Privy Council Appeal No. 66 of 2000

Berthill Fox *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF ST. CHRISTOPHER AND NEVIS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 2nd October 2001

Present at the hearing:-

Lord Bingham of Cornhill
Lord Mackay of Clashfern
Lord Hoffmann
Lord Clyde
Lord Scott of Foscote

*[Majority judgment delivered by **Lord Hoffmann**]*

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1. The appellant Mr Bertill Fox is a well-known citizen of Basseterre, St Christopher, a bodybuilding champion and former Mr Universe. He owns and operates a gym. On Friday 26 September 1997 he returned from a visit to England. During his absence he had left his keys to his house and gym with his fiancée Miss Leyoca Browne. She worked in a dress shop in Basseterre named Royalty Fashions, owned by her mother Violet Browne, who was known as Babs. On the day after his return, the appellant spoke on the telephone to a friend named Edmund Tross. He was a businessman, his girlfriend Julisca Wallace was an attendant at the gym and he himself helped the appellant run it. The appellant told Mr Tross that he had "caught Leyoca and a guy".

2. On the morning of Tuesday 30 September 1997 Amanda Matthews, who also worked in Royalty Fashions, noticed the appellant standing on the verandah outside the shop. Leyoca went out to meet him. There was a brief conversation and they came

back inside, with Leyoca leading the way. At that point Babs emerged from the back. According to Amanda, she placed herself between the appellant and Leyoca and said: "Don't come in here with that". There was a scuffle followed by a scream and then a shot. At that point Amanda Matthews ran to the bathroom and locked herself in. She heard two more shots, waited a few minutes and then came out. Leyoca had been shot once in the back. Babs had been shot in the head and side. Both women died in hospital later that day.

3. After the shooting, the appellant went to Mr Tross's office. There he found Leon Isaac, Mr Tross's assistant. According to him, the appellant said that he had just shot two people and wanted to see Mr Tross. He was out but Isaac contacted him by telephone. When he returned to the office, the appellant was waiting. According to Mr Tross, the appellant greeted him by saying that he had "just shot Leyoca and Babs". He explained that he had found a paper which showed that Leyoca had received $1500 from someone and had gone to confront her about it. They had got into an argument and then Babs had got between them and tried to push him outside. He did not know what happened as he took out his gun and started shooting them.

4. Mr Tross said that they had better go to the police and the appellant agreed. They went together and saw the station officer, Inspector Baker. Mr Tross acted as spokesman. He said: "My friend here just told me he shot somebody". According to the Inspector, the appellant heard this and did not demur. He was charged with the murder of Leyoca and Babs.

5. At the trial, the defence was partly foreshadowed by questions put to Mr Tross and Mr Isaac in cross-examination suggesting that the appellant had told them that Leyoca and Babs had "got shot" but not that he had shot them. Both witnesses adhered to their original versions. The appellant did not give evidence but made an unsworn statement from the dock, as defendants in St Christopher were then allowed to do. He said that when he returned home from England, he found that the pouch in which, on home ground, he regularly carried a gun and bullets was missing. He decided that Leyoca must have taken it and on that Tuesday morning went to Royalty Fashions to retrieve it. Leyoca greeted him warmly and said that the pouch was in the shop. She had given it to her mother for safekeeping but would go and fetch it. As she went back into the shop to do so, Babs appeared in an angry mood, waving the gun and pouch in her hands. Leyoca placed herself between them, but Babs managed to give him a push over her daughter's shoulder,

saying “Don’t come in here with that”. These were the words which Amanda Matthews had heard Babs say, but according to her evidence they had been addressed to the appellant. He, on the other hand, says that they were addressed to Leyoca and he took “that” to be a derogatory reference to himself. He wrestled with her for the gun which went off and shot Leyoca. After a further struggle it went off again and shot Babs. The appellant then panicked and ran away to Mr Tross’s office. He told Isaac that Leyoca and Babs had “got shot”. His head was spinning and he was in shock. When Mr Tross came, he told him also that “Leyoca and her mother just got shot”.

6. The suggestion that the gun had been in the possession of Babs and Leyoca was entirely new and the prosecution obtained leave to call evidence after the close of the defence case to rebut it. Julisca Wallace said that she had seen the appellant at the gym with his gun on the previous evening. Mr Tross returned to the witness box to say that he had seen the appellant with his gun on the Saturday and the Monday.

