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July 23

JOHN PATON THOMSON MORE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Criminal law—Capital murder—Whether murder was "planned and deliberate"—Meaning of word "deliberate"—Medical evidence showing impairment of ability to think—Whether misdirection as to weight of that evidence—Substantial wrong—Miscarriage of justice—Criminal Code, 1953-54 (Can.), c. 51, ss. 16, 201(a)(i), 202A(a)(iii), 592.*

The appellant shot his wife through the head while she was asleep, early one morning. He then wrote a number of letters explaining why he had done it, that he was in financial difficulty and did not want his wife to suffer from it. During the afternoon, he attempted suicide by shooting himself. The attempt having failed, he telephoned the police in the evening to tell them what he had done. Three days before, he had secured a permit for the purchase of a revolver, but did not buy any. However, two days before the shooting he did buy a rifle and a box of shells with the intention, he said, of taking his own life.

At the trial for capital murder, the defence of insanity was specifically disclaimed by his counsel. However, two medical doctors testified that at the time of the shooting the appellant was suffering from a depressive psychosis resulting in "impairment of ability to decide even inconsequential things, inability to make up a decision in a normal kind of way". The trial judge, instead of leaving this medical evidence to the

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Judson, Ritchie and Hall JJ.

jury for their consideration, quoted from authorities to the effect that the testimony of experts is of slight weight.

The appellant was convicted of capital murder. In the Court of Appeal, all the judges were of opinion that there had been misdirection as to the weight to be given to the medical evidence on the appellant's state of mind at the time of the offence. The majority dismissed the appeal on the ground that there had been no substantial wrong or miscarriage of justice. The dissenting judge would have substituted a verdict of non-capital murder. The appellant appealed to this Court.

*Held* (Taschereau C.J. and Fauteux J. dissenting): The appeal should be allowed, the conviction quashed and a new trial directed.

*Per* Cartwright, Abbott, Judson, Ritchie and Hall JJ.: There was very strong evidence that the murder was planned, but the jury could not bring in a verdict of capital murder unless they were satisfied beyond a reasonable doubt that it was also deliberate. The word "deliberate", as used in s. 202A(2)(*a*), means "considered not impulsive". It cannot simply mean "intentional" for that is the prerequisite for murder, and the subsection is creating an additional ingredient as a condition of capital murder. On the facts and the evidence as to what happened at the moment of the shooting, it was open to the jury to take the view that the act of the appellant was impulsive rather than considered and therefore was not deliberate. The medical evidence would have had a direct bearing on that question; its weight was a matter for the jury. The enactment of s. 202A(2)(*a*) has in no way affected the interpretation or application of s. 16 of the Code. The medical evidence was not relied on as raising the question whether the appellant was legally sane, but its importance was that it would assist the jury in deciding whether the shooting was deliberate. On this question of fact, the appellant was entitled to have the verdict of a properly instructed jury.

The probable result of the unwarranted disparagement of the medical evidence, which was relevant and admissible, was its withdrawal from the jury's serious consideration. On a charge of capital murder, based on an allegation that the killing was planned and deliberate, it was virtually a withdrawal of the whole defence. In these circumstances, it could not be held that there was no substantial wrong or miscarriage of justice. Since the case has never really been considered by the jury on evidence which should have been before it, the appellant was entitled to a new trial.

*Per* Taschereau C.J. and Fauteux J., *dissenting:* It was uncontrovertible on the evidence that the murder was planned, i.e., "arranged beforehand", as found by the jury and the majority of the Court of Appeal. All that was done prior to and after the shooting was done in implementation of a plan. There was nothing in the evidence foreign to this plan, suggesting a sudden impulse to kill.

