C.A. Criminal Laws — Murder — Application for leave to appeal conviction — Whether counsel unable to find any ground to urge on applicant's behalf — Leave to appeal against conviction refused.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 81 & 82/84

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

REGINA

VS.

DERRICK DOUGLAS

Mr. Howard Lettman for applicant

Mrs. C. Lawrence-Beswick for Crown

8th June, 1987

KERR, J.A.:

The applicant was jointly charged with Herman Spence and Dennis Daddi for the murder of Jubert Lawrence on the 6th May, 1982. In a trial in the Home Circuit Court from the 4th to 9th July, 1984 before Smith, C.J. and a jury. Daddi was acquitted, Spencer was found guilty of Manslaughter and sentenced to 7 years imprisonment with hard labour and the applicant convicted of murder and sentenced to death.

In May, 1982 the deceased, a fireman, shared a house at No. 32 Swallow Road, St. Andrew with Edward Morris. Their respective rooms were separated by a kitchen. Morris in evidence said that about 1 a.m. on the 6th May while in bed, the deceased with a cry of "thief" rushed from the kitchen into his room and hid under his bed. Morris bolted this connecting door. He then heard outside the door a voice, which he recognized as the applicant's, whom he knew as Country,

saying "Open the door". He refused saying "leave the man alone for God's sake". The door was kicked open and the applicant and Spencer entered the room. The electric light was turned on. The room about 10 feet by 12 feet was lit by a single bulb. The applicant had a gun, of length from his finger tip to his elbow. When he repeated his request that they leave the deceased, the applicant threatened to shoot him if he did not keep his mouth shut. Both men then drew the deceased from under the bed and took him out the room, the applicant warning him to stay inside. After they left he heard the movement of furniture and two explosions coming from the room of the deceased. Being afraid he did not leave his room until daylight. He then saw the body of the deceased lying outside his room door in a pool of blood flowing from his head. Cross examination by applicant's Attorney elicited that the movement of furniture lasted about half hour; that when he heard the voice saying "open the door", to his question "Is it Country" the applicant said "Yes". The applicant had visited him at his room twice before - the first being 3 or 4 months before. In the year that he knew him he had often seen him visiting friends in the yard. He had seen him in friendly talk with the deceased. On being reminded he agreed that he did say in his statement to the police that the applicant said if he gave a statement to the police the applicant would shoot him and that is so.

Detective Inspector Lester Howell on a warrant obtained on 10th May, 1982 arrested the applicant on February 23, 1983. Dr. Ramu who performed the postmortem examination said he found (i) a bullet entry and exit in the right hand and (ii) a bullet entry wound to the left side of the chest along the anterior auxillary line. The projectile passed through the muscles of the chest and made its exit in front below the collar bone (iii) a bullet entry wound to the back of the head on the right side - the projectile passing through

the brain and had its exit just below and behind the left ear (iv) abrasions on the left arm and left side of the neck. In his opinion death was due to shock and haemorrhage as a result of gunshot injury to the head.

Senior Superintendent Daniel Wray the ballistic expert, examined 2 expended cartridge cases found by Constable Frank Ulett about a foot from the body of the deceased when he visited the scene on the morning of the 6th May. According to Wray they were .45 automatic firearm cartridges and that they were discharged and ejected from a .45 calibre sub-machine gun. Such a gun is about 28 inches long overall.

On the morning of the 3rd day of hearing, after Morris and arresting Constable Howell had given evidence Mr. Maragh, who appeared for the appellant sought and was granted permission to withdraw from the case as appeared from the Record thus (pp 82-83):

> "MR. MARAGH: M'Lord, based on my instructions from my client and certain instructions which I have advised my client to take from me, and there is some variance with those instructions, I am unable to continue with the defence of the first-named accused. I have so advised him on at least five occasions, up to this morning before you came in I told him the consequences of my withdrawing and that he would have to conduct his own defence. He said that he would do that. I now hand over to the accused man, through the Registrar, the deposition in this case.
>
> HIS LORDSHIP: Yes, Mr. Douglas, you heard what your lawyer has said?
>
> ACCUSED: Yes, my Lord.
>
> HIS LORDSHIP: What he said is accurate? It is correct?
>
> ACCUSED: Well, yes, my Lord".

