EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCRAP2012/0006

BETWEEN:

KENUTE LYNCH

Appellant

v

THE QUEEN

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Ms. Kay Bacchus-Browne for the Appellant
Mr. Colin John for the Respondent

2016: April 19;
September 19.

Criminal appeal – *Murder* – *Inconsistencies in evidence of prosecution witnesses* – *Whether sufficiently material to render verdict unsafe and unsatisfactory* – *Questions by jury* – *Whether proviso should be applied in the circumstances*

Kenute Lynch ("the appellant") was arrested and charged for the murder of Maxwell John **("the deceased") and f**or the unlawful use of a firearm**. It was the prosecution's case that** the deceased was shot from behind by the appellant in plain view of several eye witnesses on 18th July 2007. The deceased was hospitalised and subsequently discharged; he later developed medical complications. On 16th October 2007, he succumbed to his injuries. Doctors found his cause of death to be directly related to the gunshot wound which he had received in July 2007.

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The appellant **disputed the prosecution's** version of events and relied on the defence of alibi. He was found guilty on both counts and sentenced to 30 years imprisonment. He has appealed his conviction and sentence alleging that (i) during the trial the jury foreman was permitted to ask the appellant and other defence witnesses questions which were prejudicial to him and this accordingly rendered the trial unfair; (ii) various inconsistencies in the trial rendered the verdict unsafe and unsatisfactory; and (iii) the sentence, which began to run from date of sentence, was unduly harsh.

Held: dismissing the appeal against conviction and confirming the sentence of thirty years save that the sentence shall run from the date of remand, that:

1. While it is an established practice in the courts of the Eastern Caribbean for the trial judge to invite the jury to ask questions of witnesses if the jury is unclear about a particular matter and would like clarification on it from the witnesses, it is recommended that the foreman of the jury forward the questions in writing to the judge who, being familiar with the rules of evidence, would decide whether the question is a proper one for the witness to answer. Care must be taken to ensure that jury questions, if allowed, follow the correct procedure which would eliminate the danger of eliciting evidence which may be prejudicial to an accused. The trial judge clearly erred in allowing questions, which may have, in some instances, been prejudicial or at least inappropriate, to be put directly to the defence witnesses. Notwithstanding this error, it is highly unlikely that the jury would have returned a different verdict. The other evidence in the case was not discredited in any material respect. Further, there was compelling eye witness evidence. As such, it cannot be said that the trial was unfair.

   Maureen Peters v The Queen BVIHCRAP2009/0005 (delivered 1st October 2010, unreported) followed.

2. In relation to the various inconsistencies, the question which this Court must ask itself is whether these inconsistencies are sufficiently serious in light of the other evidence adduced by the prosecution, to render the verdict unsafe. There was a significant amount of direct evidence given by the prosecution witnesses which accorded with each other. The strong eyewitness evidence coupled with the expert evidence was critical, and pointed only to the appellant as the shooter. Further, the learned judge drew all of these inconsistencies to the attention of the jury in his summation and instructed them on how to treat with these inconsistencies. The jury would have been fully aware of the inconsistencies. Accordingly, the verdict of guilty cannot be said to be unsafe and unsatisfactory.

3. The sentence imposed is not outside the range for this type of offence in the context of the circumstances of its committal. In arriving at a sentence however, a court should take into account the time the accused spent on remand. The learned trial judge gave no indication that the time the appellant spent on remand had been taken into account. Accordingly, the learned trial judge erred only to this extent as the sentence ought to have been recorded as running from the date of remand.

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JUDGMENT

[1] PEREIRA C.J: Kenute Lynch **("the appellant")** was convicted of the murder of Maxwell John on 24th February 2012 after being tried on an indictment containing four counts, two of which were withdrawn by the prosecution during the course of the trial. The two counts which remained were murder (contrary to section 159(1) of the Criminal Code[1]) and unlawful use of a firearm (contrary to section 185 of the Criminal Code). On 24th February 2012 the appellant was found guilty on both counts, and on 24th March 2012 he was sentenced to 30 years imprisonment on count 1 and 8 years on count 2, the two sentences to run concurrently. The appellant appealed against his conviction and sentence on 12th April 2012.

Factual Background

[2] On 18th July 2007, Maxwell John **("the deceased")** was shot from behind while he was in the company of his friend, Eddie Crooke **("Mr. Crooke")**. The shooter approached the two men from behind and, allegedly in plain view of several eye-witnesses, pulled out a firearm from his waist, took aim and fired in the direction of the two men, fleeing the scene after the deceased had been hit. The deceased did not die instantaneously but some months later. Mr. Crooke, who, according to his own evidence, had bolted from where he was with the deceased at the sight of the shooter, returned to assist the deceased after he had fallen when shot. The deceased was taken to hospital and then was subsequently discharged. However, he later developed medical complications, was returned to hospital and eventually died, on 16th October 2007. Doctors found his cause of death to be directly related to the gunshot wound which he had received in July 2007.

