or evidence which emerged from the

interview which might have been supported by independent evidence given by the prosecution witnesses including DC Larocque and defence witnesses Penn and Dr. Scatliffe. Further, the learned trial judge did not adequately, carefully or reasonably direct the jury as to how to deal with Penn's evidence having regard to the defence case that his explanation of the shots from the killer coincided with the Pathologist's evidence as to how Cato was hit by three bullets; one on either arm not being fatal and one in the stomach, being fatal.

[19] I will consider the complaint at paragraph 17 together with ground 2 of the appeal. Ground 2 states that the summation emphasized all the substantial points of the prosecution's case while omitting vital elements of the defence case. Mr. Williams argued that the learned judge pointed out the salient features of the defence's case and submissions.

[20] It would be prudent here to consider aspects of the summation. In the summation, the learned judge told the jury:[11]

> "The Prosecution invites you to find that no one else but this Accused, Deshawn Marcus Stoutt, was the one who murdered Godwin Cato… . The Defence say that they have brought an eyewitness, direct evidence. The witness Akiim Penn who was present, he saw what took place, and who shot and killed Godwin Cato. In short, the Defence say to you… that you have here, Deshawn Stoutt, who's the wrong person before you."

The learned judge also told the jury:[12]

> "The Defence asked you to accept the direct evidence of Akiim Penn who alleged that he was at the scene on the night of the shooting and saw with his own eyes what took place. ... The Defence say to you that the identification is very important in this case. …you also have to be sure that Godwin Cato, when he made the 911 or 999 call was not mistaken in his identification of the person who he alleged was threatening him with the gun on the fateful night in question. … The Defence case to you is that the wrong man is before the Court as their main witness, Akiim Penn, identified the person who fired five shots to be wearing, … a dark jacket with a hoodie and short pants. He was about six feet tall and big built and he was the one who struck the deceased the fatal shot, or who fired five

[11] See Record of Appeal – Vol. 3, Tab 13, p. 22, lines 3-15.
[12] See Record of Appeal – Vol. 3, Tab 13, p. 45, lines 6-25 and p. 46, lines 1-12.

> shots, one of which struck the deceased … and killed him. The Defence say to you that Penn is a formidable witness, was consistent and could not be shaken in the witness box, so you must believe him since he was present at the scene of the crime that night."

In the same vein the judge reminded the jury:[13]

> "The Defence says that their case is based on direct evidence, the direct evidence coming from their main witness, Akiim Penn."

Later in the summation, the learned judge said:[14]

> "The Defence case, Madam Foreman and Members of the Jury, is based on the evidence of Akiim Penn who claimed to be an eyewitness. He says to you, if you believe him, that he was present. … In short, he told you that it was not Deshawn Stoutt, this Accused, who fired these shots at the deceased, but a man about six feet tall, well-built, or big built, according to him, wearing a short pants and wearing a dark jacket with a hoodie, is the one he saw shot the deceased."

[21] With respect to Stoutt's interview, the learned judge told the jury that they will have to look at it and test the truthfulness of what is contained in it. The learned judge further stated:[15]

> "In this interview the Accused has denied ever shooting the deceased on the night in question. He said he never had a gun, he doesn't have a gun and he knows nothing about the shooting, but he does place himself at the scene, or he places himself in that area on the night of the incident because he said that somebody said words to the effect "watch out", and he was running and he got a cut on his left shoulder. In this interview he told us that the cut came from Cato, that Cato is the one who chopped him…"

[22] The trial judge repeatedly reminded the jury of the defence evidence and submissions. The jury was reminded in detail about Stoutt's interview. They were also reminded of the evidence of Stoutt's medical expert. The learned judge reminded the jury that Dr. Archibald, QC revealed an inconsistency in the evidence of PC Cato concerning whether Cato had told him that guys were harassing him. The learned judge told the jury that the Crown's case was circumstantial while the

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[13] See Record of Appeal – Vol. 3, Tab 13, p. 73, lines 20-22.
[14] See Record of Appeal – Vol. 3, Tab 13, p. 86, lines 17-25 and p. 87, lines 1-6.
[15] See Record of Appeal – Vol. 3, Tab 13, p. 77, lines 14-23.

defence brought the direct evidence of Penn. The learned judge reminded the jury in detail about the evidence of Penn. The judge also reminded the jury that there was a discrepancy regarding Cato's description of his assailant as to height. The judge reminded the jury that Cato never identified Stoutt by name. The judge gave appropriate directions on identification and instructed the jury to take into account all the evidence whether summarized by her or not. The judge reminded the jury of the assertion that Stoutt was not in a traffic accident with Cato. The judge reminded the jury of the defence contention that Cato had wounded Stoutt. The learned judge also balanced the prosecution's reliance on evidence of flight with the defence submission that, not being under arrest, Stoutt was free to travel wherever he wished and Stoutt was consistent in denying shooting Cato. Throughout the summation, the learned judge contrasted the Crown's case with reminders of the defence's case (particularly, Stoutt's transcript, Penn's evidence and Dr. Scatliffe's evidence). In all of the circumstances and looking at the summation as a whole, the complaints made against the learned trial judge in Grounds 1 and 2 of the appeal are not substantiated. All the important issues in the defence's arguments and evidence were addressed by the judge in the summation to the jury.

