

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 51/89

BEFORE: The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.
The Hon. Mr. Justice Downer, J.A.

R. v. LEROY BURKE

L.L. Cousins for Applicant

Bryan Clarke for Crown

February 12 & March 19, 1990

CAMPBELL, J.A.

On February 12, 1990, we refused the application for leave to appeal the conviction for murder and promised then to put our reasons in writing. This we now do.

On April 4, 1989 the applicant was convicted in the Saint Catherine Circuit Court before Orr J., and a jury of the murder of Elrado Coombs on May 11, 1986 and sentenced to death.

The evidence adduced from Gerron Pusey on behalf of the Crown was that on Sunday May 11, 1986 at about 2.45 a.m., the house of the deceased Elrado Coombs at Magazine Lane, Bog Walk, St. Catherine came under attack from at least two men who ordered the deceased to open the door. This he did. The men entered and promptly demanded money. The deceased responded that he had no money in the house. A male voice then said "Kill him and come on." This witness said there was a further incitement from a male voice using the words "shoot him or stab him into his belly and come on before crowd come down." The

deceased was heard entreating the men not to kill him. Soon after, there was a stumbling sound and the witness heard the deceased saying "Is me you ah do dat?" The witness heard one of the men say "take the tape and the fan and come." He heard footsteps emerging from the house and saw two men clad in dresses come from the house carrying things. Immediately after these men left, he heard an explosion and the house and shop of the deceased went up in flames. This witness was unable to say who the men were who entered the house but he was absolutely sure that it was male voices he heard demanding money and threatening to kill the deceased and it was two men whom he saw coming out of the house of the deceased with things while another man with a gun had been standing under the window of the house of the witness, apparently as the "look out" man.

Detective Sergeant Hamlet Pennycooke's evidence is that following on information which he received, he proceeded to Braeton in St. Catherine at about 5.30 a.m. on Monday May 12, 1986 barely 24 hours after the incident at Magazine Lane. There he found two men including the applicant each resting in a separate car on premises across the road opposite to where the applicant reportedly lived. In the possession of the one was a cassette radio and tape, in the possession of the other namely the applicant he found an electric cord and a cassette cover with cassette therein. The tape and the electric cord were positively identified by the unchallenged evidence of an employee of the deceased as the property of the deceased. They were last used in the deceased shop on Saturday May 10 and as was the deceased's practice, he took them to his adjoining room each night for safe keeping after closing his shop. The cord was identified by two pieces of tape thereon where the

deceased had previously mended it. Though the evidence of Pennycooke was that the applicant, on being asked how he came into possession of the electric cord and cassette had stated that they were given to him by the other man namely Edwards alias "Kie" who had possession of the tape, the applicant neither in his exculpatory statement nor in his unsworn statement relied on this explanation for his possession. To the contrary the cross-examination of Pennycooke demonstrated that the applicant as part of his defence was denying that the electric cord was found in his possession.

Detective Acting Corporal Dawkins' evidence is that he witnessed a statement given to Sergeant Cole by the applicant. This statement was admitted in evidence. In it the applicant admitted his non-participating presence at or near the deceased's home. He however attributed the breaking in, the killing of the deceased, the stealing of the tape and the arson of the premises to Edwards who was found with the tape. The applicant in the statement said from the time of the incident he distanced himself from Edwards until when the police came to Braeton and took them in. He was thus in effect saying that the electric cord could not have been found on him because he had deliberately avoided Edwards alias "Kie". A fortiori he could not have said that "Kie" gave the cord to him as stated in evidence by Pennycooke, when nothing was found on him.

Detective Corporal Mitchell's evidence is that at about 6.00 p.m. on May 12, 1986 he arrested the applicant on a charge of murder. He cautioned him and the applicant said "Officer a no me alone kill the man sah." This witness was supported as to what the applicant said by Pennycooke who was present when the arrest was made.

The applicant in an unsworn statement asserted his innocence and denied that he spoke the words attributed to him by Mitchell and Pennycooke. Though he was beaten and put under pressure to make a confession he uttered no such words.

Mr. Cousins for the applicant attacked the trial as unfair and he attacked the summing up on grounds ranging from a failure of the learned trial judge to point out to the jury the "insufficiency of evidence to find a common design to kill" to a failure to point out "weakness" in the crucial issue of identity.

We listened to Mr. Cousins as a matter of courtesy but none of his submissions merited our calling on the Crown to respond. The issue of identity resolved itself partially by the exculpatory statement of the applicant, the possession by him of articles from the home of the deceased shortly after the incident without explanation of how he came into possession of them and completely by his statement to Mitchell in the presence and hearing of Pennycooke namely "Officer a no me alone kill the man sah."

As the grounds in support of the application were clearly lacking in substance, and there were from our own perusal of the record no misdirections in the direction to the jury or unfairness in the trial procedures, we refused the application for leave to appeal.