Case Name:

R. v. David

Between
Her Majesty the Queen, respondent, and
Duane David, appellant

[2002] O.J. No. 3455

61 O.R. (3d) 1

164 O.A.C. 61

169 C.C.C. (3d) 165

7 C.R. (6th) 179

97 C.R.R. (2d) 232

55 W.C.B. (2d) 194

2002 CanLII 45049

Docket No. C26614

Ontario Court of Appeal
Toronto, Ontario

Weiler, Sharpe and Simmons JJ.A.

Heard: December 3, 2001.
Judgment: September 11, 2002.

(94 paras.)

On appeal from convictions entered by Justice Robert MacKinnon sitting with a jury on March 6, 1996.

Counsel:

Timothy E. Breen, for the appellant. Scott C. Hutchison, for the respondent. Robert W. Hubbard, for the Attorney General of Canada, intervenor.

The judgment of the Court was delivered by

1 **SIMMONS J.A.**:-- The central issues on this appeal are: i) whether the appellant can now challenge the constitutionality of the assessment provisions contained in Part XX.1 of the Criminal Code, R.S.C. 1985, c. C-46, as amended, on appeal, after failing to raise any objection at trial; and ii) whether the trial judge committed reversible error by instructing the jury that they should consider the appellant's defence of not criminally responsible only after making a determination that he had committed manslaughter, second degree murder or first degree murder.

2 On Tuesday April 19, 1994, police entered an Adjala Township residence and discovered the bodies of Lyrister David, Glennie Navarro, and Glennie Navarro's ten year-old son, Ricky Navarro. Lyrister David was the appellant's mother. Subsequent examination revealed that she died as a result of blows to the head from a small sledgehammer. Glennie Navarro was the appellant's aunt. Both she and Ricky Navarro died as a result of ligature strangulation.

3 The appellant was arrested in May 1994, and charged with three counts of first degree murder. Following the appellant's arrest, defence counsel retained Dr. Philip Klassen to provide an opinion concerning the availability of a not criminally responsible defence. In June 1995, defence counsel filed Dr. Klassen's preliminary report with the court and obtained an order under s. 672.11 of the Criminal Code remanding the appellant to METFORS for the purpose of an assessment. In August 1995, Dr. Klassen advised defence counsel that he could not support a defence of not criminally responsible.

4 The appellant testified at trial and denied responsibility for the homicides. Despite the appellant's testimony, soon after the commencement of the appellant's cross-examination, defence counsel confirmed that he would be raising a not criminally responsible defence. Dr. Ruth Bray, a psychologist, testified on behalf of the defence. Based on inferences drawn from the crime scene, and other aspects of the appellant's behaviour, she opined that the appellant was likely in a psychotic state at the time of the killings.

5 In reply, the Crown called Dr. Klassen and other doctors who had participated in court-ordered assessments requested by the defence. Dr. Klassen testified that inculpatory statements made by the appellant during the assessment negated any suggestion of psychosis. Moreover, the Crown experts were generally agreed that information would be required from the appellant about his mental state at the time of the killings to support a s. 16 defence.

6 On March 6, 1996, following a trial by judge and jury, the appellant was convicted of the first degree murders of his mother, aunt, and cousin. He advanced six grounds of appeal against the convictions[1]:

* that ss. 672.11, 672.2, and 672.21(3)(e) & (f) of the Criminal Code, which authorize assessments to investigate mental disorder and also govern the use of an accused's statements made during an assessment, are unconstitutional; and that the introduction of the reply evidence from Dr. Klassen and other experts who participated in court ordered assessments of the appellant requested by the defence resulted in a breach of his rights under ss. 7 and 15 of the Canadian Charter of Rights and Freedoms;
* that the trial judge erred in directing the jury to consider the appellant's defence of not criminally responsible only after determining that the appellant had committed manslaughter, second degree murder or first degree murder;
* that the trial judge erred in failing to instruct the jury that the rule in Hodge's Case[2] does not apply to the defence and that they could infer that the appellant had experienced a psychotic episode based on circumstantial evidence even if that was not the only available inference;
* that the trial judge erred in charging the jury on the process of finding facts;
* that the Crown's closing address was inflammatory; and
* that the trial judge erred in failing to exclude evidence obtained as a result of a warrantless entry by police into the appellant's residence.

7 For the reasons that follow, I would dismiss the appeal.

Background

8 The appellant was 21 years old at the time of the homicides. Neighbours of the victims informed police that he lived in an apartment in Richmond Hill during the week while attending Ryerson University, and that he came home on weekends. One of the neighbours told police that she saw the appellant at the Adjala residence on the afternoon of Friday April 15, 1994.