[23] In his supplemental skeleton arguments under Ground 2, Dr. Archibald, QC submitted that the learned judge's direction on expert evidence wrongly undermined a fundamental plank in the defence thus making the trial unfair. In that regard Dr. Archibald, QC referred to Arthurton (Errol) v R,[16] and also to section 16(1) of the Virgin Islands Constitution Order 2007 which mandates a fair hearing for any person charged with a criminal offence. Dr. Archibald, QC stated that the defence relied on the unchallenged evidence of two prosecution forensic expert witnesses, Dr. Landron, (the pathologist) and Peter Lamb and contends that the directions on expert evidence should have been tailor made for this particular case. Dr. Archibald, QC further submitted that the directions were all the more unfair because there was no or no adequate direction to the jury as to

[16] (2004) 64 WIR 129.

the duty of an expert witness in a criminal trial, especially his duty to the court, in terms of or akin to Archbold 2009 para 33.2(1) and 33.2(2) at page 1407. Archbold provides that an expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his expertise. Mr. Williams submits that the judge's directions were consistent with well settled principles and appropriate for the issues that were contentious in the case. Mr. Williams pointed out that the prosecution never disputed that the blood on the machete came from Cato and adduced evidence to prove this and also to prove that the blood could not have come from Stoutt, thus refuting Stoutt's version. Mr. Williams further submits that the well settled directions on expert evidence contributed to the fairness of the trial. Mr. Williams submits that the reference to Archbold 2009 paragraph 33.2, regarding the duty of an expert was intended to guide experts in their work and the failure to so advise the jury is not a material omission. I agree with Mr. Williams' submissions.

[24] In directing the jury on expert evidence the learned judge stated:[17]

> "Later on I'll tell you about the expert evidence and how you will treat expert evidence, but an expert is like any other witness. They come in here, they give their evidence, they give opinions, and at the end of the day it's you to determine who you believe, what to believe, whether you believe the evidence given by the expert or his or her opinion. It's totally a matter for you. But it's also said that when you have uncontroverted evidence of an expert or evidence that has not been contradicted, it will be foolhardy not to accept that evidence."

In giving further directions on expert evidence the learned judge stated:[18]

> "A witness called as an expert is entitled to give an opinion in respect of his or her findings on the matters that are put to them and you're entitled and will no doubt wish to have regard to this evidence and to the opinion or opinions expressed by the expert or experts when coming to your own conclusion about this aspect of the case. You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert, you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of an expert, even what

[17] See Record of Appeal – Vol. 3, Tab 13, p. 60, lines 4-14.
[18] See Record of Appeal – Vol. 3, Tab 13, p. 63, lines 9-25 and p. 64, lines 1-2.

> Mr. Lamb told you or Dr. Landron, because these are unchallenged evidence. You don't have to accept them. You are the sole judges of the facts. You will determine whose evidence to accept, whose opinion to accept, if any. As I said to you, you're the sole judges of the facts, and you are at liberty, if you so find, to reject all of the evidence given by these experts."

[25] The directions on expert evidence cannot be faulted. I agree with Mr. Williams that they followed well settled principles and were appropriate for the contentious issues in the case. The jury are entitled to come to a conclusion on the entirety of the evidence they have heard and that includes the expert evidence. The jury would see the expert evidence in its proper perspective, which is that it is put before them as part of the evidence as a whole to assist them. There is no merit in the submission that the learned judge's directions on expert evidence undermined a fundamental plank in the defence. I find no unfairness to Stoutt consequent upon the directions given by the learned judge with respect to the treatment of the expert evidence. Further, it cannot be said that the expert evidence or opinion of the Crown's two forensic expert witnesses lacked objectivity or was biased. I note Dr. Archibald, QC's reliance on their unchallenged evidence.

[26] Ground 3 alleges that the judge was wrong in failing to assist the jury as to how to deal with the direct evidence of Penn in a case in which the jury was encouraged by the prosecution to consider as a case of circumstantial evidence. In support of that ground, Dr. Archibald, QC contends that the judge did not invite the jury to consider whether any part of Penn's evidence was supported by other evidence in the case e.g. relating to the machete in the hands of Cato shortly before he fell to the ground; whether there was evidence from spent shells and recovered bullets and lead fragments to support Penn's evidence that there were more than three shots fired at the murder scene of which three hit the deceased; whether the shots were fired within Johnny's Bar as indicated by the prosecution's case from the murder tape or in the road, as testified by Penn. Mr. Williams' contends in response, that Ground 3 is not justified as the jury were reminded of the fact that Penn's evidence was direct and as to the defence's arguments as to its value.

[27] I note here that a trial judge is not bound in summing-up to comment on all of the evidence or to refer to all the contentions on which an accused relies. While the learned judge may not have gone into all the matters raised by Dr. Archibald, QC in support of Ground 3, it is necessary to consider any omission in the context of the trial as a whole and the strength of the case against Stoutt. In my judgment, the prosecution's case against Stoutt was very compelling. I do not agree that the learned judge failed to assist the jury as to how to deal with the direct evidence of Penn. The judge gave the jury clear guidance as to how to approach Penn's direct evidence and reminded the jury as to the defence's arguments as to its value. The jury could have been left in no doubt as to the defence as the learned judge fairly and squarely put the salient parts of the defence to them. In the circumstances I do not consider Stoutt to have suffered any unfairness. During the summation, the learned judge contrasted the prosecution's case with reminders of the defence's case (particularly, Stoutt's transcript, Penn's evidence and Dr. Scatliffe's evidence). The learned judge reminded the jury that the forensic pathologist, Dr. Landron, explained the trajectory of the wounds, the two wounds on the hand in particular and asked the jury to bear that in mind when considering the evidence of Penn. The judge reminded the jury that Penn said when he saw Cato he (Cato) had his hands to his side – the standard anatomical position. In my view, the learned judge made it abundantly clear to the jury that Penn's evidence was direct evidence and reminded the jury as to the defence's arguments as to its value.

