C.A.C. No. 112305

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Brown, 1995 NSCA 186
Chipman, Freeman and Bateman, JJ.A.

BETWEEN:		
DAVID MURRAY BROWN		James J. White and Deborah E. Bowes-Lamontagne for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Robert C. Hagell for the Respondent
	Respondent	
		Appeal Heard: October 11, 1995
		Judgment Delivered: November 1, 1995

THE COURT: The appeal is dismissed as per reasons for judgment of Chipman, J.A.; Freeman and Bateman, JJ.A., concurring.

CHIPMAN, J.A.:

The appellant was convicted following a jury trial in Supreme Court at Windsor of committing first degree murder upon the person of Fred Degenhardt on October 28, 1993.

At the time of his death, Fred Degenhardt was 59 years of age. He was married to Laura Degenhardt age 48. They had met in Alberta sometime earlier at a time when Mrs. Degenhardt was married to another. She obtained a divorce and they were married in the early 1980's. A witness who knew the couple from 1985 on described them as a loving, giving, caring couple until about 1991 when the relationship deteriorated. From then on, there was considerable tension and the parties were hardly civil to one another. Fred Degenhardt was described as quiet and very dependent upon Laura Degenhardt. She, in turn, was described as a person who made all of the decisions, was flamboyant, moody, unstable and sometimes lived in a dream world. The Degenhardts moved to Guelph, Ontario and in January of 1993 Laura Degenhardt met the appellant in Toronto. He became infatuated with her. They commenced an affair almost at once. The appellant was 25 years of age. He was 6' 4" in height. Fred Degenhardt was of small stature between 5' 5" and 5'7" in height and weighed about 150 pounds.

The appellant's affair with Laura Degenhardt carried on at various places, including his home and hers. As one witness put it, they saw each other "pretty well every day". During this time she continued to live with her husband, who was apparently unaware of the relationship. In June, 1993, Laura Degenhardt introduced the appellant to her husband as a "friend". From then on the appellant and Fred Degenhardt saw each other quite frequently. They seemed to get along and Degenhardt continued to be unaware of the relationship between his wife and the appellant.

In September, 1993, Fred Degenhardt reported to his employer that he was involved in an accident while in his van. In a statement to the R.C.M.P. on December 14, 1993 the appellant said that it happened this way:

> ". . . we went for a drive the night of the accident, ah, Laura stopped at the stop sign very rapidly, pliers came from behind me, hit Fred in the head."

In early October of 1993, Degenhardt quit his employment in Guelph and Fred and Laura Degenhardt moved to South Rawdon, Hants County, Nova Scotia. At first they lived with Paul Baxter, Laura Degenhardt's nephew, but soon took up residence in a small rented bungalow nearby.

Some two weeks after the Degenhardts moved to Nova Scotia, the appellant came to Nova Scotia. He was met at the Halifax International Airport by the Degenhardts and took up residence with Paul Baxter.

Considerable evidence was introduced concerning the relationship of the appellant and Laura Degenhardt. In addition to Laura Degenhardt's testimony that she carried on an affair from the time she met him in January, 1993, other witnesses spoke of overt demonstrations of affection between them such as holding hands and kissing in a public place. The appellant was visiting Laura Degenhardt at times when Fred was not at home, almost every day. There was demonstrative behaviour of the appellant at a bingo hall consisting of kissing Laura Degenhardt and holding his hand on her crotch. The witness who spoke of this incident stated that the appellant had a very intimidating presence and looked like he was on narcotics or alcohol. She said he was not friendly. A former girlfriend of the appellant terminated her relationship with him in September of 1992 , but they remained friendly until the last time she spoke to him in May of 1993. She said that he sometimes drank to excess. At one time he mentioned that he had met someone else and that her name was Laura and that she was married.

Another friend of the appellant living in Guelph said that he first met the appellant in 1991. For a time they lived in the same apartment. The friend saw the appellant being dropped off by Laura Degenhardt at the building. He saw Fred Degenhardt pick up the appellant and made a remark about it to which the appellant responded that Degenhardt did not seem to care that he was having intercourse with his wife. On a later occasion, the appellant wanted to borrow some money to help

Laura and Fred with a mortgage on some land in Windsor, Nova Scotia. The friend lent the money to the appellant. About a week later, he met the appellant who blurted out "I don't know what I am going to do with that guy, I guess we are going to have kill him". The friend testified that on another occasion the appellant said "God, that guy has got a hard head". When asked for an explanation, the appellant referred to an object in a vehicle that hit Fred Degenhardt in the back of the head.

