HER MAJESTY THE QUEEN .....APPELLANT;

AND

LEONARD OTTO BORG .....RESPONDENT.

1969

*Mar. 10

Apr. 29

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Capital murder—Deliberate shooting of police officer—Defence of insanity—Evidence dealing with that defence not reviewed by trial judge—Whether misdirection—Power of Supreme Court to consider other defences raised in notice of appeal or record—Criminal Code, 1953-54 (Can.), c. 51, ss. 16, 202A, 583A(3), 592(1)(b)(iii).

The respondent was convicted of capital murder. As a result of a telephone call, two uniformed police officers were sent to the respondent's home. As they approached the house, the respondent shot one of them from an upstairs window. The defence of insanity was raised. In a statement admitted in evidence, the respondent said that he had planned to kill a policeman and had purchased a rifle and ammunition for that purpose. The defence called two witnesses only, the respondent's sister

* PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

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who testified as to the mistreatment of her brother by their father when he was a child, and a psychiatrist who saw the respondent nine months after the crime and six days before the trial. The psychiatrist expressed the opinion that the respondent had an aggressive, anti-social, impulse-ridden type of personality and was unable to cope with his homicidal or sexual impulses. The trial judge did not review the evidence of the respondent's sister or that of the psychiatrist. By a majority judgment, the Court of Appeal ordered a new trial on the ground that there had been non-direction as to the defence of insanity amounting to misdirection. The Crown appealed to this Court.

Held (Hall and Spence JJ. dissenting): The appeal should be allowed and the verdict at the trial restored.

Per Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie and Pigeon JJ.: After considering all the evidence that had any relevance to the defence of insanity and in the particular circumstances of this case, the charge on this branch of the matter, considered as it must be in the light of all the evidence in the record, was sufficient in law and more favourable to the respondent than it could have been if the trial judge had made a detailed analysis of the psychiatrist's evidence. The Court of Appeal should, therefore, have rejected the ground of appeal on which it based its judgment.

The Court of Appeal found it unnecessary to consider the other grounds of appeal alleged in the notice of appeal or disclosed by the record, as it had the jurisdiction to do under s. 583A(3) of the *Criminal Code*. In these circumstances, this Court has the power to make a final disposition of the appeal. A consideration of any other defence leads to the conclusion that the trial was conducted with scrupulous fairness to the respondent, that in its course there was no error in law, that no valid exception could be taken to the charge of the trial judge and that the verdict was fully supported by the evidence. There was no need to invoke the provisions of s. 592(1)(*b*)(iii) of the Code.

Per Hall and Spence JJ., *dissenting*: The trial judge misdirected the jury on the defence of insanity in that he failed to instruct them that there was evidence that the respondent was suffering from a disease of the mind, and while an irresistible impulse was not of itself a defence the evidence that the irresistible impulse was a manifestation of a disease of the mind was evidence to be considered by them in the light of the psychiatrist's testimony. Furthermore, the trial judge should have reviewed in part what the psychiatrist had said and how the law as to insanity as a defence should be applied to the facts as the jury found them. If there is medical evidence of disease of the mind as there was here and yet the only symptoms of that disease are irresistible impulses, the jury may conclude that the accused is insane. The evidence of irresistible impulse is also relevant to the issue of whether the accused is capable of appreciating the nature and quality of the act. A man operating under an irresistible impulse may have knowledge of the nature and quality of his act without appreciating its nature and quality. In failing to point out to the jury that the theory of the defence was that the respondent had a disease of the mind and that the irresistible impulse was the manifestation of that disease, the trial judge failed to put the theory of the defence adequately to the jury. The provisions of s. 592(1)(*b*)(iii) of the Code should not be invoked. This Court has the jurisdiction to do what the Court of Appeal was required to do by s. 583A(3) of the Code.

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Droit criminel—Meurtre qualifié—Coup de feu tiré de propos délibéré sur un officier de police—Défense d'aliénation mentale—La preuve se rapportant à cette défense non passée en revue par le juge au procès—S'agit-il de mauvaises directives—Pouvoir de la Cour suprême de considérer les autres défenses soulevées dans l'avis d'appel ou le dossier—Code criminel, 1953-54 (Can.), c. 51, art. 16, 202A, 583A(3), 592(1)(b)(iii).

L'intimé a été déclaré coupable d'un meurtre qualifié. A la suite d'un appel téléphonique, deux officiers de police, en uniforme, ont été envoyés à la résidence de l'intimé. Comme ils approchaient de la maison, l'intimé, d'une fenêtre située à un étage supérieur, a tiré un coup de feu sur l'un des officiers. La défense d'aliénation mentale a été soulevée. Dans une déclaration admise en preuve, l'intimé a dit qu'il avait projeté de tuer un agent de police et que pour ce faire il avait acheté un fusil et des balles. La défense a fait entendre deux témoins seulement, la sœur de l'intimé qui a témoigné des mauvais traitements infligés par leur père à son frère lorsqu'il était un enfant, et un psychiatre qui a vu l'intimé neuf mois après le crime et six jours avant le procès. Le phychiatre a exprimé l'opinion que l'intimé avait une personnalité agressive, antisocial, menée par ses impulsions et qu'il était incapable de repousser ses impulsions meurtrières ou sexuelles. Le juge au procès n'a pas passé en revue le témoignage de la sœur de l'intimé ou celui du psychiatre. La Cour d'appel, par un jugement majoritaire, a ordonné un nouveau procès pour le motif qu'il y avait eu, quant à la défense d'aliénation mentale, un manque de directives équivalent à une mauvaise directive. La Couronne en appela à cette Cour.