[28] Ground 4 alleges that the learned judge was wrong in law in virtually omitting from the summing-up –

(a) evidence of the rebuttal witness PC Larocque under cross-examination in relation to the defence witness Penn;

(b) the evidence of the defence medical witness Dr. Scatliffe under re-examination;

(c) the exhibited documentary evidence of Dr. Kuku concerning Stoutt's injury;

(d) the admission in effect in the exhibited documentary evidence of Cato that he was mistaken when he first identified Stoutt as the person who was the driver whose vehicle was in an accident with his vehicle on 9th October 2006, thereby casting doubt as to Cato's identity of the person who had threatened him with a gun in October 2006;

(e) the significance of Cato's daylight description of Stoutt as a person 5' 6" tall, while Stott was admittedly not less than 5' 11" tall;

(f) the evidence of the prosecution that on the two versions of the exhibited tape, several voices were heard, none of which was identified in evidence as Stoutt's voice;

(g) any warning or direction to the jury that the final prosecution address alleging that Stoutt was in dialogue with Cato on the exhibited "shooting tape" and that Stoutt had damaged Cato's vehicle at the scene about the same time, was not supported by any evidence, was not part of the prosecution's case which the defence was called to meet and was excessively prejudicial, dangerous and unfair.

[29] I will consider sequentially, the issues raised in Ground 4. Firstly, I will deal with 4 (a). Dr. Archibald, QC contends that the rebuttal evidence of prosecution witness DC Vernon Larocque was of such importance to the defence in respect of the credibility of Penn that it was incumbent upon the judge to give the jury some assistance as to how to deal with it especially as Larocque testified that he made no record of what he or PC Harford said to Penn. At the close of the case of the prosecution and defence, the prosecution recalled Larocque as a rebuttal witness, to rebut matters arising on the defence's evidence relating to what Penn told the jury as to why he did not give a statement to the police. Mr. Williams pointed out that the ex improviso issue arose as Penn indicated in his evidence that he did not give his version to the police as he was threatened by Harford. Larocque's

rebuttal evidence denied this. The question therefore was, whether on this issue, Larocque or Penn could be believed. This was adequately put to the jury by the learned judge. The learned judge told the jury that they will have to decide who to believe and what to believe. It was a matter totally for them. As Mr. Williams correctly pointed out, the judge had a discretion whether to relate any part of the cross-examination of the rebuttal witness. Given that this was covered by directions on the credibility of Penn (whose evidence was being rebutted) and on the burden of proof, the discretion was properly exercised.

[30] With respect to 4(b), Dr. Archibald, QC contends that Dr. Scatliffe's evidence relating to the wound he saw on Stoutt's right rear shoulder on the day of his arrest, was a vital part of Stoutt's case but the judge did not direct the jury to give it due consideration. In response, Mr. Williams noted the extensive summation on expert evidence generally, the treatment of conflicting expert evidence and Dr. Scatliffe's in particular.

[31] In her summation, the judge reminded the jury about the defence's argument relating to the wound Penn had on his shoulder. In that regard the learned judge rehearsed the defence's argument that the wound was inflicted by the deceased on the night of the fatal shooting. The judge referred to the evidence of Dr. Scatliffe as to the age of the wound. In Dr. Scatliffe's opinion the wound was five days old. The learned judge reminded the jury that Dr. Scatliffe's evidence as to the age of the wound conflicted with the opinion of the prosecution's expert that the wound was one or two days old or perhaps three. The learned judge directed the jury as to the treatment of expert evidence and also conflicting expert evidence. The judge directed the jury that it is a matter entirely for them to decide whose evidence and whose opinion to accept. Taking into account the foregoing, I am of the view that there is no merit in the complaint that the learned judge did not direct the jury to give due consideration to the wound.

[32] Ground 4(c) relates to the exhibited documentary evidence of Dr. Kuku. Dr. Archibald, QC states that the exhibited documentary evidence of Dr. Kuku

concerning Stoutt's shoulder injury contained vital evidence for the defence. Dr. Kuku wrote and signed on "Exhibit VL-1" that the wound was consistent with the circumstances written earlier on the medical form by Inspector James, the circumstances being: "Attacked with cutlass/machete." Dr. Archibald, QC complains that the learned judge did not give the jury directions on how to treat that evidence. Mr. Williams argues that the exhibit in question was part of the basis of all the medical evidence and was taken to the jury room. In my view, the learned judge dealt comprehensively with the medical evidence and the contention of the parties pertaining to the wound on the shoulder of Stoutt and gave jury appropriate directions on this matter. The jury was well aware of the evidence, the contentions of the parties relating thereto and were armed with the relevant directions from the learned judge. In the circumstances no unfairness was occasioned to Stoutt.

[33] Ground (4)(d) complains that the judge virtually omitted from the summation, the admission in effect of Cato's documentary evidence that he was mistaken when he first identified Stoutt as the driver of the vehicle which was involved in the accident with him on 9th October 2006, thereby casting doubt as to Cato's identity of the person who had threatened him with a gun in October 2006. It is necessary to give the background to this matter. On 9th October 2009, Cato came to the East End Police Station at 5:35 p.m. and reported that he was just involved in a traffic accident in the area of the Long Look Clinic, and because he told the other driver he was going to report the same, the driver threatened him. On 10th October 2006 at 10:05 a.m., Cato reported to the East End Police Station that while driving on the Greenland Public road, the same gentleman approached him driving a grey Suzuki jeep, pointed a gun at him and told him if it were not for people in the area he would kill him. As a result of that report PC Trumpet contacted Sharon Liburd and that was when Stoutt came to the police station. Liburd was the owner of the Suzuki jeep and had testified that the only person who drove the Suzuki jeep in October 2006, apart from her, was Stoutt. PC Trumpet asked Stoutt whether he was driving the Suzuki jeep at the time, Stoutt said yes. PC Trumpet informed

Stoutt that Cato said he threatened to kill him with a gun. Stoutt denied threatening Cato and said that Cato pulled a baseball bat at him to beat him with it. He (Stoutt) put his hand under his shirt but never pulled out a gun. Stoutt stated that he was never involved in an accident with Cato. Stoutt also stated that on 10th October 2006, sometime in the morning, he was on the block at Fat Hogs Bay when Cato came there and had a conversation with one of the persons present, but not with him.

