JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 48/92

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA vs. CONROY LEVY

Randolph Williams for applicant

Kissock Laing for Crown

June 6, 7 and 13, 1994

CAREY, J.A.:

In the Circuit Court Division of the Gun Court held in Kingston between the 6th and 8th April, 1992, before Panton, J. and a jury the applicant was convicted of shooting to death Phillip Dussard and the sentence fixed by law was imposed. He now applies for leave to appeal his conviction.

The circumstances of the shooting, brutal and callous as they are, have now become commonplace. In the early morning of 19th May, 1990, Yvonne Walker, a girlfriend or ex-girlfriend of the victim, was awakened by two men who were armed with guns. She identified this applicant as one of them and the spokesman. He enquired of the whereabouts of her boyfriend and threatened to kill her if he did not find him and ended up raping and robbing her in a garage nearby. She was thereafter taken to her boyfriend's home about a half mile away and at the behest of this applicant, knocked and called out her boyfriend. When the door was opened by another girl, the applicant rushed in and shot Phillip Dussard, her boyfriend.

The medical evidence confirmed that the young man died of a gun shot wound to his upper left chest which perforated

the lung and travelled through the spine. The bullet was recovered from the tissues of the right back. When the applicant was arrested, his response was somewhat odd. He remarked, "Where you said the murder commit?"

The applicant by his defence put the Crown to proof. When called upon, he exercised his right to remain silent. We are satisfied that the applicant was not mute because he had spoken to his counsel shortly before the trial commenced.

The crucial issue in the case, as was recognised on all sides, was visual identification of the applicant by a sole eye witness. This witness knew the applicant for six years. They lived in the same area of Kingston. That night she was plainly in close proximity to him and for a period of one hour or more were in each other's company. She had seen him first through a hole in her house, and was enabled to see him from a light at the back of the house. She was taken through her gate by the applicant onto the road and to a garage. When asked about the lighting at the time of the rape, she said, "But it's in town you know, and you have street lights all around and I mean it is not somebody who I don't know, you understand. Is somebody I used to see." Finally, it must be remembered that there was no defence of alibi challenging the visual identification evidence.

Mr. Williams, who appeared on behalf of the applicant, stated that having read the record, he was quite unable to put forward any submissions to challenge the verdict of the jury. He was of the view that the learned trial judge had given the appropriate warning on the crucial issue, explained the reasons therefor and set out the circumstances of the identification itself.

We note that he brought home to the jury that mistakes are possible even in recognition cases and left for their consideration the enigmatic query of the applicant when he was apprehended. We think ourselves that the remark was capable of

amounting to corroboration, depending on the construction placed on that sentence. In our view, he left that piece of evidence very fairly to the jury.

Having ourselves examined the record, we are satisfied that no grounds for interference can be found. The jury's verdict is eminently warranted on the evidence. We also think that the summing-up was admirable. It was balanced, it was fair and the directions on the main issue were impeccable.

With respect to sentence, we are of opinion that the murder was committed in the course of burglary and must, therefore, be classified as capital murder. But in any event, the sentence imposed must be affirmed. The applicant denied that he had a previous conviction for murder but it was proved before us, by means of finger-print evidence and the evidence of the same Police Officer who was present at both trials, that the applicant was convicted in the Home Circuit Court on 11th June, 1991, for the murder of Desmond Johnson and sentenced to death. As both murders were committed around the same time, it is perhaps odd that when arrested on the second occasion he should have commented as he did.

The application for leave to appeal is accordingly refused. The conviction is classified as capital murder.