

2007

UA 205/07

USA (Texas)

Death penalty / Legal concern

Kenneth Eugene Foster (m), black, aged 30

Kenneth Foster is scheduled to be executed in Texas on 30 August. He was sentenced to death in 1997 for the murder of Michael LaHood, a white man, in 1996. Mauriceo Brown, the person who shot LaHood, was executed in 2006. Kenneth Foster, in a car some 30 metres from the crime when it was committed, was convicted under the "law of parties", the 1974 Texas law under which the distinction between principal actor and accomplice in a crime is abolished and each may be held equally culpable. Kenneth Foster maintains that he did not know that Brown would either rob or kill Michael LaHood. There is evidence not heard at trial that the murder was an unplanned act committed by Mauriceo Brown, as the latter himself claimed.

On the evening of 14 August 1996, Mauriceo Brown, DeWayne Dillard, Julius Steen and Kenneth Foster drove around San Antonio in Foster's grandfather's rental car, with Foster driving. They committed two armed robberies, with Steen and Brown robbing at gunpoint first a woman and then a man and two women. Then, in the early hours of 15 August, they stopped outside the house of Michael LaHood to which LaHood and a female companion, Mary Patrick, were returning. According to the trial evidence, Mary Patrick approached Foster's car and asked who they were. When she realized she did not know the occupants, she walked back towards Michael LaHood. Mauriceo Brown got out of the car, approached LaHood, demanded his wallet, and shot him. Not long afterwards, Kenneth Foster and his three companions were stopped by police and arrested. Kenneth Foster, who was aged 19 at the time, gave police a statement in which he said that, "Mauriceo jumped out of the car .We had tried to get Mauriceo to get in the car and leave... We just wanted to leave ...I heard a gunshot .I. did not know, at the time, that Mauriceo had a gun. Mauriceo trotted back to the car ..He was gasping... I asked him, what happened, what had he done. He didn't reply".

Mauriceo Brown and Kenneth Foster were tried jointly for capital murder. Brown admitted being the gunman but denied intent to kill. At the trial Brown testified that there had been no discussion of robbing LaHood before he got out of the car. Foster pleaded not guilty. Both were sentenced to death. Mauriceo Brown was executed on 19 July 2006. Neither Julius Steen nor DeWayne Dillard was prosecuted for the LaHood murder.

To convict Kenneth Foster of capital murder under the law of parties, the prosecution had to prove that there was a conspiracy between him and Brown to rob LaHood, and that Foster should have anticipated that murder might have occurred during the robbery. The prosecution's key witness was Julius Steen. Although Steen testified that he had not been sure of Brown's intent when he left the car and that there had been no discussion in the car about committing a robbery, he said that "it was kind of like, I guess understood what was probably fixing to go down." Asked by the prosecutor if he had understood that when Brown got out of the car, there was going to be a robbery, Steen testified that "I would say I kind of thought it". He also said that he was not sure of Foster's understanding in this regard. Affirming the death sentence in 1999, the Texas Court of Criminal Appeals observed that the case against Foster "rested largely on Steen's testimony as an accomplice". The prosecution had pointed to the two earlier robberies committed at gunpoint as a reason Foster should have anticipated that a murder could have occurred.

Neither Julius Steen nor DeWayne Dillard (who did not testify at the trial) was interviewed by Kenneth Foster's trial lawyers. This was because each was facing charges in other cases, and their own lawyers refused to allow them to be interviewed while those cases were still pending. Since the trial, both have given statements. Dillard testified at a state appeal that before the shooting, Kenneth Foster had told him that he wanted Brown and Steen to stop committing the robberies, and because Dillard had known the two longer, asked him to persuade them to stop. Dillard testified that he himself had believed there would be no more robberies because he had taken his gun back after the two earlier crimes. He said that the four were heading back to his home when they came to a dead end and, after turning the car around, had stopped when they saw Mary Patrick apparently flagging them down. Dillard testified that Brown had grabbed the gun but that Foster was unlikely to have seen that; that there was no agreement or plan to rob anyone; and that no one had encouraged Brown to do what he did. He said that after the shot was heard, Foster had appeared surprised and panicked and started to drive away, but Dillard had told him to stop and wait for Brown.

