More v. The Queen [1]

Gerald Nemiroff *

Prior to 1961 the Canadian Criminal Code did not distinguish between capital and non-capital murder. Every conviction for murder as defined in sections 201 and 202 carried with it the mandatory death penalty. In an attempt to limit the conditions under which the death penalty could be imposed, the Legislature introduced s.202A [2] defining capital murder,[3] which in part reads,

"(2) Murder is capital murder, in respect of any person, where
(a) it is planned and deliberate on the part of such person...
.....
(3) All murder other than capital murder is non-capital murder."

Section 206 describes the penalty for capital murder which is death. Non-capital murder, on the other hand, is punishable by life imprisonment.

Thus, in order to bring about a conviction for capital murder, the Crown must prove beyond reasonable doubt,

a) that the accused murdered within the meaning of s.201 or 202, and
b) that the murder was *planned and deliberate* on the part of such person, or that any of the other conditions in s.202A were satisfied.[4]

The importance of the *More* case lies in the Supreme Court's interpretation of the words "planned and deliberate" in s.202A. In view of this section, can an accused charged with capital murder raise as a defence impairment of mental capacity short of legal insanity ?

---

* Of the Junior Board of Editors, McGill Law Journal; second year law student.

[1] (1964) 41 C.R. 98; [1963] S.C.R. 522.

[2] S.C. (1960-61), ch. 44, s. 1.

[3] Just as the frequent use of the Royal Prerogative extending executive clemency to convicted murderers prior to 1961 resulted in the enactment of a statute (namely s. 202A) limiting the conditions under which the death penalty could be impesed, it appears that the repeated exercise of the Prerogative (the Crown has commuted all death sentences since April 1963 to life imprisonment) will lead to an amendment to the Canadian Criminal Code abolishing capital punishment entirely.

[4] This author shall not deal with the latter ingredients of s. 202A.

The accused, More, had experienced severe financial difficulties and was being pressured by his creditors. Realizing that his wife was a very nervous person and that her knowledge of his serious financial problems would "upset her happiness", More thought it would be best to kill his wife and then commit suicide. On September 27, 1962, he shot and killed his wife and seriously wounded himself in an attempt at suicide. Consequently, More was charged with capital murder contrary to s.201 and s.202A of the Canadian Criminal Code, the Crown claiming that More meant to cause the death of his wife (s.201 (a) (i)) and moreover, that the murder was planned and deliberate (s.202A (2) (a)).

There is no doubt that the accused is guilty of murder under s.201 (a) (i) as More certainly intended to kill his wife. Furthermore, the fact that the appellant is asking that the Court (for reasons to be discussed below) reduce the verdict from capital to non-capital murder indicates an admission to the lesser charge. Was the murder also "planned and deliberate" ? Certainly it was planned, i.e. arranged beforehand, since More had purchased the rifle two days before the murder and planned the killing of his wife. But, was the act "deliberate" ?

Although a defence of insanity was not raised by the appellant, More, two psychiatrists testified on his behalf at trial advising the Court that in their expert opinion, the accused, at the time of the shooting, 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." [5]

In his charge to the jury, the trial judge advised them to give little weight to the testimony of the experts.[6] The accused was subsequently convicted of capital murder as charged.

The Manitoba Court of Appeal held that the trial judge had misdirected the jury as to the weight to be given to the expert evidence, but nevertheless dismissed the appeal under s.592 (b) (iii) on the ground that no miscarriage of justice had occurred in the misdirection to the jury.[7] The accused appealed to the Supreme Court of Canada, and in rendering its decision, the Court was faced with the task of interpreting the meaning and scope of the word "deliberate" in s.202A. This Court concluded, Fauteux J. and Tasche-

[5] (1964) 41 C.R. 98 at p. 111.

[6] The trial judge quoted *Phipson on Evidence*, 10th ed., para. 1286, *Taylor on Evidence*, 12th ed., p. 59, both of whom point out that since the experts are usually biased in favor of the side which calls them, their testimony should not carry much weight.