Arrêt: L'appel doit être accueilli et la déclaration de culpabilité rétablie, les Juges Hall et Spence étant dissidents.

Le Juge en Chef Cartwright et les Juges Fauteux, Abbott, Martland, Judson, Ritchie et Pigeon: Après avoir examiné toute la preuve se rapportant à la défense d'aliénation mentale et dans les circonstances particulières de cette cause, les directives sur cette branche du procès, considérées comme elles doivent l'être à la lumière de toute la preuve au dossier, étaient suffisantes en droit et plus favorables à l'intimé qu'elles l'auraient été si le juge avait fait une analyse détaillée du témoignage du psychiatre. En conséquence, la Cour d'appel aurait dû rejeter le motif d'appel sur lequel elle a appuyé sa décision.

La Cour d'appel n'a pas jugé qu'il était nécessaire de considérer les autres motifs d'appel allégués dans l'avis d'appel ou apparaissant au dossier, comme elle avait juridiction de le faire sous l'art. 583A(3) du *Code criminel*. Dans ces circonstances, cette Cour a le pouvoir de disposer finalement de l'appel. Un examen des autres défenses mène à la conclusion que le procès a été tenu avec une impartialité scrupuleuse, qu'il ne s'est produit aucune erreur en droit, qu'on ne peut s'objecter validement aux directives du juge et que la déclaration de culpabilité était amplement supportée par la preuve. Il n'y a aucune nécessité d'invoquer les dispositions de l'art. 592(1)(*b*)(iii) du Code.

Les Juges Hall et Spence, *dissidents:* Le juge au procès a donné des mauvaises directives quant à la défense d'aliénation mentale, à savoir qu'il ne leur a pas dit qu'il y avait une preuve que l'intimé était atteint d'une maladie mentale, et quoiqu'une impulsion irrésistible n'est pas en soi une défense la preuve que l'impulsion irrésistible est une manifestation d'une maladie mentale est une preuve que le jury devait considérer à la lumière du témoignage du psychiatre. De plus,

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le juge aurait dû examiner en partie ce que le psychiatre avait dit et expliquer comment la loi concernant l'aliénation mentale comme défense doit être appliquée aux faits tels que déterminés par le jury. S'il existe une preuve médicale d'une maladie mentale, comme c'était le cas, et cependant les seuls symptômes de cette maladie sont des impulsions irrésistibles, le jury peut en venir à la conclusion que l'accusé est un aliéné. La preuve d'impulsion irrésistible est de plus pertinente à la question de savoir si l'accusé est capable de juger la nature et la qualité de l'acte. Un homme agissant sous des impulsions irrésistibles peut bien connaître la nature et la qualité de son acte sans en apprécier la nature et la qualité. En omettant de faire observer au jury que la théorie de la défense était que l'intimé était atteint d'une maladie mentale et que l'impulsion irrésistible était la manifestation de cette maladie, le juge au procès a omis de placer adéquatement devant le jury la théorie de la défense. Les dispositions de l'art. 592(1)(*b*)(iii) du Code ne doivent pas être invoquées. Cette Cour a juridiction pour faire ce que la Cour d'appel devait faire sous l'art. 583A(3) du Code.

APPEL par la Couronne d'un jugement de la Cour d'appel de l'Alberta[1], ordonnant un nouveau procès. Appel accueilli.

APPEAL by the Crown from a judgment of the Supreme Court of Alberta, Appellate Division[1], which had ordered a new trial. Appeal allowed.

J. W. K. Shortreed, Q.C., for the appellant.

G. A. C. Steer, Q.C., and *G. A. Verville* for the respondent.

The judgment of Cartwright C.J. and of Fauteux, Abbott, Martland, Judson, Ritchie and Pigeon JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal, brought pursuant to s. 598(1)(*a*) of the *Criminal Code*, from a judgment of the Supreme Court of Alberta, Appellate Division[1], pronounced on October 31, 1968, setting aside a verdict of guilty of capital murder and directing a new trial. Allen J.A., dissenting, would have dismissed the appeal.

The respondent was tried before Milvain J., as he then was, and a jury. The verdict was rendered on April 11, 1968. The respondent was sentenced to death.

There is no dispute as to the facts surrounding the actual killing.

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[1] (1969), 66 W.W.R. 385, 5 C.R.N.S. 222.

On June 23, 1967, as a result of a telephone call made at about 2.40 p.m. to the detachment office of the Royal Canadian Mounted Police at Grande Prairie, Alberta, Corporal Harvey and Corporal Biggar drove from the detachment office to a residence known as 1006 103rd St., in an area of the City of Grande Prairie described as Bear Creek Flats. Both were dressed in the uniform of the Royal Canadian Mounted Police. They enquired at that address as to the location of the residence of Leonard Otto Borg and Harvey Lambert, an occupant of the house, came out to show them where Borg lived. Borg lived in an apartment above a double garage to the rear and slightly to one side of the residence mentioned. Lambert, Corporal Biggar and Corporal Harvey walked past the front of that residence and turned into a driveway leading to Borg's apartment. They had walked about twelve feet along the driveway towards Borg's residence when a head appeared at an open window near the southeast corner of the apartment and a shot was heard. Corporal Harvey clutched the upper part of his body and fell to the ground. Corporal Biggar drew his revolver, fired one shot into the ground, then obtained some assistance and moved Harvey out of the line of fire. Harvey was mortally wounded and died in a short time, undoubtedly as a result of the wound caused by the bullet fired through the open window.