7. The judge left two issues to the jury. The first was the question of whether the appellant had shot the two women at all. The judge described this as a defence of accident, but he explained that, unusually, the appellant was not saying that he had fired accidentally. His case was that Babs had accidentally shot first Leyoca and then herself in the course of the struggle for possession of the gun. The judge said that he appellant did not have to prove that his version was true. It was for the prosecution to make the jury feel sure that the two women met their deaths at the hands of the appellant and that he intended to kill them.

8. Secondly, he told the jury that if they considered that the appellant had fired the shots, they should consider whether he might have been acting in self-defence. He gave a detailed direction on the law of self-defence.

9. The jury convicted the appellant of both murders and the judge imposed the mandatory death penalty. His appeal to the Eastern Caribbean Court of Appeal was dismissed. He appeals to the Privy Council against both conviction and sentence. The appeal against sentence is on the ground that the mandatory death penalty is unconstitutional. There is a recent decision of the Eastern Caribbean Court of Appeal which has so held, but an appeal to the Privy Council in that and other cases is pending. In the circumstances it was agreed that this hearing should consider only the appeal against conviction.

10. Mr Fitzgerald QC, who appeared for the appellant, argued the appeal against conviction on three grounds. First, he said that the judge had misdirected the jury about the value of the unsworn statement from the dock. Secondly, there should have been a direction that the jury could convict of manslaughter on the ground of provocation. Thirdly, the direction on self-defence was inadequate.

Unsworn statement

11. The Criminal Evidence Act 1898, which first allowed the accused a general right to give evidence on oath in England, preserved by section 1(h) the right to make an unsworn statement. Similar provisions were afterwards enacted in many Commonwealth countries. The evidential status of such a statement has always been troublesome both for judges to explain and juries to understand. As a result, section 1(h) was repealed in England by the Criminal Justice Act 1982. In St Christopher and Nevis the right to make an unsworn statement was abolished after the trial in this case by The Law Reform (Miscellaneous Provisions) Act, 1998.

12. The classic explanation of the unsworn statement is that given by Lord Salmon in *Director of Public Prosecutions v Walker* [1974] 1 WLR 1090. The judge may tell the jury that they may consider that the statement is of less value than sworn evidence because the accused has chosen not to submit himself to cross-examination. But he must direct them that it is material in the case and that it is for them to decide what weight, if any, they will give to it.

13. The judge in this case told the jury that they must take the unsworn statement into consideration when determining whether or not the prosecution had discharged the onus of proof. He said that they should consider the statement in relation to the whole of the evidence in the case and that it was material which they could use. He pointed out that it had not been tested by cross-examination and said that it therefore had less cogency and weight than sworn testimony.

14. Thus far, the direction appears to their Lordships to have been entirely orthodox. But the judge then added:

> "Such a statement cannot prove facts that have not been otherwise proven by evidence given on oath. But I should

> hasten to add here however….the accused does not have to prove anything."

15. This is the passage alleged to have been a misdirection. Their Lordships accept that its significance is not entirely clear. The jury is told that the unsworn statement cannot "prove facts" but that the appellant is not obliged to prove anything. Taken by itself, this might have left the jury rather puzzled. It was not so much a misdirection as an obscure one. But the judge then emphasised, throughout the remainder of the summing up, that the burden of proof was upon the prosecution. He put the contents of the statement to the jury: "the accused has asserted that the deaths of the two ladies were accidentally caused". He said that if the jury felt that the deaths might have been accidental, even if (contrary to the statement) the accident was that of the accused rather than Babs, they should acquit him. He ended this passage by saying "although it was the accused who has raised this matter he does not have to prove it. It is for the prosecution to make you feel sure this was no accident". He repeated this direction in various forms on a number of occasions during the remainder of the summing up. Their Lordships therefore consider that the jury can have been in no doubt that they were obliged to take into consideration the version given by the appellant in the unsworn statement and to acquit unless they were sure that it was untrue. Taking the summing up as a whole, this was an adequate direction.

Provocation

16. Although neither the appellant nor his counsel said anything to suggest reliance upon provocation, which was indeed quite inconsistent with the defence advanced in the unsworn statement, the Court of Appeal accepted that on the material before the jury it could have found that the accused had been provoked and that he had lost his self-control. Such material might have had to be pieced together from the statements made by the appellant to Mr Tross and then afterwards from the dock. But the confrontation of Leyoca over her alleged infidelity, the contemptuous expression used by Babs and the push she gave him (if the jury accepted that these incidents might have happened) could have qualified as provocative. Likewise, the sudden firing of three shots and the appellant's subsequent statement to Mr Tross that he did not know what had happened and the statement from the dock that his head was spinning might have been regarded by the jury as showing that the provocation had temporarily deprived the appellant of his self-control.