[7] 43 W.W.R. 30.

reau C.J. dissenting, that the word "deliberate" in s.202A does permit the accused to plead impairment of mental capacity short of legal insanity as a defence to a charge of capital murder, and hence ruled that there had been a miscarriage of justice in the misdirection by the trial judge as it was "virtually a withdrawal of the whole defence." [8] Consequently, the appeal was allowed and a new trial ordered.

Cartwright J. (Abbott, Ritchie, and Hall JJ. concurring) points out that the word "deliberate" as used in s.202A. .....

> "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...
>
> ...this question is one of fact and involves an inquiry as to the thinking of the accused at the moment of acting...
>
> ...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."[9]

The decision in *More* v. *The Queen* has been upheld in two subsequent decisions by the Supreme Court. In *The Queen* v. *Mitchell* [10] the issue was whether drunkenness amounting to impairment of mental processes could be allowed as a defence to a charge of capital murder. Spence J. approved the *More* decision and stated that "the jury should have available and should be directed to consider all the circumstances including not only the evidence of the accused's actions but of his condition, his state of mind... planning and deliberation involve the exercise of mental processes." [11] Similarly in *McMartin* v. *The Queen* [12] the request that a new trial be ordered to permit the defence to introduce new medical evidence indicating the mental condition of the accused at the time of the murder was granted by the Supreme Court, thus overrulling the British Columbia Court of Appeal.[13] Here again, the Supreme Court applied the holding in *More* v. *The Queen,* namely, that "deliberate" in s.202A permits a defence of impairment of mental capacity short of insanity.

The decision in *More* v. *The Queen* established another milestone in the field of criminal law in Canada. In permitting an accused to introduce psychiatric evidence showing that at the time of the

---

[8] *Ibid.*, at p. 112 (Judson, J. for the majority).
[9] *Ibid.*, at pp. 108, 109.
[10] [1964] S.C.R. 471.
[11] *Ibid.*, at pp. 475 and 477.
[12] [1964] S.C.R. 484.
[13] [1964] 41 C.R. 147.

homicidal act, he was suffering from some abnormality of mind thus preventing him from making decisions in a normal kind of way and therefore not being able to commit a deliberate act, the Supreme Court of Canada has shown a much greater appreciation of psychiatric and psychological theories than ever before. The Court, in effect, has stated that what on the surface may appear to be a deliberate act may in fact not be deliberate by virtue of an accused's mental deficiencies.

Notwithstanding the desirability of this position taken by the Supreme Court, this author is inclined to believe that the Legislature, in introducing s.202A, did not intend to allow any defence of mental impairment short of insanity, and furthermore that such an interpretation, in view of our present law, gives rise to contradictions and other undesirable consequences.

It is respectfully submitted that s.202A does not refer to the mental capacity of the accused and that this element is governed uniquely by s.16 which permits an accused to raise insanity as a defence. The only time the court can investigate into the mind of an accused is where the accused raises insanity as a defence and failure to introduce such a defence precludes any inquiry into the mental condition of the accused.

Section 16 (4) states that... "Everyone shall, until the contrary is proved, be presumed to be and have been sane," and hence it is for the defence to displace this presumption by introducing evidence which meets the test of legal irresponsibility, as defined in s.16(2) and (3). In the case at bar, however, the psychiatric evidence does not go so far as to classify More as insane within the meaning of s.16 and thus the presumption that he is sane must prevail.

