

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Borowiec, 2016 SCC 11, [2016] 1 S.C.R. 80 | **Appeal heard:** January 20, 2016  **Judgment rendered:** March 24, 2016  **Docket:** 36565 |

Between:

Her Majesty The Queen

Appellant

and

Meredith Katharine Borowiec

Respondent

- and -

Attorney General of Ontario,

Women’s Legal Education and Action Fund Inc. and

Criminal Lawyers’ Association of Ontario

Interveners

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 49) | Cromwell J. (McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner and Brown JJ. concurring) |

R. *v.* Borowiec, 2016 SCC 11, [2016] 1 S.C.R. 80

Her Majesty The Queen Appellant

v.

Meredith Katharine Borowiec Respondent

and

Attorney General of Ontario,

Women’s Legal Education and Action Fund Inc. and

Criminal Lawyers’ Association of Ontario Interveners

**Indexed as: R. *v.* Borowiec**

2016 SCC 11

File No.: 36585.

2016: January 20; 2016: March 24.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Brown JJ.

on appeal from the court of appeal for alberta

*Criminal law — Infanticide — Elements of offence — Accused found guilty of infanticide in relation to her deceased newborns — Offence provision providing that female person commits infanticide when by wilful act or omission she causes death of her newly‑born child, if at time of act or omission she is not fully recovered from effects of giving birth to child and by reason thereof or of effect of lactation consequent on birth of child her mind is then disturbed — Legal meaning of expression “her mind is then disturbed” — Whether trial judge failed to apply legal standard set out by statutory language and failed to appreciate evidence of accused’s mental state* *— Criminal Code, R.S.C. 1985, c. C‑46, s. 233.*

In October 2010, a newborn child was found crying in a dumpster. B admitted that she had given birth to the child. She later admitted to having delivered two other babies in 2008 and 2009 and leaving each of them in a dumpster. B was charged with two counts of second degree murder in relation to the deceased newborns. The trial judge acquitted B of murder and found her guilty of two counts of infanticide. The majority of the Court of Appeal dismissed the Crown’s appeal.

*Held*: The appeal should be dismissed.

Infanticide is a form of culpable homicide and applies in the narrow set of circumstances where (1) a mother, by a wilful act or omission, kills her newborn child and, (2) at the time of the act or omission, the mother’s mind is “disturbed” either because she is not fully recovered from the effects of giving birth or by reason of the effect of lactation.

The question of the meaning of the phrase “her mind is then disturbed” is one of statutory interpretation. The grammatical and ordinary sense of the words, their place within the *Criminal Code*, the provision’s legislative history and evolution, and the jurisprudence interpreting the phrase “her mind is then disturbed” do not support the conclusion that Parliament intended to restrict the concept of a disturbed mind to those who have “a substantial psychological problem”. Rather, the phrase “mind is then disturbed” should be applied as follows: (a) the word “disturbed” is not a legal or medical term of art, but should be applied in its grammatical and ordinary sense; (b) in the context of whether a mind is disturbed, the term can mean “mentally agitated”, “mentally unstable” or “mental discomposure”; (c) the disturbance need not constitute a defined mental or psychological condition or a mental illness. It need not constitute a mental disorder under s. 16 of the *Criminal Code* or amount to a significant impairment of the accused’s reasoning faculties; (d) the disturbance must be present at the time of the act or omission causing the “newly‑born” child’s death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or of lactation; (e) there is no requirement to prove that the act or omission was caused by the disturbance. The disturbance is part of the *actus reus* of infanticide, not the *mens rea*; (f) the disturbance must be “by reason of” the fact that the accused was not fully recovered from the effects of giving birth or from the effect of lactation consequent on the birth of the child.

The trial judge, relying on the defence expert’s opinion and the evidence as a whole, concluded that B’s mind was “disturbed” as a result of not yet having fully recovered from the effects of giving birth. There was no error in the trial judge’s summary of the law of infanticide. Based on his assessment of the evidence, the trial judge was entitled to conclude or have a reasonable doubt that B’s mind was “disturbed” at the time of the offences despite any indication of rational behaviour and wilful blindness.