On the dictionary definition of the word "deliberate", it appears from both the English and French versions of s. 202A(2)(*a*) that the word qualifies the murder and that a time element is the material feature common to both the definition of "planned" and the definition of "deliberate". What Parliament intended was to exclude from the offence of capital murder a murder committed on the spur of the moment. There is nothing in the definition of either word which relates to the reasonableness or unreasonableness of the arrangement made beforehand or of the predetermination to kill. Irrationality of either may suggest a

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degree of mental irresponsibility legally apt to relieve from legal responsibility. But that is a matter for s. 16 of the Code. The factual and opinion evidence does not show that the ability of the appellant to think, reason and decide was abolished but impaired. To accept the submission that such an impairment, short of insanity within the meaning of s. 16 of the Code, is a defence, would be tantamount to introducing in the Canadian law a new and secondary text of legal irresponsibility, which Parliament has deliberately refused to adopt. The language of the enactment is inapt to justify such a departure from the system of our criminal law as is contended for by the appellant. It follows that there was no substantial wrong or miscarriage of justice resulting from the direction given by the trial judge as to the weight of the expert medical evidence.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming the appellant's conviction on a charge of capital murder. Appeal allowed, Taschereau C.J. and Fauteux J. dissenting.

*John A. Scollin,* for the appellant.

*G. E. Pilkey, Q.C.,* for the respondent.

The judgment of Taschereau C.J. and of Fauteux J. was delivered by

FAUTEUX J. (*dissenting*):—The appellant was indicted and tried for the capital murder of his wife on the 27th day of September 1962 at the City of Transcona in the Eastern Judicial District in the Province of Manitoba.

The case as presented to the jury by the Crown and the defence respectively may briefly be stated:

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 the 27th day of September last, 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 expert

[1] (1963), 43 W.W.R. 30.

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.

There is no evidence to support a defence of insanity under s. 16 of the *Criminal Code* and indeed after all the evidence had been adduced, such a defence was specifically disclaimed by counsel for the accused.

The jury, presided by Nitikman J., found the accused guilty as charged. Required under s. 642A—of which the provisions are applicable in any case of an offence punishable by death—to consider whether a recommendation that he should be granted clemency should be made, the jury so recommended.

On the appeal under s. 583 of the Code the verdict of the jury was upheld. The Court[1] found that the trial judge misdirected the jury on the weight to be given to the psychiatric expert medical evidence called for by the defence. Miller C.J.M., Schultz, Monnin and Guy JJ.A. found that no substantial wrong or miscarriage of justice had occurred, and upheld the verdict of the jury. Freedman J.A. dissenting considered that the expert evidence was of major importance on the issue whether the murder was planned and deliberate and would have substituted to the verdict of capital murder a verdict of non-capital murder.

Pursuant to s. 597A(*a*) of the Code, appellant then appealed to this Court on one ground which, as formulated in his notice of appeal to this Court, 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.

Involved in this ground of appeal are three matters to be considered. (i) Whether, upon the evidence it was open to the jury, not only to conclude as they and all the members of the Court of Appeal did, that the shooting of Mrs. More was intended—thus constituting murder under s. 201(*a*)(i)—but was also planned and deliberate, as they and the majority of the Court of Appeal found—thus constituting capital murder under ss. 201(*a*)(i) and 202A (2)(*a*) of the Code; and in the affirmative, (ii) whether impairment of the ability to think, reason and decide, short

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of insanity within the meaning of s. 16 of the Code, is a defence to the offence charged; and, (iii) whether in the result there was any substantial wrong or miscarriage of justice.

The complete and unchallenged review of the evidence appearing in the reasons for judgment of Schultz J.A. may be summarized as follows: On September 4, 1962, the accused, who had become a free lance photographer, secured part-time employment as a school bus driver, hoping that by undertaking to turn over his wages to Transcona Credit Union, his most urgently pressing creditor, he would avoid legal action being taken against him and his wife, co-signer for the debt. The Credit Union refused his proposal and through its solicitor advised him his wife's wages at Eaton's would be garnisheed on September 28 if the debt were not paid in full before that date. On September 24, which was four days before the deadline set by Credit Union and three days before that of the murder, the accused obtained a permit from the police to convey a revolver from a Sporting Supplies store to his residence. On September 25, shortly after 9:00 a.m. he asked for two days off from his school bus driving employment on the admittedly false pretext that he and his wife had to go east to bring back his father-in-law whom he falsely represented as having had a heart attack. Later the same morning, he went to the Sporting Supplies store to buy a revolver, representing again admittedly falsely, that he required it for use in connection with Sea Cadet activities. He left the store without making a purchase and went to the T. Eaton Company where he purchased a single shot .22 calibre rifle and a box of 50 cartridges. The rifle was taken home and kept there in the cellar without the knowledge of his wife. On September 27, at 6:00 a.m., according to his testimony, his wife while asleep was shot by him through the forehead, the rifle being held not more than 6 inches at the most from the head. Between 6:00 a.m. and 10:00 a.m. he testified he wrote numerous documents hereafter referred to, which he left on the kitchen table. At 8:00 a.m., according to independent testimony, he telephoned his wife's employer that she would not be in to work that day as she was ill. At 10:00 a.m. he testified that his sister, Mrs. St. Jean, telephoned and asked him to drive her downtown, which he did, mentioning

