C A N A D A
Province de Québec
Greffe de Montréal

No: 500-10-000079-838

(555-01-000232-828)

Cour d'appel

Le 15 juin 1990

CORAM : Juges Kaufman,
Jacques et Fish

CARLE JOHNSTONE ALLARD,
accusée apppelante,

c.

SA MAJESTÉ LA REINE, intimée

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LA COUR, statuant sur le pourvoi de l'appelante contre un verdict rendu le 25 février 1983 par un jury présidé par l'honorable Louis-Philippe Landry de la Cour supérieure, division criminelle, district de Pontiac, déclarant l'appelante coupable de meurtre au premier degré;

Après étude, audition et délibéré;

Pour les motifs exposés dans l'opinion écrite de M. le juge Morris J. Fish déposée avec le présent arrêt, à laquelle souscrivent MM. les juges Kaufman et Jacques;

ACCUEILLE le pourvoi;

CASSE le verdict de meurtre au premier degré prononcé le 25 février 1983 par un jury;

ORDONNE la tenue d'un nouveau procès sous l'accusation telle que portée. JJ.C.A.

OPINION OF FISH J.A.

For poisoning her husband to death, Carle Johnstone Allard was convicted by a jury of first degree murder.

She appeals her conviction on four grounds, stated as follows in the proceedings filed by Appellant:

1) The learned trial judge left the jurors with the impression that they must reach a verdict;

2) That the burden of proof imposed on the accused by S. 16(4) of the Criminal Code is unconstitutional as being inconsistent with S. 11(d) of the Canadian Charter of Rights and Freedoms, or should be "read down" to impose no greater burden on the accused than to raise a reasonable doubt as to her state of insanity at the time of the commission of the offence;

3) That the learned trial judge erred in not relating the medical testimony to the mental elements necessary to constitute first degree murder;

4) That the learned trial judge erred in not informing the jury that if the accused would be acquitted on account of insanity, she would be kept in strict custody until the pleasure of the Lieutenant Governor of the Province is known.

In my respectful view, Appellant's third ground is well-founded. For the reasons set out below, I believe a fresh trial must therefore be had.

The Facts

Fernand Allard died on September 29, 1982, after ingesting a vitamine capsule laced by Appellant with a fatal dose of strychnine. The position of the Crown was that Appellant had killed her husband deliberately. He had subjected her to verbal and physical abuse. She murdered him to end their marriage, without sacrificing the farm. By divorce, she stood to lose it; by undetected murder, she could keep it.

The position of the defence was that Appellant was insane when she caused her husband's death. In any event, because of her mental disorder and the effect of abuse by her husband, she did not kill him intentionally or in a planned and deliberate manner. Appellant had a history of mental illness. She had received shock treatments in the early 'sixties and had seen a psychiatrist for six years prior to her husband's demise. Because of her mental condition, Appellant did not appreciate the consequences of her act. She intended only to cause sickness, not death.

Several experts were heard. Only one, Dr. Claude Bernard, expressed the opinion that Appellant suffered from manic-depressive psychosis.

In his view, as the trial judge told the jury, Appellant "may have been able to appreciate that she was using a poison, that the poison could make a person sick but she could not appreciate that it could kill" (p. 1035). (1)

(1) All page references, unless otherwise noted, are to Appellant's factum.

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Dr. Norman Sutherland had seen the Appellant sometime in September, 1982 (her husband was poisoned, it will be recalled, at the end of that month). She claimed to have been beaten by her husband and bore a large bruise on her left eye, along with scratches and other symptoms "compatible with physical abuse" (p. 944). According to Dr.

Sutherland, Appellant was "extremely angry"; he had never seen her in this state previously (ibid.). Though she had her "ups and downs", Appellant "was not seriously disturbed" (p. 946). Dr. Sutherland agreed, in answer to a question by Crown counsel, that "she was reacting like everybody else would react, being a strong-willed intelligent woman" (p. 947).

Dr. Ronald Harris, a psychiatrist, was called by the Crown in rebuttal. He had seen Appellant several times a year between 1976 and 1982. Dr. Harris "found no evidence whatsoever during the six years that (he) knew her of any serious emotional illness which would otherwise be known as a psychosis", but only "evidence of a personality disorder which is an entirely different thing" (p. 970).

