

Berthill Fox

Appellant

v.

The Queen

Respondent

FROM

**THE EASTERN CARIBBEAN COURT OF APPEAL
(SAINT CHRISTOPHER AND NEVIS)**

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

Delivered the 11th March 2002

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hutton
Lord Hobhouse of Woodborough
Lord Millett
Lord Rodger of Earlsferry

[Delivered by Lord Rodger of Earlsferry]

1. On 22 May 1998 the appellant, Berthill Fox, was convicted in the High Court of Saint Christopher and Nevis of the murders of his fiancée and her mother. He was sentenced to death in terms of section 2 of the Offences Against the Person Act 1873 (“the 1873 Act”) which provides:

“Whosoever is convicted of murder shall suffer death as a felon.”

2. Fox appealed against his conviction and sentence to the Eastern Caribbean Court of Appeal. On 10 May 1999 the Court of Appeal dismissed his appeal. On 4 October 1999 their Lordships’ Board granted Fox special leave to appeal against both his conviction and his sentence, the basis of his appeal against sentence being that the mandatory death penalty in section 2 of the 1873 Act was unconstitutional. On 2 October 2001 the Board dismissed Fox’s appeal against conviction: *Fox v The Queen* [2001] UKPC

41. The judgment of the majority of the Board delivered by Lord Hoffmann contains a full account of the relevant facts of the case and of the issues relating to the appeal against conviction. Their Lordships refer to that opinion for the background to the present appeal.

3. The Constitution of Saint Christopher and Nevis is set out in schedule 1 to the Saint Christopher and Nevis Constitution Order 1983 (SI 1983 No 881) (“the Order”). The supremacy of the Constitution is secured by section 2 which is in these terms:

“This Constitution is the supreme law of Saint Christopher and Nevis and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

4. Section 3 of the Constitution recites that every person in Saint Christopher and Nevis is entitled to certain fundamental rights and freedoms. It goes on to enact that the provisions of Chapter II of the Constitution are to have effect for the purpose of affording protection to those rights and freedoms, subject to the limitations contained in those provisions.

5. Section 4(1) says that no one is to be deprived of his life intentionally

“save in execution of the sentence of a court in respect of a criminal offence of treason or murder under any law of which he has been convicted.”

6. Section 7 provides:

“A person shall not be subjected to torture or to inhuman or degrading punishment or other like treatment.”

7. Section 18(1) of the Constitution, so far as relevant for present purposes, is to this effect:

“If any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him ..., then, without prejudice to any other action with respect to the same matter that is lawfully available, that person ... may apply to the High Court for redress.”

8. As their Lordships explained when giving their judgment in *The Queen v Hughes* [2002] UKPC 12, the appellant’s challenge to the death penalty really involves two contentions. First, he

contends that section 2 of the 1873 Act, in so far as it provides for a mandatory death sentence in the case of all murders, is inconsistent with his right not to be subjected to inhuman or degrading punishment or treatment under section 7 of the Constitution. Section 2 of the 1873 Act is, therefore, void by reason of section 2 of the Constitution. Secondly, the appellant contends that, since section 2 of the 1873 Act is void, the death penalty imposed on him under that section was unlawful and should accordingly be quashed.

9. In resisting those contentions the Attorney-General relied in the first place on paragraph 9 of schedule 2 to the Order (“paragraph 9”):

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 7 of the Constitution to the extent that the law in question authorises the infliction of any description of punishment that was lawful immediately before 27th February 1967 (being the date on which Saint Christopher, Nevis and Anguilla became an associated state).”

The provision is essentially the same as paragraph 10 in schedule 2 to the Saint Lucia Constitution Order 1978 (SI 1978 No 1901). In *The Queen v Hughes* the Board analysed paragraph 10 of the Saint Lucia Order and its relationship with sections 5, 16(1) and 120 of the Constitution of Saint Lucia. Their Lordships apply exactly the same analysis to paragraph 9 and to its relationship with sections 7, 18(1) and 2 of the Constitution of Saint Christopher and Nevis. On the basis of that analysis their Lordships reject the Attorney-General’s argument that paragraph 9 prevents them from holding, if so advised, that section 2 of the 1873 Act, to the extent that it requires the judge to impose the death penalty, is inconsistent with section 7 of the Constitution and that any sentence passed on the appellant under section 2 should therefore be quashed.

10. In the case of *Reyes v The Queen* [2002] UKPC 11 their Lordships held that the mandatory death penalty in Belize is inconsistent with section 7 of the Constitution of Belize 1981, which is in similar terms to section 7 of the Constitution of Saint Christopher and Nevis. In the hearings before the Board Mr Fitzgerald represented not only the present appellant but also the appellant Reyes, as well as the respondent Hughes in the Crown appeal in his case. The case of *Hughes* was heard first and in it Mr Fitzgerald deployed his full array of arguments relating to the mandatory death penalty and the constitutional guarantee against

inhuman or degrading punishment or treatment. Mr Fitzgerald then adopted those arguments in the present appeal and in *Reyes*. Similarly, in the present appeal the Attorney-General, who had been present during the argument in *Hughes*, adopted, but also added to, the arguments on this point advanced in that case by Sir Godfray Le Quesne on behalf of the Crown. The decision in *Reyes*, the last of the appeals to be heard, was therefore reached in the light of all the arguments which the Board had heard in *Hughes* and in the present appeal. The Attorney-General did not suggest that there were any special provisions in the Constitution of Saint Christopher and Nevis or any special social conditions which the Board should take into account. In these circumstances their Lordships will follow their decision in *Reyes* and will accordingly hold that section 2 of the 1873 Act is inconsistent with section 7 of the Constitution to the extent that it requires the court to impose the death penalty whenever someone is convicted of murder. The death sentence imposed on the appellant under section 2 must therefore be quashed and the matter remitted to the High Court for the judge to determine the appropriate sentence, having regard to all the circumstances of the case.

11. Paragraph 2(1) of schedule 2 to the Order provides:

“The existing laws shall, as from 19th September 1983, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.”

Section 2 of the 1873 Act is inconsistent with section 7 of the Constitution only to the extent that it requires the court to sentence to death anyone convicted of murder. By contrast, a provision which simply authorised the imposition of the death penalty in the case of murder would be consistent with sections 4(1) and 7 of the Constitution. In exercise of the power under paragraph 2(1) of schedule 2 their Lordships accordingly construe section 2 of the 1873 Act as providing:

“Whosoever is convicted of murder may suffer death as a felon.”

The effect of this construction of section 2 is that, whenever anyone is convicted of murder, he may be sentenced to death or else he may be sentenced to a lesser punishment. The selection of the appropriate sentence will be a matter for the judge, having regard to all the circumstances of the case. Before sentence is imposed, the judge may be asked to hear submissions and, if

appropriate, evidence relevant to the choice of sentence. Their Lordships refer to their fuller discussion of this matter in their judgment in *The Queen v Hughes*.

12. For these reasons their Lordships will humbly advise Her Majesty that the appeal against sentence should be allowed, that the sentence of death passed on the appellant on 22 May 1998 in the High Court of Saint Christopher and Nevis should be quashed and that the matter should be remitted to the High Court to decide what sentence should be pronounced.