nothing to her on the occasion about the killing of his wife. He testified that around 4:00 p.m. he laid down beside his dead wife, shot himself through the head, and that expecting to die from his serious, though not fatal, wound he stayed lying in the bed. At 8:00 p.m. he telephoned a constable at the Transcona Police Station, identified himself and said:

> I shot my wife this morning and myself this afternoon, but I did not do a good job on myself, so I had better go to the hospital. Come to the side door.

Upon the arrival of the police he volunteered:

> I shot her this morning, shot myself at about 4:00 o'clock, did not make a good job, financial problems; it is all there,

and he pointed to the numerous documents lying on the kitchen table. On the way to the hospital in the police car, having been duly cautioned, he said:

> the only thing I have to say is I have financial problems, and I was going to do away with both of us, that is all.

The following day in the hospital and again after being cautioned he declared to the police officers:

> I had some financial problems. It was worrying my wife so much. She was a very nervous type of person. Anything like this would upset her. Actually I had a choice of doing one of two things, either going to personal bankruptcy which would probably upset her so much that it would upset her happiness or doing what I did by trying to take both our lives. That's all there is to it.

He testified that when he made the last two statements he was under the impression that he was going to die and trying to be truthful and not hide anything.

The substance of the documents written and left by appellant on the kitchen table or mailed by him when he left his home to drive his sister downtown tallies with these voluntary declarations made to the police immediately after the event. The documents also indicate his debts in great detail, the location of his insurance policies and those of his wife, and contained the disposition to be made of his estate. A letter written and mailed to a close friend reads in part:

> Please read the following very carefully before you do anything.
>
> I shot Marge early this morning & am now going to do away with myself.

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Please get Joe Teres Transcona Chief of Police & tell him to come to the house 330 Harvard Ave. W. & here is the key to the side door. Do not come in with him because it is a horrible sight to see, I know because I know what Marge is like & I just hope I have the courage to finish what I have started. We are both in the back bedroom . . .

I hope this will do some good some where, & I really don't feel too badly, because Marge & I have had a good life together even if it has been shortened by this act. I'll close now as I must join Marge & I hope to 'Go with God'.

In a three-page note to Mrs. St. Jean, her husband and family, he wrote:

I am sorry to do this, but as far as I can see it is my only way out.

Marge is so upset and worried lately that it is hurting me deeply. Marge and I love each other very deeply & have had a real good & happy life together & in one way I think I am doing the right & best thing.

Please try & not feel too bad about us, because at least we are still together & if there is another world beyond this one I hope Marge & I have as much happiness there as what we have had here on earth.

* * *

Well I guess that's it for now. Once again please don't feel badly about us, as we have always been happy together & we will still have our happiness as we are still together.

In a further note to Mrs. St. Jean, admittedly written after he had driven her to work, he wrote in part:

. . . When you get the insurance money be sure to straighten out your affairs & do as I asked this morning if you don't have cash for it don't buy it. I just wish I had taken my own advice & this would not be necessary.

Please try and find happiness instead of sadness over this, as I'm sure Marge & I will be happy together in the future as we have been in the past . . .

I know it's easy to say, but please don't feel badly about us and enjoy your lives as much as Marge & I have.

