

Leroy Burke

Appellant

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
1ST DECEMBER 1992

Present at the hearing:-

LORD KEITH OF KINKEL
LORD LANE
LORD LOWRY
LORD MUSTILL
LORD WOOLF

[Delivered by Lord Woolf]

In the early hours of Sunday, 11th May 1986 Elrado Coombs was killed in the shop premises at which he lived in the Parish of St. Catherine, Jamaica. The appellant, Leroy Burke, was convicted of his murder on 4th April 1989 at the St. Catherine Circuit Court and was sentenced to death. His application for leave to appeal to the Court of Appeal was refused. On 16th April 1991 the appellant was granted special leave to appeal by Her Majesty in Council.

Two other men were arrested and charged with the same murder. One of those men was Carlton Edwards. At the outset of the trial, he pleaded not guilty of murder but guilty of manslaughter and that plea was accepted by the prosecution. He was sentenced to ten years' imprisonment. The other man, Boysie Vernon, died before the trial.

The explanation for Edwards' plea to manslaughter being accepted is far from clear. It may have been intended to call him as a witness on behalf of the prosecution. However the evidence of his involvement in the murder was very similar to the evidence against the appellant.

The principal ground of appeal is that a grave and substantial miscarriage of justice occurred at the trial as a result of:

1. The introduction by the prosecution without prior notice, of evidence of an alleged confession by the appellant and
2. The reliance by the prosecution at the trial on that evidence.

This ground was also relied upon in the appellant's notice of appeal to the Court of Appeal of Jamaica. However there is no reference to it in the judgment of that court and it may well be that it was not raised in argument before that court. What was relied on before that court was an "insufficiency of evidence to find a common design to kill" and "a failure to point out 'weakness' in the crucial issue of identity". The Court of Appeal considered that those arguments had no substance and also indicated that their perusal of the record disclosed no misdirection of the jury or unfairness in the procedure at the trial.

Evidence was given at the trial that the appellant, in the company of Edwards, had visited a house quite near to that of the deceased's a few hours before the deceased was killed. A neighbour of the deceased, Mr. Pusey, described how at approximately 2.45 a.m. on 11th May 1986 he was awoken by the sound of breaking glass coming from the deceased's house. He said that he then heard voices one of which he recognised as being that of the deceased. Mr. Pusey was not asked whether he heard more than one voice in addition to that of the deceased. However he heard at least one voice demanding money from the deceased and the deceased protesting that he did not have any. He then heard the words "kill him and come" and then "shoot him or stab him into his belly and come on before crowd come down" and the deceased then saying "don't kill me" and "see the key here, take it and take all you want". This was followed by a repetition of the words "kill him and come" and "take the tape and the fan and come". Mr. Pusey then saw from a window two men wearing women's clothing leaving the deceased's house and a third man with a gun in his hand standing outside. Mr. Pusey described one of the men who left as being "extra tall" and the other as "not so tall" and the third man as being the smallest of the three. The faces of the two men who left the building were masked and they were carrying something which the witness was unable to identify.

After the men left, the building burst into flames and when the deceased's body was recovered it was severely burnt but, although the cause of death could not be identified, it was established that the death was not due to the fire and must have occurred prior to the fire.

Evidence was given by a Police Sergeant Pennycooke that on Monday, 12th May 1986 at about 5.30 a.m. the appellant

was found asleep in a car and in possession of an electric cord and a cassette which were identified as the deceased's property. Edwards was found in another car not far from the appellant. He was then in possession of a radio cassette player and a tape which were identified as belonging to the deceased. The appellant, after being cautioned by the police sergeant, said that he had obtained possession of the electrical cord from Edwards.

Another police officer, Constable Dawkins gave evidence that at about 2.15 p.m. on Monday, 12th May 1986 the appellant made a written statement in which he accepted that he had been near the scene of the crime shortly before the deceased was killed; however while he had seen Edwards enter the deceased's house he had walked away and had played no part in the robbery or killing.

Evidence was also given that of the three men who were charged with the murder the appellant was the tallest, being 5'10½"-11", Edwards' height was 5'7½"-8" and Vernon was 5'6-6½" tall.