9 Following various unsuccessful attempts to contact the appellant, police entered his basement apartment in Richmond Hill without a warrant sometime after 4:35 p.m. on Wednesday, April 20, 1994. Once inside the appellant's apartment, police observed bloodstained clothing. They seized the clothing after obtaining a warrant, and, on the basis of that evidence, eventually obtained a further warrant authorizing seizure of a sample of the appellant's blood for purposes of D.N.A. analysis.

10 The appellant was arrested in Los Angeles on May 20, 1994, after telephoning his mother's former workplace and asking to speak to her. Local authorities arrested him at a telephone booth awaiting a callback from his mother.

11 In June 1994, Dr. Klassen interviewed the appellant at the Barrie jail. In a preliminary report dated November 28, 1994, he informed defence counsel that he felt "quite strongly" that the appellant was suffering from a major mental illness and that he felt it "quite likely" that the appellant "must almost certainly have been under the influence of a psychotic illness" at the time of the alleged incidents. Dr. Klassen recommended that the appellant be admitted to METFORS, where he acted as a staff psychiatrist, for the purpose of further assessment.

12 On June 28, 1995, defence counsel filed Dr. Klassen's preliminary report with the court in support of an application for an assessment order under s. 672.11 of the Criminal Code. On July 4, 1995, the appellant was remanded to METFORS.

13 On August 24, 1995, the appellant agreed to undergo a sodium amytal interview. He became agitated after the interview and was placed in a "safe room" and given various medications to help him settle. On August 28, 1995, while still in the safe room, the appellant spoke of violent sexual fantasies involving his aunt, of sexually assaulting her when he was sixteen, and of attempting suicide the next day. He made a statement to the effect that "the situation was inevitable ... [he] started with one, went to the next one, and [that he] didn't have a choice after that". He said his aunt was the target and that the others were collateral damage. When questioned about the elements of s. 16 of the Criminal Code, the appellant responded, "I realized I was killing my mother". Following this interview, Dr. Klassen informed defence counsel that he could not support a s. 16 defence.

14 Dr. Angus MacDonald provided a second opinion at the request of Dr. Klassen. In a letter to the Crown dated September 25, 1995, Dr. MacDonald questioned whether the appellant's statement of August 28, 1995 should be accepted at face value and recommended that the appellant undergo phallometric testing at Penetanguishene Mental Health Centre. Defence counsel applied for a second assessment order on October 6, 1995, on the basis of that opinion. The appellant was remanded to Penetanguishene on October 11, 1995. He refused to undergo phallometric testing and denied any interest in sexual violence. However, he acknowledged making some of the statements recorded at METFORS, and explained that he was suicidal and attempting to harm himself at the time.

15 At trial, the Crown's case implicating the appellant in the homicides was formidable. Police found a pair of track pants, a pair of men's underwear, and a pair of socks rolled up and stuffed between the bed and the dresser in the bedroom where Glennie Navarro's body was found. The underwear and track pants were bloodstained from the inside out, meaning the blood originated from the person wearing the clothing. There were also medium velocity impact stains on the lower right leg of the track pants. D.N.A. analysis indicated that the appellant was the source of the inside out bloodstaining, whereas the bloodstains on the lower right leg of the track pants yielded a D.N.A. profile consistent with Lyrister David. A sweatshirt seized from the same bedroom also had inside out bloodstaining consistent with the appellant's D.N.A. profile. Medium velocity impact bloodstains, consistent with being cast off from a weapon raised above the shoulder were observed on the right arm of the sweatshirt. A friend of the appellant's and two neighbours of the victims

confirmed that they had seen the appellant wearing a similar sweatshirt. Bloodstained pants seized from the appellant's apartment were also stained from the inside out with the appellant's blood.

16 Acquaintances of the appellant testified about his mental and emotional state while at school in the time frame leading up to the homicides. One acquaintance said he became concerned about the appellant in November 1993. He said the appellant was reclusive and made no effort to attend to his physical appearance. In December 1993, the appellant told the acquaintance that he had dropped out of school and that he was apprehensive about his family learning about his school situation. In January 1994, the appellant spoke of suicide. Another acquaintance described the appellant as appearing depressed and said that, at one point, the appellant asked about counselling services. One of the police officers that entered the appellant's apartment described it as not being fit for human habitation.