**Cases Cited**

**Approved:** *R. v. L.B.*, 2011 ONCA 153, 274 O.A.C. 365, aff’g (2008), 237 C.C.C. (3d) 215, leave to appeal refused, [2011] 3 S.C.R. x; **referred to:** *R. v. Coombs*, 2003 ABQB 818, 343 A.R. 212; *R. v. Guimont* (1999), 141 C.C.C. (3d) 314; *R. v. Parks*, [1992] 2 S.C.R. 871; *R. v. Leung*, 2014 BCSC 558.

**Statutes and Regulations Cited**

*Act to amend the Criminal Code*, S.C. 1948, c. 39, s. 7.

*Coroners and Justice Act 2009* (U.K.), c. 25, s. 57.

*Criminal Code*, R.S.C. 1927, c. 36, s. 262.

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 2 “mental disorder”, “newly‑born child”, 16, 233, 663(b), 672.11(c).

*Criminal Code*, S.C. 1953‑54, c. 51, s. 204.

*Infanticide Act, 1922* (U.K.), 12 & 13 Geo. 5, c. 18, s. 1(1).

*Infanticide Act, 1938* (U.K.), 1 & 2 Geo. 6, c. 36, s. 1(1).

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*Oxford English Dictionary*, 2nd ed. Oxford: Clarendon Press, 1989, “disturbed”.

United Kingdom. House of Lords. *Hansard*, series 5, vol. 50, May 25, 1922, pp. 758‑59, 761‑62, 765 and 768 (online: http://hansard.millbanksystems.com/lords/

1922/may/25/child-murder-trial-bill).

APPEAL from a judgment of the Alberta Court of Appeal (Côté, McDonald and Wakeling JJ.A.), 2015 ABCA 232, 21 Alta. L.R. (6th) 301, 326 C.C.C. (3d) 438, 22 C.R. (7th) 132, [2015] A.J. No. 752 (QL), 2015 CarswellAlta 1237 (WL Can.), affirming the accused’s convictions for infanticide. Appeal dismissed.

*Julie Morgan* and *Joanne Dartana*, for the appellant.

*Andrea L. Serink* and *Alias Amelia Sanders*, for the respondent.

*Jocelyn Speyer*, for the intervener the Attorney General of Ontario.

*Jessica Orkin*, *Kim Stanton* and *Frances Mahon*, for the intervener the Women’s Legal Education and Action Fund Inc.

*Jonathan Dawe* and *Michael Dineen*, for the intervener the Criminal Lawyers’ Association of Ontario.