[3] The prosecution alleged that the shooter was the appellant. At trial, the appellant relied on the defence of alibi. He gave evidence that he was at home with his mother and two nieces on the evening of the shooting, and that his mother had refused to let him leave the house after receiving news that **the appellant's** brother,

[1] Cap. 124, Laws of Saint Vincent and the Grenadines 1990.

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Evans Lynch, had been shot. She feared that the appellant would end up being shot too if he went out.

Grounds of Appeal

[4] The appellant originally advanced seven grounds of appeal but relied on only three of the original seven, which are set out below:

(1) The questions put to the appellant by the jury foreman and the answers elicited thereby were prejudicial to the appellant and therefore rendered the trial unfair and the verdict unsafe.

(2) The verdict was unsafe and unsatisfactory, having regard to the inconsistencies in the evidence led by the prosecution witnesses.

(3) The sentence was unduly severe.

[5] I propose to deal with ground 2 first since the findings and discussion in relation to this ground have some bearing on the first ground of appeal.

Ground 2 **–** Whether the verdict was unsafe and unsatisfactory having regard to the evidence

[6] The gravamen of the challenge on the part of the appellant rests on the assertion that the evidence led by the prosecution contained several inconsistencies. The two main prosecution witnesses who gave direct evidence at the trial were Mr. Crooke and Delroy Quashie **("Mr. Quashie")**. Ms. Bacchus-Browne submitted that certain aspects of their accounts of what transpired on the night the deceased was shot were conflicting. She argued that these inconsistencies within the **prosecution's own evidence rendered the verdict unsafe and the trial unfair.**

[7] The first inconsistency had to do with the direction which Mr. Crooke was facing when the shooter approached him and the deceased. At pages 24-26 of the transcript, Mr. Crooke testified that he was facing the deceased right before the

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shooter approached them and that the shooter came up from behind him (Mr. Crooke):

"BY MR. COLIN JOHN:

Q. Okay. Take us through the incident. Take us for-what you can remember about that incident.

...

A. ... **Well we was there chilling. At the same time,** I was facing my friend –

Q. Yeah.

A. -- and we was there talking and thing. So, something tell me look back. At e same time --

...

Q. Okay, if you were facing – he come behind you or in front of you?

A. From behind me he come – come up.

...

THE COURT: From behind he what?

THE WITNESS: He come from behind, coming **up.** 'Cause my back been turn.

BY MR. COLIN JOHN:

Q. Okay. So, how did you get to see him?

A. After – well, he appear – so I look back at e same time. **So when I look back, I saw him.**"

However, on pages 51-52 of the transcript Mr. Crooke gave the following evidence, which clearly seemed to suggest that he was facing the shooter from the very beginning, as he (the shooter) approached the two men:

"BY MR. COLIN JOHN:

Q. When you first -- when you first saw Bahoo, how far was he from you?

A. Well he was just turning the gap coming up.

...

A. – I saw him coming up – more closer he get, I saw him."

[8] Ms. Bacchus-Browne further submitted that there seemed to be quite a bit of confusion in relation to what happened after Mr. Crooke saw the shooter and ran away. Mr. Crooke said that he jumped away and landed over a short fence in trying to get away, then when he got up and started running again, he almost ran

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into the shooter and so had to 'spin back round' and head back the other way. She submitted that it makes no sense for him to say that he nearly bumped into the appellant after jumping over a fence while running away unless the shooter had followed him over the fence, which was not a part of the prosecution's case.

[9] There was also an inconsistency in relation to whether Mr. Crooke heard the shot when it was fired by the shooter. At page 41 of the transcript he says that he 'saw Bahoo buss the shot' but at page 164 he said during cross-examination 'I don't heard no shot fire'. Then shortly afterwards he said at page 165 'The only shot I hear is way Bahoo – when Bahoo shoot me partner'.

[10] Mr. Quashie gave evidence that he was standing on Texier Road with a group of more than three persons talking and that he witnessed the shooting from where he was standing with his friends. Mr. Quashie stated that he had a clear, unobstructed view of the scene of the shooting and witnessed everything from the time the shooter came up the road up until he fled the scene after the shooting. Counsel submits that there were inconsistencies between the evidence given by Mr. Crooke and that given by Mr. Quashie. Mr. Crooke went into great detail about his efforts to escape when he saw the shooter, vividly describing how he jumped over a fence, nearly ran into the shooter again and then spun back around and got away, only to later return to assist the deceased. However, when Mr. Quashie describes the scene of the shooting, he mentions none of this. In fact, when the jury foreman specifically posed the question to Mr. Quashie as to whether he saw Eddie or Maxwell run when Mr. Quashie saw the shooter 'pull something', he responded in the negative, without hesitation.[2] He said neither Mr. Crooke, nor the deceased ran. Also, Mr. Quashie had great difficulty explaining what he meant by 'army pants' which he said he saw the shooter wearing. The court was trying to find out from him then whether by 'army pants' he meant a pair of camouflage pants or just a pair of plain green pants. There was also conflicting evidence relating to when Mr. Quashie said he went to the police to

[2] See p. 262 of the transcript of proceedings.