In his unsworn statement the applicant said his name was Stephen Miller, he was not called Derrick Douglas. The police gave him that name. He lives in St. Ann at Calderwood, Esse Castle and is a farmer. He is not guilty.

The co-defendant Spencer, in whose possession according to the police, were found articles of furniture and

an insurance policy belonging to the deceased gave evidence on oath to the effect that at the time he lived at 21 Swallow Road, and approximately midnight while in bed at home sleeping a young lady named Pauline of 32 Swallow Road called him and in response he got up and went out to see her accompanied by applicant, one Brent and one Bend Down. Each man had a fire-arm - the applicant a long gun and the others short guns. Pauline threatened if he did not come with them he and fireman, his friend, would be shot. So he went with them to the home of the deceased. On instructions he called to deceased who opened the door. The applicant then said he came to kill the deceased. They went in and put him to sit with the deceased in a corner. Deceased ran into Morris' room. Morris refused to open the door saying "For God's sake leave the man alone". Applicant kicked open the door. He followed into the room while the others stood by the kitchen door. Applicant turned on the light looked under the bed and drew out the deceased and threatened to kill Morris should he go to the station and give a statement. Applicant took deceased back to his room and with the help of the others moved out the furniture leaving only a buffet and wardrobe./ He denied that he was ever in possession of the He ran off and when some distance away he heard two explosions. furniture of the deceased or that he removed furniture from 19 Baldpate Way to 92C Waltham Park Road. He did tell police that furniture was at 19 Baldpate Way and that was where the furniture was found.

The learned trial judge adverted applicant's attention to this damaging evidence and advised applicant to cross-examine him. The applicant said he did not know the co-defendant Spencer. At that time he was in St. Ann.

Of the co-defendant's evidence in his summation the learned Chief Justice said (p. 163):

> "Now the accused, Spencer, Members of the jury, you will remember he called Mr. Douglas' name in his evidence and he told you that

> "Douglas did that or Douglas did that. Now what Mr. Spencer said was said on oath so it is evidence in the case and normally sworn evidence that is given in a case whether from the defence or from the prosecution, the jury is entitled to take it into account, unlike a statement from the dock. If a statement in the dock is made nothing in it can help anybody else in the case or can condemn anybody else in the case, but where evidence is given in the case it is evidence for all purposes but when one prisoner or one person who is accused gives evidence and by his evidence implicates another prisoner a jury is always warned not to use it as evidence against the other prisoner. In other words though strictly speaking, it is evidence in the case a jury is usually warned not to record it as evidence against the others because - well a person who is giving evidence like that can have motive for trying to sink somebody else of free himself or try to save himself. I am not saying that is what Spencer is doing because you will have to say if you believe the evidence that Spencer gave but that is possible, but a jury is usually warned. An accused person is only to give the evidence in so far as that particular person is concerned. Don't use it as evidence against Douglas. That is what I am inviting you to do in this case; not to use anything that came from the accused, Spencer, as evidence against Douglas. In other words, what you are to use in respect of the case of Douglas is the evidence given by Mr. Morris and the reasonable inferences which flow from the evidence given by Mr. Morris".

These directions were in our opinion unduly favourable to the applicant.

Morris' evidence was clear, consistent and on the face of it, cogent and convincing.

The learned Chief Justice in his usual careful manner reviewed the evidence, defined the essential elements in the offences returnable on the indictment, identified the issues and gave impeccable directions on such specific issues as common design, inferences, circumstantial evidence and the prudent approach to visual identification evidence.

The applicant's Attorney frankly conceded that having carefully considered the evidence below at the trial and also the Summing-up of the learned Chief Justice he was

unable to identify any grounds which he was able to urge on behalf of the applicant.

Accordingly the application for leave to appeal against conviction is refused.