The judgment of the Court was delivered by

Cromwell J. —

1. Introduction
2. This case requires us to explore a particularly dark corner of the criminal law, the law of infanticide. Section 233 of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that “[a] female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed”. The focus of the appeal is the legal meaning of the phrase “her mind is then disturbed”, a phrase which is not defined in the *Code* and for which the case law has provided little explanation.
3. In my opinion, Parliament intended the concept of a “disturbed” mind in this offence to have its ordinary meaning, so as to provide a broad and flexible legal standard which will serve the ends of justice in the particular circumstances of these difficult cases. While we can provide some limited guidance for trial judges and juries, the rest is left, by Parliament’s design, to their good judgment.
4. Overview of Facts, Issues and Judicial History
5. In October 2010, a newborn child was found crying in a dumpster. The respondent, who was sitting nearby, admitted that she had given birth to the child. She later admitted to having delivered two other babies in 2008 and 2009 and leaving each of them in a dumpster.
6. The respondent was charged with two counts of second degree murder in relation to the deceased newborns. Two expert witnesses were called at trial, each with opposing views on whether the respondent’s mind was disturbed at the time of the offences.
7. Dr. Kenneth Hashman, called by the Crown, was of the opinion that the respondent’s “balance of the mind”, as that expression is used in s. 672.11(c) of the *Criminal Code*, was not disturbed at the time of the commission of the alleged offences in 2008 and 2009. Dr. Jeannette Smith, called by the defence, concluded that the respondent’s actions were explained by her mind being disturbed as a result of her not yet having fully recovered from the effects of giving birth.
8. The main issue at trial and on appeal was whether the evidence gave rise to a reasonable doubt as to whether the respondent’s mind, at the time of the acts which resulted in the children’s deaths, was disturbed by reason of not having fully recovered from the effects of giving birth or lactation.
9. The trial judge accepted Dr. Smith’s opinion. In rejecting Dr. Hashman’s opinion, the trial judge noted that the expert failed to refer to an “important symptom” in his final report (namely that the respondent suffered “significant depersonalization” evidenced by statements that she felt like she had “zero control” of her actions and was “observing from outside” her own body); erroneously applied the “balance of the mind” language found under s. 672.11(c) of the *Criminal Code*; and that he seemed to require that the respondent have a mental disorder in order to have a disturbed mind.
10. In addition to Dr. Smith’s opinion, the trial judge considered the case as a whole, including that the respondent had no criminal record and no psychopathic or sociopathic tendencies. The trial judge concluded, as a result of the respondent’s “bizarre actions” and Dr. Smith’s opinion, that the respondent’s mind was disturbed as a result of the births. Consequently, the trial judge found that the Crown failed to prove beyond a reasonable doubt that the respondent’s mind was not disturbed. The trial judge acquitted the respondent of murder and found her guilty of two counts of infanticide.
11. On the Crown’s appeal of the acquittal at trial, the Court of Appeal divided. The majority upheld the acquittals on the counts of second degree murder. Côté and McDonald JJ.A., writing for the majority, held that Parliament was deliberately vague in defining infanticide and that Parliament intended to set “a very low threshold” in using the term “disturbed”: 2015 ABCA 232, 21 Alta. L.R. (6th) 301, at para. 45, citing *R. v. Coombs*, 2003 ABQB 818, 343 A.R. 212, at paras. 32 and 37. The majority also concluded that, while s. 233 does not refer to “balance of the mind”, it was unlikely that Parliament intended any significant difference between that language and the “mind is disturbed” as found in s. 233: para. 50. While the trial judge was wrong on this point, the majority ultimately found no error in the trial judge’s analysis of the law on infanticide and dismissed the appeal.
12. The dissenting justice, Wakeling J.A., found that a woman had a “disturbed” mind only if her psychological health was substantially compromised because she recently gave birth and she had a newborn to care for and, as a result, her ability to make rational decisions promoting the best interests of her child was substantially impaired. Wakeling J.A. found that the trial judge and the experts failed to apply this standard (or any other standard) and would have allowed the appeal and ordered a new trial.
13. The main issue on the further appeal to this Court concerns the legal meaning of the phrase “her mind is then disturbed”. I will first put this issue in the context of the law of infanticide and then turn to the definitional issue.
14. Analysis
    1. Overview of the Law of Infanticide