[34] After referring to the evidence cited above, the learned judge told the jury:[19]

> "The Defence invite you to find … that it cannot be this accused, Deshawn Stoutt, because at no time was he involved in a traffic accident with the deceased, Godwin Cato. The Prosecution invite you to find that despite this apparent discrepancy, it was this Accused, Deshawn Stoutt, as no other male person was driving the… Suzuki, … in the month … of October, 2006."

[35] The learned judge also invited the jury to look at a written report/statement recorded by PC Richards from Cato on the 10th October 2006. The statement commenced at 10:50 a.m. and ended at 11:50 a.m. The statement reads in part:[20]

> "On Monday, 9th October, 2006 I was driving … along the East End Public Road when I got involved in a … minor traffic accident with a green Toyota motor car. … The driver of the green motor car and his passenger flee the scene of the traffic accident. Actually, the driver left the scene and the passenger stayed and was cursing me. The driver later returned without his motorcar. I walked to the East End Police Station and informed them of the traffic accident. … Whilst the police was at the scene, two other young men who were not involved in the traffic accident started to tell me that I am a punk. They will kill me and I can't drive by East End again. … One of the young man is slim, about five feet six inches in height, about one hundred and fifty pounds, in his mid twenties with braided hair. … On today's date, the 10th of October, 2006, about 9:30 a.m., while I was driving … I saw a … Suzuki Grand Vitara, PV17447. … While in the vicinity of the road going to Greenland … the driver of PV17447 pull up alongside me. I stopped and he stopped also. He exited his jeep with a big hand gun. … The young man pointed the gun at me and told me that if the houses were not around he would have killed me. Whilst he was pointing his gun at me, I exited my jeep with a baseball

[19] See Record of Appeal – Vol. 3, Tab 13, p. 35, lines 22-25 and p. 36, lines 1-5.
[20] See Record of Appeal – Vol. 3, Tab 13, p. 38, line 11-25, p. 39 and p. 40, lines 1-19.

> bat … The driver of the motor jeep PV17447 was not the person who was involved in the traffic accident, but he is relative to the young man who and I were involved in the accident. … The driver of … PV17447, is the young man I described earlier who is in his mid twenties about five feet six inches with braided hair, bulged eyes and is very slim."

After referring to the statement above, the learned judge told the jury:[21]

> "The Defence is saying to you … that the deceased, Cato, described the person who is alleged to have pointed a gun at him to be six feet, sorry, five feet six inches …. But the Prosecution say to you that the deceased described the person as being about five feet six inches, that not only did he give the height of the person, but he also gave other helpful information or descriptions to the police. He said to Officer Elvis Richards that the driver of PV17447 is in his mid twenties with braided hair, bulged eyes and is very slim."

[36] The learned judge also told the jury:[22]

> "The Defence invite you to find that this Accused does not own a gun and never pulled a gun at the deceased on the 10th of October, 2006, or on the fatal night in question, the 25th of January, 2007, or at all. The Defence say that Mr. Cato said the man who pulled the gun at him is the same man that he had the accident with and this Accused was never involved in any accident with Mr. Cato. A matter for you, Members of the Jury. The Defence says that the Prosecution case is one based on mistaken identity, that they brought the wrong man before this court, and as I said to you, the Defence say that the police should go back, reinvestigate this case and bring the real assistant [sic] before this court."

[37] The learned judge again reminded the jury of the defence case, by stating:[23]

> "The Defence case to you is that the wrong man is before the Court as their main witness, Akiim Penn, identified the person who fired five shots to be wearing, a man wearing a dark jacket with a hoodie and short pants."

In her charge to the jury the learned judge stated:[24]

> "…if after reviewing the evidence you find that it was this Accused who had threatened Godwin Cato with a gun on the morning of the 10th of

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[21] See Record of Appeal – Vol. 3, Tab 13, p. 40, lines 21-25 and p. 41, lines 1-8.
[22] See Record of Appeal – Vol. 3, Tab 13, p. 44, lines 16-25 and p. 45, lines 1-5.
[23] See Record of Appeal – Vol. 3, Tab 13, p. 45, line 25 and p. 46, lines 1-4.
[24] See Record of Appeal – Vol. 3, Tab 13, p. 47, lines 5-18.

> October, 2006, then you still have to go on to consider whether Godwin Cato was not mistaken on the night of the fatal shooting as to the identity of the person when he said "couple months ago last year I made a complaint concerning a gentleman who pulled me over with a gun. Tonight I am here at Johnny's Bar. This gentleman has pulled me over again with a gun. I'm asking for assistance, please." So I must warn you of the special need for caution before convicting the Accused in reliance on the evidence of identification."

The learned judge further instructed the jury to consider all the evidence for the prosecution against what the defence is saying, namely, that the prosecution has the wrong person in front of them. It was a matter for them. Towards the ending of the summation the learned judge exhorted the jury to be cautious in their approach to the evidence of visual identification and informed the jury that a convincing witness may nevertheless be mistaken and mistakes can also be made in the recognition of someone known to the witness, even a close relative or friend.

[38] An examination of the summation clearly shows that the complaint made in Ground 4(d) is unjustified as the judge comprehensively addressed the issues raised therein and gave appropriate directions to the jury.

