

5/12/2003

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 3 of 2003

Indictment No. 69/01

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

And

ORN KENNETH MONCRIEFF

APPELLANT.

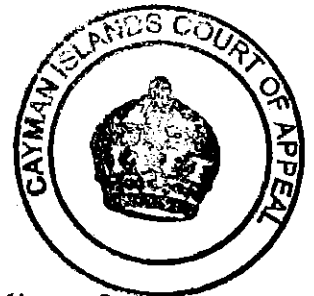
**BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President.
The Honourable Mr. Justice I. D. Rowe, J. A.
The Honourable Mr. Justice M. Taylor, J. A.**

Mr. Philip St. John Stevens Q.C. and Lawrence Aiolfi instructed by Walkers for the Appellant and Adam Roberts, Senior Crown Counsel, for the Crown.

HEARD: July 29, & August 1, 2003

DELIVERED: 5th December, 2003

REASONS FOR JUDGMENT



ROWE, J.A.

1. After a most careful judgment, Sanderson J. entered a verdict of manslaughter against the appellant on the indictment charging him with murder. On the broad facts, a layman could easily have thought that this was a case of murder most foul. After his careful and scholarly consideration of the law, the learned trial judge stated that he was satisfied, so that he could feel sure, that this appellant was not provoked

and that finding disposed of the defence of provocation. The trial judge then went on to consider the defence of diminished responsibility. After a full and elaborate consideration of the facts and the law, the learned trial judge concluded that the appellant was suffering from an abnormality of the mind; that it was caused by a disease or diseases namely dependence on alcohol, dependence on drugs and/or a depressive disorder and that the abnormality of the mind induced by those diseases, or a combination of them, substantially impaired the appellant's mental responsibility for his acts. As a consequence of this finding of diminished responsibility, on December 20, 2002, the learned trial judge found the appellant not guilty of murder but guilty of manslaughter. No appeal has been taken against the verdict of manslaughter. This appeal is against sentence only.

2. The gruesome facts of this case need not be recounted save to say that they disclosed a senseless and brutal killing of an unresisting woman. The sentencing stage provided a significant challenge to the Court. This was only the second case in the Cayman Islands where a defendant was found guilty of manslaughter on the ground of diminished responsibility and consequently there was no pool of local authority by which the

Court could be guided in imposing sentence. The sentencing options open to the Court were either a fixed custodial sentence or an indeterminate sentence, if, in the opinion of the court, the defendant constituted a danger to the public.

3. Sanderson J. reviewed seven (7) cases decided between 1998 and 2001 in which manslaughter verdicts were recorded and determinate sentences were imposed. He reviewed, too, the case of *R. v. Bush*, (1980-83) CILR, Note 8, in which Summerfield CJ imposed a determinate sentence on a conviction for manslaughter based on diminished responsibility. In his admirable manner, the learned trial judge reviewed eight cases decided in the United Kingdom in the same period, 1988 to 2000, in which various sentences were imposed for manslaughter after a finding that the defendant had suffered from diminished responsibility.
4. In the course of the substantive trial evidence was received from three forensic psychiatrists, to wit, Dr. Othello, Dr. Von Kirchenheim and Dr. Lockhart. The learned trial judge preferred the evidence of Dr. Lockhart over that of Dr. Othello and it was on the basis of Dr. Lockhart's evidence that he concluded that the appellant was suffering from an abnormality of the mind caused by disease or diseases, namely

dependence on alcohol and/or drugs and/or a depressive disorder and that this abnormality of mind substantially impaired the appellant's mental responsibility for his acts.

5. We have had the advantage of reviewing the passage quoted by the trial judge from the evidence of Dr. Lockhart, wherein the doctor said that:

“The combination of substance dependence with other major psychopathology is more volatile than either alone. This taken with certain personality traits such as; impulsivity, low frustration tolerance, inability to tolerate criticism and suspiciousness increases the potential risks of violence. A general disrespect for life including one's own also increases the violence risk potential. Violent suicide attempts increase the likelihood of future violence towards others. (*Convit et al* 1988 *Brizer* 1989). It is my opinion, using the standards of my profession, that Mr. Moncrieff at this time presents a serious potential threat to society in general. He continues to require psychiatric treatment with monitoring of abstinence from illicit substances. The risk of Mr. Moncrieff's relapse of both his psychiatric and substance disorders continue to be increased. He requires long term monitoring and supervision in a structured facility for his safety and the safety of others”.

Sanderson J. then went on to say that he accepted the report and

evidence of Dr. Lockhart and that he believed the appellant to pose a significant risk to society. The trial judge found that there was a possibility that over time and with proper treatment, that risk could be reduced substantially although no one could say how long that might take. After deep reflections, the learned trial judge opined that one option open to him was to impose a sentence of 14 to 15 years imprisonment if he considered that the appellant did not pose a risk to society. He rejected that option and stated:

“I do not feel that in the circumstances of this case, such a sentence would be appropriate. I say that because I have no way of knowing when Mr. Moncrieff will no longer pose a risk to society”.

The judge reflected that based on the opinion of Dr. Lockhart it could be safe for the appellant to be returned to the society in 10-15 years or more. No precise length of time could be predicted for this eventuality.