Laura Degenhardt testified at the trial that the appellant was deeply infatuated with her. She spoke of their affair and of her husband's apparent ignorance of it. She also told of the time she stopped the van "really fast" with the result that pliers sitting on the back window flew forward striking Fred Degenhardt on the head. The appellant was in the back seat of the vehicle at the time. Laura Degenhardt did not actually see the pliers in motion. She said that she took her husband to the hospital and that he suffered "a lot of head pain for awhile".

On October 28, 1993 Laura Degenhardt went to Windsor and did some shopping. She bought a dozen beer. That evening between 6:00 and 7:00, she and Fred were together with the appellant. They were drinking beer. She prepared supper consisting of steak, potatoes, carrots and gravy. As she prepared the meal, she put four milligrams of Xanax, a tranquilizer for which she had a prescription, into the gravy which Fred Degenhardt ate with his dinner. She testified that her intention in doing this was to drug him so that she and the appellant could have some time alone for sex. They had not had any sex since his arrival in the province a week or so previously.

The appellant had been putting pressure on Laura Degenhardt to be alone with her. She told him that she would put drugs in her husband's food so that they could be alone.

According to Laura Degenhardt, she and her husband got drunk that evening. Her recollection of details was not clear. At some point Fred suggested that

they go out to look at some land which he had purchased. It was a rainy night. Nevertheless the three of them got in the car, went for a drive and later returned to the house. Her husband went to bed. She thought that he had just his underwear on. She also believed that the appellant left to get his sleeping bag. At any rate, the appellant returned and suggested getting some fresh air. The appellant helped Fred get dressed. The three of them got back into the car with the appellant driving, Laura Degenhardt in the front seat and Fred Degenhardt in the back seat. They drove a short distance to the narrow bridge spanning the Herbert River. Laura Degenhardt recalled sitting in the car while it was on the bridge. The appellant and her husband got out. The next thing that happened was that the appellant jumped back into the car and said something like "got to get the Hell out of here". He drove the car away very fast. She was not clear on what happened when she got back to the house. She went to sleep or passed out. She never saw her husband alive again.

The appellant did not testify at his trial.

In a statement obtained by the R.C.M.P. on December 13, 1993, and admitted following a **voir dire**, the appellant said that Laura Degenhardt was driving the car in the vicinity of the River Herbert bridge on the night of October 28, 1993. Fred Degenhardt said that he "had to have a pee". She turned the car around and drove onto the bridge and stopped, putting out the lights. The appellant helped Fred Degenhardt to the railing of the bridge. He then said:

> "He started to take a pee and she said 'push him'. I said what. She said 'push him' and I did. She started to drive towards the house. She stopped because she couldn't drive anymore she said. Then I drove to the house. She said, we killed him. We went to bed and I sat up all night smoking and crying . . ."

In the early afternoon of Friday, October 29, 1993 the R.C.M.P. received a telephone call from Paul Baxter advising that Fred Degenhardt was missing. Corporal F. G. Rowsell went to the Degenhardt residence to investigate. He was told by the

appellant that he had spent the evening of October 28 with the Degenhardts and stayed over night with them. They had supper and sang with the karaoke machine during the evening. The appellant had one beer and the Degenhardts had a few beers. During the course of the evening, they drove out to look at a piece of land which Fred Degenhardt wanted to show them but could not find it. It was raining hard and they returned to the house. He went to Paul Baxter's house to get his sleeping bag and when he arrived at the Degenhardts', he found the two of them asleep in their bedroom. He was awakened at 9:30 a.m. on October 29 by Laura Degenhardt saying that her husband had gone. He spent the rest of the morning driving around looking for him and searching the nearby woods.

The appellant told Corporal Rowsell that he came from a broken home and that the Degenhardts were like parents to him. He had come to Nova Scotia on October 11 to be close to them.