When Corporal Biggar fired into the ground the head in the window disappeared. A very short time later Corporal Biggar saw what he believed to be the same head appear at the same open window and he fired his revolver towards the head. He saw "the head come up and appear to fall back". Corporal Biggar radioed to the detachment office for assistance. He could then see no movement in the house and he fired another shot into the ground immediately in front of him. He then heard a voice coming from inside the building "If I throw my gun out you won't shoot, will you?". Corporal Biggar said he wouldn't and told the man to stand up where he could see him. A hand with a rifle came over the windowsill and the rifle dropped to the ground. The man inside said there was no door on the front and that the Corporal would have to go to the back. The Corporal went to the back and told the man to come out

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with his hands up; the man, who was Borg, did so and was placed under arrest; he was found to have been shot and slightly wounded in one ear.

Following a voir dire, the learned trial judge admitted in evidence portions of a statement written and signed by the respondent and two questions out of several asked of him by Corporal Dillabaugh and his answers thereto.

These are as follows:

I then slept till 9 a.m. Went down town and bought a cil. 22 for $19.80 and one box of .22 long. I came back home and made a phone call to the RCMP. I didn't give them . . . .

(Here a sentence is omitted.)

. . . . I later went up town at 1 am and had one drink of Vodka strate and one ry and water I came home about 2 30 am and made a phone call to the RCMP telling them where I lived When the police arrived I shot one in the chest some ware around the heart, at least thats where I was aiming shortly after that the second police man shot at me hitting me in the left ear it knocked me to the floor I then thought whats the use. I caused enough grief in my life. I then gave myself up.

(It is obvious, and was agreed by counsel, that "1 am" and "2 30 am" should have read "1 p.m." and "2.30 p.m.")

The questions and answers were as follows:

Que. When you made the phone call to the R.C.M. Police & told them who you were & where they might find you, did you at that time plan to kill a policeman when he came to see you?
Ans. I planned to kill a policeman before that, before I ever went up town to buy the gun.

Que. Just when did you first plan to kill a policeman?
Ans. My plan to kill a policeman first came into my mind while I was doing 3 years in the B.C. pen for something I didn't do.

There is evidence confirming the purchase of the rifle and ammunition on the 23rd June 1967. Ammunition of the type purchased was found in the respondent's apartment in several places. Some blood was splattered upon the floor in the vicinity of the open window and there were quite substantial amounts of blood upon the respondent's shirt.

It should be explained why portions only of the written statement and the questions and answers were read to the jury.

On the voir dire there had been filed as Exhibit V.D. 5, three documents, (i) a lengthy statement in the handwriting of the respondent headed, "To whom it may concern", (ii)

a short letter commencing "Mom Dad and Kinfolk" and (iii) a short document intended to be the respondent's will. These documents had been found by Staff Sergeant Chalk, at about 3.10 p.m. on the day of the killing of Corporal Harvey, in a sealed envelope in the apartment occupied by the respondent from which the fatal shot was fired. At the time when these documents were found, the respondent was in a police car outside the building. In the apartment was the dead body of a woman. It seems obvious that the three documents were written by the respondent between the time when he killed the woman and the arrival of Corporal Harvey and Corporal Biggar.

Between 10.15 p.m. and 11.45 p.m. on June 23, 1967, the respondent made a lengthy statement to Corporal Dillabaugh and Constable Fischer. This statement was written and signed by the respondent. It was filed as Exhibit V.D. 3 on the voir dire. It described in considerable detail the killing of a woman by the respondent on December 21, 1966, and the burning by him of the shack in which her dead body lay with the result that her death was held to have been accidental. It went on to describe the killing of another woman by the respondent in the early morning hours of June 23, 1967, stating that she was dead about 3 a.m. Immediately following this point in the statement were the words:— "I wrote a letter detailing my part". This letter would appear to be item (i) in Exhibit V.D. 5 mentioned above. This sentence immediately preceded the portion of the statement which was read to the jury and which has been quoted above. The "sentence omitted" indicated in the quoted statement, read as follows:

I just told them that I had murdered my wife, I didn't give them any details of the place at the time for I was not sure of my plans.

Following the making of this written statement by the respondent, he was asked several questions by Corporal Dillabaugh. These questions and answers of the respondent were taken down in writing and were signed by the accused and this document was marked as Exhibit V. D. 4.

The two questions and answers read to the jury have been quoted above.

It would seem that both counsel at the trial were of the view that, although the learned trial judge had ruled that

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the statements made by the accused were voluntary, it would be unfair to the accused to show that he had killed two persons other than the one with whose murder he was charged and that after discussion, in the absence of the jury, some of which appears to have taken place in the judge's chambers, counsel agreed, with the approval of the learned trial judge, as to what should be read to the jury.

In taking this course I presume the learned trial judge and counsel had in mind the rule of conduct referred to in such cases as *Noor Mohamed v. The King*[2], that evidence, although legally admissible, should not be tendered if the prejudice to the accused would far outweigh its probative value relevant to the issue before the Court.

In my opinion, so far as the statement, V.D. 3, the questions and answers, V.D. 4 and the documents contained in Exhibit V.D. 5 were tendered to show that the accused had murdered Corporal Harvey it may well have been proper to exclude the portions which were withheld from the jury; but it appears to me that they were all clearly relevant to the issue of the defense of insanity and on that issue could properly have been put before the jury in their entirety. However, in view of the course taken at the trial, I propose in deciding how this appeal should be disposed of to consider only the evidence actually placed before the jury.

In the course of his reasons the learned Chief Justice of Alberta, who delivered the judment of the majority of the Appellate Division, after summarizing the facts surrounding the shooting of Corporal Harvey, said that it was established beyond any room for doubt (i) that the shooting was the act of the respondent and (ii) that his act amounted to capital murder and consequently that the only defence open to the respondent was that of insanity under s. 16 of the *Criminal Code*. I agree with this statement; it is supported by conclusive and uncontradicted evidence.

