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Article 18

More v. The Queen

J. E. L.

More v. The Queen[1] — CRIMINAL LAW — CAPITAL MURDER — PLANNED AND DELIBERATE — DIMINISHED RESPONSIBILITY IN CANADA.

This is an appeal from the Manitoba Court of Appeal[2] affirming the conviction of the appellant for capital murder. The facts of the case are simple and tragic. The accused was happily married but he ran into financial difficulties. His wife, who helped with the family income through her earnings, had co-signed for a debt of the appellant. Unable to accommodate his most pressing creditor, the accused was advised by their solicitors that his wife's wages would be garnisheed on September 28th, 1962. This upset the accused who feared that disclosure of the situation would have a bad effect on the happiness of his wife, blissfully unaware of his financial plight. On September 25, the accused bought a .22 calibre rifle and 50 cartridges which (unknown to his wife) he placed in the cellar of his house. On September 27, at 6 a.m. he shot his wife through the head while she was sleeping. He then proceeded to prepare various documents which testified to his devotion and love for his wife and his feeling that knowledge of the debts would so upset his wife as to ruin her happiness. At 8 a.m. he telephoned his wife's employer and informed him that she was ill and would not report for work. At 10 a.m. he drove his sister downtown and said nothing of the killing of his wife. At 4 p.m.

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1 [1963] S.C.R. 522
2 43 W.W.R. 30.

he attempted suicide by shooting himself in the head but did not die. At 8 p.m. he telephoned the police. The evidence is not contradicted.

The theory of the Crown was that the accused loved his wife but having accumulated heavy debts, of which he had not fully informed her, he became worried and depressed and that, when threatened with legal action which would have disclosed his true financial position to her, he shot her and attempted to commit suicide. On the evidence, the killing of his wife was motivated, intended, planned and deliberate, thus amounting in law to a capital murder under ss. 201(a)(i) and 202A 2(a) of the Criminal Code. In defence, the accused, who admittedly killed his wife on September 27th, pleaded that at the time he was an automaton, devoid of will, not knowing what he was doing, and that the Crown had failed to prove that the homicide was planned and deliberate. According to the expert medical evidence of two psychiatrists called by the defence, the accused was suffering from a diminution of his ability to think, reason and decide at the time of the offence.

The defence relied on the effect on the jury of the expert testimony to show that the requirement of "deliberate" in s. 202A(2) (a) of the Criminal Code had not been proven beyond a reasonable doubt by the Crown.

The learned trial judge did not permit the evidence of the experts to go to the jury without comment. He quoted from text-book writers to the effect that expert witnesses are biased in favour of the side that calls them and that therefore little weight should be given to their evidence. The direction to attach little weight to this evidence is the ground of appeal and the issue of law before the Supreme Court of Canada. The notice of appeal reads:

> The learned trial judge so misdirected the jury as to the weight to be attached to the medical evidence called by the defence that the (accused) appellant was not properly convicted of capital murder.[3]

Speaking for the majority Cartwright J. held:

> The recital of the facts and the evidence of the appellant as to what occurred at the moment of the discharge of the rifle . . . show that it was open to the jury to take the view that the act of the appellant in pulling the trigger was impulsive rather than considered and therefore was not deliberate. The evidence of the two doctors and particularly that of Dr. Adamson, also quoted by my brother Judson, that, in his opinion, at the critical moment the appellant was suffering from a depressive psychosis resulting in "impairment of ability to decide even inconsequential things, inability to make a decision in a normal kind of a way" would have a direct bearing on the question whether the appellant's act was deliberate in the sense defined above; its weight was a matter for the jury.[4]

Fauteux J. in his dissent states:

> Acceptance of appellant's submission that mental defect or disease not sufficient to render an accused legally irresponsible under s. 16, Criminal Code, may nevertheless operate to reduce the degree of the crime charged is tantamount to introducing in the Canadian law a new and secondary

[3] *Supra*, footnote 1, p. 525.
[4] *Ibid.*, p. 534.

test of legal irresponsibility as was done in England prior to the enactment of the provisions of s. 202 A (2)(a) by The Homicide Act, 1957 (U.K.), c. 11, of which s. 2(1) and (2) read:

2(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

2(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

Undoubtedly aware of these provisions, the Canadian Parliament deliderately refused to adopt them. If the appellant's submission is accepted, it follows that the Canadian Parliament has adopted rather obliquely a policy more generous than that of the English law.[5]

In substance then Fauteux J. states that if it was the intention of the Canadian Parliament to incorporate this test, it would have done so expressly.

The Supreme Court of Canada reversed the Court of Appeal of Manitoba and held that the learned trial judge should have allowed the jury to give proper weight to the expert medical evidence and therefore ordered a new trial. The evidence related to whether the act of the appellant in pulling the trigger was impulsive rather than considered.

It is submitted that the ratio of this case constitutes an incorporation into our law of the doctrine of diminished responsibility which was adopted by the English Homicide Act from Scots law.

The Homicide Act, 1957, imported [across the Border] a new defence to a charge of murder, namely, diminished responsibility. The purpose of the provision is to save the judge from having to pass a formal sentence of death in a case of insanity outside the M'Naughton rules, where the sentence would not in any case be carried out, and also to give a measure of recognition to mental abnormality short of insanity. On a verdict of diminished responsibility, resulting in a conviction of manslaughter, the judge may award such term of imprisonment or other punishment or treatment as he thinks fit.[6]

Cassells J. has carefully considered the effect of the doctrine. He says:

. . . (it) preserves the life of a person charged with capital murder who is not insane but is so mentally abnormal as not to be fully responsible for his crime. Such a decision should be in the field of the Jury, as is 'provocation' as a defence and not be dependent upon executive clemency.[7]

S. 202A of the Criminal Code divides murder into capital and non-capital. The purpose is to prevent capital punishment in cases where it has little value other than misdirected vengeance. The rule in *More v. The Queen* is in keeping with this purpose as it allows evidence of mental abnormality which establishes that an element

[5] *Ibid.*, pp. 531-2.
[6] Glanville Williams, *Criminal Law* (2nd ed.), p. 541.
[7] (1964) 7 Can. Bar Journal 9.

of the crime is not present and that the Crown has not proved its case.

A final consideration in this case is whether the grounds for Appeal are proper. One argument is that the direction of the trial judge of the weight to be attached to certain expert evidence is not a legitimate ground for consideration by an appellate court. The trial judge who has first-hand impressions of witnesses (experts included) is best qualified to comment on the weight to be given to certain evidence, and this comment is integrally a part of his directions to the jury. However, the majority's view that the instruction amounted to a decimation of the whole defence, it is submitted, illustrates the contention that in these circumstances, questions of the weight of evidence become questions of law rather than matters for judicial discretion.

Whether or not the doctrine will be recognized in Canada in its full force remains to be seen. However, if as a result of this case evidence of mental abnormality short of the requirements of s. 16 of the Criminal Code is admissible to show that the crime was not deliberate, then it is possible that a verdict of manslaughter, rather than the mere reduction from capital to non-capital murder will be obtained.

J.E.L.