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give his statement. He had earlier told the magistrate that he had given the statement on 28th July but he said in court that he had given it on the day after the incident, 19th July 2007.

[11] Then, Ms. Bacchus Browne submitted that there was the issue of the police officer, Constable Simmons, who took Mr. Crooke back to the scene of the shooting on 22nd July 2007. Defence counsel stated that Officer Simmons wanted it to appear as if the deceased had named his attacker when in fact he had not. Notes on the incident were only taken by the officer one year later. He stated at trial that he had made notes but he was unable to produce these notes. Furthermore, the statement made one year later was made without the benefit of notes. Ms. Bacchus-Browne submitted that this lie by the police must have **assisted the prosecution's case.** She cited the case of Kelvin Dial (otherwise called Peter) and Andrew Dottin (otherwise called Maxwell) v The State.[3] Officer Simmons did not admit that he had lied in saying that the deceased had **named "Bahoo" as his attacker. However, Ms. Bacchus**-Browne argued that when he said he made notes this was shown to be untrue.

[12] The appellant submitted that he had therefore been prejudiced since there was no innocent explanation for this lie told by the police constable. The appellant says that the police constable **clearly lied in saying that the deceased named "Bahoo"** as his attacker. Furthermore, the officer stated in his evidence that he had visited the appellant**'s house but** yet did not seem to know where the appellant lived. The officer said he made three statements, however, only two were disclosed.

[13] Ms. Bacchus-Browne also took issue with the depositions of Paver and Kommer Sheen that were read into evidence. She submitted that i**n relation to Paver's** deposition, this was not taken until 16th October 2007 notwithstanding that she was allegedly an eyewitness in the case. Also, her evidence as regards what she saw was merely read out in court. Therefore, there was no opportunity to cross-

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[3] [2005] UKPC 4 at paras. 40 and 41.

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examine her. In relation to **Kommer Sheen's evidence**, one major discrepancy was the fact that he gave a statement to the police in which he said that he could not see who fired off the shot in the area. He did not, however, say this in the deposition that was read to the jury. Furthermore, as was the case with Paver, there was no opportunity to cross-examine Kommer Sheen to put to him his prior statement where he had said that he did not see who fired off the shot.

[14] Ms. Bacchus-Browne submitted that one Officer Grant gave evidence that the deceased made a report at the police station after he was shot. However, the evidence clearly showed that the deceased was taken directly to the hospital.

[15] Ms. Bacchus-Browne also complained about the manner in which the Crown sought to have one of its witnesses, Dr. Davy, refresh her memory from a note which she had made on a police medical form, on 18th July 2007, when she saw the deceased at the hospital. Dr. Davy had given evidence in relation to the cause of death of the deceased. Ms. Bacchus-Browne argued that no proper foundation was laid by prosecuting counsel before attempting to have the witness refresh her memory from the note. Furthermore, the doctor was testifying on the basis of the police medical form, without it having remained in her possession from the time she wrote it up until the trial. Counsel submitted that the note had been in the possession of the police, up until just before the trial, which was when it was handed over to Dr. Davy for use at the trial. A further issue taken with the police medical form, was that it appeared to have been sworn before a Justice of the Peace but the doctor confirmed in cross-examination that she had never done this herself.[4] Ms. Bacchus-Browne pointed out that the doctor could not say that the note on the police medical form was made contemporaneously in order for her to use it to refresh her memory.

[16] Ms. Bacchus-Browne also sought to challenge the **link between the deceased's** eventual cause of death and the shooting and submitted that it had not been

[4] See p. 521 of the transcript of proceedings.

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proven that the death was caused by the shooting. She submitted that it was not clear that the embolism was as a result of the gunshot wound. In effect, she therefore challenging the autopsy report which stated clearly that the pulmonary embolism was due to the gunshot wound.[5]

[17] Counsel for the prosecution, Mr. Colin John, stated that notwithstanding the inconsistencies in the evidence pointed out by Ms. Bacchus-Browne and the possible errors made in the conduct of the trial, based on the strength of the evidence adduced at trial, the Court should apply the proviso. He highlighted the fact that there was the direct evidence of Mr. Crooke, who saw the appellant approaching, pull out a gun, point it in the direction of him and the deceased, and fire. This accorded with the evidence of Mr. Quashie, who stated that he too saw the appellant pull out a gun from his waist and shoot the deceased. Mr. Quashie went as far as saying "Bahoo, I see you." Furthermore, the appellant was known to both these witnesses from childhood. They both said that they had a good look at his face and their evidence on this issue was not seriously challenged by the appellant in cross examination. There were no discrepancies in relation to the main and important aspects of the prosecution's case.