While on his evidence all the documents were written on the morning of the 27th, after the shooting of his wife, many bear a prior date. At trial he said he back-dated these particular documents, this to overcome any possible suggestion that he might not have been sound of mind when they were written which would cause them to be ineffectual. Two such documents are significant. The first is dated the day before the murder; it is headed "Last Will and Testament of John P. T. More", of which the opening words are "Being of sound mind at the time of writing this, I hereby declare this to be my last will and testament". The second is dated the 24th, to wit the day he obtained the permit from the police to carry a revolver to his residence; it lists 14 items

of expensive photographic equipment and provides for their return partly to a creditor and the balance, not to his wife but to Mrs. St. Jean. Shown this last exhibit at trial, he could give no explanation why it was dated September 24.

Subject to the consideration of matters raised for the appellant, on this evidence it was manifestly open to the jury to conclude that the killing of Mrs. More was intended, planned and deliberate.

That it was intended was found by the jury and all the members of the Court of Appeal. It was also, by necessary implication if not expressly, admitted by appellant who did ask this Court to reduce the verdict of capital murder to one of murder simpliciter. The defence of automatism was rejected by the jury which disbelieved the evidence of the appellant at trial as to what occurred at the moment of the discharge of the rifle. This defence was abandoned in this Court.

That the murder was planned, *i.e.*, "arranged beforehand"—cf. the Shorter Oxford Dictionary—as found by the jury and the majority of the Court of Appeal is, in my respectful view, uncontrovertible on the above evidence accepted by the jury. There was a plan and one plan only; and all that was done by the appellant, prior to and after the shooting of his wife, was done in implementation of this plan. With deference to my brother Cartwright, I find no evidence, of anything foreign to this plan, suggesting that the accused was suddenly impelled to kill his wife at the moment of the discharge of the rifle. Obviously the jury, having rejected the evidence as to what occurred at the time of the discharge of the rifle, could not rely on or infer from the same evidence impulsivity intervening at that particular moment.

From appellant's factum and the oral argument, the grievance as to the direction of the trial judge with respect to the weight to be attached to expert medical evidence is rather fundamentally related by him to the question whether the murder was deliberate within the meaning he gives to this word under the provisions of s. 202A (2)(*a*). To dispose of the merits of this appeal, this Court, in my respectful view, must unavoidably determine the meaning of the word "deliberate" under these provisions of the *Criminal Code* and their legal effect in the case.

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In the Shorter Oxford Dictionary, the word is thus defined:

> *Deliberate:* well weighed or considered, carefully thought out, done of set purpose, studied, not hasty or rash. Of persons: characterized by deliberation, considered carefully, leisurely, slow, not hurried.

The first part of the definition is related to an action; the second part is related to a person. Under the provisions of the section the word "deliberate" qualifies not the person charged but his action, i.e. the murder. In the French version of these provisions, the expression "de propos délibéré" stands for the word "deliberate", and, according to the Larousse XXe siècle, means "à dessein—de parti pris—de dessein formé, arrêté à l'avance". In Harrap's Standard French and English Dictionary, the expression "of set purpose" is translated "de propos délibéré, de parti pris". In the same dictionary, the word "predetermination" is translated "détermination prise d'avance; dessein arrêté".

Thus it appears from both the English and French versions, which in the consideration of a federal statute must be read together, *Composers, Authors and Publishers of Canada Ltd. v. Western Fair Association*[1], that a time element is the material feature common to both the definition of the word "planned" and the definition of the word "deliberate". This feature was not a constitutive element of murder under the state of the law as it was prior to the enactment of s. 202A (2)(*a*). All of which reasonably indicates that what Parliament intended, by adding it as such, was to exclude from the offence, henceforth categorized as capital murder, a murder committed on the spur of the moment. There is nothing in the definition of either of the words "planned and deliberate" which relates to the reasonableness or unreasonableness of the arrangement made beforehand or of the predetermination to kill. If, in the context of the relevant part of ss. 201(*a*)(i) and 202A (2)(*a*), from which stems the definition of capital murder, the words "planned" and "deliberate" were held to imply reasonableness, what type of planned and deliberate murder could be held by a jury to be reasonable and when would these provisions have any application, I am unable to say. Irrationality of either, if appearing in a given case, may

[1] [1951] S.C.R. 596, 12 Fox Pat. C. 1, 15 C.P.R. 45, [1952] 2 D.L.R. 229.