In attaching a mental element to "deliberate" in s.202A, a second test of legal irresponsibility is introduced for which there is no definition.[14] However inadequate the standard in s.16 may be, it at least provides for a *definition* of legal insanity. In effect, it says that if, in the opinion of psychiatrists, the mental state of an accused satisfies the definition in s.16, then it can be said that this constitutes

[14] Fauteux, J. (dissenting) states that such an interpretation cannot prevail as it is "tantamount" to introducing in the Canadian Law the provisions of the *British Homicide Act 1957*, 5 and 6 Elizabeth II, ch. 11, which the Canadian Parliament could have easily adopted if they so desired (*Ibid.*, at p. 106). It is respectfully submitted that this statement is somewhat inaccurate as the English Act reduces *murder to manslaughter* where an accused suffers from some abnormality of mind whereas the majority's position reduces *capital to non-capital murder* where an accused suffers from some mental defeciency. Thus the Canadian position remains more severe than that of the English.

sufficient mental impairment to render an accused not responsible for his acts. Without any such definition, what must the court ask of the psychiatrist ? Must the court demand that the accused be declared cranky ? bad tempered ? psychotic ? neurotic ? There is no answer. There is no longer any criterion of responsibility to enable the court to determine what constitutes sufficient mental impairment to declare an accused incapable of deliberating. Can it reasonably be said then, that by introducing the word "deliberate" in s.202A, the Legislature intended to create such a vacuum in the law ? With all due respect, this author maintains that all the Legislature intended was to exclude from capital murder a murder committed on the spur of the moment, and that the words "planned and deliberate" refer only to a time element without any reference to the mental condition of the accused.[15]

Cartwright J. held that the defence raised had nothing to do with s.16 but rather, proposed that the Crown failed to prove the ingredients of the offence charged, namely that the murder was "deliberate". ("the subsection is creating an additional ingredient to be proved..." [16]). Such a contention, argues Mr. Justice Fauteux, gives rise to highly undesirable consequences. The *British Homicide Act* reduces murder to manslaughter where the *defence* can show that the accused suffered from some degree of mental impairment. If the decision in *More* v. *The Queen* is left to stand, it would mean that the *Crown* has to prove beyond a reasonable doubt the accused's capacity to plan and deliberate. In other words, if an accused pleads insanity as a defence the burden of proof rests with the defence, but if no such defence is put forth, then the Crown has the burden of proving that the accused was capable of deliberating. This is tantamount to saying that on the one hand s.16 (4) presumes every person to be sane whereas s.202A (2) (a) presumes every person accused of capital murder to be mentally impaired until the Crown proves otherwise ! If the Legislature had intended to tax the Crown so heavily, it surely would have been more explicit and clear.[17]

The majority's position leads to further difficulties. Once an accused has been declared insane according to s.16, he is placed in a mental institution for care. However, an accused, who may well

---

[15] *Ibid.*, at p. 105; the view set forth by Fauteux, J. (dissenting) with which this author agrees.

[16] *Ibid.*, at p. 108.

[17] *Ibid.*, at p. 107 — "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.*)

come under the terms of being insane legally (s.16), may prefer to plead mental deficiency short of insanity in the hope of receiving a fixed sentence on a non-capital murder conviction, rather than being "put away" in some mental institution. This can be a peril to society especially if the sentence is shortened by parole.

Furthermore, it seems unreasonable that the Legislature intended to permit a defence of mental incapacity short of legal insanity to charges of capital murder without extending such a defence to all criminal charges. It is certainly inconsistent to say that while an accused may be suffering from some mental disorder which would relieve him from a charge of capital murder, such disorder would not, under the same conditions, relieve him from a charge of non-capital murder or rape etc. An accused's mental condition must be given the same considerations independent of the crime. To maintain otherwise leads to obvious contradiction.

That "deliberate" does not refer to the mental condition of the accused, is supported by a statement made by Justice Minister Davey Fulton in 1961 to a question raised in the House of Commons...

> "Finally, I suggest that 'deliberate' has no direct bearing on the question of mental capacity, which remains as it is now."[18]

With all due respect, this author submits that the Supreme Court has wrongly interpreted the meaning of "deliberate" in s.202A (2) (a) of the Canadian Criminal Code. The growing recognition of psychology and psychiatry will inevitably lead to drastic alterations of the criminal law. It appears, however, that the Supreme Court of Canada is one step ahead of the Legislature.

---

[18] (1960-61) 5 H.C. Debates, at p. 5448.