17 The appellant testified that he went to his mother's home on April 16, 1994, and told her that he had finished his exams. He described cutting his hip accidentally on April 17, 1994, when he jumped into a door after being startled. However, the appellant claimed that all of his family were fine when he left the Adjala residence that evening. He said that, in March 1994, he had planned a vacation to the United States and that he left on vacation on April 19, 1994.

18 The appellant acknowledged that he did not write any of his exams in December 1993, and confirmed that he deceived his family about continuing in school. He said that he intended to tell his mother the truth sometime before September 1994.

19 Shortly after the commencement of the appellant's cross-examination defence counsel confirmed that he would be calling Dr. Bray as a witness. In discussing the admissibility of the statements made by the appellant during the course of the assessments, he indicated that he would not object to them being introduced so long as the circumstances in which they were made was made clear to the jury.

20 In cross-examination, the appellant admitted making some of the comments attributed to him in the August 28, 1995, interview with Dr. Klassen but indicated that he did not know whether he said all of the things he was reported as saying or what some of his comments referred to. He said that he did not kill his mother, aunt, and cousin.

21 The trial judge cautioned the jury, during the course of the appellant's cross-examination and again during his charge, that the evidence of the August 28, 1995 statement was not admissible for the truth of its contents and could only be used for the purpose of assessing the appellant's credibility and in relation to the issue of criminal responsibility.

22 Dr. Bray was qualified as an expert in forensic psychology. She opined that, assuming that the appellant killed his relatives, he was probably in a psychotic state at the time and that it was highly likely that he did not appreciate the consequences of his actions or know that they were wrong. She described a psychotic episode as a situation where someone under stress, "lose[s] it and ...

become[s] totally disorganized ... their thinking becomes unclear and ... impulses which they usually have under control take over".

23 Dr. Bray opined that the appellant suffers from schizotypal personality disorder. She said that persons suffering from this disorder may experience transient psychotic episodes lasting minutes to hours. In her opinion, the appellant was also experiencing a major depressive episode with psychotic features at the time of the killings, and post-traumatic stress disorder in their aftermath.

24 Dr. Bray testified that inferences concerning the appellant's mental state at the time of the killings could be drawn from the crime scene and other aspects of the appellant's behaviour. She said that the appellant was under considerable stress at the time of the killings, having concealed his failure at school from his mother. She opined that a confrontation with his mother or the pressure of contemplating telling her may have precipitated the psychosis.

25 Dr. Bray said "the house ... showed the act of someone who was very disorganized in terms of what happened to weapons, where weapons were found". The number and variety of weapons, which included a sledgehammer, a knife, three belts and two ties, in particular, were "not the choice of somebody who was reasoning and fully functioning". She said that leaving the sledgehammer on top of other items in a hall cupboard, stuffing his bloodstained clothing behind a bed, and the haphazard arrangements for his trip to Los Angeles "reflected disorganized thinking and a lack of rational awareness of what situation he was in and ways of protecting himself". The appellant's behaviour in the time frame leading up to the homicides was a manifestation of a major depressive episode.

26 Dr. Bray acknowledged that it was possible that the appellant was feigning his lack of memory of the killings but said that in her view, his fabricated account of injuring himself, and his belief that his mother was still alive, were attributable to disassociation and repression and were consistent with post-traumatic stress disorder.

27 In reply, the Crown called two psychiatrists, including Dr. Klassen, a psychiatric resident, two psychologists, and a nurse. All of these witnesses participated in court ordered assessments of the appellant.

28 The Crown experts agreed with or conceded the reasonableness of Dr. Bray's diagnosis of schizotypal personality disorder, and also agreed that schizotypal personalities are susceptible to psychotic episodes. Most agreed that testing had shown that the appellant becomes highly disorganized under stress and that he was experiencing substantial stress at the time of the killings. However, Dr. Klassen testified that he was not aware of any information that would support a s. 16 defence. He explained, "you want to have something from the individual themselves as regards their mental state at the time". In light of the appellant's account of his mental state at the time of the killings and the fact that he displayed no symptoms of psychosis while at METFORS, Dr. Klassen concluded that the appellant was not psychotic at the time of the killings. Other Crown experts also expressed the opinion that evidence from the appellant concerning his mental state at the time of the

homicides would be necessary to support a s. 16 defence.