Julius Steen signed an affidavit in 2003 clarifying his trial testimony, clarification that had not been elicited by the defence because their cross-examination was inevitably weak due to their lack of pre-trial contact with this witness. Steen recalled that it was only when he had seen Mauriceo Brown standing opposite Michael LaHood that he understood "what might be going down. At that point, and not before, I thought that Brown might be robbing the man". He stated that "There was no agreement that I am aware of for Brown to commit a robbery at the LaHood residence. I do not believe that Foster and Brown ever agreed to commit a robbery. In my opinion, I don't think that Foster thought that Brown was going to commit a robbery. When Brown got back in the car, we were all shocked. Even Brown looked shocked. I don't think that Brown knew why he shot the man and was surprised that he did". In a recent appeal,

Foster's lawyer has argued: "Foster clearly did not anticipate what Brown himself did not foresee. Brown clearly acted on his own independent impulse, and not pursuant to the imaginary robbery conspiracy that has trapped Kenneth Foster on death row".

In 2005, a federal district judge found a "fundamental constitutional defect in Foster's sentence". In 1982, the US Supreme Court had ruled in *Enmund v. Florida* – in the case of a man who had been in a parked car while his accomplices committed robbery and murder in a house nearby – that the death penalty is disproportionate if it is imposed on a defendant who did not himself kill, attempt to kill, or intend to kill the victim. The Court modified this rule five years later in *Tison v. Arizona* when it held that a defendant who participates in a crime that leads to murder and whose "mental state is one of reckless indifference to the value of human life" may be sentenced to death. The federal judge ruled that Foster's jury had not been asked to determine if he had any intent to kill LaHood, and that this failure represented a misapplication of the law. However, Texas appealed to the Fifth Circuit Court of Appeals, which overturned the decision.

Since the USA resumed executions in 1977, 1,089 prisoners have been put to death; 398 of them in Texas. There have been 32 executions in the USA in 2007, 19 of them in Texas. The UN Safeguards Guaranteeing Protection of the Rights of those facing the Death Penalty state that "capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts". The fact is that Kenneth Foster did not kill Michael LaHood, and there is compelling evidence that he did not plan, intend or anticipate that he would be robbed or killed either.

RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible, in English or your own language, in your own words (please include Kenneth Foster's inmate number, #999232):

- expressing sympathy for the family of Michael LaHood, and explaining that you are not seeking to excuse the manner of his death or to downplay the suffering it will have caused;
- noting that the person who actually shot Michael LaHood, Mauriceo Brown, was executed last year;
- expressing concern at the use of the law of parties in this case, noting evidence that the shooting was the spontaneous act of Mauriceo Brown, and that all those involved in the crime have said that there was no conspiracy to rob Michael LaHood, which would make Kenneth Foster innocent of capital murder;
- noting that the two other accomplices in the car were never prosecuted in this crime, and yet as the evidence stands today their and Foster's culpability in it would appear to be similar or the same;
- calling for Kenneth Foster to be granted clemency.

APPEALS TO:

Rissie Owens, Presiding Officer, Board of Pardons and Paroles, Executive Clemency Section
8610 Shoal Creek Boulevard, Austin, TX 78757, USA

Fax: +1 512 463 8120

Salutation: Dear Ms Owens

Governor Rick Perry, Office of the Governor, P.O. Box 12428, Austin, Texas 78711-2428, USA

Fax: +1 512 463 1849

Salutation: Dear Governor

COPIES TO: diplomatic representatives of USA accredited to your country.

PLEASE SEND APPEALS IMMEDIATELY.
