

ST. CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 40 OF 1998

BETWEEN:

BERTHILL FOX

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Albert Redhead
The Hon. Mr. Adrian Saunders
The Hon. Mr. Ephraim Georges

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Dr. Henry Browne for the Appellant
Mr. Dennis Merchant for the Respondent, Ms. Bridget Nurse with him

2003: July 23;
September 22.

JUDGMENT

[1] **REDHEAD, J.A.:** This is an appeal against sentence. The appellant was convicted on 22nd May 1998 for the double murder of his fiancé and her mother.

[2] The appellant was then sentenced to the mandatory sentence of death. On 11th March 2002 the Privy Council held that the mandatory death sentence passed on the appellant violated his rights under Section 7 of the St. Christopher and Nevis Constitution.

- [3] On 27th September, 2002 the appellant was re-sentenced in the High Court. He was given two life sentences.
- [4] He now appeals to this court against his sentence.
- [5] Dr. Browne learned Counsel for the appellant in his skeleton submissions argued that the sentence which was available to the learned trial Judge was “at large” in that he was not restricted to passing either a sentence of death or a sentence of life imprisonment.
- [6] Dr. Browne contended that the learned trial judge had a discretion whether or not to impose a life sentence.
- [7] Learned Counsel submitted that the cases show that a discretionary life sentence should only be imposed where it is necessary for the protection of the public. He contended that there was no such evidence in this case and therefore imposition of a sentence of life imprisonment was wrong in principle.
- [8] Dr. Browne referred to **R v Whitaker 1997 Cr. App. R 261**. In that case the court of appeal in England laid down two pre-conditions for the imposition of a life sentence.
1. The offence must be very serious and
 2. There should be good grounds for believing the offender might remain a serious danger to society for a period which could not be reliably estimated at the date of the sentence.
- [9] Learned Counsel for the appellant before us put forward the view that if the defence of diminished responsibility had been available in St. Kitts at the time of the appellant’s trial then he would have been liable to be convicted for the offence of manslaughter be reason of diminished responsibility.
- [10] It is pertinent at this stage to refer to the facts of this case as presented to the jury.

- [11] Berthill Fox, the appellant was a World Champion Body Builder and "Mr. Universe".
- [12] The appellant's case was that having returned from an overseas trip, he went to retrieve his gun and pouch from his fiancé who was at her mother's place of business. His fiancé greeted him friendly but her mother instead appeared in a hostile manner with his gun in her hand in the air. On retrieving his gun from her, a struggle ensued and the gun went off once injuring his fiancé. A further struggle ensued. The gun went off a second time injuring the mother. He panicked ran out of the shop, went to Edmund Tross his friend and told him Leyoca and Violet Browne had been shot. He handed over the gun to Tross. His defence before the jury was that at all times when the gun went off, it did so in the hands of Violet Browne.
- [13] The case for the prosecution was that the appellant, having just returned from his overseas trip, discovered that his fiancé might have been unfaithful to him. He went to her mother's shop and cold bloodedly murdered both of them.
- [14] The prosecution led evidence from Edmund Tross to show that what the appellant told him was that he (the appellant) "just shot Leyoca and Babs" (Violet Brown) and not that he said that "Leyoca and Violet got shot." Tross testified that the appellant told him he caught "Leyoca and a guy." Prosecution witness Leroy Isaac also testified that the appellant told him that he "just shot two people."
- [15] After the appellant made a statement from the dock, the prosecution made application to and was granted leave by the judge to lead rebuttal evidence which purported to give a lie to the appellant's statement that when he went to the shop Violet Browne had the gun. The witnesses Edmund Tross and Julsica Wallace testified in rebuttal that at the appellant's gym at around 10.00 am on Saturday September 27, 1997 and 8.30 pm on Monday September 29, 1997 they saw the appellant in possession of his gun.

- [16] The jury having found the appellant guilty of the murder of his fiancé and her mother. It is beyond doubt that they rejected that appellant's version of how the incident occurred and accepted the prosecution's i.e. he brutally murdered two women in cold blood.
- [17] At the hearing of the sentencing of the appellant there was a Psychiatric Report compiled by Dr. Diana Tamlyn.
- [18] This report was before the learned trial Judge for consideration during the sentencing phase of this matter.
- [19] Dr. Tamlyn was at the time of the report responsible for forensic psychiatry at Rampton(Maximum Security) Hospital Nottinghamshire England.
- [20] In her report she stated that the appellant had been a long time user of anabolic steroids. Dr. Tamlyn explained that these drugs are derivatives of testosterone which is produced naturally in men and women. They have been used for several decades now by weight lifters and athletes to enhance back and muscle performance. In the excessive doses taken by body builders to enhance and maintain their appearance, and particularly if taken over a prolonged period, (in Berthill Fox's case over 40 years) anabolic steroids can lead to well recognised psychological effects. The main effects of steroid abuse are:
- (i) changes in mood including improved self-esteem and irritability.
 - (ii) Loss of inhibition and a lack of judgment, mood swings and grandiose ideas. The user can become suspicious and aggressive.
 - (iii) Violent, hostile, anti-social behaviour know as "roid rage" resulting in property damage, self-injury, assaults, marriage break-ups, domestic violence and murder.
- [21] Finally for the purpose of this exercise, Dr. Tamlyn gave as an opinion "psychiatric evaluation on 9th May 2002 elicited evidence to support the contention that at the time of the index offence, Berthill Fox was likely to have been suffering an abnormality of the

mind, due to prolonged anabolic steroid use which rendered him susceptible to provocation and lack of judgment.”

[22] Dr. Tamlyn’s opinion in my view is not conclusive because she said, “was likely to have been suffering an abnormality of the mind.”

[23] Is this appellant likely to be a danger to the public? There is no indication from this report that his steroid abuse which “can lead to well recognized psychological effects,” whether that effect, if in fact it had any effect on him, can be eradicated by a non-use of the steroid.

[24] Is it a habit-forming drug? I do not know the answer.

[25] In any event having regard to the prosecution’s case which the jury must have accepted there could be no doubt that this was a very serious offence.

[26] The appellant had received 2 consecutive life sentences Mr. Merchant conceded that the sentences should be concurrent. I agree.

[27] The appeal against sentence is dismissed, the sentences to run concurrently.

A. J. Redhead
Justice of Appeal

I concur

A. Saunders
Justice of Appeal

I concur

Ephraim Georges
Justice of Appeal [Ag.]