Analysis

i) The Appellant's Claim that the Reply Evidence Ought to Be Excluded Because ss. 672.11, 672.2, and 672.21(3)(e) & (f) of the Criminal Code are Unconstitutional

29 The appellant submits that ss. 672.11, 672.2, and 672.21(3)(e) and (f) of the Criminal Code violate the ss. 7 and 15 Charter rights of in-custody accused because they require in-custody accused who wish to investigate a defence of not criminally responsible to waive the protection of privilege. He claims that the reply evidence was generated and admitted pursuant to those sections, and that the admission of that evidence breached his Charter rights and resulted in an unfair trial.

30 The relevant portions of ss. 672.11, 672.2 and 672.21(3)(e) and (f) are as follows:

> 672.11 A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine
>
> (b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1);
>
> 672.2(1) An assessment order may require the person who makes the assessment to submit in writing an assessment report on the mental condition of the accused.
>
> (2) An assessment report shall be filed with the court that ordered it ...
>
> 672.21(3) Notwithstanding subsection (2), evidence of a protected statement is admissible for the purpose of
>
> ...
>
> (e) determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), if the accused puts his or her mental capacity for criminal intent into issue, or if

> the prosecutor raises the issue after verdict;
>
> (f) challenging the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously; or

31 The appellant contends that it was necessary, because he was in custody, that he file Dr. Klassen's November 28, 1994 report, and therefore waive the privilege otherwise attaching to that report, in order to obtain an order directing a psychiatric assessment under s. 672.11 of the Criminal Code.

32 The appellant also relies on the fact that ss. 672.21(3)(e) & (f) of the Criminal Code provide that statements made during the course of an assessment ordered under s. 672.11 cease to be privileged once an accused testifies or places his mental state in issue. Accordingly, once the appellant placed his mental state in issue, the Crown was in a position to call Dr. Klassen and the other experts who participated in court-ordered assessments, even though it was initially the defence that retained Dr. Klassen.

33 The appellant claims that out-of-custody accused have far more flexibility in obtaining psychiatric assessments without a court order, and that they are not therefore subject to the same risks in investigating a defence of not criminally responsible. He submits that privilege is an essential component of the adversary system, and that a requirement that in-custody accused waive the protection of privilege constitutes a breach of their rights under ss. 7 and 15 of the Charter.

34 In the alternative, the appellant submits that Dr. Klassen put himself into a position of conflict with the appellant when he adopted a position adverse to the appellant, and that his evidence should be excluded on that basis, in any event.

35 None of these arguments were advanced at trial. In my view, it is not open to the appellant to raise them for the first time on appeal for two reasons.

36 First, defence counsel at trial (not Mr. Breen) specifically acknowledged that "there were a number of potential grounds upon which [he] might have objected" to the introduction of the appellant's statements to Dr. Klassen, which formed an integral component of the reply evidence. However, rather than object, defence counsel confirmed that his sole concern was in ensuring that the jury heard evidence concerning all of the circumstances leading up to the August 28, 1995 statement. He said the following:

> [Defence counsel]: So my friend is taking the position that he will, indeed, make sure that this evidence is called so that by the end of the case the jury will be able to fully understand the circumstances under which these statements were allegedly made and on that understanding I am not going to object to those questions being put.

> [The Court]: You are not going to object as protected statements under s. 672.21 of the Code? Is that what you are saying?
>
> [Defence counsel]: *Yes, well there were a number of potential grounds upon which I might have objected but I won't as long as the jury is fully informed of all of the events*, including ... this will include from my perspective a playing of the tape for them of the sodium amytal interview ... and at some point before the end of the case, as long as they get the full picture which includes a playing of that tape, a description of all his behaviours and what happened leading up to that 28th of August interview *then I am content*. [emphasis added]

37 Defence counsel clearly made a tactical decision not to object to the introduction of the appellant's statements. There is no suggestion that his decision was the result of incompetence. Accordingly, in my view, it is not open to the appellant to object to the admissibility of his statements on appeal.

38 Second, because there was no objection to the court-ordered assessment procedure at any stage of the trial proceedings, neither party requested any restrictions on the form of the various orders that were granted, and neither party led evidence concerning other options for assessment that may have been available. As a result, in my view, the record is inadequate to permit a proper constitutional review.

39 Dealing first with the form of order, it may not be clear either that medical evidence is necessary to obtain an assessment order or that an assessment report is a necessary component of an assessment order.

40 Section 672.11 provides that a court "may order an assessment ... if it has reasonable grounds to believe that [an assessment] is necessary to determine whether the accused was ... suffering from a mental disorder" at the relevant time. Although medical evidence may be required in some cases to meet this threshold, given that the appellant made no attempt to obtain an assessment order without filing Dr. Klassen's report, I do not accept that it was necessarily required here.