17. The difficulty lies in the third element of the defence of provocation, namely that the provocation must have been such as to make a reasonable man act in the way in which the appellant acted. If section 3 of the English Homicide Act 1957 had been the law in St Christopher, the judge would have been obliged to leave the question of whether this element in the defence could reasonably have been satisfied to the jury: see *R v Camplin* [1978] AC 705. He would not be entitled to withdraw the issue on the ground that no reasonable jury could have considered that a reasonable man would have responded to an insult and a push from a woman by taking out a gun and shooting her and her daughter dead.

18. In St Christopher, however, section 3 has not been enacted and the common law still prevails. This allows the judge to withdraw from the jury the issue of whether a reasonable man would have acted in the same way as the accused. The Court of Appeal decided that the judge was justified on this ground in not giving the jury a direction on provocation. They said that the reaction of the accused was "totally disproportionate". The High Court of Australia, where the common law also still applies, came to a similar conclusion in *Stingel v The Queen* (1990) 171 CLR 312.

19. Mr Fitzgerald, who appeared for the appellant, did not really dispute that the reaction was so disproportionate that no reasonable jury could have found that a reasonable man could have reacted in that way. Under the common law as it existed in England before 1957, the judge would therefore have been entitled, indeed, obliged, to withdraw the issue from the jury. But he said that the Board should develop the common law of St Christopher so as to bring it into line with section 3. He submitted that such a development would be calculated to give effect to the constitutional guarantees of human rights in the constitution of St Christopher and Nevis.

20. Their Lordships consider that to interpret the common law in this way would be nothing short of judicial legislation. Nor could it be mandated by any guarantee of human rights. In giving the jury the exclusive right to decide whether the objective element in provocation might have been satisfied, Parliament in effect gave the jury the right to return a perverse verdict of manslaughter free of any control by the judge. This may or may not have been justified by a perception that judges had been unduly restrictive in their directions on provocation. But there is no human right to a perverse verdict and the decision as to whether to adopt section 3 must be left to the legislature of St Christopher and Nevis.

21. Their Lordships therefore consider that the Court of Appeal were right to decide that the judge was not obliged to leave the issue of provocation to the jury.

22. At the hearing before the Board, documents and a statement were produced on behalf of the appellant which showed that he had regularly taken anabolic steroids in connection with his bodybuilding and that there was medical evidence that steroids could cause aggressive and violent behaviour. Investigation into whether there was actually any causal link between the steroids and the appellant's behaviour is still at an early stage. But, it was submitted, such evidence could be taken into account in deciding whether the appellant's response to provocation had been that of a reasonable man. No formal application was made to admit these documents as fresh evidence but their Lordships were invited to remit the matter to the Court of Appeal to decide whether they should be.

23. In their Lordships opinion, the objection to admitting such evidence is that it is irrelevant. The reasonable man at common law does not share the characteristics of the accused or suffer from personality defects caused by steroids: see *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119. The decision in *R v Smith (Morgan)* [2001] 1 AC 146 that the jury are entitled to take such matters into account was based entirely upon the construction of section 3 of the 1957 Act.

Self-defence

24. Finally, Mr Fitzgerald criticised the directions on self-defence, which he said were confusing and misleading. The judge first pointed out, correctly, that on the appellant's version of events, there was no question of self-defence. He did not claim to have fired while defending himself against either Leyoca or Babs. He said that he had not fired at all. But the judge then said that it might be possible to construct a scenario at variance with the appellant's version in which he thought he was defending himself against Babs. In case the jury considered this could reasonably have been true, he gave the jury a direction on the legal requirements of self-defence.

25. The Court of Appeal thought that any scenario which could give rise to a case of self-defence was so far-fetched that the judge should not have left the issue to the jury at all. But their Lordships respectfully think that he was right to do so. The confused statements of the appellant about the struggle in the shop required

that the jury be instructed on the issue. But their Lordships do not think that the summing-up can be criticised. Any difficulty which the jury may have had in dealing with the issue was an inevitable consequence of the judge having to direct them on an hypothesis different from the defence which the appellant was actually putting forward.

Conclusion

26. Their Lordships will humbly advise Her Majesty that the appeal against conviction should be dismissed. Mr Fitzgerald submitted that, as the decision of the Court of Appeal of the Eastern Caribbean that the mandatory death penalty is unlawful represents the current state of the law in St Christopher, the case should be remitted to the Court of Appeal to decide upon an appropriate sentence. But their Lordships do not think that it would be appropriate to take such a step while appeals which raise the issue are pending before the Board. The appeal against sentence will therefore be adjourned to be heard with the other appeals and their Lordships express the hope that arrangements can be made to hear them with all convenient speed.