Appellant, he insisted, was not a "depressed person" (p. 976). And yet, asked whether he had prescribed anti-depressants regularly", Dr.

Harris replied, "Not regularly, whenever she attended" (at p. 980, my

emphasis). On the one hand, Dr. Harris stated that "There had been episodes when she had been neurotically depressed for a matter of a few hours, or a day or so" (at p. 976). On the other, he said, "Well not seeing her very frequently I had no idea how long the depression lasted" (at p. 980). Appellant's attempted suicide in 1977, when she "took an overdose of fifty tablets of view, "wasn't a very determined attempt" (p. 976). In his mind, "she knew perfectly well what she was doing all the time" (P. 971); and yet, because of her personality disorder, she at times had "an incapacity to realize" the consequences of her actions, such as "the propriety of hitting one's husband over the head with a bottle" (p. 987).

In view of my conclusion that a new trial must be ordered because of the trial judge's directions specifically with respect to this medical evidence, I consider it inappropriate and unnecessary to refer in detail to the testimony of other witnesses.

The Law

Appellant was charged with first degree murder. To find her guilty of that offence, the jury had to be persuaded beyond a reasonable doubt that she intended to cause her husband's death or that she meant to cause him serious bodily harm, knowing it was likely to cause his death, and was reckless whether death ensued or not: section 229(a), Criminal Code. In addition, the jury had to be satisfied that the murder was planned and deliberate.

If Appellant was insane at the time, the jury was bound to acquit her.

But if her defence of insanity failed, the jury was nonetheless required to bear in mind all the evidence -- including the expert

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evidence as to her mental condition -- in considering the live issues of intention, planning and deliberation.

Thus, if the jury concluded that Appellant was sane and therefore capable of forming the requisite intent for murder, it still had to consider whether for any reason she in fact did not have that intent.

If there was reasonable doubt on that issue, the proper verdict was not guilty of murder, but guilty of manslaughter.

If the murder was intentional, but not planned and deliberate, Appellant could be convicted of second degree murder, but she had to be acquitted on the charge as laid.

Appellant's mental condition, I repeat, was relevant not only to her capacity to form and the existence in fact of an intent to cause death, but also to the additional and separate elements of planning and deliberation: R. v. More, (1963) 3 C.C.C. 289 (S.C.C.), at pp. 291-92; R. v. Mitchell, (1965) 1 C.C.C. 155 (S.C.C.), at p. 166; R. v. Charest, C.A.M. 500-l0-000087-872, March 2, 1990, summarized at J.E. 90-657; R. v. Kirkby (1985) 21 C.C.C. (3d) 31 (Ont. C.A.), at pp. 61-67. Moreover, the burden was on the Crown to prove each of these elements beyond a reasonable doubt. And this burden on the prosecution, I emphasize, did not depend in any way on Appellant's onus in relation to the defence of insanity.

Thus, in More, the medical evidence was held relevant to the "deliberate" nature of what was "admittedly the intentional act of a sane man" (at p. 291). And in Kirkby, after concluding that the issue of insanity had been properly withheld from the jury, Martin, J.A. found that evidence of the appellant's mental disorder was to be considered by the jury in determining whether the killing was planned and deliberate (at p. 61).

Clearly, on a charge of first degree murder, evidence of mental condition, even if it is adduced to support a defence of insanity, cannot be disregarded merely because the defence of insanity fails.

Though insufficient to bring the accused within section 16 of the Code, the evidence may yet be adequate to raise a reasonable doubt whether, in fact, he or she intended to commit murder.

Moreover, evidence which falls short of negating an intent to kill may yet suffice to negative planning or deliberation.

Dealing with these distinctions very recently in the context of drunkenness, the Supreme Court of Canada held in R. v. Wallen (April 12, 1990, not yet reported), that a trial judge must expressly direct the jury to consider the accused's intoxication with respect to planning and deliberation separately from the issue of intent.