The only issue discussed before us and the only one of any substance in this case is that regarding the defence of insanity.

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[2] [1949] A.C. 182 at 192.

The ground on which the majority of the Appellate Division allowed the appeal is summarized in the formal judgment as follows:

AND UPON this Honourable Court finding that the learned trial Judge failed to review the substantial parts of the evidence of Mrs. Hartman and Dr. Spaner and to instruct the jury as to how the law was to be applied to the facts as they found them and thereby misdirected the jury by such non-direction.

The only evidence at the trial called by the defence was that of Mrs. Hartman, a sister of the accused, and Dr. Spaner, a medical practitioner specializing in psychiatry whose qualifications were not questioned. Their evidence related entirely to the defence of insanity.

The Crown called no evidence in reply.

The evidence of Mrs. Hartman is sufficiently summarized by Bruce Smith C.J.A. as follows:

Mrs. Hartman gave a very detailed description of her and the appellant's life at home as children. She said he had been persecuted, beaten and abused by his father and unnecessarily mistreated in many ways; that he had been shown no affection by his father; that he would be given conflicting instructions by his father and then brutally punished because he did not properly carry out the instructions; that his father cheated him out of a trap line when he became older. She said that on one occasion, after he had left home, he returned and was very mixed up and acting strangely. She said that he was 'sitting there sharpening a knife and looking at me' and that she was afraid and got an iron and a knife with which to protect herself. On another occasion, at the time of Mrs. Hartman's wedding, the appellant didn't remember where he had been for five days. She said his only association was with Metis women, not white girls, and that he didn't feel good enough for white girls.

Dr. Spaner interviewed the accused at Fort Saskatchewan gaol on April 2, 1968, that is six days before the commencement of the trial and a little over nine months after the killing of Corporal Harvey. The interview lasted between $2\frac{1}{2}$ and 3 hours. Dr. Spaner heard the evidence of Mrs. Hartman and the portions of the accused's statement and answers that were read to the jury. It was from these materials that he formed his opinion.

As was pointed out by Bruce Smith C.J.A., Dr. Spaner nowhere in his evidence expressed the opinion, in so many words, that the accused at the time he shot Corporal Harvey did not know that what he was doing was contrary to law or that he was incapable of appreciating the nature

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and quality of his act. The learned Chief Justice was, however, of the view that either of these conclusions could be founded on Dr. Spaner's evidence if accepted. With the greatest respect I cannot agree with this.

It appears to me that if the view of Dr. Spaner's evidence most favourable to the accused were taken by the jury it could be said to show, (i) that Borg was suffering from a disease of the mind called a psychopathic state and that he fitted into the classification of the aggressive, anti-social, impulse-ridden type of personality, (ii) that he had very few healthy coping mechanisms or ways of defending himself against impulses such as homicidal or sexual ones, (iii) that this lack of impulse control is chronic, (iv) that a major characteristic of this impulse type of personality is being emotionally unbalanced by the illness, that the moral issues cannot be differentiated, that he does not have the moral ethical part of his mind functioning most of his life but "most important of all he can have normal cognitive functioning—that is the knowing part of his mind functioning", (v) that the impulse is so powerful his judgment is impaired but he can still have intellectual functioning, (vi) that the effect of alcohol is unpredictable; it can wipe away any controls or it might even calm him; it is impossible to say, (vii) that Borg hates authoritarian figures and under the influence of his anti-social impulse driven, aggressive impulses, he can kill, (viii) that if the force of the impulse cannot be resisted "at that moment", and this is a symptom of what he suffers from—an impulse —psychotic state—an irresistible impulse when he neither reasons nor deliberates, (ix) that the irresistible impulse is both a symptom of the disease of the mind and the disease itself, (x) that he operates sometimes with normal intellect, sometimes with a little better than normal intellect and sometimes like a little boy.

An important answer made by Dr. Spaner in the course of his cross-examination was as follows:

> Que. You are unable to say with any degree of accuracy whether or not the drink of rye—the drink of vodka straight and the rye and water, aggravated any—what—first of all I would gather you are unable to say what particular emotional condition he was in at the time.
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> Ans. No, I just thought he—that the circumstances that were going on, that it was quite possible that he was anxiety ridden, panic stricken, under the influence or some catastrophic disorganization.

It appears to me that the effect of Dr. Spaner's evidence is that, in his opinion, at the time of the shooting Borg may have been acting under an irresistible impulse such as the Doctor had described. There is no evidence that Borg himself had that view and the portions of his statement and of his answers read to the jury far from suggesting anything in the nature of an impulsive action indicate a careful and deliberate plan which it took him some hours to carry out. The actions and statements of Borg after the shooting indicate that he was well aware of what he had done and that it was wrong. The evidence taken as a whole falls far short of being sufficient to satisfy the onus of proof on the balance of probabilities which rests on the defence when insanity is alleged.

