JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 50/96

COR: THE HON MR JUSTICE FORTE JA
THE HON MR JUSTICE GORDON JA
THE HON MR JUSTICE BINGHAM JA

REGINA VS LANSFORD JAMES

Paul Ashley for applicant

Dwight Reece for Crown

November 18 & December 16, 1996

GORDON JA

On 7th August 1995, Cathleen Angella Shoener and Kirkman Meyer landed at the Sangster International airport as visitors from the United States of America to attend Sumfest Festival. They had no reservations for accommodation or transportation and their efforts to get a rent-a-car proved futile. They fell prey to a tout one Jesse who took them to a place where they rented a scooter. Jesse then took them to the Caribana Restaurant where they ate. The applicant who is the nephew of the proprietor of the restaurant joined the couple and they conversed. He arranged accommodation for them in a make-shift bedroom behind the kitchen. The couple left, rode around the city of Montego Bay and returned to their base at the restaurant. They sat on stools in the bar and conversed with the applicant while they drank beers. The afternoon moved into evening and night and the party indulged in ganja smoking in

addition to beer drinking. The couple eventually retired from the company of the applicant and went to bed sometime after 9:00 p.m.. They were awakened from slumber by the applicant who demanded $500 for the beers they had consumed. He refused to postpone the collecting until the next day. Mr. Meyer opened the door, the applicant entered the room and Miss Shoener paid him with one $500 note and he left. The couple returned to bed. Sometime later in the night their slumber was again disturbed by the applicant who enquired where the motor scooter had been parked. Meyer replied that it was in front of the building. The conversation continued and Mr. Meyer left his bed and went through the door into the kitchen. Miss Shoener heard two clashing sounds and she left her bed and went to the door leading to the kitchen. In the kitchen she saw Mr. Meyer on the floor with the applicant standing over him armed with a piece of wood. She saw the applicant hit Meyer in the head with the wood. She yelled "stop" and the applicant struck him again.

The applicant then approached the witness Shoener who backed away from him. He placed one hand over her mouth and told her not to scream. On releasing his hold she screamed and he replaced his hand over her mouth promising not to hurt her. He again released his hold and she pleaded with him to leave them. He left her and went and pulled Kirkman into the room. He demanded of her "give me your money." She gave him two $100 travellers cheques. He demanded Kirk's money and

she gave him. The applicant remained in the room and she endeavoured to arm herself with a knife. He overpowered her and apparently struck her as she lost consciousness. When she recovered he was gone and she was bleeding and dizzy. Kirk lay on the ground bleeding and kicking, obviously not yet dead. She sought help and was hospitalised.

Kirkman Meyer died and the Pathology Consultant Dr. Bennett found death was due to severe head injury with multiple skull fractures and bleeding in the brain mostly caused by blunt trauma.

On 21st August the applicant went to the home of Mr. Ernie McKenzie at Sturge Town. He asked Mr. McKenzie for his brother called "Johnny Cool." Consequent on arrangements made, Mr. McKenzie took the applicant to a safe haven: there he remained for a while.

Mr. McKenzie visited the applicant from time to time and the applicant told him a story. The applicant told McKenzie how he and his uncle assisted two "whitey" with drugs. He was paid by the female from a roll of money and sent again to buy more drugs. On his return he had a fuss with the white man. They wrestled and he hit him with a 2 x 4 plank. He said he also had to hit the girl. He left the scene and went to St. Ann. Under the pretext of changing his hiding place, Mr. McKenzie led the applicant to the police who arrested him on the capital charge. Sergeant Calbert Bowen saw the applicant in custody at Runaway Bay and told him of the charges against him. The applicant said he would tell everything he knew when he

got to Montego Bay and added: "me no know how me get mix up inna it. Through me did high."

In an unsworn statement the applicant told of visiting his uncle in search of work. He was told to help with the guests and he did. He carried drinks for the white couple then he left for his girlfriend's home and slept. He went back to St. Ann to get clothes to wear. He heard on the radio that he was wanted by the police. He went to Johnny cool who he knew was a District Constable and turned himself in. He declared "I don't know anything about any murder."

On the 17th April 1996, the applicant was convicted of the capital murder of Kirkman Meyer. He applied for leave to appeal and his application was heard on 18th November 1996 and refused. We now give, as promised, our reasons.

Mr. Ashley by leave proffered three grounds of appeal:

> "1. That the learned trial judge erred in law by failing to leave manslaughter, based on a lack of intent, for the jury's consideration.
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> 2. That the learned trial judge mis-directed the jury as to the manner in which they should treat the extra-judicial statement.
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> 3. That the learned trial judge erred in law by refusing the Crown's application to visit the locus, thereby depriving the jury of critical assistance in resolving the conflict in the evidence pertaining to the opportunity for identification/recognition."