[18] Additionally, he submitted that the witnesses gave evidence that there was some degree of immobility by the deceased after he had been shot. This was supported by the evidence of Dr. Davy which showed that the deceased was immobile after receiving the injury. The doctor noted that the deceased had decreased motor function to the lower right extremity. Finally, Mr. John submitted that the evidence from the post mortem report indicates that the cause of death was related to the gunshot wound and that this was conclusive.

[5] See p. 834 of the record of appeal.

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Analysis

[19] **Defence counsel's challenge to the cause of death has no merit.** I agree with counsel Mr. John that there was a post mortem report which said that the cause of death was pulmonary embolism due to the gunshot injury and this was conclusive.

[20] It is clear from the summation that the learned trial judge did put the inconsistencies in evidence to the jury. In particular, he did say '**Crooke was** facing Maxwell John and he turned around and he saw, the accused man behind him. So if he was facing Maxwell John and he turned around, then both of them would be facing the attacker, who we say is the **accused**'. Also, at page 735 of the record of appeal, the learned judge said:

> "Then the accused pointed the gun in our direction, he jumped, landed over a fence, dropped got [sic] and almost ran into the attacker who he say [sic] **is the accused; and I'd** ask yourselves, Mr. Foreman and members, how could this be possible? If you are escaping from an attacker jumped over a fence or edge, drop on a stone, get up and when you try to continue your escape you run into the person? How that **happened? I don't k**now."

Additionally, he expounded on and dealt **with the confused state of Crooke's** evidence, and he dealt with the depositions adequately. He also placed before the jury what can only be described as the very poor handling on the part of the police of the criminal investigation. The question which this Court must ask itself is whether these inconsistencies are sufficiently serious in light of the other evidence adduced by the prosecution, to render the verdict unsafe. It is significant that the evidence of the eyewitness Mr. Quashie was not undermined by the defence to any great extent. Also, when considering the material aspects of **Mr. Quashie**'s evidence, he described exactly the same sequence of events as Mr. Crooke, during the period from moments before the deceased was shot, until the shooter fled the scene – both Mr. Crooke**'s and Mr. Quashie's accounts of events describe** a shooter wearing 'army pants' and '**an army** jacket' come up the road, approach Mr. Crooke and the deceased, pull a gun out from his waist, shoot the deceased and flee the scene. Also, Mr. Crooke gave evidence that when one of the other eyewitnesses to the shooting (who had allegedly been standing in the group with

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Mr. Quashie), called out to the shooter by the nickname **"Bahoo"**, the shooter looked up, before running away. Yet another bit of evidence which was consistent with the eyewitness accounts that the deceased was trying to get away from the shooter when he was shot, was that of Dr. Davy, who stated that judging from the nature of the injury, the deceased would have been shot from behind. All of this strong eyewitness evidence coupled with the expert evidence was critical, and pointed only to the appellant as the shooter. Moreover, there was no other evidence of anyone else shooting in the vicinity at the relevant time. As was submitted by counsel Mr. John there was a significant amount of direct evidence given by the prosecution witnesses, which accorded with each other. I agree fully with this submission of the prosecution. Furthermore, the learned judge drew all of these inconsistencies to the attention of the jury in his summation and instructed them on how to treat with these inconsistencies. So the jury would have been fully aware of the inconsistencies in reaching their verdict. Accordingly, the verdict of guilty cannot be said to be unsafe and unsatisfactory. I would therefore dismiss this ground of appeal.

Ground 1 – Whether questions put to the defence witnesses by the jury foreman were prejudicial and therefore rendered the trial unfair and the verdict unsafe.

[21] Counsel for the appellant, Ms. Bacchus-Browne, contended that the jury foreman was permitted to ask the appellant and other defence witnesses questions which were prejudicial to the appellant and this accordingly rendered the trial unfair and the verdict unsafe. The questions being referred to here are those posed by the jury foreman to the appellant, his mother, and his niece, Jovana, when he was given an opportunity to do so by the judge after each of these witnesses had given their evidence. I shall look at the complaints made in relation to the questions posed to each one of the defence witnesses, in turn.

[22] After Ms. Bacchus Browne had indicated that she did not wish to re-examine the appellant, the foreman took the opportunity to ask him about the relationship

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between himself (the appellant) and one Julius John. The exchange is set out below:

"THE COURT:	Yes. Any questions Mr. Foreman?
MR. FOREMAN:	(Inaudible)
THE COURT:	Yes.
MR. FOREMAN:	Mr. Lynch?