The only evidence given on the last day of the trial was that of Mrs. Hartman followed by that of Dr. Spaner. It would be fresh in the minds of the jury when they heard the judge's charge. That charge in so far as it dealt with the law regarding insanity was clear and correct. The learned trial judge did not analyze or summarize the evidence of Mrs. Hartman or that of Dr. Spaner but he did say:

> Now in this case I suggest that you can bear in mind as you weigh the entire evidence in this regard, many things: you bear in mind, of course, the evidence that was given by the accused's sister of his background and life; you bear in mind what we have learned of the man through the statements, or, to the extent that the statement is before you, and we bear in mind the evidence that was given by Dr. Spaner. All of those things together form the evidence that you consider.
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> * * *
>
> You weigh in your minds the whole of the evidence that you have heard because it is your province and your province alone to conclude whether or not, on a balance of probabilities, the accused has satisfied you that he was insane within the meaning of the Act that I read you, and if he has done so, of course, your verdict then would be not guilty but insane.
>
> It would seem to me, gentlemen, in viewing the whole of this case, when you retire to consider your verdict, there are three possible verdicts within the law. One verdict could, of course, be guilty as charged; he could be found not guilty at all, or he could be found not guilty because of insanity. Those appear to me to be the only three possible verdicts.

It is not surprising that the learned and experienced counsel for the defence did not request the judge to give a further charge involving a detailed examination of the Doctor's evidence. Such a request, if acceded to, would

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have resulted in the judge having to point out to the jury how far the evidence fell short of indicating that the accused was other than sane at the time of the shooting.

After considering all the evidence that had any relevance to the defence of insanity I am satisfied that, in the particular circumstances of this case, the charge on this branch of the matter, considered as it must be in the light of all the evidence in the record, was sufficient in law and more favourable to the accused than it could have been if the judge had made a detailed analysis of Dr. Spaner's evidence before the jury.

For these reasons I am, with respect, of opinion that the Appellate Division should have rejected the ground of appeal on which it based its judgment and, so far as that ground is concerned, should have dismissed Borg's appeal.

This, however, is not the end of the matter. When the appeal came before the Appellate Division the duty of that Court was prescribed by subs. 3 of s. 583A of the *Criminal Code* which reads as follows:

> (3) The court of appeal, on an appeal pursuant to this section, shall
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> (*a*) consider any ground of appeal alleged in the notice of appeal, if any notice has been given, and
>
> (*b*) consider the record to ascertain whether there are present any other grounds upon which the conviction ought to be set aside or the sentence varied, as the case may be.

The Appellate Division having come to the conclusion that the supposed defects in the charge of the learned trial judge to the jury relating to the defence of insanity necessitated the quashing of the conviction and the ordering of a new trial, it became unnecessary for that Court to consider, and consequently it did not consider, any grounds of appeal alleged in the Notice of Appeal or which might have been ascertained by a consideration of the record as required by clause (*b*), quoted above, other than the ground on which it decided to allow the appeal.

In these circumstances I have reached the conclusion that the duty cast upon the Appellate Division by s. 583A(3) devolves upon this Court and, while I do not doubt our power to do so, it is my opinion that it would not be proper for us to refer the matter back to the

Appellate Division to consider all possible grounds of appeal other than the one upon which the judgment of that Court was based.

The question of our power to make a final disposition of the appeal appears to me to be settled by the decision of this Court in *The Queen v. McKay*[3]. In that case McKay had been convicted before LeBel J. and a jury on the charge that he and others being armed with offensive weapons did unlawfully assault one Robson with intent to rob. An appeal to the Court of Appeal was allowed by a judgment of the majority, Laidlaw and MacKay JJ.A., on the ground of law that there was no evidence to go to the jury, the conviction was accordingly quashed and a verdict of acquittal directed; Hogg J.A., dissenting, held that there was legal evidence against McKay upon which the jury were entitled to find him guilty. On appeal by the Crown to this Court the majority, Kerwin, Taschereau, Kellock and Fauteux JJ., held that Hogg J.A. was right in law and that the appeal should be allowed.

However, McKay in his Notice of Appeal to the Court of Appeal had asked leave to appeal on questions of fact. The Court of Appeal after deciding that there was no evidence to go to the jury had not proceeded to determine whether, even if there was such evidence, the verdict should be set aside as unreasonable. Kerwin J., as he then was, dissenting in this regard, was of opinion that the proper order to be made in these circumstances on an appeal by the Crown (which he differentiated from an appeal by the accused) was to remit the case to the Court of Appeal in order that it might, if leave had been given or should be given, pass upon the question as to whether the verdict was unreasonable in the light of all the evidence. This view was decisively rejected in the judgment of the other members of the Court who formed the majority, which was delivered by my brother Fauteux.

After quoting, in abbreviated form, s. 1024 of the *Criminal Code,* as then in force, and s. 46 of the *Supreme Court Act* as follows:

> 1024. The Supreme Court of Canada shall make such rule or order thereon, either in affirmance of a conviction or for granting a new trial, or otherwise . . . as the justice of the case requires.

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[3] [1954] S.C.R. 3, 17 C.R. 412, 107 C.C.C. 304.

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46. The Court may . . . give the judgment . . . which the court whose decision is appealed against, should have given . . .

Fauteux J. examined a number of authorities and continued, at pp. 6 and 7:

It is true that in each of these cases, the appeal, contrary to what is the situation in the present instance, was entered by the accused and not by the Crown. But the suggestion that this difference as to the person appealing calls for a distinction in law as to the powers of this Court finds, in my respectful view, no support, either in the enactments defining them or in the above judicial pronouncements interpreting such enactments.

* * *

On an exhaustive review of the evidence, it does not appear that the verdict of the jury was unreasonable.

In this view, it would not, in my opinion, be consonant with the diligence required in the proper administration of justice in criminal matters to return this case to the Court of Appeal in order that it may pass on that question, i.e., whether the verdict is unreasonable, which this Court is in as good a position as the former to determine.

The power given to this Court by s. 600(1) of the *Criminal Code,* now in force, is at least as wide as that conferred by s. 1024 above referred to. It reads:

600. (1) The Supreme Court of Canada may, on an appeal under this Part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.