6. Having regard to all this uncertainty, the learned trial judge then considered the mechanism, which exists in England and elsewhere in the British Commonwealth for the detention of persons in the situation of the appellant in a mental facility until such time as the appropriate authorities concluded that it was safe to release him. He found that no

such mental facility existed in the Cayman Islands. However, in acknowledgement of the power of the Governor, pursuant to Section 53 of the Constitution, to remit the whole or any part of any sentence of a person, the trial judge imposed a sentence of life imprisonment in respect of the appellant. Very significantly, in addition, it was specifically ordered by the court as part of the sentence that the Government should provide ongoing psychiatric treatment to the appellant while he remained in prison and that a full psychiatric review be prepared and presented to the Governor no later than 10 years from the date of sentencing. The learned trial judge ended his sentencing remarks by graciously imploring the Governor to accept his remit and to act upon it in due course with appropriate legal advice.

7. It is from this judgment that the appeal against sentence has been taken. Mr. Stevens has invited us to say that the discretionary, preventative, sentence was wrong in principle and that the correct sentence was one of 12-15 years imprisonment. We found that the approach of the learned trial judge in sentencing this appellant to be illuminating and correct. Accordingly we declined to accept the invitation of the appellant's counsel to interfere with the sentence and we add the reasons, which

follow.

8. Mr. Stevens submitted that there is the possibility that after the completion of the notional punitive determinative sentence appropriate to the appellant had been served, and the appellant no longer posed a danger to society, he could still continue to be in detention as there was no machinery to bring his sentence to an end. In his submission, from that time onwards, the detention of the appellant would be unlawful unless there was a system in place to satisfy the condition precedent that during any further indeterminate preventative period of detention, the appellant was continuing to pose a danger to the public.
9. Our attention was drawn to Article 5(4) of the EC Human Rights Convention 1998, which provides that:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

It was admitted by appellant’s counsel that this provision of the EC Human Rights Convention of 1998 was not included in the Cayman Islands Constitution of 1972 and now forms no part of domestic law of the Cayman Islands. In consequence, the decision in *Weeks v. UK* 10

E.H.R.R. 293 and *Thyne, Wilson and Gunnell v. UK* 13 E.H.R.R. 666, do not have direct application to the Cayman Islands. It is to be recalled, however, that it was decided in these cases that at the end of the punitive period of a life sentence the incarcerated persons were entitled under Article 5(4) of the Convention to take proceedings to have the lawfulness of any continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court. This is not now the law of the Cayman Islands.

10. We did not think that the provisions of the *Mental Health Law* (1997 Revision) made provisions that could apply to the circumstances of this case. The term “mentally defective” is defined in section 2(e) of the *Mental Health Law* as follows:

“Mentally defective” is descriptive of a person who –

- (e) By reason of mental defect is of vicious or criminal propensities and requires to be kept under control for the physical protection of others”.

It is not at all clear that this definition covers someone in the position of the appellant who has been found to be suffering from a disease of the mind, which may be cured with psychiatric treatment.

11. Notwithstanding the persuasive advocacy of Mr. Stevens, it seems clear to us that the *Mental Health Law* of 1997 has no relevance to persons who have been committed to prison upon conviction for criminal

offences and who require psychiatric treatment while incarcerated. These convicted persons do not fall in the categories of the so-called “deranged”; “street people”; or “mad people”, who can be seen on the streets of some townships, or to the persons who are turned over to the authorities by relatives or guardians on account of their uncontrollable behaviour. Convicted individuals may appear perfectly sane, and indeed, they had been found mentally fit to plead to the charges brought against them. Persons convicted of manslaughter on the ground of diminished responsibility are in our view miles apart from the common “mentally defective” persons.

12. *The Mental Health Law* deals with prisoners who are alleged to have developed mental illnesses and who have been sent to the mental hospital for observation. What is clear from section 11 is that the period of observation in the mental hospital does not count as part of the sentence of the individual. This provision ensures that prisoners are dissuaded from simulating mental illness to avoid the normal conditions of incarceration.

13. We were attracted to the arguments of Mr. Roberts, for the Crown, that this Court is obliged to apply the law as it is today and cannot properly

apply new provisions, which may be inserted into the Constitution in the future. If the Constitution of the Cayman Islands should in the near future include a provision similar to *Article 5(4) of the E.C. Convention*, that could bring additional entitlements to persons in the Cayman Islands. That day has not yet arrived.

14. We believe that Sanderson J. in this difficult case, got it just right when he came to impose sentence. We repeat for emphasis what he said on page 11 of his Reasons for Judgment at the sentencing stage:

“However, this is a case of domestic abuse and that in my view is an aggravating feature. Ultimately, however, the fact is, that he took the life of a decent and lovely young woman. That simply cannot be measured in terms of the years of imprisonment”.

15. In the absence of domestic statutory law or controlling constitutional provisions in the Cayman Islands, we are unable to apply the EC Human Rights Convention to this case. We consider the attempt to invoke the provisions of the *Mental Health Law* of 1997 and to equate it with the various Hospital Acts of England and Wales to be wholly artificial and inapplicable to this case. We feel confident that the Governor will pay

full regard to the recommendations of Sanderson J. and if satisfactory conditions arise, make a determination as to the territorial jurisdiction in which a portion of the appellant's sentence may be served.

ZACCA, P.

ROWE, J.A.

TAYLOR, JA.