[39] Ground 4(e) relates to the significance of Cato's description of Stoutt as being 5' 6" tall, while Stoutt was not less than 5' 11". Mr. Williams posits, and I agree, that on the facts, the error in height was quite trivial and points out that Cato's initial description of Stoutt as being 5' 6" was repeated in the summation in the context of the possibility of mistaken identity. The learned judge reminded the jury that there was a discrepancy regarding Cato's description of Stoutt as to height. I agree with Mr. Williams' contention that the possible discrepancies as to whether Stoutt was the driver of the car during the accident and as to the height Cato attributed to Stoutt, though live issues at trial, their importance would have been minimal for the following reasons:

(1) Cato's signed statement could be preferred over a summary report not signed by him.

(2) Cato's identification of his assailant was not to the accident but to the Greenland incident where the firearm was pulled, and though not conceding that he had a firearm in his possession, Stoutt admitted to officer Trumpet that he was the man. Further, there was independent confirmatory evidence of Stoutt's possession of the Suzuki.

(3) The jury could have found that the description of the hair style and eyes were correct.

(4) The unchallenged evidence linking Stoutt to the green house that was indicated by Cato.

[40] The complaint in Ground 4(f) relates to the fact that Stoutt's voice was never identified on the "shooting tape". Part of Ground 4(g) alleges that the judge virtually omitted in the summation to warn or direct the jury that the final prosecution address alleging that Stoutt was in dialogue with Cato was not supported by the evidence, was not part of the prosecution case and was consequently prejudicial and unfair. Mr. Williams submits that it was possible for the prosecution to ask the jury to conclude that the voice engaged in conflict with Cato was that of Stoutt. I agree with Mr. Williams that the shooting tape placed Cato in a violent confrontation with a man, who, in the circumstances, it was clearly open to the jury to find was Stoutt. In the circumstances the suggestion of prejudice or unfairness to Stoutt is not well founded. Dr. Archibald, QC argues that the shooting tape failed to place Stoutt in a position where he could have shot Cato in the public road a considerable distance away from the building housing Johnny's Bar, although the tape was interpreted by the prosecution as saying that Cato complaining from Johnny's Bar when the three bangs were heard, was proof of him being shot. I note here that the learned judge reminded the jury of Dr. Landron's statement that there could have been physical activity following the gunshot wound. Cato would not have necessarily immediately collapsed. He could have walked; he could have run for a distance before enough blood was lost

that would have made him finally lose consciousness and collapse. Death would not be instantaneous.

[41] Dr. Archibald, QC also complains in Ground 4(g), that the learned Director of Public Prosecutions' assertion to the jury in his final address that Stoutt flattened Cato's car tire just before the shooting, was not supported by the evidence, thus prejudicing Stoutt's case. The prosecution led evidence that Cato's tire was flattened. On the 911 call, Cato said: "Daddy you flat my tire you nuh…" From the evidence led, the jury was entitled to find as a fact that Cato's tire was flattened. The question is whether the jury, from the facts that they found, could draw the further inference of fact that Stoutt flattened the tire or whether to do so would be an improper speculative exercise. When one considers the 911 call in the context of the totality of the evidence, it was indubitably open to the jury to find that Stoutt was referring to Cato when he said: "Daddy you flat my tire you nuh…" In the circumstances, the complaint of prejudice or unfairness to Stoutt is not made out.

[42] Ground 7 alleges that the learned judge failed to direct the jury as to the defence case for the firing of more than three shots and as to the relationship between the evidence of Penn as to the actual shootings and the evidence of the pathologist, Dr. Landron as to the bullet wounds and as to the number of shots fired as evidenced by the total identified bullets, bullet wounds, spent cartridges and slug. Dr. Archibald, QC contends that the jury required the judge's assistance in this respect. Mr. Williams states that contrary to the submission in Ground 7, the learned judge reminded the jury of Penn's account of the shooting and related it to Dr. Landron's evidence.

[43] In respect of Ground 7, a perusal of the summation shows that the learned judge repeatedly reminded the jury of the defence's evidence and submissions. The judge extensively reminded the jury of Penn's account of the shooting. The judge referred to Penn's cross-examination and as to whether Penn's evidence coincided or conflicted with Dr. Landron's evidence. The learned judge invited the

jury to compare Penn's evidence with Dr. Landron's evidence as to the anatomical, the standard anatomical position and the trajectory of the bullet.

[44] Ground 8 complains that the judge was wrong in law in failing to direct the jury that it was insufficient for the prosecution to allege in its final address that Penn was a convicted criminal and a liar, without putting to him in cross-examination the grounds on which he was to be disbelieved as to his description of the killer, the several shootings by the killer, Cato's possession of a cutlass on the scene, and how Cato fell mortally wounded in the street. Penn left the witness box unchallenged as to his description of the killer and his shootings and the actual killing of Cato. Dr. Archibald, QC relies on Village Cay Marina Ltd. v Acland and Others[25] where it was said that it was a general rule of procedural fairness that, if a court is to be invited to disbelieve a witness, the grounds upon which his evidence is to be disbelieved should be put to him in cross-examination so that he may have an opportunity to offer an explanation. Mr. Williams submitted that Ground 8 is untenable as the prosecution suggested to Penn that his evidence was to be disbelieved.

[45] As Mr. Williams stated, it was clearly suggested to Penn in cross-examination that he was lying to assist Stoutt. Penn was unaware that there was a tape recording of the incident and, after hearing the tape, agreed that his version of events conflicted with the taped version particularly as the tape had the first gunshot following shortly after a verbal quarrel between Cato and another man and Penn claimed that there was no such quarrel. Although Penn admitted hearing this quarrel just before the first shot on the tape, he claimed that his version was to be believed. Further, Penn claimed that when Cato was shot, his (Cato's) hands were "down" and "at his side", a position inconsistent with the anatomical position. In the circumstances I do not find much merit in this ground.