…

MR. FOREMAN:	And umm the guy John who shot your brother and killed your brother Hazelwood --"
THE ACCUSED:	Julius John?
MR. FOREMAN:	**Julius John, what's the relationship between you and –**
THE COURT:	Who – who Julius who?
MR. FOREMAN:	Julius John shot and killed your brother?
THE ACCUSED:	Yes.
THE COURT:	Where that name come from, who is that person?
MRS. KAY BACCHUS BROWNE:	No Algernon was shot by Julius Pipey.
THE ACCUSED:	Julius John better known as Pipey, he shot my brother Algernon Lynch the 31st of October 2004 I think.
THE COURT:	That is something else that is something else you know.
MRS. KAY BACCHUS BROWNE:	**Yeah. That's three years ago that's not relevant.**
THE COURT:	That is not part of the case you know.
MR. FOREMAN:	I –
THE COURT:	**Is the first I'm hearing that name.**
MR. COLIN JOHN:	My Lord, I – **My Lord, umm … my learned friend** brought it up my Lord.
THE COURT:	2004.
MR. COLIN JOHN:	That umm his brother, the older brother Algernon Lynch was shot by one Julius Pipey John My Lord, that was brought up.
THE COURT:	Yes I remember that.
MR. COLIN JOHN:	Yes My Lord.
THE COURT:	Anyhow continue.
MR. FOREMAN:	So what -- do you know the relationship between Julius John and Maxwell John?
THE ACCUSED:	They are cousins.
MR. FOREMAN:	Cousins.
THE ACCUSED:	Yes.
MR. FOREMAN:	**That's it.**

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THE COURT: Yes thank you."[6]

[23] Indeed, very early during the course of the **appellant's** examination in chief, when he was relating his account of what happened on the night Maxwell John was shot, the name Julius John was brought up by the appellant himself in response to a question asked by Ms. Bacchus Browne. The appellant had told the court that his mother told him that Evans Lynch, the appellant**'s brother**, had been shot on Texier Road and **that she (the appellant's mother)** had instructed him not to leave the house to go there because if he did, he would be killed just like his older brother, Algernon Lynch. Page 599 of the transcript of proceedings reads as follows:

> "BY MRS. KAY BACCHUS BROWNE:
> Q. And who is Algernon Lynch?
> A. My brother, my older brother.
> Q. How was he killed?
> A. He was shot in his chest up in Texier Road by a guy name Julius John.
> Q. And Evans Lynch is your?
> A. **My older brother, my second brother."**

[24] Ms. Bacchus-Browne submitted that by putting these questions to the witness, the foreman was using personal knowledge of facts which were not in evidence in order to suggest that the appellant had a motive for killing the deceased. The questions were not to clarify evidence already given. Ms. Bacchus-Browne admitted that the appellant himself had brought up the name when she asked him how his older brother Algernon Lynch had been killed, however, she states that she was merely seeking to show why the appellant was staying at home -- it was because his mother had instructed him to, fearing that he would be killed in the same manner in which Algernon Lynch had been killed, apparently, by Julius John. Ms. Bacchus-Browne further submitted that even if the name Julius John came up while the appellant was giving his evidence, his **(Julius John's)** relationship with the deceased was not raised. She contended that this showed that the foreman had previous knowledge of this link between the appellant, Julius

[6] At pp.628-631 of the Transcript of Proceedings.

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John and the deceased, and he chose to bring out this link by asking the questions which he did.

[25] Concerning the questions posed to the appellant's mother, after the prosecution had cross-examined Ms. Lynch, the foreman inquired of her, firstly, whether the appellant had come to her house before or after Evans Lynch had been shot; then, he asked her if she **ever goes across to the appellant's house from the time** she had been living in Algernon Lynch**'s house; and after that**, he asked her whether she dozed off 'at any point' the night Evans got shot, while the appellant was in the house with her. The relevant parts of the transcript are set out below:

At pages 657-658 of the transcript:

"MR. FOREMAN: Mrs. Lynch?
THE WITNESS: Yes sir.
MR. FOREMAN: Tell me something on the night umm Evans got shot --
…
MR. FOREMAN: Did Kenute come over to your house before or after?
THE WITNESS: No he did not come out.
MR. FOREMAN: To your house, he come to your house before --
THE WITNESS: If he did come out of my house --
MR. FOREMAN: Did he come to your house before?
THE WITNESS: Yes he come to my house before.
MR. FOREMAN: Before you heard that Evans got shot –
THE WITNESS: Before we heard that Evans get shot –"

At pages 658-659 of the transcript:

"MR. FOREMAN: Tell me something Mrs. Lynch, do you ever go **over to Kenute's house?**
…

THE WITNESS: If I ever walk cross Kenute house?

MR. FOREMAN: If you ever go across there?
THE WITNESS: Me?
MR. FOREMAN: Yes.
THE WITNESS: When, in the night?
MR. FOREMAN: At anytime.
THE COURT: She used to live there she say you know.