Having formed the opinion that we have the necessary authority to make a final disposition of this case and that, to use the words quoted above, "it would not be consonant with the diligence required in the proper administration of justice in criminal matters" to do otherwise, I have not only considered every ground set out in the Notice of Appeal to the Appellate Division and those referred to in the reasons delivered in that Court but I have read with care the whole of the record to ascertain whether there are present any other grounds upon which the conviction ought to be set aside.

As a result, I have reached the conclusion that the trial was conducted throughout with scrupulous fairness to the accused, that in its course there was no error in law, that no valid exception could be taken to the charge of the learned trial judge to the jury and that the verdict was fully supported by the evidence. I am satisfied that there are no grounds upon which the conviction ought to be set aside.

Because there was some discussion in argument as to the possible application of the provisions of s. 592 (1)(*b*)(iii) of the *Criminal Code*, which enacts that even where there has been error in law at the trial the Court of Appeal may dismiss an appeal against a conviction if of opinion that no substantial wrong or miscarriage of justice has occurred, I wish to make it clear that I am not basing my conclusion in any way upon that clause; there is no need to invoke it.

I would allow the appeal, set aside the judgment of the Appellate Division and restore the verdict at the trial.

The judgment of Hall and Spence JJ. was delivered by

HALL J. (*dissenting*):—The facts are fully set out in the reasons of my brother the Chief Justice. The only real defence which was being put forward at the trial on behalf of Borg was that of insanity. The fact of the killing of the police officer was not in dispute. It was admitted in Borg's confession and proved conclusively by the verbal testimony and that fact was recognized in the reasons of the learned Chief Justice of Alberta.

With deference to contrary opinion, I would dismiss the appeal. As I see it, the learned trial judge misdirected the jury on the defence of insanity in that he failed to instruct them that there was evidence that Borg was suffering from a disease of the mind, and while an irresistible impulse was not of itself a defence the evidence that the irresistible impulse was a manifestation of a disease of the mind was evidence to be considered by them in the light of Dr. Spaner's testimony.

I think, too, that the learned trial judge should have reviewed in part what Dr. Spaner had said and how the law as to insanity as a defence should be applied to the facts as they found them. The law in this regard is clear. In *Azoulay v. The Queen*[4], Taschereau J. (as he then was) said:

> On the second point, I agree with the Chief Justice of the Court of King's Bench. *The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may*

[4] [1952] 2 S.C.R. 495, 15 C.R. 181, 104 C.C.C. 97.

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appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them. (Spencer v. Alaska Parkers, (1905) 35 Can. S.C.R. 362.) As Kellock J.A. (as he then was) said in *Rex v. Stephen et al,* (1944) O.R. 339 at 352: "It is not sufficient that the whole evidence be left to the jury *in bulk for valuation.*" The pivotal questions upon which the defence stands must be clearly presented to the jury's mind. Of course, it is not necessary that the trial judge should review all the facts, and that his charge be a minute record of the evidence adduced, but as Rivard, J.A. said in *Vincent v. Regem,* Q.R. (1932) 52 K.B. 38 at 46: (Emphasis added)

> Il faut admettre que l'adresse du juge est plutôt brève et que, tant sur les faits que sur les questions de droit, il n'a dit que l'essentiel, sans développement. Mais la question n'est pas de savoir si le juge a été court; il faut rechercher plutôt *s'il a omis le nécessaire.*

Regarding the defence of insanity, the learned trial judge said to the jury:

> Now then, the defence say assuming that all of this is found to be so as to fact, or a set of facts, that it was in fact the accused who fired the shot that killed Harvey and that Harvey was a policeman within the meaning of the section I read you, in the course of his duty, assuming all those things were found, and that the shot killed him, that he is not guilty of the charge against him because he was at that time insane. It is a defence of insanity. Now, I must say to you in that regard that where the defence places before you a defence of insanity, I must instruct you, as best I can, of the law that lies behind such defence.
>
> I think I should say to you at the outset that it is not all forms of insanity which furnish a defence according to law. It is only that type of insanity which carries with it certain attributes that will furnish a defence at law, and I refer you immediately to Section 16 of the Criminal Code because it is from this section that the law we are about to consider, comes, and Section 16 says this:
>
> "No person shall be convicted of an offence in respect of an act or omission on his part while he was insane."
>
> Section 2:
>
> "For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong."
>
> Then I think I should tell you the provisions of subsection (3) because they may apply. It says:
>
> "A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission."
>
> And then subsection (4) of that section is of extreme importance because it says this:
>
> "Every one shall, until the contrary is proved, be presumed to be and to have been sane."
>
> In other words, when we come to a defence of insanity, the accused person starts off with a presumption at law that he is sane, and the obligation rests on him to prove that he is insane within the meaning of this section, before it will serve him as a defence.

Now, I told you at the outset that the Crown was under an obligation to prove all that it must prove, beyond a reasonable doubt. But when the accused is called upon to establish insanity the obligation of proof is not that of proof beyond a reasonable doubt, it is proof by a preponderance of evidence. In other words, it establishes a set of facts from which the reasonable probability or the preponderance of probabilities points towards insanity, and that is to say, insanity within the meaning of this section, and it is only proof to that extent that the accused is called upon to establish, not proof beyond a reasonable doubt.

Now, I must tell you that at law a so called irresistible or uncontrollable impulse of itself is not a defence within the meaning of this Act unless that uncontrollable or irresistible movement or impulse stems from the existence of insanity as defined here, and when one looks to the reasonable rationality of it, it becomes so obvious why it is that a mere irresistible and uncontrollable impulse is not a defence. Because everybody would get such impulses with respect to any offence. The man who breaks a jeweller's window to steal a diamond, has an irresistible impulse to do it, and, therefore, is acquitted on the ground of insanity if one is guided by this mere proposition of irresistible impulse. It must be as this section says and I repeat it to you:

> "For the purpose of this section a person is insane when he is in a state of natural imbecility"

now there is no suggestion of that here—

> "or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong."