Lamer J. (Cory J. concurring) stated at p. 5:

I cannot, therefore, agree with my colleague Justice McLachlin that an instruction that a lesser degree of intoxication may suffice to negative planning and deliberation than to negative the intent to kill is not

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essential in a judge's charge to the jury. First degree murder is, in terms of punishment, the most serious offence in the Criminal Code, calling for a mandatory sentence of life imprisonment without eligibility for parole until a person has served twenty-five years of his or her sentence. It is imperative, having regard for the serious consequences of a finding by the jury that the appellant planned and deliberated on the killing of his wife. that the jury be explicitly and clearly instructed on the distinction between the effect of intoxication on intent to kill as opposed to planning and deliberation.

McLachlin J. (L'Heureux-DuDé J. concurring) held (at p. 9) that it "is certainly not wrong, and may indeed be helpful" to "expressly instruct the jury that a lesser degree of intoxication may suffice to establish incapacity to formulate or carry out a plan to murder than to negative intent to kill".

And at pp. 9-10:

The judge was obliged to instruct the jury on the legal requirements for first degree murder. He was required to explain to the jury what is required for a finding that the murder was planned and deliberate.

He was obliged to tell them that in determining whether those requirements were met they should consider the accused's intoxication, and that this consideration is separate and distinct from consideration of his intoxication with respect to the capacity to form an intent to murder. Those are the essential legal instructions. The degree of drunkenness required to negative capacity to formulate and carry out a plan is a question of fact for the jury. In deciding this question the jury will take into account the complexity of the plan and the degree of intoxication demonstrated by the evidence. It is evident to anyone who directs his mind to the matter that the degree of intoxication required to negative capacity to plan and execute a murder may be less than the degree required to negative intent to kill. While it might be useful to tell the jury this expressly, failure to do so is insufficient to vitiate the charge, the matter being one of fact rather than law and one with which the jury is quite capable of dealing, provided it has been properly instructed on the legal elements I have mentioned as well as the facts.

La Forest J., the fifth member of the Bench, expressed his view as follows (p.1):

I have had the advantage of reading the reasons of my colleagues, Lamer and McLachlin JJ., and would respectfully dispose of this appeal in the manner proposed by Lamer J. I should, however, say that I agree with McLachlin J. that, while it is certainly the better course to follow, there is no hard and fast rule that the trial judge must always give explicit instructions clearly distinguishing between the degree of intoxication necessary to negative intent to kill and that necessary to negative planning and deliberation. The charge must be read as a whole. In the present case, however, the repeated use of the words "very intoxicated" in both contexts may, as Lamer J. holds, have misled the jury.

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Nothing in the opinion of La Forest indicates disagreement with the fundamental principle explicitly affirmed by all other members of the Court in Wallen: on a charge of first degree murder, the jury must be instructed expressly to consider the accused's intoxication separately with respect to intent, planning and deliberation.

For present purposes, it is unnecessary to transpose in a mechanical way all that was decided in the context of drunkenness to a case where the defence is insanity. No more need be said, in my respectful view, than this:

1. On a charge of first degree murder, where there is evidence for the jury to consider on the issue of insanity, the jury ought first to decide whether that defence has been made out. If it has, the jury must acquit the accused.

2. If the defence of insanity fails, the jury must consider all of the evidence, including any evidence tendered with respect to insanity, in order to decide whether the requisite intent for murder has been proven beyond a reasonable doubt. If not, the accused may be convicted of manslaughter, but must be acquitted of murder.

3. If the intent to murder has been established, the jury must then decide whether the murder was planned and deliberate. With respect to each of these elements, the jury must reconsider, separately, all of the relevant evidence, including any evidence as to the mental state or condition of the accused at the time the offence was committed.

Only if the jury is then satisfied that the murder was planned and deliberate, may it convict the accused of first degree murder.

Judge's Charge

Structurally and conceptually, the trial judge's charge in this case is, on the whole, exactly what a charge should be. For the most part, the charge sets out with remarkable clarity and fairness the relevant principles of law, the respective positions of the parties and the evidence both for and against.