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THE WITNESS: Anytime like how, like when?
MRS. KAY BACCHUS BROWNE: I didn't understand the question My Lord.
MR. FOREMAN: I'm asking if she goes across to Kenute's house at anytime
THE COURT: At anytime, but I'm saying she said she used to live over there before she over [sic] to the one room.
MR. FOREMAN: Since you living at Al -- the first son that got shot baby --
THE WITNESS: Baby?
MR. FOREMAN: Yes, since you living in Baby's house --
THE WITNESS: Yes.
MR. FOREMAN: Do you ever go across to Kenute's house, do you go across there at all?
THE WITNESS: Yes I go across because I have things plant in the yard, so I have to take a bench, is a bench I have -- I walking wid, I can't walk."

At page 660 of the transcript:

"MR. FOREMAN: And on the night Evans got shot, did you at any point doze off or?
THE WITNESS: If I do what?
MR. FOREMAN: If you had doze off at any point like drop sleep.
THE WITNESS: Doze off? I never sleep that night, that man up dey dey above me.
MR. FOREMAN: Seeing that you never sleep, were you tired the next day or did you feel physically tired, drained?
THE WITNESS: In the day?
MR. FOREMAN: During -- the next day, the very next day in the morning.
THE WITNESS: Yes I will feel sleepy and what's not.
MR. FOREMAN: So you didn't sleep?
THE WITNESS: If I thin [sic] I take ah doze but me nuh go sleep like how me does use fu sleep ah night.
MR. FOREMAN: Thanks a lot Mrs. Lynch."

[26] Ms. Bacchus-Browne argued that the jury questions posed to Ms. Lynch showed a fair amount of knowledge by the jury foreman aimed at eliciting evidence designed to link the relationships between the appellant, the deceased and others. She argued that the questions were not to clarify information which had come out of Ms. Lynch's evidence. Rather, his aim in posing the questions was to test

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Ms. Lynch's credibility, as she was an alibi witness for the appellant. In particular, Ms. Bacchus-Browne submitted that by the jury foreman asking the **appellant's** mother if she had ever dozed off at all that night, he was trying to get an answer from her which could be used as a basis for saying that Ms. Lynch would not have known if the appellant remained at her house all night. Ms. Bacchus-Browne further argued that no questions were put by the jury to the prosecution witnesses.

[27] The jury foreman was also permitted to **pose questions to the appellant's 11** year old niece, Jovana Lynch. She is Ms. Lynch**'s** granddaughter. The relevant exchanges between Jovana and the jury foreman can be found at page 679 of the transcript:

> **"MR. FOREMAN:** Could you remember how granny behaved when she heard Evan [sic] got shot?
> THE WITNESS: She started to cry.
> MR. FOREMAN: Just cry alone?
> THE WITNESS: And she started to bawl out then after Kenute came over.
> MR. FOREMAN: And you also said Bahoo slept between you and your sister?
> THE WITNESS: Yes please.
> MR. FOREMAN: Did you fall asleep before him?
> THE WITNESS: Yes please.
> MR. FOREMAN: And was your sister asleep also?
> THE WITNESS: Umm?
> MR. FOREMAN: Was your sister asleep also?
> THE WITNESS: Yes please.
> MR. FOREMAN: **That is all."**

[28] Ms. Bacchus-Browne submitted that all questions were aimed at testing veracity or knowledge in terms of the alibi evidence. The jury foreman was essentially seeking to determine whether a particular witness did not know whether the appellant remained in the house or not. Ms. Bacchus-Browne accordingly submits that the foreman entered the arena and must have prejudiced the way the jury saw the case.

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[29] Ms. Bacchus-Browne contends that the basic principle is that where, during a trial, a judge realises that something has occurred which is likely to prejudice a juror, or which shows that a juror is likely to have some predisposition against an accused, the judge should conduct an investigation into the matter. If, on that investigation, the judge finds that there is a real danger that what transpired will prejudice or predispose any juror, the judge must discharge the juror and continue the trial. If the investigation shows that other jurors had also been prejudiced or the jury panel has become contaminated, the judge should discharge the jury and empanel a new jury unless alternate jurors are sufficient to constitute a proper panel. She cited the case of R v Jody Ann Blackwell[7] in support of this submission. Ms. Bacchus-Browne submits that in the present case, nothing of the sort happened. Even after the prejudicial questions were posed to the defence witnesses, the trial continued without the matter being addressed at all when it did occur.

[30] The prosecution conceded that the fact that the foreman posed the questions directly to the defence witnesses was not the best practice. He accepted that it would have been more appropriate for the questions to have been first sent up to the judge for him to determine whether they were suitable and then put to the witnesses.[8] However, counsel Mr. John maintained that the questions were relevant ones, aimed at clarifying ambiguities and therefore were not prejudicial.