Laura Degenhardt gave Corporal Rowsell a similar account of the events of the evening of October 29 to that provided by the appellant. When she got up on the morning of October 29 at about 8:30 a.m. she found that her husband was gone. She woke the appellant, who went looking for him.

Paul Baxter testified that around 9:00 a.m. on October 29, the appellant came to his house and reported Fred Degenhardt missing. He joined in the search carried out by neighbours. He was told by the appellant that he had called the police and was advised that they were not interested in missing persons until they were gone for 24 hours. Baxter called the police and reported Degenhardt missing. They did not mention any such rule about waiting 24 hours before joining in a search.

The R.C.M.P. conducted a search. A dog was used on the night of October 29. On October 30, Constable Gairns was driving the appellant around the area. As they approached the bridge over the Herbert River, he noticed that the

appellant was nervous and stared intently down the river from the bridge as they drove past. He became suspicious and returned the appellant to the scene of the search and dropped him off. He returned to the bridge and after searching down the river found a body about 160 metres from the bridge. This body was identified as that of Fred Degenhardt.

The R.C.M.P. learned from the autopsy performed by Dr. Malcolm MacAulay on October 31 that Fred Degenhardt had died of drowning. Samples of blood, urine, bile, stomach contents and vitreous fluid from the body were turned over to the R.C.M.P. lab. There was no alcohol in the blood or stomach, but a small concentration in the urine. The lab found evidence in the blood of the drug Alprazolam, or Xanax, to a level of ten micrograms percent which was about five times the therapeutic level. The police were advised that such a level would physically incapacitate a person from walking the distance of 2.5 kilometres from Fred Degenhardt's house to the Herbert River bridge.

After contacting the police in Guelph, the R.C.M.P. learned of the affair between the appellant and Laura Degenhardt. They learned that Fred Degenhardt had, on occasion, exhibited a great fear of water. They learned that a few nights before the death of Fred Degenhardt the appellant, while visiting Paul Baxter, went for a walk to the area of Herbert River bridge. Upon returning from the walk, he described in great detail the area and spoke of the large number of roads nearby. He referred to the rush of the water in the river: "man it was awesome".

The police also learned from Helen Baxter that she had spoken to Laura Degenhardt and the appellant about the police interviewing residents of a trailer located on the river near the bridge. Laura Degenhardt had made a remark to the effect that no one lived in the trailer, but she was corrected by Baxter. At this point, Laura Degenhardt began to shake and the appellant calmed her down, telling her to take it

easy. Baxter saw the appellant lean forward and heard him whisper to Laura Degenhardt, "I swear to God, I thought that place was empty".

Having formed the belief that the appellant and Laura Degenhardt were responsible for the murder of Fred Degenhardt, but being unable to obtain an incriminating statement from them, the police concluded that the only possible way to secure sufficient evidence was to obtain an authorization to intercept private communications pursuant to s. 184 of the **Criminal Code**. An affidavit from Constable James Crawford sworn on November 24, 1993 set out the details of the investigation and the lack of a confession or other hard proof that the appellant and/or Laura Degenhardt were responsible for the murder of Fred Degenhardt. Constable Crawford deposed:

> "29 THAT on these facts I believe an Authorization to Intercept Private Communications should be given upon the following terms and conditions:
>
> (a) The offenses in respect of which private communications may be intercepted are:
>
> i) Murder, contrary to Section 235(1) of the Criminal Code;
>
> ii) Conspiracy to Commit Murder, contrary to Section 465(1)(a) of the Criminal Code;
>
> (b) The types of communications that may be intercepted are:
>
> i) <u>private telecommunications including any oral communications and any telecommunications</u>, and
>
> ii) r a d i o - b a s e d t e l e p h o n e communications;"
>
> (emphasis added)

The deponent identified the suspects to be Laura Degenhardt and the appellant, and sought authorization that their private communications be intercepted

at the dwellings where each of them lived, the neighbouring dwelling of Paul and Helen Baxter, the 1992 Ford Tempo presently used by Laura Degenhardt, and other places. The manner of interception sought was by means of electromagnetic, acoustic, mechanical, automatic recording or any other device. Permission to enter the places mentioned for the purpose of installing devices was also sought.