15. The law of infanticide has been comprehensively reviewed by the Ontario Court of Appeal in *R. v. L.B.*, 2011 ONCA 153, 274 O.A.C. 365, leave to appeal refused, [2011] 4 S.C.R. x. I need do little more than summarize its key conclusions.
16. Infanticide, which is defined in s. 233 of the *Criminal Code*, is a form of culpable homicide and applies in the narrow set of circumstances where (1) a mother, by a wilful act or omission, kills her newborn child (under one year of age, as defined by the *Criminal Code*, s. 2) and, (2) at the time of the act or omission, the mother’s mind is “disturbed” either because she is not fully recovered from the effects of giving birth or by reason of the effect of lactation: *L.B.*, at para. 58.
17. This definition “requires a mother-child relationship between the perpetrator and the victim”: *L.B.*, at para. 59. Further, “the mental state of the perpetrator/mother must be disturbed and that disturbance must be connected to the effects of giving birth or lactation”: *ibid.* The offence of “infanticide does not require any causal connection between the disturbance of the mother’s mind and the decision to do the thing that caused her child’s death”: *ibid.*; *R. v. Guimont* (1999), 141 C.C.C. (3d) 314 (Que. C.A.), at p. 317. The disturbance is part of the *actus reus* of the offence, and not the *mens rea*: *L.B.*, at para. 59.
18. Infanticide operates both as a stand-alone offence and as a partial defence, as in this case, to a charge of murder: *L.B.*, at paras. 99 and 104; *Guimont*, at p. 320. Where the evidence establishes an air of reality to an infanticide defence, the Crown must negate the defence beyond a reasonable doubt: *L.B.*, at para. 137.
19. The *mens rea* of infanticide is the same as that required for manslaughter: *L.B.*, at para. 114. Thus, “to prove infanticide, the Crown must establish the *mens rea* associated with the unlawful act that caused the child’s death and [the] objective foreseeability of the risk of bodily harm to the child from that assault”: *ibid.*, at para. 121. As the Court of Appeal notes, it is the “unique actus reus of infanticide that distinguishes it from murder and manslaughter”: *ibid*.
20. When infanticide is raised as a partial defence to a charge of murder or manslaughter, the jury should be instructed as set out in *L.B.*, at para. 139. Where the Crown proves that the accused committed a culpable homicide, the jury must consider the nature of the culpable homicide and whether it is infanticide. If the Crown fails to negate at least one of the elements of infanticide beyond a reasonable doubt, the jury must be instructed to return a verdict of not guilty of murder, but guilty of infanticide: *ibid*.
    1. Disturbed Mind
21. The question of the meaning of the phrase “her mind is then disturbed” is one of statutory interpretation. To answer it, we apply the often reiterated “modern” approach which requires that we read the words in their “entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. I will look at the grammatical and ordinary sense of the words, their place within the *Criminal Code*, the provision’s legislative history and evolution, and, finally, at the jurisprudence interpreting this phrase.
    * 1. Grammatical and Ordinary Sense
22. The adjective “disturbed” means “[d]isquieted; agitated; having the settled state, order, or position interfered with” and “emotionally or mentally unstable or abnormal”: *The* *Oxford English Dictionary* (2nd ed. 1989), at p. 872.
23. The French version of the legislation provides that a woman commits infanticide “*si au moment de l’acte ou de l’omission elle n’est pas complètement remise d’avoir donné naissance à l’enfant et si, de ce fait ou par suite de la lactation consécutive à la naissance de l’enfant, son esprit est alors déséquilibré*”. *Le Grand Robert de la langue française* (2nd ed. 2001)defines “*déséquilibré*” as “*[q]ui n’a pas ou n’a plus son équilibre mental, psychique*”: p. 1344.
24. The grammatical and ordinary sense of the words used in s. 233 supports the conclusion that the legislator did not intend to restrict the availability of infanticide to situations where the psychological health of the woman was substantially compromised or where a mental disorder was established.
25. The statutory language also shows that there is no requirement for a causal connection between the disturbance of the accused’s mind and the act or omission causing the child’s death. There is, however, a required link between the disturbance and having not fully recovered from the effects of giving birth to the child or of the effect of lactation consequent on the child’s birth; in either case the disturbance must be “by reason thereof”.
    * 1. Statutory Context
26. The concept of a “disturbed” mind is unique to infanticide and does not appear elsewhere in the *Criminal Code*.Conceptually, a “disturbed” mind must be different from a “mental disorder”, a term used in s. 16 of the *Criminal Code*, and, when proved on a balance of probabilities, can lead to a verdict of not criminally responsible. It must also be different from non-insane automatism, which makes the act committed by the accused involuntary: *R. v. Parks*, [1992] 2 S.C.R. 871, at p. 896.
