

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 7/98

**BEFORE: THE HON. MR. JUSTICE PATTERSON, J.A.
 THE HON. MR. JUSTICE HARRISON, J.A.
 THE HON. MR. JUSTICE PANTON, J.A. (Ag.)**

NICHOLAS CURTIS vs. REGINA

Carrington Mahoney and Miss Lorraine Smith for Crown

Applicant unrepresented

January 29 and March 1, 1999

PATTERSON, J.A.:

The applicant, Nicholas Curtis, was convicted on 26th January, 1998, in the Home Circuit Court of non-capital murder and was sentenced to imprisonment for life. The indictment charged that between the 29th November, 1991, and 1st December, 1991, in the parish of St. Andrew, he murdered Victor Nembhard. His application for leave to appeal was refused by a single judge on the 8th September, 1998, but he renewed his application to the court which we have refused and affirmed the conviction and sentence. The court below specified that the applicant serves a period

of twenty-two years before becoming eligible for parole, and we ordered that the period should commence on the 26th April, 1998. These are the reasons for our decision.

The Crown based its case primarily on circumstantial evidence and on an alleged confession by the applicant. In the afternoon of Friday the 29th November, 1991, the deceased, Victor Nembhard, drove his cream-coloured Mercedes Benz motor car to the playfield of the University of the West Indies and parked it off the road between the tennis court and the cricket ground. As was his custom for many years, he then proceeded to the cricket ground and knocked golf balls about. He had arrived alone in his car, but two men were later seen beside it, and when the deceased returned to it at about 4:00 p.m., the men climbed into the rear seat. The deceased turned his car about and drove off in the direction of the University. About ten minutes later the deceased returned driving fast and blowing the horn as he drove towards August Town with the two persons in the rear seat. Detective Acting Corporal Daniel Walters had seen two men stooping about 8-10 feet from the left side of the deceased's car at about 3:45 p.m., and he recognised them to be "Nicholas Curtis otherwise called Nicky" and "Ira Hillary otherwise called Didiruff". At that time, he said he also saw the deceased knocking golf balls on the cricket ground. He had known both men before, and he also knew the deceased and his car.

The testimony of Sheldon Curtis, given at a previous trial, supported that of Detective Acting Corporal Walters. Curtis is the nephew of the applicant. He saw the applicant and "Didiruff" sitting near a car on the University playfield on the 29th November, 1991. At that time, he saw "an old man" playing golf on the field. At about 11:50 p.m. that same night, the applicant was seen by one Donovan McCarthy sitting in the passenger seat of "a cream coloured Benz" while the other man, "Didiruff", sat on the bonnet. The car was parked on a hill in August Town. "Didiruff" asked McCarthy "for \$50 for gas money", which he got. "Didiruff" then drove off the car with the applicant seated beside him.

The deceased's motor car was found in the parking lot of the National Stadium on the 30th November, 1991. It had been vandalized. A lot of dirt and bush were stuck to its undercarriage. It was subsequently identified by Donovan McCarthy as the car in which he saw the applicant and "Didiruff" on the night of Friday, 29th November, 1991. It was also identified by Oliver Nembhard, the son of the deceased, as the car he had given to his father in 1979.

The deceased had not returned home since leaving at about 2:00 p.m. on Friday, 29th November. A report had been made to the police that very day, and they commenced investigations. On the 1st December, 1991, the police received information and at about 1:00 p.m. they went to Bedward Pasture in the August Town area. They saw a muddy area and imprints of a

motor vehicle tyre along a dirt road. The imprints revealed that the vehicle had been turned around at a lonely and bushy area. They followed a track and about $\frac{3}{4}$ chain from the road, they saw a stone with what appeared to be bloodstains. Nearby, the body of the deceased was unearthed from a shallow grave. A post mortem examination of the body revealed two gunshot wounds to the chest, and lacerations to the scalp with underlying compound fracture of the bone. The head injuries were consistent with infliction by a stone. Death would have resulted from any of those injuries.