[25] (1996) 52 WIR 238 at 270.

Burden of Proof

[46] Dr. Archibald, QC contends in Ground 5 that the judge was wrong in law in failing to direct the jury adequately on the issue of reasonable doubt between the circumstantial evidence of the prosecution and the direct evidence of shooting as posited by the defence. Dr. Archibald, QC argues that because of the conflict of evidence between the circumstantial and direct evidence, the judge should have directed the jury that if they were left in reasonable doubt on all the evidence as to whether Cato was killed as stated by the prosecution or whether he died as described by Penn, then the jury had a duty to return a verdict of not guilty. Dr. Archibald, QC contends that the omission of such a direction in the circumstances of the case was tantamount to a material irregularity, affecting the safety of the conviction. Ground 6 alleges that the judge was wrong in law in failing to direct the jury that if they considered on all the evidence at trial that Penn's evidence might be true, then Stoutt was entitled as of right to be acquitted.

[47] Penn's evidence was of fundamental importance to the defence, providing direct evidence, by way of an eyewitness account, of Cato's shooting by someone other than Stoutt. The learned judge reviewed the salient aspects of Penn's evidence and instructed the jury that they must decide how to assess Penn's evidence. The learned judge reminded the jury that the prosecution viewed Penn's evidence as mere fabrication, and, at the end of the day, they (the jury), are the ones to decide whose evidence to accept and whose evidence to reject. The learned judge instructed the jury that they would have regard to Penn's evidence to decide whether or not he is credible. The learned judge further instructed the jury that at the end of the day, if they rejected the defence, then they would have to fall back on the prosecution's case and if they are not sure of the prosecution's case, then they must acquit Stoutt. It appears to me that Stoutt's entitlement to an acquittal would also arise if the jury believed Penn's evidence that Stoutt was not the

person who shot Cato or if they had doubts about Penn's evidence as to who shot Cato. Importantly, the learned judge told the jury:[26]

> "If you are in doubt, and reasonable doubt it should be, as to who fired the fatal shot that killed Godwin Cato, you must also free this Accused. You will only convict if you feel sure that this accused man fired the fatal shot which killed Godwin Cato… ."

The learned judge adequately, fairly and properly covered the issues raised in Grounds 5 and 6 of the appeal. There was no omission in the directions given by the learned judge constituting a material irregularity. Grounds 5 and 6 must, accordingly, fail.

[48] Assessing the summation in the round and in the context of the real issues arising at the trial, there is no doubt that the learned judge explained to the jury the critical factual and legal issues which fell for their determination. The thrust of the directions given by the learned judge in relation to putting the defence adequately placed the several issues before the jury and gave them a proper explanation of their task in a clear manner, in relation to the issues they had to decide. The judge focused the jury's attention on the factual issues which fell for their resolution and did not sway from her task of placing before the jury the defences advanced by Stoutt. In the circumstances, there are no grounds for impugning the safety of the conviction.

Sentence

[49] Ground 10 avers that the sentence of life imprisonment is wrong in law because it is not automatic on the verdict of guilty of murder, but there should be a lawful and just sentence of a term of years fixed by a judge of the High Court after a proper sentencing hearing. Ms. Hanley submits that a life sentence for murder is mandatory in the Territory of the Virgin Islands but since the instant trial, the Parole Act, 2009[27] ("the Parole Act") has provided for a system of parole and by

[26] See Record of Appeal – Vol. 3, Tab 13, p. 30, lines 3-7.
[27] Act No. 7 of 2009, Laws of the Virgin Islands.

section 30(2) the Court of Appeal is empowered to make a determination as to the minimum period.

[50] Upon Stoutt's conviction, the learned judge imposed a life sentence, noting that she had no discretion in the matter as the life sentence was automatic and there was nothing she could do to reduce it. The learned judge paid regard to section 150 of the Criminal Code, 1997[28] which states that:

> "Any person who is convicted of murder is liable to imprisonment for life"

and also to section 23(1) which provides that:

> "A person liable to imprisonment for life or any other period may be sentenced to a shorter term, except in the case of a sentence passed in pursuance of section 150."

[51] This Court recently addressed the question of the lawfulness of the automatic life sentence in Jerry Martin v The Queen.[29] Jerry Martin was convicted of murder and appealed the sentence of life imprisonment on the ground that "the sentence of life imprisonment is not automatic on the verdict of guilty of murder." This Court upheld the decision of the trial judge who imposed an automatic sentence of mandatory life imprisonment on the appellant. I adopt and apply the reasoning in Jerry Martin to the case at bar and accordingly dismiss the appeal against sentence. In Jerry Martin, the Court, speaking through Edwards JA, held[30] that:

> "The penalty in section 23(1) [of the Criminal Code 1997] is clearly a fixed penalty prescribed by legislative judgment for the offence of murder having regard to its gravity, despite the different circumstances in which the offence may be committed. Indeed, these provisions mirrored the Imperial Order of the U.K extended to the Territory, which substituted mandatory life for mandatory death when it enacted the Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991.... That fixed penalty under the principle in Deaton [Deaton v The Attorney General and the Revenue Commissioners [1963] I.R. 170] is not incompatible with the doctrine of the separation of powers under the 1976 Constitution Order, nor for that matter the 2007 Constitution Order. That legislative judgment must be respected in my view, subject of course to

[28] Act No. 1 of 1997, Laws of the Virgin Islands.
[29] Saint Lucia HCRAP 2007/003 (delivered 6th June 2011).
[30] At para. 45.

any statute-based regime for a tariff to be fixed which is compatible with the Constitution, and/or for review or clemency."

The Court however recognized that this was not the end of the matter having regard to the statute based regime currently existing and in particular section 30(2) of the Parole Act which gives the court the discretion of revising the sentence to bring it in conformity with the Act.