27. From this we may infer that the disturbance addressed in the infanticide provisions need not reach the level required to provide a defence under s. 16 of the *Criminal Code*, that is, to be the result of a mental disorder (which is defined as a “disease of the mind” under s. 2 of the *Criminal Code*) that renders the accused incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong. We can also infer that the disturbance aspect of infanticide need not render the accused’s acts or omissions involuntary as is required for automatism.
    * 1. Legislative History and Evolution
28. Section 233 of the *Criminal Code* originated in the English *Infanticide Act,* *1922* (U.K.), 12 & 13 Geo. 5, c. 18. In 1938, that legislation was replaced with the *Infanticide Act, 1938* (U.K.), 1 & 2 Geo. 6, c. 36, and, in 2010, was amended by the *Coroners and Justice Act* *2009* (U.K.), c. 25, s. 57.
29. The *Infanticide Act, 1922* introduced the requirement that “at the time of the act or omission [the mother] had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed”: s. 1(1). The *Infanticide Act, 1938* introduced amendments that remain in force today, in particular that the “balance of [the mother’s] mind” could be “disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child”: s. 1(1).
30. The adoption of the *Infanticide Act, 1922* was intended to remedy the fact that judges and juries were reticent to convict a mother who killed her newborn of murder since she necessarily faced the death penalty: House of Lords, *Hansard*, series 5, vol. 50, May 25, 1922 (online) (the “*Child Murder (Trial) Bill*”), at pp. 758-59; see also D. Seaborne Davies, “Child-Killing in English Law” (1937), 1 *Mod. L. Rev.* 203, at pp. 211 and 217-19; and *L.B.*, at paras. 67-68. The conditions in which infanticide arose drew much public sympathy. It was thought to be a crime mostly committed by “illegitimate mothers” trying to hide their shame, a motive which the general opinion thought lessened the heinousness of the crime. Further, it was acknowledged that women who committed infanticide often faced difficult economic circumstances, which led to the commission of the crime: Davies, at pp. 221-22.
31. The drafters of the *Infanticide Act, 1922* deliberately adopted broad language. In the House of Lords, the Lord Chancellor noted that the words expressing the requirement that the balance of the mother’s mind be disturbed were “not terms of art”. Rather, the use of these “new words” was intended to distinguish it from the language “appropriated by prescriptive usage to insanity proper and to mental derangement produced by drunkenness” and that it was better to provide a formula “which might be the subject of reasonable judicial decision” and which would give effect to the intention behind the proposed legislation: *Child Murder (Trial) Bill*, at pp. 761-62.
32. However, the language used did introduce some limitations. Lord Carson recommended that the legislation should not provide relief to just any woman who has gone through childbirth. Rather, it should apply in situations where there was evidence that “the crime when committed was the result of the balance of [the mother’s] mind having been disturbed”: *Child Murder (Trial) Bill*, at p. 765. The Lord Chancellor agreed that one had to establish “some exceptional derangement and disturbance”: p. 768.
33. In Canada, infanticide first appeared in the *Criminal Code* in 1948: *Criminal Code*, R.S.C. 1927, c. 36, s. 262, as amended by *An Act to amend the Criminal Code*, S.C. 1948, c. 39, s. 7. In the English version of the law, Parliament adopted the same “balance of the mind” language as in the *Infanticide Act, 1922*. Amendments were made to the infanticide provisions in 1954: *Criminal Code*, S.C. 1953-54, c. 51. Among other changes, Parliament replaced the “balance of the mind” language with the requirement that the mother’s mind must be “then disturbed” and added lactation, in addition to giving birth, as a potential cause of that disturbance: s. 204. While the “balance of the mind” language was retained in other provisions pertaining to infanticide, namely ss. 663(b) and 672.11(c) of the *Criminal Code*, there is no meaningful difference between this language and the requirement that the mother’s “mind is then disturbed” under s. 233 of the *Criminal Code*. In the French versions of the successive statutory provisions at issue, the following language was used: “*son esprit était alors déséquilibré*” (in the 1927 version of the infanticide provision and in s. 663(b)); “*son esprit est alors déséquilibré*” (in the 1954 version of the infanticide provision); and “*mentalement déséquilibrée*” (in s. 672.11(c)). There is no meaningful difference, either, in the language used in French to describe the mother’s required state of mind.