The Crown relied on testimony of three witnesses, Clover Morris, Raymond Hall and Sheldon Curtis, who could not be located to give direct oral evidence. Hall had not been seen since testifying at the preliminary enquiry, and the other two since testifying in a previous trial. Although all reasonable steps had been taken to find them, they could not be found. The testimony of each was admitted in evidence and read to the jury, pursuant to the provisions of the Evidence Act (as amended). Clover Morris' evidence placed both men working at her premises at 7c August Town Road on the Friday, 29th November. They were assisting in the construction of a house, using pickaxe and shovel. Her premises is about a quarter mile from Bedward Pasture where the deceased's body was found. She did not say what time the men left her premises. She next saw both men when they arrived on the Sunday morning. They were "sweatie", and "Didiruff" had burr all over his clothes. Raymond Hall's deposition was read in evidence. He

too deposed that both the applicant and "Didiruff" were engaged as labourers in the construction of the house at 7c August Town Road on Friday, 29th November, 1991. They were there on the Saturday and the Sunday also. He too noticed that the applicant and "Didiruff" were sweating when they arrived that Sunday morning, but he said that it was the applicant who had burr on his clothes. They worked that day. The following night, the applicant came to his home and told him that he was going to run away. He asked the applicant why, and he said, "he told me that he is going to run away because people say is him and Didiruff kill the man, and is him and Didiruff kill the man." The applicant continued by saying, "all like how me and you is friend, your name could a call too", and asked the witness if he also was going to run away. The applicant told this witness that he was running away to St. Mary.

On the 4th December, 1991, Detective Sergeant Scott and other police officers went to Woodside in St. Mary. They were accompanied by one Jacqueline Gilzene, the girlfriend of Raymond Hall and a cousin of the applicant. The applicant was pointed out by Jacqueline Gilzene as he walked along the road. Detective Sergeant Scott accosted the applicant and told him that he "had information that he had killed Mr. Nembhard and he ran away to the country". He cautioned the applicant who then said, "Is not me kill Mr. Nembhard, is Didiruff." The applicant was subsequently arrested and

charged with the murder of Victor Nembhard. When cautioned, he said he did not know anything about the murder.

That was the case for the prosecution. The witnesses were cross-examined with a view to establishing that they were not being truthful, and that the case against the applicant was trumped up. A number of discrepancies were revealed, but the learned trial judge gave the jury careful and adequate directions on how they should view such discrepancies as they found in the evidence.

The applicant made an unsworn statement. He said that "on the 4th December when my cousin Jackie bring these policemen at the country, reason why I going to country to clean up my mother's grave and introduce my girlfriend to my mother." He said that what Raymond Hall said is not true; they were not on good terms. It is not true that he went to Donovan McCarthy's house in a Benz car. He did not know anyone with a Benz, and he does not remember "seeing himself driven into a Benz car." He continued by saying that he was walking on the street when two police cars stopped beside him and "same time mi cousin sey 'see him deh officer a him kill Nembhard and run away'." He said the police beat him, and all "these people come against me and try to dig a hole for me." His cousins were against him - malicious feelings - and that is why they were saying these things against him. Then he put forth an alibi: "I am sure Friday the 29th of November, I work at Independent (sic) City Basic School. I can't remember

saying this. I never kill a man or involve in a killing. I innocent. Police charge me wrongfully. I don't know anything about it."

The applicant did not call any witnesses. The learned trial judge correctly instructed the jury on the way to treat the unsworn statement of the applicant, and left the defence put forward for their consideration.

We enquired of counsel for the Crown if he had identified any area of the learned judge's summation that would give support to the applicant's application for leave to appeal. Counsel informed us that he had read the transcript of the summation carefully, but did not detect any flaw. We are of a similar view. The learned trial judge, in a balanced summation, dealt adequately with all the issues which reasonably arose out of the evidence. The question of the credibility of the witnesses was left for the consideration of the jury, and they were given ample instructions on how they should view the testimony of the witnesses who did not appear before them. The learned trial judge correctly stated the law applicable to the case. The jury arrived at a verdict that was overwhelmingly supported by the evidence placed before them. We saw no reason or justification to interfere with their decision, nor did we find any other ground supportive of the application. We concluded that the application was wholly devoid of merit.