Unfortunately, however, the trial judge, in my respectful view, did not adequately direct the jury to consider the evidence of Appellant's mental condition in relation to the elements of actual intent, planning and deliberation. He did not specifically direct the jury, in deciding whether the murder was planned and deliberate, to bear that evidence in mind. On the contrary, the following passage near the very end of his charge, together with an earlier one similar in vein, may well have caused the jury to believe that the medical evidence was to be entirely discarded, absent a finding of insanity (at pp. 1043-44):

Doctor Bernard, I've already alluded (to) the evidence of Doctor Bernard in my remarks on insanity but he first met Mrs. Allard at the Court request in the week of October 6 to 13 and he met her Monday evening this week for forty-five minutes and he states that the accused suffers from an affective disorder and that he calls manic depressive psychosis. This disorder manifests itself by rapid changes of moods going from a depressive state to euphoria. He states that at present,

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the accused is under heavy medication, that she may not function properly. He found that the accused had a loss of memory as she told him, she could not remember certain events. The accused told remember him (sic) about the shock treatment she received, about five or six attempted suicides. Manic depressive people may at times talk a lot, do petitious stains (sic) with no apparent goal and threaten people. He feels her judgement was impaired before October 1st. On cross-examination, he admits that in his report submitted to the Court in October, he stated that the accused did not suffer from any psychosis. He says at that time, there were indications that she suffered from an affective disorder. While she was in the hospital, her behaviour conformed to the norm and he did not observe the extreme of the manic side or the depressive side of the sickness he described to you. He says that the accused appreciates that the poison she gave her husband might make him sick and appreciated that but she may not appreciate that it could kill him.

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Doctor Sutherland saw the accused a number of times particularly in September. Her complaint pertained to an assault from her husband. He saw bruises, scratches that were in evidence. She was excited, afraid and extremely angry. He had never seen her in that state previously.

The accused always struck him as an intelligent resourceful woman who as able to cope with life. She was not seriously disturbed and was reacting to circumstances. In relation to the defence of insanity in rebuttal, the Crown had Doctor Grégoire heard and Doctor Harris. Now, I do not propose to summarize. I've already alluded to those two witnesses and you've heard them yesterday and their evidence must be fresh in your mind. So in dealing with this case, you should first look at the defence of insanity. Should you conclude that the Defence has established on a balance of probability that the accused at the time of the crime suffered from a manic depressive psychosis and that she could not appreciate the nature and quality o her actions, whether if what she was doing was wrong, your verdict should then be not guilty on account of insanity. Should you conclude that the Defence has not established its defence of insanity on a balance of probability, you then disregard that defence.

Earlier, the trial judge had said (at p. 1036):

...so you have facts before you that may allow you to determine what weight to give to Doctor Bernard's opinion but I tell you, Doctor Bernard did not tell us that she could not appreciate at least that she was using poison and that would make her husband sick. He says she could appreciate that and here, the Defence has to show you, even if there's a mental illness present, the Defence has to show you on a balance of probability that illness rendered the accused incapable of appreciating what she was doing. Are you satisfied of that on a balance of Probability or is it more probable from the evidence that she was able, capable of appreciating it. Should you, after a review of the whole of the evidence and the Defence evidence on that question insanity, find that the Defence has shown on a balance of Probability that the accused was insane within the meaning that I have just explained to you, it is that she suffered from a mental illness, manic depressive psychosis on September 29, that she was unable to appreciate what she was doing, the quality and nature of the act, that she did not know that the act was

wrong, then should you be satisfied of that, your verdict would be not guilty on account of insanity but should you find that the Defence has failed to demonstrate on a balance of probability that accused was insane in the meaning that I have indicated, then you should disregard that defence completely and look at the evidence along the lines that we have discussed before.

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The medical evidence was not related, even in general terms, to the issues of planning and deliberation. Whatever the burden of proof on insanity -- an issue we need not, in this case, decide(2) -- the cumulative effect of the passages cited cannot be measured with certainty. Standing alone, though literally correct, they introduce an element of doubt whether the jury properly understood that the evidence of Appellant's mental condition was to be considered with respect to intention, planning and deliberation, even if the defence of insanity failed. That doubt, moreover, is amplified by the absence of an express direction, elsewhere in the charge, that the medical evidence was to be separately considered on each of the elements mentioned.