Now in this case I suggest that you can bear in mind as you weigh the entire evidence in this regard many things: you bear in mind, of course, the evidence that was given by the accused's sister of his background and life; you bear in mind what we have learned of the man through the statements, or, to the extent that the statement is before you, and we bear in mind the evidence that was given by Dr. Spaner. All of those things together form the evidence that you consider.

I explain to you that the evidence of an expert is merely evidence. Just because an expert says that something is so, doesn't mean that it is. The evidence of experts is weighed along with all other evidence. An expert's evidence, by a jury or by a Judge, for that matter, can be accepted in whole or disregarded in whole or accepted in part and disregarded in part. There is no complete sanctity of evidence because it has been given by an expert.

But the thing that strikes me as being of importance to consider, you may not think so, but I think you should bear it in mind, is that in the statement which the accused gave to the police and to the extent that it's before you, he winds up by saying, he speaks of having been hit by the bullet which the police officer fired at him; he says "It knocked me to the floor. I then thought what's the use, I caused enough grief in my life and then gave myself up."

This is at least some indication gentlemen, as to whether or not the mind of the accused was such that he appreciated the nature and quality of his act and as to whether or not it was wrong, and these things never are conclusive one direction or another, but it is evidence of some weight to consider.

You weigh in your minds the whole of the evidence that you have heard because it is your province and your province alone to conclude

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whether or not, on a balance of probabilities, the accused has satisfied you that he was insane within the meaning of the Act that I read you, and if he has done so, of course, your verdict then would be not guilty but insane.

As will be seen, his only reference to the evidence of Dr. Spaner is in the paragraph:

Now in this case I suggest that you can bear in mind as you weigh the entire evidence in this regard, many things: you bear in mind, of course, the evidence that was given by the accused's sister of his background and life; you bear in mind what we have learned of the man through the statements, or, to the extent that the statement is before you, *and we bear in mind the evidence that was given by Dr. Spaner.* All of those things together form the evidence that you consider.

(*Emphasis added*)

There were parts of Dr. Spaner's evidence which should have been drawn to the jury's attention as they related specifically to whether, when Borg killed Constable Donald Archibald Harvey, he was incapable of appreciating the nature and quality of his act or of knowing that it was wrong. Dr. Spaner had testified in chief as follows:

I felt that Leonard Borg was suffering *from a mental illness, or a disease of the mind* which is called a psychopathic state. There are many types of psychopathic states, and he fits into the classification of the aggressive, anti-social, impulse ridden type of personality. Another name for *a psychopath is a personality disorder.* (Emphasis added)

* * *

Q. Now, he has there stated that when the officers came, he shot one of them. In your opinion how was Borg's mind operating at this time? A. Well, in view of what I said at the very beginning, the impulse to kill can be operating right side by side with the—with the knowing part of his mind.

Q. Yes, and in your opinion how strong is this impulse? A. I don't think that the knowing part played any part at the moment the impulse comes up. It is swept aside.

Q. Pardon? A. It's swept aside.

Q. What is swept aside? A. The knowing part.

Q. The knowing part—? A. Of his mind.

Q. And when you say that, would you clarify it for us, doctor? A. I mean the impulse is the force that is operating. I would say to the exclusion of everything else.

Q. In the situation in which he found himself—and as he has said, he shot one of these men—is he able—. A. I missed a word there. Is he what?

Q. Is he able—and I'm going to ask you not to answer until my friend has a chance to say something, if he so wishes—is he able to resist—I will put it—yes, all right, go ahead. A. Is it all right to answer?

MR. MCGURK: Is he able to resist the impulse?

MR. STEER: Yes.

MR. MCGURK: I have objection.

MR. STEER: Go ahead—with His Lordship's permission.

THE COURT: Very good. A. My opinion is that the force of that impulse cannot be resisted at that moment.

Q. MR. STEER: Now, this irresistible impulse which you have described, is this a symptom of a disease of the mind, or is it the disease of the mind itself. A. I would say both.

Q. Pardon? A. Would you mind repeating the question?

Q. What I am trying to find out is: is this a symptom, this impulse, is it a symptom of something in Borg's mind? A. The answer to that part is yes, it is a symptom of what he suffers from, an impulse—psychopathic state.

Q. How far had this disease of the mind that you have described, progressed in Borg at this time? A. Well, I don't think there was any—much of anything else operating except the impulse to kill.

Q. How would this impulse that you have described affect Borg's mind as to knowing whether he was doing anything wrong? A. I think I said before, the moral issues of right and wrong are not operating at—when the impulse is at a certain intensity. That part of the mind is not operating.

Q. Now, had the impulse at this time as far as Borg is concerned reached that degree of intensity in your opinion, or had it not? A. Oh, I think by this time it had reached that height.

Q. Intensity? A. Yes.

Q. What is your opinion as to whether Borg could reason about this act which has been described, or which has been read to the jury? A. He wasn't reasoning at all. He was under the influence of this powerful force, or this irresistible impulse—or if it was, it was so insignificant that as far as I am concerned, it didn't play any part.

Q. Now, one other question, doctor: what is your opinion as to whether the act he has described was a considered act? A. Does that mean deliberate? That he deliberated?