On November 24, 1993 an authorization was granted by a judge of the Supreme Court in the same terms as set out in the request contained in Constable Crawford's affidavit. The authorization was valid from November 25, 1993 to and including January 23, 1994.

Among other things, the police installed a room probe or "bug" in the homes of the appellant and Laura Degenhardt. Several conversations between them were monitored and recorded. They said a number of things implicating themselves in the murder of Fred Degenhardt. They discussed details of the murder. The appellant, at one point, unequivocally stated that he had murdered Fred Degenhardt. He said:

> "Well I mean if it wasn't for me Fred wouldn't be gone. You wouldn't be depressed.
>
> . . .
>
> I'm gonna tell you somethin' right now and look me in the face, okay. I killed Fred, yeah, I did it. I did it to be with you, okay. I'll stand on the fuckin' roof an' I'll yell that, okay, if I have to."

As a result of the interceptions, the R.C.M.P. arrested the appellant in Windsor on December 13, 1993. He was given the standard police caution, standard secondary caution and informed of his right to counsel. He was taken to the audio/video interview room at the Bedford R.C.M.P. Detachment. An interview took place there which was recorded on video tape commencing at 4:50 p.m. and continuing until 11:17 p.m. The officers principally involved in the interview were Corporal T. C.

Townsend and Sergeant P. T. Scharf.

At the start of the interview, the appellant requested an opportunity to speak to a lawyer. He was given an opportunity to do so and he had a conference with Mr. James Armour, a senior lawyer with Nova Scotia Legal Aid. The appellant told the police that Armour advised him that he should make no statements. Despite this, the police pressed on with the interview. Several times the appellant told the officers that he would not answer questions. At other times he denied being involved in Fred Degenhardt's death or of having any knowledge of it.

After about three and one-half hours, the appellant again asked to speak to his lawyer and he was again given an opportunity to speak to Mr. Armour.

At 9:23 p.m. Sergeant Scharf informed the appellant that they had listening devices in his residence and that they had heard the conversations between him and Laura Degenhardt discussing details of the murder. Within a couple of minutes the appellant asked that the video be turned off. The appellant gave a written statement beginning at 9:44 p.m. and concluding at 10:58 p.m. He described in detail his involvement in the death of Fred Degenhardt. The video tape was resumed shortly after the statement was completed and concluded at 11:17 p.m. The appellant was returned to the Detachment in Windsor.

The appellant was again interviewed at the Windsor Detachment on December 14, 1993. He was given the so-called secondary caution and his rights to counsel. He called Mr. Armour and then Mr. James White, counsel who defended him at the trial. He told the police that Mr. White had advised him not to say anything. In due course, he gave the police another statement which was recorded on audio tape. He again provided a detailed account of his involvement in the death of Fred Degenhardt. He stated that Laura told him after dinner that she had put drugs in Fred's food. She showed him the bottle, which she then destroyed. With reference to his

pushing Fred Degenhardt over the railing of the bridge, he said that he had no intention of doing what he had done: "I wasn't even thinking when I did it". At another point, he said he had no choice but to accept the fact that he and Laura murdered Fred. He said that he realized that Laura was using him to do something that he would never have done on his own.

Following a **voir dire** at the beginning of the trial, the trial judge admitted the intercepted conversations and the statements in evidence. There then followed evidence from the Ontario witnesses respecting the relationship between the appellant and Laura and Fred Degenhardt while they lived there. There was evidence from witnesses in the South Rawdon area relating to their relationship, and the behaviour of the appellant and Laura Degenhardt after Fred Degenhardt's disappearance. There was evidence from the police respecting their investigation and statements and wiretaps which were introduced by them. There was expert evidence from two pathologists, a toxicologist and an alcohol specialist respecting the cause of death and substances found in Fred Degenhardt's body. There was evidence from Laura Degenhardt. The trial judge advised the jury to be extremely cautious in accepting the evidence of such an accomplice.

At the conclusion of the trial, the jury rendered a verdict of guilty of first degree murder on November 25, 1994. The appellant was sentenced to life imprisonment without eligibility for parole for 25 years.