Dissenting judgment delivered by ***Lord Scott of Foscote***

27. I respectfully agree with the reasons given in the judgment prepared by my noble and learned friend, Lord Hoffmann, for concluding that the appellant's appeal against conviction on the grounds argued before the Board should be dismissed.

28. I regret, however, that I am unable to agree with the opinion, obiter I think, expressed in paragraph 23 of the judgment that fresh evidence relating to anabolic steroids of the sort referred to in paragraph 22 would necessarily be irrelevant. In my opinion, it should be left open to the appellant to make an application in the local courts for the admission of such evidence relating to his consumption of anabolic steroids and its effect, in particular, on his self-control as he may be advised. The local courts can examine the factual plausibility of the fresh evidence and of the existence of a causal link between the appellant's consumption of steroids and his killing of Miss Leyoca Browne and Mrs Violet Browne. This examination would not, of course, be necessary if, in any event and whatever its cogency, the fresh evidence would, in law, be irrelevant to the appellant's defence of provocation. This is the point on which I am in respectful disagreement with their Lordships.

29. The law on provocation has been exhaustively examined in the Privy Council in *Luc Thiet Thuan v The Queen* [1997] AC 131, an appeal from Hong Kong, and in the House of Lords in *R v Smith (Morgan)* [2001] 1 AC 146. In the latter case the House, by a majority, declined to follow the majority view expressed in the former and preferred the dissenting opinion that had been given by Lord Steyn. In *Smith (Morgan)* the majority view was that personal characteristics of the accused, such as a mental condition which had the effect of reducing his power of self-control below that of an ordinary person, could be taken into account by a jury in considering a provocation defence. This had been the view expressed by Lord Steyn in *Luc Thiet Thuan* where the accused had suffered from brain damage which made him prone to loss of self-control on minor provocation.

30. In both these cases the law being applied was the common law as amended by statute, namely, section 3 of the Homicide Act 1957, enacted in Hong Kong in identical terms by section 4 of the Homicide Ordinance. As is noted in paragraph 23 of the majority judgment in the present case, "The decision in *R v Smith (Morgan)* … that the jury are entitled to take such matters into account was based entirely upon the construction of section 3 of the 1957 Act". The law to be applied in the present case is the law of St Christopher and Nevis. St Christopher and Nevis has no statutory equivalent to section 3 of the 1957 Act. It is the common law on provocation that applies.

31. If the common law remained as stated in *Director of Public Prosecutions v Bedder* [1954] 1 WLR 1119, I would agree that the anabolic steroid evidence, whatever its cogency, would be irrelevant and inadmissible. But the common law is not set in stone. In *Holmes v Director of Public Prosecutions* [1946] AC 588, in which the House of Lords considered the question whether words alone could ever amount to sufficient provocation to reduce to manslaughter what would otherwise have been murder, Viscount Simon commented, at p 600, that

> "… the application of common law principles in matters such as this must to some extent be controlled by the evolution of society."

32. The historical survey of provocation as a defence to murder undertaken by Lord Hoffmann in *Smith (Morgan)* and by Dr Holder in his book *Provocation and Responsibility* (1992) demonstrates that the objective reasonableness of the response to

provocation became a requirement of a successful provocation defence only in the 19th Century and that the "reasonable man" as the standard by which to judge the appropriateness of the response first appeared in *R v Welsh* (1869) 11 Cox CC 336, 339. In *Bedder* the "reasonable man" standard reached its common law apotheosis. The House of Lords endorsed with explicit approval a direction to the jury on a provocation defence that included the following passage:

> "There may be, members of the jury, infirmity of mind and instability of character, but if it does not amount to insanity, it is no defence. Likewise infirmity of body or affliction of the mind of the assailant is not material in testing whether there has been provocation by the deceased to justify the violence used so as to reduce the act of killing to manslaughter. They must be tested throughout this case by the reactions of a reasonable man to the acts or series of acts, done by the deceased woman". (p 1121)

33. It was not until 1966 that the House of Lords became able to depart from its own previous decisions (see [1966] 1 WLR 1234) and statutory intervention, following the 1953 Report of the Royal Commission on Capital Punishment, was the obvious way forward. Hence the 1957 Act.