34. The same concerns that led to the *Infanticide Act, 1922* in the U.K. were also motivating factors in Canada. Namely, sympathetic juries repeatedly refused to convict mothers who killed their newborn children. The infanticide provision was intended to make it easier to get a conviction for the offence of homicide short of murder or manslaughter: *House of Commons Debates*,vol. V, 4th Sess., 20th Parl., June 14, 1948, atpp. 5184-87.
35. It was also expressed in debates that, as the U.K. statute, the provision was intended to apply to cases “where there is not the degree of mental derangement amounting to insanity” and that “[i]t does not go as far as the rule in Macnaughton’s case [which sets out a legal test for insanity]”: *House of Commons Debates*, at p. 5185 (Hon. J. L. Ilsley, then Minister of Justice). It was also noted that the provision would capture “a slightly deranged, distressed mother” who would otherwise be guilty of murder: p. 5187.
36. The debates in the U.K. and Canada surrounding the enactment of the infanticide provisions demonstrate that the purpose of the provision was to provide for a less serious offence than murder in cases of infanticide and to provide a broad and flexible standard that would be applied on a case-by-case basis.
    * 1. The Jurisprudence
37. Infanticide, and, in particular, the meaning of having a “disturbed” mind at the time of committing the act or omission leading to the child’s death, has received limited treatment in English and Canadian jurisprudence. The Canadian jurisprudence establishes that there is a “very low” or “fairly low” threshold for a finding of mental disturbance and that it does not require evidence that the accused has a mental disorder: *Coombs*, at paras. 36-37; *R. v. Leung*, 2014 BCSC 558, at paras. 26 and 32 (CanLII); *R. v. L.B.* (2008), 237 C.C.C. (3d) 215 (Ont. S.C.J.), at para. 59, aff’d 2011 ONCA 153, 274 O.A.C. 365 (although the trial judge there held that the standard should not be so minimal as to cheapen or disrespect the memory of the innocent victim). In *Leung*, the jury was also told to give the word “disturbed” under s. 233 its ordinary, common meaning: see A.F., at para. 80 (fn. 119).
    1. Conclusion on Meaning of “Mind Is Then Disturbed”
38. From this review, I cannot accept the conclusion of the dissenting judge in the Court of Appeal that Parliament intended to restrict the concept of a disturbed mind to those who have “a substantial psychological problem”: para. 140. Rather, I conclude that the phrase “mind is then disturbed” should be applied as follows:
    1. The word “disturbed” is not a legal or medical term of art, but should be applied in its grammatical and ordinary sense.
    2. In the context of whether a mind is disturbed, the term can mean “mentally agitated”, “mentally unstable” or “mental discomposure”.
    3. The disturbance need not constitute a defined mental or psychological condition or a mental illness. It need not constitute a mental disorder under s. 16 of the *Criminal Code* or amount to a significant impairment of the accused’s reasoning faculties.
    4. The disturbance must be present at the time of the act or omission causing the “newly-born” child’s death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or of lactation.
    5. There is no requirement to prove that the act or omission was caused by the disturbance. The disturbance is part of the *actus reus* of infanticide, not the *mens rea*.
    6. The disturbance must be “by reason of” the fact that the accused was not fully recovered from the effects of giving birth or from the effect of lactation consequent on the birth of the child.
    7. Application
       1. The Trial Judge’s Reasons
39. The trial judge reviewed the limited body of jurisprudence on infanticide and the definition of a “disturbed” mind, which, among other points, established that “disturbed” mind did not require an actual diagnosis of a mental disorder and sets a very low threshold.
40. The trial judge rejected Dr. Hashman’s evidence, finding that the Crown expert erroneously referred to the “balance of the mind” test, required proof of a mental disorder and failed to refer in his final report to an important symptom described by the respondent which supported a theory of depersonalization and dissociation despite having referred to it in prior correspondence.
41. Dr. Smith, on the other hand, referred in her report to the respondent’s descriptions of how she felt at the time of the deliveries and the similar information she gave to the police about her emotional state. For example, she noted that the respondent said she felt “detached and not thinking”, like she was “dreaming but not there” and described the deliveries as an “out of body experience”: A.R., vol. VI, at p. 93. This, Dr. Smith found, was “highly consistent with dissociation and depersonalization”: pp. 93-94. At trial, Dr. Smith also referred to these descriptions by the respondent and found them to be consistent with “significant depersonalization”.
42. The trial judge, relying on Dr. Smith’s opinion and the case as a whole, concluded that the respondent’s mind was “disturbed” as a result of not yet having fully recovered from the effects of giving birth.
    * 1. The Trial Judge’s Alleged Legal Errors
         1. Did the Trial Judge Fail to Apply Any Legal Test?