The appellant raises four issues:

(1) the trial judge erred in admitting evidence of the intercepted conversations in view of the language of the authorization;

(2) the trial judge erred in his recharge to the jury respecting participation of the appellant in planning and deliberation;

(3) the trial judge erred in his charge in not sufficiently emphasizing

discrepancies in the medical evidence, and in failing to properly explain the theory that the deceased had died of an overdose; and

(4) the trial judge erred in failing to point out to the jury that there was little evidence to support a conviction for first degree murder.

1. Intercepted Communications:

Authorizations to intercept private communications and the circumstances under which they may be admissible are dealt with in ss. 184.1 - 190 of the **Criminal Code**. Section 184.2 deals with applications for authorization to intercept. Subsection 4 reads:

> "184.2(4) An authorization given under this section shall
>
> (a) state the offence in respect of which private communications may be intercepted;
>
> (b) state the type of private communication that may be intercepted;
>
> (c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;
>
> (d) contain the terms and conditions that the judge considers advisable in the public interest; and
>
> (e) be valid for the period, not exceeding sixty days, set out therein. 1993, c. 40, s. 4."
>
> (emphasis added)

The language of s. 184.3 of the **Code** dealing with applications by "telephone or other means of telecommunication" appears to recognize the obvious distinction between such communications and oral communications.

The authorization to intercept granted on November 24, 1993 provided that the types of communication that may be intercepted are:

"(i) private telecommunications including any oral communications and any telecommunications, and

(ii) radio-based telephone communications;"

(emphasis added)

The appellant's position is simply put. The authorization does not extend to communications that are not telecommunications. The words "including any oral communications" are governed by the words "private telecommunications" and hence relate to oral telecommunications such as telephone conversations, as distinguished from non-oral telecommunications such as fax messages, e-mail and so forth. Hence, interceptions by way of a room probe were not intercepted telecommunications and should have been excluded. There was no evidence of telecommunications between the appellant and Laura Degenhardt other than by telephone.

The trial judge resolved the issue as follows:

> "In my opinion, the interceptions here were made in accordance with the authorization granted November 24, 1993. A reading of the document as a whole, with the several references to interception of 'private communications', makes it clear that that is what was intended on the one occasion where the term 'private telecommunication' was used. Indeed it does not make any sense otherwise. If one eliminates the words 'any oral communications and' in the impugned paragraph, it would read, 'i) private telecommunications including any telecommunications'. To my mind, this makes it clear that it was intended to refer to private communications in that paragraph and that the authorization should be interpreted in that manner as it was by the police officers who carried out the electronic surveillance."

The trial judge also held that were he wrong in this interpretation, he was satisfied that the evidence should not be excluded under s. 24(2) of the **Charter**. The officers acted in good faith and in the belief that they were authorized to do what they did. There was testimony before the trial judge that it was intended to apply for the interception of all private communications between the appellant and Laura Degenhardt. The police wanted to use a room listening device at their residences and

in their vehicle. They also wanted to intercept telephone conversations as they knew they were talking from a phone at the home of Paul and Helen Baxter. The police operated in the belief that the authorization was valid. Sergeant Gordon Barnett testified that the standard authorization sought in cases such as this refers to private communications including oral communications and telecommunications and radio based communications. The use of the word "telecommunications" after the word "private" was a clerical error. It was intended to use the word "communications".

On consideration, I agree with the trial judge's conclusion as to the interpretation of the authorization. The authorization must be read as a whole, and the surrounding circumstances must be considered. It is quite clear from the context of Constable Crawford's application that what he wanted was interception of the private communications, both telephone and oral, of these two people in a number of places, including their homes. There would be no sense in him asking for telecommunications only. I do not consider it necessary to rely on the **viva voce** evidence of the police with regard to their intention in making the application for an authorization. On its face, the authorization appears to be, and must have been, intended to apply to all private communications that were either oral communications or telecommunications. Indeed, I would go farther and say that, on the awkward language of the authorization, I interpret the words "including oral communications" to mean just that, not restricted to oral telecommunications. This interpretation is warranted particularly because of the words that follow "and telecommunications". I see no reason to restrict these latter words to telecommunications that are not oral.

I appreciate that the use of a room probe is about the most intrusive invasion of the state into the privacy of a citizen. At no place does one have a higher expectation of privacy than in a face to face conversation in one's home.