suggest a degree of mental irresponsibility legally apt to relieve from legal responsibility. The policy of the law in this respect is not stated in s. 202A (2)(*a*) but in s. 16 of the Code, which appearing in Part 1 of the Code is all-embracing with respect to the question of insanity in criminal matters. Of course it is for the prosecution to show and for the jury to say whether it is shown by the evidence that the offence charged is intended, planned and deliberate. The mental capacity to commit this as well as any other offence is another matter altogether. For it is a matter of defence to displace the presumption created in the imperative terms of s. 16(4)—"Everyone shall, until the contrary is proved, be presumed to be and to have been sane". This presumption cannot be displaced by factual or opinion evidence unless such evidence meets the test of legal irresponsibility set forth in s. 16(2), (3). The factual and opinion evidence in this case does not show that the ability of the appellant to think, reason and decide was abolished but impaired. The evidence does not meet the legal test; on the contrary Dr. Adamson affirms that the accused was capable of appreciating his unlawful acts and added that he could not convince himself that the accused did not know the difference between right and wrong at the time of the offence.

Acceptance of appellant's submission that mental defect or disease not sufficient to render an accused legally irresponsible under s. 16 of the Code may nevertheless operate to reduce the degree of the crime charged is tantamount to introducing in the Canadian law a new and secondary test of legal irresponsibility as was done in England prior to the enactment of the provisions of s. 202A (2)(*a*) by the *Homicide Act 1957*, 5 & 6 Eliz. 2, 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) 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.

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Undoubtedly aware of these provisions, the Canadian Parliament deliberately 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. Contrary to what is the case in England, the prosecution in Canada would further have the burden of proving, as a constitutive element of the offence of capital murder, not only that the accused is mentally sane within the meaning of s. 16, but also that his mental responsibility is not affected to a lesser degree for which no legal standard is given. Again on appellant's submission there are two different tests of legal irresponsibility with respect to the offence of capital murder. The first being with respect to intent is defined in s. 16; the other being with respect to planning and deliberation is left to the arbitrament of the jury to define in each case. I am unable to read the section as implying such substantial innovations and changes in our Criminal Law.

In the United States, the tests of irresponsibility of the various jurisdictions, in cases involving insanity as a defence to crime, are reviewed in Weihofen, Mental Disorder As A Criminal Defence, at pages 129 et seq. In most of the jurisdictions, it appears that where the law of the State includes specific intent, deliberation or premeditation as constitutive elements of a murder of first degree, it is held that insanity, not sufficient to require an acquittal, may not be shown to negative intent, deliberation or premeditation, and so reduce the crime to murder in second degree.

There is a presumption against implicit alteration of the law and one of these is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares. It is in the last degree improbable that the Legislature would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness. (Maxwell on Interpretation of Statutes, 9th ed., pp. 85 et seq.). In my view, the language of the enactment—which on the above meaning of the words "planned and deliberate" is truly related to a time element—is inapt to justify such a departure from the system of our Criminal Law as is contended for by appellant.

On that view of the law, impairment of mental capacity short of insanity was not a defence to the crime charged. It follows that there was no substantial wrong or miscarriage of justice resulting from the direction given by the trial judge as to the weight of the expert medical evidence. For while relevant to a defence of insanity—to negative intent or that the murder was planned and deliberate—, in this particular case the evidence adduced was admittedly short of showing insanity to the degree required by law to relieve from legal responsibility. And, again, insanity as a defence was specifically disclaimed. To the extent that it could be relevant to the consideration of a recommendation that the accused should be granted clemency, there was no prejudice, for such a recommendation was made.

I would dismiss the appeal.

The judgment of Cartwright, Abbott, Judson, Ritchie and Hall JJ. was delivered by

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Judson and wish to add only a few words on one aspect of the matter.

It does not appear to have been argued by counsel for the Crown at any stage of the proceedings that the evidence of Dr. Adamson and of Dr. Thomson was not relevant to the question whether the appellant was guilty of capital murder; and all of the learned judges in the courts below have proceeded on the view that it was relevant. In my opinion they were clearly right in so doing.