[52] Section 30 of the Parole Act states:

> (1) "A person who prior to the commencement of this Act is serving a life sentence in Her Majesty's Prison may, on the commencement of this Act, apply to the High Court for a review of the sentence imposed, and the Court shall indicate in its revised judgment when the person would be eligible for consideration for parole.
>
> (2) Where on the commencement of this Act, a criminal appeal is pending before the Court of Appeal, the Court may in delivering its judgment, revise the sentence of the High Court to bring it into conformity with this Act."

Section 9 of the Parole Act states:

> "…
>
> (2) A judge upon sentencing a person to imprisonment for life, shall state whether such person may be eligible to be considered for parole and, if a person is found to be so eligible, state a minimum period of imprisonment that such person shall serve before being considered for parole for the first time.
>
> …
>
> (5) For the purposes of determining the length of that part of the sentence which a prisoner has served, any period pending the determination of an appeal against conviction or sentence shall be taken into account as if he or she has served that period as part of the sentence, unless the court hearing the appeal otherwise directs."

[53] The Parole Act came into force in the Territory of The Virgin Islands on 20th May 2009. Stoutt was convicted and sentenced on 16th March 2009 and filed an appeal against conviction and sentence on 31st March 2009, thus his appeal was

pending when the Parole Act came into force. Dr. Archibald, QC did not address the Court on the issue of sentence, noting that a similar ground of appeal was awaiting the decision of the Court in Jerry Martin. In the circumstances of this case, the Court is not properly positioned to exercise its discretion under section 30(2) of the Parole Act. Stoutt may apply to the High Court for a review of the sentence that was imposed in accordance with section 30(1) of the Parole Act.

Conclusion

[54] In conclusion, the appeal against conviction and sentence is dismissed and the conviction and sentence are affirmed. Stoutt is however free to apply to the High Court for a review of the sentence pursuant to section 30(1) of the Parole Act.

Davidson K. Baptiste
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

[55] EDWARDS, J.A.: I have had the opportunity to read and consider the draft judgment of my learned brother Baptiste J.A. Save for his reasoning and conclusions at paragraphs 12, 15, and 16 in his judgment, I agree with his resolution of the other issues raised in the Grounds of Appeal and the result of the appeal. The reasons for my disagreement are explained below.

[56] My understanding of the testimony of the defence witness Akiim Penn concerning the shooting of the deceased Cato is somewhat different from how it was summarized in the submissions of the Director of Public Prosecutions ("DPP"), Mr. Williams. It was somewhat inaccurate for the learned DPP to submit that Penn stated in his evidence that the deceased's hands were down and to his side when

the shots were fired, having regard to Penn's evidence at Volume 2, Tab 6, pages 86 to 90 of the Record of Appeal. It is helpful to recap this evidence.

[57] The witness Penn testified that as he left the bar that night and was on his way home, he passed the deceased Cato whom he referred to as "the rastaman" on the west side of Johnny's Bar. He also passed the appellant, Stoutt, sitting in the alley. On reaching Mr. Carlton's place he heard somebody bawl out behind him and on turning around he saw Stoutt running coming holding a part of his hand and grunting. He also saw the rastaman walking back up alongside the bar towards the town side with a machete in his left hand. Then he saw a light and heard a bang come out of the abandoned portion of the building where the bar is and the appellant, Stoutt, was then in the middle of the road coming towards him with nothing in his hands; and he saw the rastaman Cato running. He testified that a man then came out of the abandoned building in a jacket and hoodie with his hands up with his back towards him (Penn) and he (Penn) heard two shots more. By then Cato, who had passed the parking lot, had turned around and the gunman fired two to three times more. Penn testified that Cato's hands were down and at his side when the gunman who was by Cato's side fired at Cato who then ran. The gunman was behind Cato when he fired the second shot. Cato then turned around facing the gunman and the gunman fired again. Penn also stated that he heard about five to six shots fired and the gunman was by the hillside area of the road.

[58] The major findings of the pathologist Dr. Landron were that the deceased had three long range gunshot wounds i.e. (i) a superficial gunshot wound which entered to the back of the deceased's right forearm and exited at the level of the elbow; (ii) a grazing gunshot wound which scraped the skin of the deceased's left anterior forearm and then entered almost at the level of the of the elbow with no exit wound. The bullet was recovered in his arm; and (iii) the fatal gunshot wound which entered the left upper quadrant of the deceased's abdomen, perforated the stomach, hit and perforated the vena cava which is the largest vein in the body,

and then perforated the right kidney and caused massive internal bleeding resulting in death. The exit wound was present on the right back of the deceased. At the trial the prosecution contended that Penn's evidence as to the position that the deceased was in when the gunman fired the shots were inconsistent with Dr. Landron's findings and the trajectory path of the bullets manifested by the gunshot wounds on the deceased and Penn was not a credible witness.

[59] On the other hand, the appellant's case was that Cato had chopped him on his shoulder while he was running away and he heard shots after he had been injured by Cato and was running and he did not shoot Cato. Apart from this evidence, the appellant, in his interview report which was tendered by the Crown, told the police that he went to his house after being cut, changed his shirt, stayed at his house, and left early morning. He stated that he had gone to the Peeble's Hospital that same night and was refused medical attention. He went to St. Thomas, US Virgin Islands, on a boat the Friday without going through customs, because people were talking that he shot a man and the police like to harass him. He did not seek medical attention for his injury in St. Thomas and he came back to Tortola on a boat on either Saturday or Sunday. He turned himself in at Road Town Police Station in the company of his father on 30th January 2007. The Police testified that the appellant had a wound to his shoulder and they took him to the Road Town Health Centre where Dr. Scatliffe attended to him and referred him to the Peebles Hospital. The defence called Dr. Scatliffe, who te0stified that the appellant had a severe cut on his shoulder which looked quite dirty and this cut was an old wound beyond four and could be six days old. The appellant appeared to be in great pain and would not allow Dr. Scatliffe to touch it on palpitation or squeeze his shoulder.