The appellant refers to **R. v. Duarte** (1990), 53 C.C.C. (3d) 1 (S.C.C.).

LaForest, J. said at p. 12:

> ". . . Only a superior court judge can authorize electronic surveillance, and the legislative scheme sets a high standard for obtaining these authorizations. A judge must be satisfied that other investigative methods would fail, or have little likelihood of success, and that the granting of the authorization is in the best interest of the administration of justice."

Earlier at p. 11 LaForest, J. said:

> "The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. As Douglas J., dissenting in **United States v. White, supra,** put it, at p. 756:
>
> > 'Electronic surveillance is the greatest leveller of human privacy ever known.'
>
> If the state may arbitrarily record and transmit our private communications, it is no longer possible to strike an appropriate balance between the right of the individual to be left alone and the right of the state to intrude on privacy in the furtherance of its goals, notably the need to investigate and combat crime."

I agree. However, the information laid before the authorizing judge called strongly for the most intrusive procedures available to the state in the investigation of this highly suspicious death. The police investigation had reached a point where the only means whereby the investigation could be satisfactorily concluded was by reference to this last resort.

The words of the authorization, particularly in the context of the entire document and the circumstances revealed by the supporting affidavit are wide enough to justify the use of a room probe.

It is not necessary in my view to resort to a s. 24(2) **Charter** analysis.

My opinion that the interceptions were lawfully obtained disposes of the appellant's subsidiary argument that the statements, being triggered by them, stood on no higher basis than they did.

While the appellant conceded that the grounds in the notice of appeal relating to the admissibility of the statements were "baseless", he does not formally abandon them. There is no evidence to support a **Charter** argument that the statements should be excluded. I wish, however, to deal briefly with the question of the voluntariness of the statements.

The trial judge referred to **R. v. Hébert** (1990), 57 C.C.C. (3d) 1; [1992] S.C.R. 151 and **R. v. Broyles**, [1991] 3 S.C.R. 595 and (1991), 68 C.C.C. (3d) 308 and comments in McWilliams, **Canadian Criminal Evidence**, 3rd Edition, pp. 15-18 and a **Guide to Criminal Evidence** by Mr. Justice Jean-Guy Boilard dealing with those cases. The materials supported the conclusion that the confessions rule in its negative terms stated in **Ibrahim v. The King**, [1914] A.C. 599 remains the law, and breach thereof leads to automatic exclusion. This rule is supplemented by the **Charter** right to remain silent which may lead to a discretionary exclusion under s. 24 of the **Charter**. I refer as well to the decision of this Court in **R. v. Wood** (1994), 135 N.S.R. (2d) 335 at pp. 353-55.

The trial judge was satisfied that the statements were made freely and voluntarily and that the appellant's right to remain silent was not violated. He referred to the length of the interview and the persistence employed by the officers to move the appellant to confess. Nevertheless, the appellant took the opportunity to speak to counsel on two occasions during the video taped interview. What appears to have triggered the first statement was the confrontation by the officers of the appellant with the fact that they had his intercepted statements. The trial judge, in referring to the

tactics of the police, found that they were not improper and referred to the statement of McLachlin, J. in **Hébert, supra**, at p. 41:

> ". . . Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence."

With respect to the audio recorded statement the following day, December 14, the trial judge again found that all of the evidence pointed to that statement having been made freely and voluntarily and not in breach of the appellant's right to remain silent. These rights were made clear to him in the interview. He had already been told by counsel that he should say nothing to the police, but despite this he chose to speak.

I have viewed the video, heard the taped interview and read the written statements and the transcript of the taped audio statement. After considering the applicable principles as enunciated by the trial judge, I am satisfied that he made no error in his finding that the statements should be admitted. The appellant freely exercised his right to choose to speak rather than to remain silent.

I would therefore reject the first ground of appeal.

2. <u>Recharge dealing with Appellant's Participation in Planning and Deliberation</u>:

After having covered the subject of planning and deliberation in his charge to the jury in a manner to which no exception was or could be taken, the jury commenced its deliberations at 12:19 p.m. on November 25. They returned at 4:30 p.m. with a note. The matter of concern raised in the note was a question from the jury in the following terms:

> ". . . In the definition of first degree murder, to satisfy the requirement of planning and deliberation, does planning require execution of the plan, awareness of the plan being executed and/or participation in the formation of the plan?"