[31] Concerning the questions posed to the appellant's mother, counsel Mr. John did concede that they were leaning more towards testing her credibility. However, he submitted that notwithstanding this, the proviso ought to be applied since the evidence of the prosecution was so strong that the jury would still have convicted the appellant had these questions not been asked. He relied heavily on the direct evidence which Eddie Crooke gave in relation to the shooting as well as that of Mr. Quashie, two eye witnesses. Furthermore, the learned trial judge dealt with

[7] [1995] 2 Cr App R 625.
[8] See Maureen Peters v The Queen BVIHCRAP2009/0005 (delivered 1st October 2010, unreported).

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the inconsistencies extensively in his summing up. Accordingly, he submitted, the appellant's conviction should not be quashed notwithstanding the conduct of the jury at trial.

Analysis

Questions posed directly to defence witnesses by jury foreman

[32] Firstly, with regard to the questions posed by the jury foreman to the appellant concerning Julius John, the foreman clearly intended to establish whether there was a link between the deceased and Julius John, who is said to have killed the appellant's brother Algernon. Whether this was simply on the basis that Julius and the deceased shared the same surname, or whether it was because the foreman had some previous knowledge (as alleged by Ms. Bacchus-Browne) and merely sought to bring out that which he already knew, is not certain. It had already been established by the defence (when the appellant was giving his evidence) that Julius John was the one who had killed the appellant's brother. The foreman sought to go further than this however, in asking what was the relationship between the deceased and Julius John. It is not inconceivable that he may have been attempting to establish this link in order to satisfy himself that the appellant would have had a possible motive for the killing of the deceased. If Julius John was indeed related to the deceased, then the killing of the deceased could be seen as an act of revenge by the appellant, for the killing of his brother Algernon.

[33] Secondly, concerning the questions posed to the appellant's mother by the jury foreman, I am in agreement with the submissions of Ms. Bacchus-Browne that they do seem to have been aimed at testing her credibility. The jury foreman seemed to be trying to get something more than what he had already heard from her when she previously gave her evidence, in order to support the view that she was being untruthful in saying that the appellant had remained at home with her for the entire night when the deceased was shot. In particular, at page 636 (lines 19 and 20) of the transcript, it was clearly established in examination in chief that Ms. Lynch did not sleep for the whole night.

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"Q. You didn't sleep that whole night?
A. I did not sleep because I was watching him on the ground and my mind was on Evans. And he never come out until 6o'clock the morning. He get up and he said to me, he say Tanty I gwine go fishing. …"

Also, at page 650 of the transcript, Mrs. Lynch again confirmed that she had not slept for the whole night, while being cross-examined by Mr. Colin John:

"Q. He [the appellant] sleep soundly?
A. He sleep until morning.
Q. He sleep soundly?
A. Well if he sleep -- he bin sleeping but I wasn't sleeping --
Q. Right, so you watch him sleeping.
A. I watch him lie down dey sleeping between the two little baby girls dey.
Q. That's after his brother was shot?
A. After I done talk to him and tell him not to move outer here."

However, immediately following this evidence, the foreman posed his question about whether she had 'dozed off' at all while the appellant was over at her house.

[34] In the case of Maureen Peters v The Queen[9] it was stated that while it is an established practice in the courts of the Eastern Caribbean for the trial judge to invite the jury to ask questions of witnesses if the jury is unclear about a particular matter and would like clarification on it from the witnesses, it is recommended that the foreman of the jury forward the questions in writing to the judge who, being familiar with the rules of evidence, would decide whether the question is a proper one for the witness to answer.[10] Indeed, the exchanges above demonstrate the undesirability of jury questions being asked directly without the pre-screening safeguard by the trial judge and input from counsel where warranted. The trial judge clearly erred in allowing questions to be put directly to the defence witnesses – the case of Maureen Peters v The Queen makes this clear. However, two questions still remain: i) whether the questions were prejudicial and

[9] BVIHCRAP2009/0005 (delivered 1st October 2010, unreported).
[10] See also R v Barnes (1990) 155 JP 417.

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even if they were, ii) whether their prejudicial nature was sufficient to render the trial unfair with the result that the conviction should be quashed.

Were the questions asked prejudicial?

