JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 121/04

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.

LEONARD PUSEY v R

Patrick Atkinson for the applicant

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions
& Ms Sasha-Marie Smith for the Crown

26th January 2009

ORAL JUDGMENT

PANTON, P.

1. In this matter the applicant, Mr. Leonard Pusey was convicted and sentenced for the offence of murder. He was sentenced on the 4th June 2004 to life imprisonment at hard labour with a specification that he was to serve 25 years before becoming eligible for parole. The trial took place before Mrs. Justice Norma McIntosh and a jury in the Manchester Circuit Court between the 27th May and the 2nd June 2004.

2. The particulars of the offence indicated that on the 28th day of March 2002 in the parish of Manchester the applicant murdered Miguel Harris. The single judge of this court, having considered the application, refused leave to

appeal on the basis that, in this case, the issues were identification, common design and alibi and that they were adequately dealt with by the learned trial judge in her summation. The single judge opined that her summation to the jury was detailed and balance and could not in the view of the single judge be faulted.

3. The applicant has renewed his application for leave to appeal before us and Mr. Patrick Atkinson on his behalf urged the consideration of three grounds of appeal -

> "Ground 1
>
> The Learned Trial Judge erred in law in failing to uphold the No-Case Submission which was based on insufficiency of evidence.
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> Ground 2
>
> The Learned Trial Judge failed to direct the jury that mere presence at the scene of a crime was not enough evidence from which it could be inferred that one was a participant to that crime. This non-direction was a misdirection in law.
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> Ground 3
>
> The Learned Trial Judge misdirected the jury when she directed them as a matter of law that only the evidence from the witness box was to be considered in arriving at their verdict. This misdirection in effect withdrew the defence, which was based on an unsworn statement of the Applicant, from the jury."

4. The circumstances of this murder are that during the night of the 28th March 2002 in a district known as Mayday, in the parish of Manchester, the

applicant and two other men entered a shop operated by the deceased and Nicolette Williams, the main witness for the prosecution, she being his common law wife. The only witness as to fact in terms of the commission of the offence was Miss Williams. Her evidence disclosed that the applicant and two other men came into the shop; they ordered drinks and cigarettes. This was paid for by one of the men described as the "short brown man." Shortly after, the short brown man produced a firearm and demanded money of the deceased. The short brown man followed the deceased as he retreated while the demand was made. The deceased went outside came back with a machete and he was promptly shot by the short brown man. The robbery was completed and indeed the deceased received further bullets from the "short brown man."

5. The applicant having used his teeth to open the bottle of guiness that was provided for him by the "short brown man", positioned himself at a corner near the doorway of this shop. He was in the shop when the demand for money was made and the firearm was produced. He exited the shop, and after the killing all three men who had entered the shop, disappeared – there had been the sound of a motor vehicle moving off nearby coinciding with their disappearance from the scene.

6. The applicant, when he was identified, used words to the effect that the witness would have pointed him out as he was in the shop. However, at the trial he did not give evidence. He made what has become traditional - an unsworn

statement, typical of this jurisdiction, and in that statement he was extremely brief, as was his right. He said, he was not present at the robbery in the shop and he was not present at any shooting in the shop.

7. Before us, Mr. Atkinson has urged that there was really no case to answer. With reference to ground 1 he argued that there was no evidence other than the bare facts that the applicant was in the shop and went outside and that was not enough to require him to answer a case. We are unable to agree with that submission as the circumstances do indicate that the applicant was with the person with the firearm, was treated to drinks by the person with the firearm, they came together; the applicant was present when the firearm was produced, was present when the demand for money was made and the applicant left at the same time with the person who discharged the firearm.

8. In terms of ground 2, we are of the view that the learned judge gave adequate directions in respect of this applicant who was not the person who discharged the firearm and that she made it clear to the jury that it was a question of him being present to aid and abet the person with the firearm, if the circumstances warranted.

9. So far as ground 3 is concerned, we are surprised that Mr. Atkinson dwelt on this matter, it being of long standing that, "a statement which was not made under oath is to be given such weight as the jury thinks fit" and in this situation the learned judge clearly advised the jury to that effect and she did so

repeatedly. So far as his interpretation goes that the applicant was merely saying that he was not at the shop for the shooting or the robbery and that it was not a question of him setting up an alibi, we are of the view that the learned judge was indeed correct to further stress the point that the question of him being not at the scene required the jury to be sure that they came to that conclusion before returning a verdict adverse to him.

10. We cannot say that there was any misinterpretation by the learned judge as to what the applicant meant by his statement. In all the circumstances, the summation, which contains repetitions of the important points to be made to the jury, was in keeping with what was required in relation to the facts and the law in this case.

11. The application for leave to appeal is refused. Sentence is ordered to run from the 4th September 2004.