The trial judge's recharge in response to this is as follows:

> "First, I will just repeat part of my original charge respecting the meaning of 'planned'. I told you before that the words 'planned' and 'deliberate' have different meaning.
>
> . . .
>
> Now to deal more particularly with the questions that you have raised in your note, I would add this; an accused must have known that the plan existed prior to the commission of the murder. He must have known what the plan was; that is, that it was to kill the intended victim by a particular means or method. It is not essential that the accused have participated in the formulation of the plan. It is essential, however, that the accused executed or participated in the execution of the plan.
>
> That is, just to try to give you the answers to the questions in the order in which you posed them in your note. First, you asked, 'Does planning require execution of the plan,' and directing an answer to that specifically, the answer is that the planning within the meaning of the section requires execution of the plan. Secondly, you asked 'If awareness of the plan being executed is required' and the answer there is, it does require awareness of the plan on the part of the accused, and finally, 'Is it required that the accused participate in the formation of the plan,' and the answer there is no, it is not necessary that the accused have participated in the formation or the formulation of the plan in order to be, or for the case to have come under the umbrella of planning and deliberation. I can repeat that if you wish."

The appellant refers to **R. v. Mitchell**, [1964] S.C.R. 471 (S.C.C.) where Spence, J. at pp. 478-479 set out the law relating to planning and deliberation as it related to murder. It was clear from that passage as well as from a passage of Cartwright, J. at p. 482 that a planned and deliberate murder must be <u>planned and deliberate on the part of the accused</u>. No issue can be taken with this statement of the law. The appellant submits, however, that the recharge quoted above could leave the impression that it was not necessary for the accused to have done the planning and deliberation. I repeat from the trial judge's recharge:

> "It is not essential that the accused have participated in the formulation of the plan. It is essential, however, that the accused executed or participated in the execution of the plan."

What distinguishes this case from **Mitchell, supra**, and other cases where reference is specifically made to the planning and deliberation by the accused is that those cases dealt with but one accused and the question was whether or not he planned and deliberated. Here there are two persons alleged to have been involved in the murder. If there was one party only to the commission of a murder, it would be necessary to determine whether that party planned and deliberated in order to decide if murder was first degree murder. With more than one individual, it is possible that only one of them actually formulated the plan. There is no requirement that another participated in the formation of the plan as long as he knew about it, adopted it and executed it. The trial judge made it clear that the appellant must have known what the plan was, and while it was not essential that he had participated in its formulation, it was essential that he executed it or participated in its execution. I can find no error in this direction and I would reject this ground of appeal.

3. Discrepancies in Medical Evidence and Theory of Death by Drug Overdose:

Both pathologists who testified, Dr. MacAulay and Dr. Avis, were of the opinion that death was caused by "dry drowning". This was a drowning where very little, if any, water actually enters the lungs because of spasm of the muscles in the airway which result from immersion in water. The person suffocates because he cannot get air. It occurs in 10 to 15% of drowning cases. Dr. MacAulay agreed on cross-examination that it was possible that death might have been caused by a drug overdose, but that the indications of death by drowning were stronger.

Dr. MacAulay wanted a second opinion. Dr. Simon Avis, a forensic pathologist also conducted an autopsy. He confirmed the diagnosis of death by drowning. On cross-examination, when put to him that death may have been by a drug overdose he said that it was possible but not probable. It was unlikely. He excluded death by other means and pointed out that death by drowning is a diagnosis by

exclusion.

The appellant contends that the trial judge dealt with the extensive expert testimony in little more than a page of typed transcript in his charge. That is true, but having reviewed the record I am of the opinion that he presented an adequate and fair summary of that evidence.

Moreover, at the request of defence counsel, the trial judge again summarized the concession by Dr. Avis that it was possible the death was caused by a drug overdose.

The trial judge also summarized the evidence of Michaela Holzbecher, a toxicologist. She found the concentration of the sedative in the deceased's blood to be 10 micrograms percent. She testified that the lethal level in one case of which she was aware was 12.2 micrograms but that was in association with a high blood alcohol level. Another death without alcohol was 17.7 micrograms and in two other cases where there was a level of 30, death did not occur.