(2) Whether the accused must prove insanity on the balance of probabilities, as the trial judge held in this case, or merely raise a reasonable doubt, in view of the presumption of innocence enshrined in s. 11 (d) of the Charter, is a question pending before this Court: R. v. Leblanc, C.A.M. 10-000048-890, reserved April 17, 1990. In that case, prior to the hearing of witnesses, Boilard, J. adopted the standard of reasonable doubt (Que. S.C., 500-01-002849-880, January 12, 1989, unreported.) At the time of imposition of sentence, however, Mr. Justice Boilard took care to note that counsel had not drawn to his attention the then very recent judgment of the Supreme Court of Canada in R. v. Mailloux (1988), 45 C.C.C. (3d) 193: see R. v. Leblanc, (1989) R.J.Q. 885 at p. 887. In any event, the Supreme Court of Canada is now seized of the issue in R. v. Chaulk (S.C.C. No. 21012), heard May 29-30, 1990, with a series of cases concerning the defence of insanity, including R. v. Landry (1988), 48 C.C.C. (3d) 552 (Que. C.A.).

At one point, the trial judge did state (at p. 1042):

The Defence argues that on September 29, the accused was insane, that she put the poison in her husband (sic) capsules, when she put the poison, the accused suffered from manic depressive psychosis and could not appreciate what she was doing. The Defence also argues that at any rate, bearing in mind the emotional state of the accused, by reason of her personality disorders, her marital problems, the beating she received from her husband, she could not form the intent necessary to permit the jurors to conclude that she killed her husband intentionally. It is the Defence argument that the evidence on the whole shows that the mind of the accused was so troubled on September 28 and 29 that she could not appreciate what she was doing. The accused at that time reached a point where she had a complete breakdown falling in the manic depressive psychosis pattern. For this reason, she was not responsible for what she did and she should be declared not guilty on account of insanity.

In this passage, the trial judge did mention "the emotional state of the accused, by reason of her personality disorders", but again in the

context of insanity and not in relation to the separate issues of actual intent, planning and deliberation.

Nothing in the context, or in the specific words used, can be said to have instructed the jury, as required by law, that these elements were to be considered in the light of the medical evidence even if the defence of insanity failed.

CONCLUSION

For these reasons, the verdict in this case is unsafe. On that ground alone, in my respectful view, Appellant's conviction must be set aside.

It is therefore unnecessary to consider Appellant's other grounds, since none could change the result.(3)

(3) With respect to the first ground, concerning the trial judge's direction as to the requirement of unanimity, see R. v. Laforet (1979), 50 C.C.C. (2d) 1 (S.C.C.); R. v. Harrison (1974), 18 C.C.C. (2d) 129 (S.C.C.); R. v. Hébert, (1955) S.C.R. 120; R. v. Latour, (1951) S.C.R. 19; R. v. Hamilton (1980), 58 C.C.C. (2d) 467 (Que.

C.A.); R. v. MacFarlane (1981), 61 C.C.C. (2d) 458 (Ont. C.A.); R. v. Littlejohn and Tiribasso (1978), 41 C.C.C. (2d) 161 (Ont. C.A.); R. v. Davidson (1975), 24 C.C.C. (2d) 161 (Ont. C.A.); R. v. King (1974), 19 C.C.C. (2d) 565 (Ont. C.A.); R. v. King, Gallipeau and Jariett (1974) 18 C.C.C. (2d) 193 (Ont. C.A.); R. v. Wedge and 3 others (1973), 14 C.C.C. (2d) 490 (Man. C.A.). As to the second ground, see footnote 1 supra, and as to the fourth, concerning the trial judge's failure to advise the jury of the consequences of an insanity verdict, see Landry, supra, at p. 563; R. v. Jollimore (1985), 19 C.C.C. (3d) 510 (N.S.C.A.); R. v. Conkie (1978), 39 C.C.C. (2d) 408 (Alta. C.A.); R. v. Smith (1967), 5 C.R.N.S. 162 (King, J., Ont. S.C.). Appellant's success on any of these grounds would merely lead to a new trial, which is the disposition I propose for the reasons already stated.

In his report to this Court, the trial judge states that the evidence at trial would have justified a conviction for second degree murder.

Such a verdict, says the judge, would have come as no surprise.

The trial judge adds, however, that there was evidence to support a verdict of first degree murder as well.

With respect, I agree. On the same evidence, a properly instructed jury might, on a second trial, return the same verdict.

Having reached a similar conclusion in Wallen, to which I referred earlier, the Supreme Court of Canada elected to order a new trial.

I propose that we follow the same course in this case. J. A.

INSTANCE-ANTÉRIEURE

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