The alleged miscarriage of justice occurred as a result of Sergeant Pennycooke towards the end of his evidence-in-chief stating that at about 6.00 p.m. on 12th May 1986 he was present when another officer Detective Corporal Mitchell arrested the appellant who, after being cautioned, said "A noh me alone kill the man". It is agreed that if the appellant said these words they would mean that the appellant was admitting that he had killed the deceased but was not alone in doing so. It is also common ground that both the prosecution and the defence lawyers were unaware that Sergeant Pennycooke was able to or was intending to give this evidence. The sergeant when his deposition was taken on oath at the Preliminary Investigation made no mention of such an admission and the prosecution and defence were unaware of the existence of any document in which the sergeant had referred to such an admission. Both counsel for the prosecution and the defence were therefore taken equally by surprise. No objection was taken at the time to the giving of this evidence and counsel representing the appellant when cross-examining the sergeant confined himself, so far as the alleged admission was concerned, to suggesting that it had not been made. The sergeant was however energetically cross-examined as to other aspects of his evidence. It was suggested that the accused had never been seen in a car but instead that he had been seen in a room in a house, that the property said to have been recovered from him had not been recovered from him and that the appellant had been subjected to considerable violence and placed under pressure to give the written statement.

The next day a Detective Corporal Mitchell was called. Prior to his being called, the counsel for the defence had been given a statement which was undated setting out his

proposed evidence. The detective corporal had not been called in the court below and it appears clear that he was only called as a witness at the trial as a result of the evidence given by Sergeant Pennycooke of the alleged oral confession. In the course of his evidence Mitchell said that when the appellant was arrested and cautioned he said in response to the caution "Officer, a no me alone kill the man sah". The corporal explained that he had not given evidence in the court below because he was in hospital suffering from injuries. He said that he had made a statement immediately after the appellant had been arrested but that statement was never produced although it was according to the corporal attached to the file. (The statement which had been served on the defence had only been prepared the previous day.) He also said that he had recorded the confession in his notebook, but was unable to produce the notebook, but he did say that if he was given some time he might be able to find it. However, so far, that notebook has never been produced.

After the conclusion of the prosecution's case counsel for the defence submitted there was no case to answer and that the evidence of the oral confession should be excluded. That submission was rejected by the judge. The appellant then in accordance with a common practice in Jamaica did not give evidence on oath but made an unsworn statement. In his unsworn statement he denied in particular that he had made the alleged oral confession and repeated the allegation that he had been beaten by the police.

In his summing-up the trial judge made several references to the alleged oral confession, the last of those references being in his concluding comment to the jury.

In his submissions in support of the present appeal, Mr. Jeremy Roberts Q.C. accepted that the judge's summing-up is not open to criticism in relation to the manner in which it dealt with the matters as to which the jury had to be satisfied before they could find the appellant guilty of murder as a result of his being a participant in a joint venture. Apart from the references to the oral confession, the only criticism which is made of the summing-up is that the judge at one stage of the summing-up, contrary to what he said later, wrongly suggested that Mr. Pusey gave evidence that he had heard different people say "kill him and come" and "shoot him or stab him into his belly and come on before the crowd come down".

In his helpful submissions on behalf of the prosecution Mr. Guthrie accepts that what happened at the trial in relation to the oral confession was unfortunate. He explained that in Jamaica there are safeguards to protect a defendant from being unfairly taken by surprise. Prior to a trial on indictment there will always be a Preliminary Inquiry before a Magistrate which is equivalent to an old style committal in England. If it is intended to call a witness who has not given evidence at the Preliminary Inquiry then his witness statement will be served with a

Notice of Additional Evidence. This situation is subject to an important proviso that if a witness's deposition is inconsistent, to a material extent, with other information in possession of the prosecution, the prosecution is obliged to draw this to the attention of the defence.

In addition at the hearing of this appeal Mr. Guthrie produced a memorandum dated 29th July 1982 prepared by the then Director of Public Prosecutions of Jamaica which records the practice:-

"that where the prosecution intends to lead evidence of verbal admissions or confessions the defence should always be alerted before the start of the case of such intention and the terms of the admission/confession so as to give the defence an opportunity to determine whether or not to challenge the admissibility of the evidence."

This did not happen in this case in respect of the alleged oral confession through no fault of those conducting the prosecution. However, Mr. Roberts submits that after the evidence of Sergeant Pennycooke and Detective Corporal Mitchell had been given, the prosecution either knew or ought to have known that the evidence of the alleged oral confession was unreliable and they should not have placed any reliance upon that evidence. There is substance in this criticism. Apparently no reasonably contemporaneous document existed which recorded this important alleged admission. Documents can of course be lost, but if the evidence was reliable by any objective standard it is hard to understand why the prosecution was not able (and are still not able) to produce any document which supports the suggestion that shortly after the crime the appellant made a significant admission and why, if what the officers were saying at the trial was correct, evidence of the admission was not adduced at the Preliminary Investigation. The judge at the trial did offer the defence an adjournment to allow Corporal Mitchell to try and find his notebook and that offer was not accepted. However it was perfectly reasonable for the appellant's counsel to take the stand which he did, that, if there was a contemporary record of the admission, the obligation was upon the prosecution to produce that note and it was not for him to seek an adjournment to allow them to do so.