34. There is no reason today, however, why the common law on provocation applicable in St Christopher and Nevis should be regarded as having been fixed immutably by the opinions expressed in the House of Lords in 1954. As Viscount Simon commented in *Holmes*, society evolves. One of the features of the last decade or so has been the taking by athletes of performance-enhancing substances. Anabolic steroids are an example. The effect of these substances, long-term and short-term, on those who take them is the subject of current medical research. The research appears to show that they bring about a significant inability to exercise self-control. The same may be true of other drugs and medications. The newspapers recently have featured a tragic tale of a father who in a state of mind suggested to have been attributable to Prozac killed his wife and children and then himself. Had he survived, the courts might well have been exercised with the question of his responsibility under criminal law for his actions. Had these events happened in St Christopher and Nevis would it be said, on the authority of *Bedder v The Director of Public Prosecutions*, that evidence about the totally unexpected causal effects of taking Prozac would be irrelevant to his criminal responsibility?

35. In *B (A Minor) v Director of Public Prosecutions* [2000] 2 WLR 452 the House of Lords had to deal with the issue of mistake as a defence to criminal liability. It had been supposed, prior to *B (A Minor)*, that the common law rule applicable in a case where the mistake did not negative an essential ingredient of the offence (see *Director of Public Prosecutions v Morgan* [1976] AC 182) was that the mistake had to be objectively a reasonable one to have made (see *R v Tolson* (1899) 23 QBD 168. But in *B (A Minor)* the House agreed with the view expressed by Lord Steyn that as a matter of general principle mistake, whether reasonable or not, was a defence if it negatived the mens rea necessary for the crime in question. The mistake did not have to be based on reasonable grounds. This decision has attracted some criticism (see Archbold (2001 Ed) paras 17.10 to 17.14) and I mention it simply as an example in an analogous area of the ability of the common law to develop, and to shed where thought desirable, previously accepted rules.

36. Whether the common law rules on provocation, as expressed in *Bedder* in 1954, should in 2001 be reformulated is open to debate. But it seems to me at least possible that the insistence on the "reasonable man" standard in relation to specific disabilities, such as was present in *Smith (Morgan)* and in *Luc Thiet Thuan* or mental disabilities brought about by previously unknown effects of medication would be found unsatisfactory. There seems to me no reason in principle why the common law should not now be re-stated so as to be similar in its effect to section 3 of the 1957 Act.
37. The judgments of Lord Hoffmann in *Smith (Morgan)* and Lord Steyn in *Luc Thiet Thuan* contain passages which, although directed to the position under section 3, or its Hong Kong equivalent, would have equal force if directed to the common law. At p 173 of [2001] 1 AC Lord Hoffmann said this:

> "The law expects people to exercise control over their emotions. A tendency to violent rages or childish tantrums is a defect in character rather than an excuse. The jury must think that the circumstances were such as to make the loss of self-control *excusable* to reduce the gravity of the offence from murder to manslaughter."

and

> "The general principle is that the same standards of behaviour are expected of everyone, regardless of their individual psychological make-up. In most cases, nothing more will need to be said. But the jury should in an

appropriate case be told … that this is a principle and not a rigid rule. It may sometimes have to yield to a more important principle, which is to do justice in the particular case. So the jury may think that there was some characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonably have expected of him and which it would be unjust not to take into account."

38. Lord Steyn in *Luc Thiet Thuan* cited a very pertinent passage from the speech of Lord Simon of Glaisdale in *R v Camplin* [1978] AC at 705 and, at p 157, said this:

> "Counsel for the prosecution argued that it may prove difficult to say where the line should be drawn. We ought not to shrink for this reason from recognising a rational and just development. The traditional common law answer is apposite: any difficult borderline cases will be considered if and when they occur. In the meantime nobody should underestimate the capacity of our law to move forward where necessary, putting an end to demonstrable unfairness exposed by experience."

39. It should, in my respectful opinion, be left open to the appellant, if he can produce sufficient factual evidence, to argue that the principles expressed by Lord Hoffmann and Lord Steyn can properly be taken to be principles of the developed common law applicable in St Christopher and Nevis. My objection to the passage in the majority judgment that writes off any such evidence, whatever its cogency, as being "irrelevant" is that it assumes without any argument and without the point ever having been properly addressed that the common law as expressed in *Bedder v Director of Public Prosecutions* is not capable of development so as to accord with those principles. Such an assumption is not, in my opinion, warranted and, I suggest, undervalues the vitality of the common law as well as, potentially, doing an injustice to the appellant.