C.A.C. No. 02885

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Hart and Jones, JJ.A.

Cite as: R. v. Johnson, 1994 NSCA 79

BETWEEN:

CLAYTON NORMAN JOHNSON Appellant	)	Joel E. Pink, Q.C. for the Appellant
- and -	)	John C. Pearson for the Respondent
HER MAJESTY THE QUEEN Respondent	)	Appeal Heard: March 8, 1994
	)	Judgment Delivered: March 8, 1994

THE COURT: Appeal dismissed from conviction for first degree murder (**Criminal Code,** s. 231(2)), per oral reasons for judgment of Clarke, C.J.N.S.; Hart and Jones, JJ.A. concurring.

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NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CLAYTON NORMAN JOHNSON	)	
	)	
Appellant	)	
- and -	)	R E A S O N S
FOR		
	)	JUDGMENT
BY:		
HER MAJESTY THE QUEEN	)	
	)	CLARKE, C.J.N.S.
	)	(Orally)
Respondent	)	
	)	
	)	
	)	
	)	
	)	
	)	

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

The appellant was found guilty on May 4, 1993, of the first degree murder (**Criminal Code**, s. 231(2)) of his wife, following his trial by judge and jury. He was sentenced to life imprisonment with twenty-five years to be served before becoming eligible for parole.

In appealing his conviction, the appellant raises three issues of law.

The first is that the trial judge, Justice Saunders, erred in declaring the appellant's daughter, Darla Johnson, a Crown witness, to be adverse and thus permitting the Crown to cross-examine her. The problem centered on whether she had made a previous inconsistent statement in a conversation with Claire Thompson, another Crown witness, by comparing her evidence at the preliminary inquiry to that given on a voir dire at trial.

In finding Darla Johnson adverse pursuant to s. 9 of the **Evidence Act**, the trial judge considered relevant authorities and in particular followed the procedure approved by the Ontario Court of Appeal in **Regina v. Cassibo** (1982), 70 C.C.C. (2d) 498. In his charge to the jury, Justice Saunders clearly and concisely explained the limited use that could be made of this particular portion of evidence. We find the trial judge made no error in formulating his opinion to rule Darla Johnson adverse pursuant to s. 9, nor did he err in his instructions to the jury respecting the resulting use to be made of the evidence.

The second ground is that the trial judge erred in his directions to the jury on what constitutes "planning and deliberation" as it relates to first degree murder.

Respecting this issue the trial judge charged the jury as follows:

"First degree murder is where there is not only the intent to

kill or do bodily harm but where that intent is formed as a result of both planning and deliberation. The Crown must satisfy you beyond a reasonable doubt that the murder was planned and that it was deliberate before you can return a verdict of first degree murder under those provisions.

The word planned has its natural meaning. In other words a calculated scheme or design which has been thought out in advance and where the nature or consequences have been considered and weighed. Having said 'thought out in advance' you will be wondering about the time element. Please remember that as far as time is concerned we are here only interested in the time involved in developing the plan, not the time between developing the plan and doing the act. One could carefully prepare a plan and immediately set out to do the act or, alternatively, one could wait an appreciable time to do it once the plan had been formed. Thus the concept we are concerned with here is taking time to come up with a design and to consider the consequences.

The other word is deliberate. And in order to support a charge of first degree murder the Crown must establish this element. The word deliberate must mean more than intentional because you will remember that it is only if the accused's act is intentional that he can be guilty of murder in the first place. And so this subsection of the **Criminal Code** I have given you creates an additional ingredient of deliberation. Deliberate means carefully thought out and not something rash or hasty. It would not include a murder committed without consideration or done on the spur of the moment. And so a planned and deliberate act is one where the doer has taken the time to prepare a plan, consider the consequences and weigh the advantages and disadvantages of his intended action. In considering whether the murder was planned and deliberate you will consider all of the circumstances."

On this matter Justice Saunders followed the interpretation given by the Supreme Court of Canada (Mr. Justice Cory) in **R. v. Nygaard and Schimmens** (1991), 51 C.C.C. (3d) 417. In our opinion, the trial judge did not err.

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The third ground is that the verdict of the jury is perverse and against the weight of evidence.

The appellant contends that the evidence especially bearing on exclusive opportunity and motive left the jury with a fact situation where in the words of **R. v. Yebes** (1987), 36 C.C.C. (3d) 417 (S.C.C.), "... the guilt of the accused is not the only

rational inference which can be drawn". (p. 432)

However, upon our review of the record and consideration of the evidence and the exhibits and by applying the standards required by **Yebes** and **R. v. W.(R.)** (1992), 74 C.C.C. (3d) 134 (S.C.C.), we are satisfied that there was sufficient evidence upon which this jury properly instructed, as it was, could convict the appellant. In our view there was evidence that the appellant had the exclusive opportunity to commit the offence and that it was planned and deliberate.

Accordingly, we dismiss the appeal from conviction.

C.J.N.S.

Concurred in:

Hart, J.A.

Jones, J.A.