Jean-Claude Landry was a forensic alcohol specialist who confirmed that there was no alcohol present in the blood and that the minimal amount found in the urine indicated any alcohol consumed by the deceased had passed through his blood system. The trial judge then dealt with the issue of causation of death. He said:

> ". . . ask yourself the following question: Would Frederick Degenhardt have died if the accused had not done what he has alleged to have done; that is, throwing him into the Herbert River? In other words, would Fred Degenhardt's death have occurred anyway, even if Mr. Brown hadn't done that? This is, not done the unlawful act, and I say without any reservation that throwing a man in the river under those circumstances would be an unlawful act. The fact that Mr. Degenhardt died and that the accused committed an unlawful act does not necessarily mean that his conduct was the cause of that death. . . the Defence contends that Mr. Degenhardt was already dead at that time, that he had died of an overdose of drugs."

The trial judge then told the jury that they had to be convinced beyond a

reasonable doubt that the conduct of the appellant was at least a contributing cause of the death - more than "an insignificant or attributable cause of the death".

In summarizing the theory of the defence, the trial judge again explained that if there was a reasonable doubt that death had resulted from an overdose, they were then left with a reasonable doubt that Fred Degenhardt was alive when thrown into the river. In such circumstances, they must acquit.

I have reviewed the medical evidence and I am satisfied that the trial judge made a fair summary of it. It must not be overlooked that along with the medical evidence there was the appellant's own statement that Fred Degenhardt was alive and in the process of urinating when the appellant grabbed him by the feet and pushed him over the railing of the bridge and into the river:

> "He started to take a pee and she said push him. I said what. She said push him and I did."

On this issue, I am satisfied that the jury was properly instructed. Acting judicially it was reasonable for them to conclude that the appellant caused the death of Fred Degenhardt.

4. <u>Failure to point out that there was little evidence to support first degree murder</u>:

I have reviewed the trial judge's charge carefully. He reviewed the evidence in detail, explained planning and deliberation as the essential ingredients of first degree murder and stated the theory of the Crown and the theory of the defence to the jury in a full and fair manner.

With respect, in my opinion there was ample evidence which if believed, supported a conviction of first degree murder. There was motive. Sometime before the death of Fred Degenhardt the appellant told his friend in Guelph:

> "I don't know what I'm going to do with that guy, I guess we are going to have to kill him."

Dealing with this statement, the trial judge cautioned the jury about putting

too much weight on it as it "may have been mere huffing and puffing on his part".

There was the incident when Fred Degenhardt was hit in the head with a pair of pliers. The appellant and Laura Degenhardt were the only other occupants of the vehicle. The appellant later said, "God, that guy has got a hard head". The appellant followed the Degenhardts to Nova Scotia. His interest in Laura Degenhardt remained. As one of the witnesses said, "he was all over Laura". There was a rendezvous at which the three of them were together and at which Laura Degenhardt drugged Fred Degenhardt into a stupor. The appellant knew this. The appellant and Laura Degenhardt then had intercourse. They then went out into the car ostensibly at the request of Fred Degenhardt, who was heavily drugged, to visit some land in the middle of a dark and rainy night. They ended up on the bridge over a river which had greatly fascinated the appellant some few days earlier. He had examined the surrounding area in detail. The appellant helped Degenhardt out of the car, up to the railing of the bridge and then pushed him over while he was urinating. There was the evidence of the appellant's statement to Laura Degenhardt that he thought the house near the bridge was empty. While the appellant's subsequent inadequate attempts to cover his tracks are not proof of planning and deliberation, his admission to Laura Degenhardt that he killed Fred for her was yet more evidence of planning and deliberation.

The foregoing items taken in totality are, in my opinion, sufficient to warrant a jury, acting judicially and properly instructed, to convict for first degree murder.

It was for the jury to balance all this evidence with the statement by the appellant to the police on December 14 that he was not thinking when he pushed Fred Degenhardt over the railing, in determining whether the Crown proved planning and deliberation beyond a reasonable doubt.

In the result, I would dismiss the appeal.

Chipman, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.