The prosecution were also at fault in not, so far as is known, disclosing to the defence that the suggestion that the appellant had made an oral admission was a novel one so far as the prosecution were concerned and not supported by any document of which they were aware. Evidence which comes into existence in the way in which the evidence of the alleged oral admission of the appellant in this case came into existence should undoubtedly be treated with considerable caution. When that evidence is not only unreliable but also highly prejudicial to a defendant's case if accepted by the jury, not only is

there a duty on the prosecution not to rely on that evidence, there is also the need to consider whether the trial can fairly proceed. In this case, the alleged oral confession could not have been more damning to the appellant. It associated him with the killing. It was inconsistent with his written statement and his unsworn statement at the trial and the fact that two police officers gave virtually identical evidence about how it came to be made gave it a misleading appearance of being highly credible. In this situation, at the very least, the judge in his summing-up was under an obligation to warn the jury in the clearest possible terms to approach that evidence with caution. In fact the summing-up contained no such warning and the judge's treatment of the alleged oral confession could well have encouraged the jury to attach considerable weight to it. This was a course which would have been perfectly appropriate if the existence of the alleged oral confession had not been revealed in such surprising circumstances, but which was wholly inappropriate in the circumstances which are now known.

In the recent case of *Berry v. The Queen* [1992] 3 W.L.R. 153 in which the judgment of the Privy Council was given by Lord Lowry, their Lordships indicated (at page 161) that "the most suitable ways of achieving ... fairness (which should not be immutable and require to be reconsidered from time to time) are best left to, and devised by, the legislature, the executive and the judiciary which serve the community and are familiar with its problems". Here, as already indicated, there was no compliance with the requirements in Jamaica and it appears likely that, if the trial judge had been made aware of the extent to which the prosecution were taken by surprise by the evidence which was given, the summing-up to the jury as to the significance of the alleged oral confession would have been in very different terms.

Cases were cited as to the precise test which should be adopted by their Lordships in determining whether a case is one which requires a conviction to be set aside. This was a question which was also considered in *Berry v. The Queen*. However so far as the conviction for murder of the appellant is concerned, this is not a case in which detailed consideration needs to be given to those authorities. It is clear that so far as the conviction for murder is concerned the manner in which the alleged oral confession was treated during the trial amounted to a material irregularity as a result of which grave injustice may have been done. The alleged oral confession having been admitted in evidence before the jury, after the circumstances in which that evidence came to be given had been investigated, the preferable course to have adopted at the trial was to discharge the jury from giving a verdict. The alleged oral confession was highly prejudicial to the appellant since it was the only evidence which, if reliable, indicated that the appellant was an active participant in the killing. In this it differed from the evidence of the conversation which was overheard. That conversation clearly indicated that one of

the two intruders invited the other intruder to attack the deceased but provided no assistance as to whether the other intruder responded to that invitation. It would be perfectly consistent with that conversation if the second intruder not having responded to the invitation, the first intruder himself carried out the attack without the participation of the second intruder. It is because the appellant could have been the second intruder but not responded to the invitation that their Lordships are of the opinion that the conviction of murder cannot stand. On the evidence apart from the alleged oral confession it is possible that the appellant neither personally inflicted any injury on the deceased nor became a party to an enterprise which contemplated either his being killed or becoming the victim of serious injury.

However while the conviction of murder has to be set aside, the question remains as to whether it would be appropriate to direct that a verdict of manslaughter should be substituted. Mr. Roberts recognised that this would be the appropriate course if the evidence, other than that of the alleged oral confession, satisfies their Lordships that it is not possible to come to any other conclusion but that the appellant was present in the deceased's premises when the killing took place. The reason why Mr. Roberts realistically makes this concession is that the only explanation for the appellant's presence would be that he was a party to a plan to rob the deceased, a plan which would contemplate use of sufficient violence to make the appellant guilty of manslaughter if the death of the deceased was the result of the execution of that plan. As to the presence of the appellant, their Lordships are of the opinion that the evidence is overwhelming. The evidence of the witness, Pusey, that the two taller men were present in the deceased's premises was evidence which was not challenged by cross-examination and was uncontradicted by any other sworn evidence.

Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Court of Appeal with the direction that that court should quash the conviction of murder, enter in its place a verdict of guilty of manslaughter, and impose the appropriate sentence.