In the circumstances of this case, the defence of insanity having been expressly disclaimed, there were really only two questions for the jury. The first was whether the appellant meant to cause the death of his wife; if this was answered in the affirmative he was guilty of murder. The second, which arises under s. 202A (2)(*a*) of the *Criminal Code,* was whether this murder was planned and deliberate on his part; if this was answered in the affirmative he was guilty of capital murder.

The evidence that the murder was planned was very strong, but, as was properly pointed out to the jury by the learned trial judge, they could not find the accused guilty of capital murder unless they were satisfied beyond a reasonable doubt not only that the murder was planned but also

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that it was deliberate. The learned trial judge also rightly instructed the jury that the word "deliberate", as used in s. 202A (2)(*a*), means "considered not impulsive". Other meanings of the adjective given in the Oxford Dictionary are "not hasty in decision", "slow in deciding" and "intentional". The word as used in the subsection cannot have simply the meaning "intentional" because it is only if the accused's act was intentional that he can be guilty of murder and the subsection is creating an additional ingredient to be proved as a condition of an accused being convicted of capital murder.

The recital of the facts and the evidence of the appellant as to what occurred at the moment of the discharge of the rifle, set out in the reasons of my brother Judson, 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.

I wish to emphasize that all that I have said above is related to the peculiar facts of this particular case.

Since writing the above, I have had an opportunity of reading the reasons of my brother Fauteux and I wish to make it clear that in my opinion the enactment of s. 202A (2)(*a*) of the *Criminal Code* has in no way affected the interpretation or application of s. 16. The evidence of the two doctors is not relied on by the defence as raising the question whether the accused was legally sane. Its importance is that it would assist the jury in deciding the question whether the accused's action in pulling the trigger, which so far as this branch of the matter is concerned was admittedly the intentional act of a sane man, was also his deliberate act. This question is one of fact and its solution involves an inquiry as to the thinking of the accused at the moment of acting. If the jury accepted the evidence of the doctors it,

in conjunction with the accused's own evidence, might well cause them to regard it as more probable that the accused's final act was prompted by sudden impulse rather than by consideration. On this question the accused was entitled to have the verdict of a properly instructed jury.

I would dispose of the appeal as proposed by my brother Judson.

The judgment of Cartwright, Abbott, Judson, Ritchie and Hall JJ. was delivered by

JUDSON J.:—The Manitoba Court of Appeal[1], with Freedman J.A. dissenting, has affirmed the conviction of the appellant on a charge of capital murder. His appeal asks this Court to set aside the verdict of guilty of capital murder and substitute a verdict of guilty of non-capital murder, or, in the alternative, to quash the conviction and order a new trial.

The issue in the appeal is sharply defined in the reasons for judgment delivered in the Court of Appeal. All the judges were of the opinion that the learned trial judge had misdirected the jury on the weight to be given to the medical evidence called by the defence on the appellant's state of mind at the time of the offence. The majority considered that the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code* applied and that there had been no substantial wrong or miscarriage of justice despite the wrong decision of the learned trial judge on a question of law. Freedman J.A., dissenting, held that the appellant was not properly convicted of capital murder but should have been convicted of non-capital murder and would have substituted the latter verdict under s. 592(3) of the *Criminal Code*. The issue therefore is whether the majority of the Court of Appeal was correct in holding that there was no substantial wrong or miscarriage of justice.

The accused shot his wife through the head while she was asleep about 5 o'clock on the morning of September 27, 1962. He then wrote a number of letters explaining why he had done it. He concealed his crime during the day and during the afternoon he attempted suicide by shooting himself through the head. Although seriously wounded, he did

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not die and at 8 o'clock in the evening of September 27, he telephoned the police to tell them what he had done.

There is no history of matrimonial discord in this family, either remote or immediate. The accused married his wife in 1942 and the evidence indicates that they lived together happily. From 1942 to 1945 the accused served in the Navy. On his return to civilian life he completed his apprenticeship as an upholsterer and worked at this trade for 12 years in the employment of the Canadian National Railways. He left this employment to start his own business as a photographer. In this he was unsuccessful. He accumulated many debts; he was being hard-pressed by his creditors at the time of the crime; and there is no doubt that he was suffering from some mental disturbance that caused him to do what he did.