[60] Dr. Kuku attended to the appellant at Peeble's hospital on 30th January 2007 and issued a medical report which was tendered by the police.[31] Dr Kuku's report included the following:

[31] See Record of Appeal – Volume 1, Tab 6, pp. 23-24.

"(3) Particulars of circumstances under which injury is alleged to have been inflicted: Attacked with cutlass/machete.
(4) Place of occurrence: In vicinity of Johnny's Bar, Fat Hogs Bay.
(v) Date and Time of occurrence: 25th January, 2007, 10:45 p.m. to 11:00 p.m.
…
Part II:
…
(2) Are injuries consistent with circumstances set out in paragraph 3 of Part I? Yes."

[61] The police recovered spent shells and a machete from the crime scene area. The machete was recovered on the public road close to the entrance to Dead Man Rental Service business. The DNA expert Mr. Peter Lamb testified that the blood sample which was on the blade of the machete matched the DNA profile of the deceased Cato and not the DNA profile of the appellant.

[62] The Crown rebutted the defence with the evidence of WPC Beverly James who knew the appellant quite well. She testified that on 28th January 2007, whilst she was at a mall in St. Thomas, US Virgin Islands, she saw the appellant in a store at the mall sometime after 12:30 p.m. She observed that he appeared to be normal. Apparently he was not behaving as if he had a severe wound on his shoulder that was paining him or causing him discomfort. Although she knew that he was a wanted person of interest to the police, she did not inform the police that she had seen him in St. Thomas until after the appellant had turned himself in. Dr. Yee-Singh viewed a photograph of the appellant's wound taken by the police on 30th January 2007 and Dr. Kuku's report as to his findings for the appellant's wound. Dr. Yee-Singh opined that the fact that there was blood on the band aid, but there was no active bleeding from the wound means that it was a fairly recent wound, probably a day or two or probably even three days old and the wound could have been inflicted with a cutlass or a machete.

[63] Having regard to the appellant's defence that at the time when the deceased was shot he was armed with a machete, that it was another man who shot the deceased and not the appellant, and that at the time the deceased was shot the

appellant was injured and not present where the shooting took place, any evidence which tended to support any aspect of that defence, or served to create doubt as to who shot and killed the deceased, ought to have been pointed out to the jury by the trial judge in my view. The answer of Dr. Lamb that it was possible that the deceased's blood got on the machete while the deceased was shot in his belly and on his arm while carrying the machete was, at its highest, evidence favourable to that aspect of the defence that the deceased was shot while he was armed with a machete, though it would not have assisted the appellant's case that the deceased chopped him on his shoulder with that or another machete. Dr. Lamb's answer would also have supported the defence witness Penn's testimony that the deceased was shot while carrying a machete. Had the trial judge assisted the jury in evaluating this evidence, it would have assisted the jury in assessing the credibility of Penn in my view. This was a material irregularity.

[64] The evidence that the police recovered the spent shells near the hillside would also have assisted the jury in determining whether Penn was a credible witness, in my view. The trial judge's lapse in not assisting the jury with an appropriate direction on this evidence was also another material irregularity in my view.

[65] However, these irregularities would not cause the appellant's conviction to be unsafe, in the face of the strength of the other circumstantial evidence adduced by the Crown, which the jury obviously accepted as pointing only in one direction, i.e. to the guilt of the appellant.

[66] Dr. Archibald, QC complains that the trial judge erroneously prevented the jury from considering the evidence of PC Cato as to what the deceased had told him concerning guys who were harassing and attacking him. This evidence is hearsay evidence which was relevant evidence under section 63(1) of the Evidence Act, 2006,[32] as it was evidence "that, if it were accepted, could rationally affect, whether directly or indirectly, the assessment of the probability of the existence of

[32] Act No. 15 of 2006, Laws of the Virgin Islands.

a fact in issue…" That fact in issue was whether the deceased was shot and killed by another man after the deceased had wounded the appellant. However, section 64 of the Act states that the admissibility of this relevant evidence was subject to Part XII of the Act, which permits only certain previous representations made by a person who is not available to give evidence about an asserted fact, to be admissible evidence.

[67] Particularly, section 71(2) disapplies the hearsay rule to the relevant hearsay evidence under consideration, only where PC Cato's evidence as to the deceased's previous representations qualifies under the criteria established in section 71(2)(a)-(d).[33] It has not been shown that the relevant hearsay evidence in question falls within any of the circumstances envisaged in the criteria. That evidence was relevant hearsay evidence which was therefore not admissible to prove the existence of the fact that the deceased was threatened by persons other than the appellant.

[68] Consequently, that evidence would attract the questioned jury directions of the trial judge, even where PC Cato admitted, after refreshing his memory, that the deceased did make those representations.

Ola Mae Edwards
Justice of Appeal

[33] Section 71(2) states: "The hearsay rule does not apply in relation to evidence of a previous representation that is given by a witness who saw, heard or otherwise perceived the making of the representation, which is a representation that was (a) made under a duty to make that representation or to make representation of that kind; (b) made at or shortly after the time when the asserted fact occurred and in circumstances that made it unlikely that the representation is a fabrication; (c) made in the course of giving sworn evidence in a legal or administrative proceeding if the defendant, in that proceeding, cross-examined the person who made the representation, or had a reasonable opportunity to cross-examine that person, about it; or (d) against the interests of the person who made it at the time when it was made."