43. The Crown argues that the trial judge failed to apply any legal test in determining whether the respondent’s mind was “disturbed” at the time of the deliveries. The Crown submits that the trial judge erroneously found that “balance of the mind” was something different from the “mind is disturbed” and failed to suggest what the test was or what level of disturbance would be sufficient.
44. I disagree that the trial judge failed to apply a legal test or standard. As concluded by the majority of the Court of Appeal, there was no error in the trial judge’s summary of the law of infanticide. The trial judge applied the correct standard, which is set out by the statutory language in s. 233 of the *Criminal Code*. Although the trial judge, erroneously, thought there was significant difference between the “balance of the mind” language found in related provisions and the wording of s. 233 that the mother’s mind be “disturbed”, this error did not affect his analysis of the evidence or his application of the appropriate legal standard to it. The trial judge rejected Dr. Hashman’s evidence for several reasons, including that he failed to refer to a symptom the trial judge thought was important in his final report and seemed to require evidence of a mental disorder.
45. The Crown seeks to impose a higher threshold than what is provided for by s. 233 of the *Criminal Code* in arguing that a mother has a “disturbed” mind only if her psychological health is “substantially compromised” because she recently gave birth. As noted earlier, this is not the legal standard intended by Parliament in s. 233 of the *Criminal Code*.
    * + 1. Did the Trial Judge Infer the Respondent’s Mental State Solely From Her Conduct?
46. The Crown submits that the trial judge used the respondent’s conduct to determine the respondent’s mental state. In other words, the Crown argues that the trial judge adopted circular reasoning in finding that the respondent’s mind must have been disturbed because her actions were “bizarre” and “absolutely contrary to the nurturing that humankind depends on for its propagation”: A.F., at para. 99.
47. This argument must also be rejected. The trial judge’s reasons make it clear that he did not find that the respondent’s conduct met the requirements of the definition of infanticide simply because she had killed two of her children. The trial judge relied not only on the respondent’s personal history and the circumstances of the offences (which includes the nature of the acts themselves), but also on Dr. Smith’s expert opinion. In doing so, the trial judge had an evidentiary basis for concluding that the Crown failed to prove that the respondent’s mind was not disturbed at the time of the offences and did not rely on the circular reasoning alleged by the Crown.
    * + 1. Did the Trial Judge Fail to Appreciate the Evidence of Mental State?
48. Finally, the Crown submits that the trial judge failed to consider the respondent’s “detailed account of *each* birth, her goal-oriented behaviour, her personal circumstances beyond not having a criminal record or psychopathic tendencies, and her pattern of rational behaviour and wilful blindness” in considering whether the level of depersonalization met the requirement of infanticide: A.F., at para. 103 (emphasis in original). In short, the Crown argues that the respondent’s behaviour demonstrated rational thought and an uncompromised mind.
49. Even assuming that this point raises a question of law, I cannot accept it. The trial judge took into consideration Dr. Smith’s report, which relied on the respondent’s statements about her behaviour to Dr. Smith and to the police, the respondent’s personal history, as well as the circumstances of the offences.
50. Dr. Smith was of the opinion that the “extreme panic associated with the delivery triggered significant dissociative symptoms, in particular depersonalization, which in turn impaired her ability to think clearly, to accurately perceive and judge her situation, to make reasonable decisions and to control her behaviour” and concluded that the respondent’s mind was disturbed as a result of not having fully recovered from the effects of giving birth: A.R., vol. VI, at p. 94.
51. The trial judge also considered the case as a whole, including the facts of the offences and that the respondent had no criminal record or psychopathic or sociopathic tendencies. Based on his assessment of the evidence, the trial judge was entitled to conclude or have a reasonable doubt that the respondent’s mind was “disturbed” at the time of the offences despite any indication of rational behaviour and wilful blindness.
52. Disposition
53. I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: Attorney General of Alberta, Calgary.

Solicitors for the respondent: Serink Law Office, Calgary; Alias Amelia Sanders, Calgary.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Women’s Legal Education and Action Fund Inc.: Goldblatt Partners, Toronto; Women’s Legal Education and Action Fund Inc., Toronto.

Solicitors for the intervener the Criminal Lawyers’ Association of Ontario: Dawe & Dineen, Toronto.