On ground 1, he submitted that on the evidence adduced the applicant and both victims at a time just before the commission of the offence smoked ganja. This indulgence probably affected the mind of the applicant to the extent that he lacked the necessary intent. He said on arrest "me no know how me get mix up inna it through me did high." Manslaughter, Mr. Ashley submitted should have been left to the jury based on lack of intent.

The applicant in his unsworn statement said he served the victims with drinks from the bar when they ordered it. He provided room service. He saw them smoking but he did not say he participated in either activity, drinking or smoking. Even if he did then, any resulting effect from indulgence would be self-induced and could not assist his defence: **R. v. Lipman** [1970] 53 Cr. App. R. 600. On the prosecution evidence there was careful planning of the crime. The first call to the victims was for money owed at the bar. The second call lured Mr. Meyer from his room into the kitchen. There he was bludgeoned and Miss Shoener robbed. Alerted to these circumstances Mr. Ashley did not pursue this ground.

The second ground of appeal was raised then abandoned by Mr. Ashley when his attention was directed to the learned trial judge's summing-up at page 177 of the record. There the evidence of

Mr. Eric McKenzie who narrated what the applicant told him of the incident was properly placed before the jury for them to decide if they accepted that the applicant said what Mr. McKenzie alleged he did say and if they accepted the evidence they should decide what it meant. We find the judge's directions were clear, fair and correct and that Mr. Ashley's brevity was well advised.

Mr. Ashley's third ground was what he regarded as his primary ground. He submitted that the learned trial judge should have acceded to the Crown's request for a visit to the locus in quo. The denial of this request was unfair to the defence as it deprived the jury of real evidence which would have assisted them in assessing the validity of the identification evidence.

The trial judge's directions on identification evidence could not be faulted. He followed the hallowed guidance given in ***Turnbull*** [1977] Q.B. 224, ***Junior Reid & Others*** [1989] 3 W.L.R. 771. The applicant had spent hours in the company of the chief prosecution witness Miss Shoener and he entered her room twice after she had retired to bed. On both occasions they had physical contact. On the first she paid him $500.00 on the second she gave him money he demanded. He held her, chucked her on the bed, he struck her unconscious. This identification evidence did not stand alone. There was the evidence of Eric McKenzie of the confession made by the applicant and there was the statement allegedly made to Sgt.

Calbert Bowen which by interpretation could amount to an admission of guilt. It was a question of fact for the jury. Sgt. Bowen testified that fundamental changes had been made to the structure of the area at Caribana which made it different from what it was at the time of the murder. Partitions had been installed and the relationship of kitchen/bedroom changed. The atmosphere could not be recreated or recaptured. The judge thereupon refused the Crown's application for a view of the locus. He asked questions of this witness in an endeavour to make the explanations and demonstrations clear so that the jury would have no difficulty in understanding the evidence.

In ***R. v. Warwar*** [1969] 11 J.L.R. 370, this court approved the principles stated by Parnell, J on which the court acts in deciding whether or not to grant an application to visit the locus. "The object of a view or visit to the locus in quo should be for the purpose of enabling the jury to understand the questions being raised, to follow the evidence and to apply the evidence, and was not a substitution for such evidence."

The layout of the storeroom cum bedroom and the kitchen was given with clarity by the witness. There was but one door between both rooms and the jury ought to have followed the evidence. The judge quite rightly decided that the changes that had been made had altered the appearance of the place and rendered a view unhelpful. The learned trial judge did not act on any wrong principle in law in refusing the application.

The exercise of his discretion is unassailable. We repeat what this court said in ***Warwar***'s case: "a view is essentially one which is within the discretion of the trial judge to be exercised according to the facts of each case." For emphasis we add the dicta of this Court per Fox, J.A. in ***R. v. Herman Williams*** [1971] 12 J.L.R. 541 at 544:

> "A decision as to whether or not the locus in quo should be visited is entirely a matter within the discretion of the trial judge. So long as this discretion has been judicially exercised, this court cannot interfere. The considerations which guide the discretion in making this decision are not circumscribed by the rules which regulate the reception of the evidence as was contended."

On ground 1 we indicated that the identification evidence did not stand alone. The summing up was clear and adequate and followed the guidelines. There was in addition to identification the admission made by the applicant to Eric McKenzie and the statement of the applicant on his having been charged with the offence of murder. We found no merit in any ground of appeal.