Q. Yes. A. At the height of the impulse there is no deliberation.

and on cross-examination:

Q. Doctor, your opinion is that this irresistible—this impulse which can at its height be absolutely over-powering, is a symptom of a disease, and not a disease itself? A. It is the most characteristic symptom of the disease, yes. It is a symptom of a disease.

The learned trial judge's statement:

Now, I must tell you that at law a so called irresistible or uncontrollable impulse of itself is not a defence within the meaning of this Act unless that uncontrollable or irresistible movement or impulse stems from the existence of insanity as defined here . . .

although an accurate statement of the law, was misleading in the context on the case. In order for the defence of

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insanity to be established, the defence must prove on the balance of probabilities two propositions: (1) that the accused was suffering from a disease of the mind; and (2) that the disease rendered the accused incapable of appreciating the nature and quality of the act or knowing that the act is wrong. When an accused pleads insanity there is a sense in which it is true to say that irresistible impulse of itself is not a defence. However, there are two senses in which it is not true to say that irresistible impulse of itself is not a defence.

There is no legal presumption of insanity merely from the existence of an irresistible impulse. If an accused presents no medical evidence of disease of the mind but merely pleads that he was acting under an irresistible impulse, a jury is not entitled to infer that the man was insane. In that sense irresistible impulse is not of itself a defence. However, if there is medical evidence of disease of the mind as there was here and yet the only symptoms of that disease of the mind are irresistible impulses, the jury may conclude that the accused is insane. This specific point was dealt with by Lord Tucker in *Attorney-General for South Australia v. Brown*,[5] when, speaking for their Lordships of the Privy Council, he said at pp. 449-450:

> Their Lordships must not, of course, be understood to suggest that in a case where evidence has been given (and it is difficult to imagine a case where such evidence would be other than medical evidence) that irresistible impulse is a symptom of the particular disease of the mind from which a prisoner is said to be suffering and as to its effect on his ability to know the nature and quality of his act or that his act is wrong it would not be the duty of the judge to deal with the matter in the same way as any other relevant evidence given at the trial.

In that sense irresistible impulse is of itself evidence of a disease of the mind.

The evidence of irresistible impulse is also relevant to the issue of whether the accused is capable of appreciating the nature and quality of the act. It is not so relevant in England. The reason for the difference is that there is a difference between the definition of the defence of insanity in s. 16 of the Canadian *Criminal Code* and the state-

[5] [1960] A.C. 432, [1960] 1 All E.R. 734.

ment of the defence according to *M'Naghten's* case[6]. In *M'Naghten's* case the judges said that a man could not be held to be insane unless he did not know the nature and quality of the act he was doing. Section 16 of the Canadian *Criminal Code* states that a man cannot be held to be insane unless he did not appreciate the nature and quality of the act he was doing. A man operating under an irresistible impulse may have knowledge of the nature and quality of his act without appreciating its nature and quality. A man may be aware of an act without foreseeing and measuring its consequences. That is what Dr. Spaner testified to here when he said: "I think I said before, the moral issues of right and wrong are not operating at—when the impulse is at a certain intensity. That part of the mind is not operating."

Although what the learned trial judge said as previously quoted was good law, it was irrelevant law in context. There was no question of the jury concluding that Borg was insane simply because there was evidence that he acted under an irresistible impulse because there was medical evidence that Borg was suffering from a disease of the mind, and in failing to point out to the jury that the theory of the defence was that Borg had a disease of the mind and that the irresistible impulse was the manifestation of that disease, he failed to put the theory of the defence adequately to the jury.

The Chief Justice, being of the view that there was no error in law and that no valid exception could be taken to the charge of the learned trial judge to the jury, saw no need to invoke s. 592(1)(*b*)(iii) of the *Criminal Code* which authorizes that even when there has been an error in law at the trial, the Court of Appeal (and this Court has the same power) to dismiss the appeal if, notwithstanding that a ground of appeal may be decided in favour of the appellant, it is of opinion that no substantial wrong or miscarriage of justice has occurred. Having come to the conclusion that there was in this case an error in law, I should consider the provision of that section. I am of opinion that

[6] (1843), 10 Cl. & F. 200, 8 E.R. 718.

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the section should not be invoked here. I agree with Spence J. in *Colpitts v. The Queen*[7], where he said at 756:

> I am of the opinion that this Court cannot place itself in the position of a jury and weigh these various pieces of evidence. If there is any possibility that twelve reasonable men, properly charged, would have a reasonable doubt as to the guilt of the accused, then this Court should not apply the provisions of s. 592(1)(*b*)(iii) to affirm a conviction.

There is a further and separate issue which arises in this appeal and it is as to the power of this Court to make a final disposition of the appeal notwithstanding that the Appellate Division did not consider any grounds other than those set out in the reasons of the learned Chief Justice of Alberta. On this aspect of the appeal, I am fully in agreement with the Chief Justice that this Court has the jurisdiction to do what the Appellate Division was required to do by subs. (3) of s. 583A of the *Criminal Code*. My consideration of the record brought me to the conclusion that there was error in the learned trial judge's charge to the jury, but I have no doubt as to this Court's power under s. 46 of the *Supreme Court Act* to render the judgment which the Appellate Division could or should have given.

I would, accordingly, dismiss the appeal and confirm the decision of the Appellate Division of the Supreme Court of Alberta granting the appellant a new trial.

Appeal allowed and conviction restored, Hall and Spence JJ. *dissenting.*

Solicitor for the appellant: The Attorney General for Alberta, Edmonton.

Solicitors for the respondent: Milner & Steer, Edmonton.

[7] [1965] S.C.R. 739, 47 C.R. 175, [1966] 1 C.C.C. 146, 52 D.L.R. (2d) 416.