On September 24 he had secured a permit for the purchase of a revolver. He made some enquiries at a shop about the purchase but did not go through with it. At that time he gave a false reason for his interest in a revolver. On September 25 he bought a rifle and a box of shells with the intention, he said, of taking his own life because of worry about his financial problems and the effect upon his wife of their impending discovery.

He was up twice during the night of September 27 thinking about his troubles while his wife was sleeping. He said that the second time he got up was about 5 a.m. and that he sat around smoking and thinking. He gave his description of the shooting in the following words:

> From there the only next thing I can remember is standing by the bed with the rifle in my hand and hearing it go off.

He also said that immediately before the rifle was discharged he was thinking

> what my wife and I had here on earth and what it would be like in a better world ahead, Heaven . . . I thought what a better place it would be, that we would not need to think of money problems or anything like that.

The letters that he wrote after the shooting of his wife indicated the same kind of mental disturbance. Dr. Gilbert L. Adamson, who had been practising in the field of neurology and psychiatry in Winnipeg since 1931, and who had recently retired as Associate Professor of Medicine in

the University of Manitoba, gave the following opinion about the mental condition of the accused at the time of the killing:

I formed the opinion that on the 27th day of September 1962 he was suffering from an abnormal state of mind, which is referred to as a depressive psychosis, in which the symptoms are severe depression, hopelessness, inability to sleep, loss of appetite, loss of weight, and impairment of volition—that is to say, impairment of ability to decide even inconsequential things, inability to make up a decision in a normal kind of a way. In this state, a person is so hopeless, their feelings are so hopeless, that their judgment becomes distorted, and their thinking confused.

Dr. Ian Blake Thomson, Assistant Medical Superintendent of the Psychiatric Institute in Winnipeg and a lecturer in psychiatry at the University of Manitoba, expressed the following opinion:

. . . I formed the opinion that he had during the course of last year . . . suffered from symptoms of depression, and that towards the end of the period in question—that is, in September of last year, during the month of September—his condition deteriorated very markedly, so that the depression deepened and became a severe depression with great feelings of despair and despondency and hopelessness; and he suffered from brooding preoccupation which interfered with his ability to work, to reason, to think, and that at the time of the alleged offence, this condition very probably was one which in medical terms is called a "psychosis", which is a major mental illness.

This is very important and highly relevant evidence given by men of eminence in their profession. The learned trial judge instead of leaving it to the jury for the consideration to which it was entitled, quoted from Phipson on Evidence, Taylor on Evidence and Lord Campbell, to the effect that the testimony of experts is of slight weight.

From Phipson on Evidence, 9th ed., p. 403, he quoted:

The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories . . .

From Taylor on Evidence, 12th ed., p. 59, he quoted:

Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses* . . . it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them.

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From Lord Campbell's judgment in the *Tracy Peerage* case[1], he quoted:

> Skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence.

I agree with Freedman J.A. that as generalizations, these statements are bad. They could, moreover, have no possible application to the evidence given in this case. All the judges in the Court of Appeal were of the opinion that the medical evidence was relevant and admissible and that there was error in the judge's instruction. In the context in which this instruction was given, the only possible reference is to the evidence of Dr. Adamson and Dr. Thomson and the probable result of this unwarranted disparagement of their evidence was its withdrawal from the jury's serious consideration. On a charge of capital murder, based on an allegation that the killing was planned and deliberate, it was virtually a withdrawal of the whole defence.

I agree with Freedman J.A. that in these circumstances the Court cannot hold that there was no substantial wrong or miscarriage of justice. I would, however, not substitute a verdict of non-capital murder. This case has never really been considered by the jury on evidence which should have been before it.

I would allow the appeal, quash the conviction of capital murder and direct a new trial.

Since writing these reasons, I have had the opportunity of reading the reasons of my brother Cartwright and I agree with them.

*Appeal allowed and new trial directed,* TASCHEREAU C.J. *and* FAUTEUX J. *dissenting.*

*Solicitors for the appellant: Pitblado, Hoskin & Company, Winnipeg.*

*Solicitor for the respondent: Attorney-General for Manitoba.*

[1] (1843), 10 Cl. & F. 153 at 191, 8 E.R. 700.