[35] In my view, it is definitely arguable that the jury foreman's focusing on the link which Julius John had with the deceased may have caused the members of the jury to at least contemplate that the appellant may have had a motive for killing the deceased and this was a matter which may have been prejudicial to the appellant, since it did not form a part of the prosecution's case. However, this line of questioning was first opened up by defence counsel. That said, care must be taken to ensure that jury questions, if allowed, follow the correct procedure which would eliminate the danger of eliciting evidence which may be prejudicial to an accused. Furthermore, the questions asked and the answers elicited at the instance of the jury foreman were not sufficiently addressed by the learned trial judge in his summation in order to indicate to the jury members exactly how they should treat any inferences which could come about from that particular link which had been established between Julius John and the deceased. With regard to the questions which were posed by the jury foreman to the appellant's mother, I find that while they might have been aimed at testing her credibility since the matters asked about had already clearly been established in examination in chief and cross examination, this was more inappropriate than it was prejudicial. The members of the jury were entitled to ask questions (I have already stated that the best manner for this to be done is through the trial judge however) in order to clarify certain matters. As long as nothing came about as the result of posing the question which was of a prejudicial nature to the appellant, then there would be no issue with the question. Concerning the evidence of young Jovana Lynch, I have difficulty seeing how this particular line of questioning by the jury foreman could have been prejudicial to the appellant, on its own. The jury merely wished to clarify the events which took place at the appellant's mother's home on the night that the deceased was shot.

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[36] Notwithstanding that some of the questioning by the jury foreman may have, in some instances, been prejudicial or at least inappropriate, it still remains to be determined whether or not this prejudice would have made a difference to the verdict which the jury reached at the end of the trial, in light of the other evidence which the jury had before them. As mentioned in paragraph 20 in dealing with ground of appeal 2 above, based on the strength of the direct eyewitness evidence adduced by the prosecution which, as to the critical facts of the shooting **(in particular, the sequence of events and the shooter's attire)** and the identification of the shooter, remained largely uncontroverted, I am of the view that even if these elements complained of by the defence had not been present in the trial, it is highly unlikely that the jury would have returned a different verdict. The evidence of the eyewitness Mr. Quashie was not discredited in any material respect. Further, the evidence of the eyewitness Mr. Crooke did not differ in any material respect from the evidence of Mr. Quashie in their recount of the circumstances at the material time of the shooting and plainly identifying the shooter, **with Mr. Quashie calling him by his known name "Bahoo"**. Finally, as mentioned above at paragraph 20, there was no evidence adduced of any other shooter being on the scene at the material time.

Ground 3 **–** Whether the sentence was excessive

[37] Ms. Bacchus-Browne submitted that the sentence of 30 years was on the high side when it is compared to other sentences given by the court. Furthermore, the time which the appellant spent on remand was not taken into account. The appellant remained in custody since 16th August 2007. As a matter of principle, the court should take into account the time from the period of remand. The prison ledger in this case showed that sentence began to run from the date sentence was handed down.

[38] Counsel Mr. John submitted that the sentence of 30 years was not excessive and the learned trial judge did not make any error in dealing with sentencing. The social inquiry report which was done was not supportive of the appellant. In this

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report, the appellant was described by the community members as being like a "Texas Ranger". Mr. John further submitted that this was a full trial so there was no benefit of a discount. Also, there were previous convictions, one of them, for the discharge of a firearm. It was an unprovoked attack on an unarmed person, and according to the medical report the deceased was not facing the shooter when the gun was fired. Mr. John brought to the Court's attention two authorities, Rudolph Lewis v The Queen[11] and Ewart Bacchus v The Queen.[12] In Rudolph Lewis, the appellant pleaded guilty to murder but there was some degree of planning in this case. The appellant was sentenced to 25 years. In Ewart Bacchus, the appellant was sentenced to 30 years for murder. Accordingly, the appellant's sentence is not out of range and therefore, there is no basis for interfering with the sentence handed down.

[39] It must be mentioned here that the court, at the end of the hearing, directed the Director of Public Prosecutions to procure a psychiatric report in respect of the appellant and submit same to the court. This direction was of the court's own volition as no ground of appeal had been raised regarding the appellant's mental state but simply by way of considering whether any information disclosed thereby may be of relevance in considering the issue of sentencing. Having received written communication from the Director of Public Prosecutions of the difficulties being encountered in complying with this request, it is highly unlikely that a report will be obtained any time within the near future. Accordingly the court must assess the appropriateness of the sentence on the material presently before it.

[40] I accept the submission of Ms. Bacchus Browne that the learned trial judge gave absolutely no indication that the time on remand had been taken into account and what had been noted on the prison ledger clearly supported this position. The authorities adduced by Mr. John do show that the 30-year sentence is not outside the range for this type of offence in the context of the circumstances of its

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[11] SVGHCRAP2009/0016 (delivered 16th April 2012, unreported).
[12] SVGHCRAP2008/0006 (delivered 29th April 2011, unreported).

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committal. I agree. There is no basis for interfering with it save that the sentence should be recorded as running from the date of remand. To this extent only, the learned judge erred. I would accordingly order that the sentence of thirty years be confirmed save that the sentence shall run from the date of remand.

Conclusion

[41] For the reasons given, I would dismiss the appeal and affirm the conviction. I would also affirm the sentence of thirty years save that I would order that said sentence be stated to run as from the date of remand.

Dame Janice Pereira, DBE
Chief Justice

I concur

Mario Michel
Justice of Appeal

I concur

Paul Webster
Justice of Appeal

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