41 Moreover, in R. v. Bernardo [Psychiatric Assessment Ruling], [1994] O.J. No. 4382 (O.C.J.G.D.) LeSage A.C.J. held that the language of s. 672.2 did not require that he order the assessor to file a report with the court. Although LeSage A.C.J. did not conclusively determine the issue of privilege in making the assessment order, it is clear from his comments that, subject to waiver, he anticipated that privilege would be preserved if the defence of not criminally were raised.

42 In light of the foregoing matters, it may not be clear that the impugned provisions operate in the manner that the appellant describes. However, assuming that they do, neither party had the opportunity of leading evidence at trial concerning matters that would be relevant on a constitutional review.

43 For example, neither party had the opportunity of leading evidence concerning how often the s. 672.11 assessment procedure is used by out-of-custody accused, concerning other assessment options that are available to in-custody accused and how they compare to the options that are available to out-of-custody accused, or concerning how the assessment provisions operate in other provinces. There are obvious tactical advantages in obtaining a "neutral" court-ordered assessment. In these circumstances, the implications of requiring that in-custody accused waive privilege in order to obtain a court-ordered assessment are unclear. Without proper evidence concerning the other assessment options that are available to both in-custody and out-of-custody accused, in my view, it is not appropriate that this court undertake a constitutional review: Re Vickery and Prothonotary of the Supreme Court of Nova Scotia (1991), 64 C.C.C. (3d) 65 (S.C.C.); R. v. Ryan (1992), 12 C.R. (4th) 173 (Ont. C.A.); and R. v. Rees (1994), 72 O.A.C. 199.

44 In the circumstances, I see no basis for the appellant objecting to Dr. Klassen's evidence on appeal.

45 I would not give effect to this ground of appeal.

ii) Did the Trial Judge err in directing the Jury to consider the S. 16 Defence only after determining that the Appellant had committed Manslaughter, Second Degree Murder, or First Degree Murder?

46 The trial judge instructed the jury to consider the s. 16 defence only if they were satisfied that the appellant had committed manslaughter, second degree murder, or first degree murder.

47 The appellant submits that s. 16 of the Criminal Code creates an exemption to criminal responsibility based on incapacity for criminal intent[3] and that, as a matter of logic, the trial judge ought to have instructed the jury to consider the s. 16 defence before determining the issues of intent for murder and planning and deliberation. He claims that the structure of the charge and the manner in which the trial judge reviewed the evidence of mental disorder created a risk that the jury would not consider all of the evidence relating to mental disorder when they determined the issues of intent for murder and planning and deliberation, or worse, that they would misuse the evidence of mental disorder.

48 I agree that it would have been preferable had the trial judge instructed the jury that they could consider the s. 16 defence only if they were satisfied that the accused committed the act forming the subject matter of a particular charge and, if it was necessary that they consider the s.16 defence, that they should do so before determining whether the appellant had the necessary intent for murder and whether the murders were planned and deliberate. However, I am not persuaded that the trial judge committed reversible error by instructing the jury as he did.

49 Section 16(1) of the Criminal Code provides as follows:

16(1) No person is criminally responsible for an act committed or an omission

> made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

50 Given that a s. 16 defence advanced on the basis of negating mens rea[4] relates to the issue of capacity to form intent, it is more logical, theoretically, to deal with that issue prior to considering whether an accused actually formed the requisite intent. If the jury rejects the s. 16 defence, it is nevertheless required to consider the whole of the evidence relating to mental disorder in determining whether the Crown has proven that the accused actually did form the necessary intent[5]. In light of the nature of the issues to be determined and the evidence to be considered, it is more logical to begin with the issue of capacity and then move to the question of actual intent.

51 Moreover, Dr. Bray's evidence illustrates that it may be difficult, if not impossible, to isolate the issue of capacity for intent from the question of whether a particular accused actually formed the requisite intent. When specifically asked about whether the appellant was incapable of knowing that the killings were wrong, Dr. Bray said "this is someone who tends to dissociate, who tends to get very easily confused, who doesn't consider the consequences, that it is not a matter that he wouldn't be capable of it but that he at that moment was not capable of it ... the capacity was there but it wasn't operating". In order to avoid the risk that the jury would compartmentalize the evidence relating to the s. 16 defence, and therefore fail to consider the whole of that evidence when determining intent, it was desirable, in the circumstances of this case, that the issues of capacity and intent not be segregated.

52 I acknowledge that the trial judge may have instructed the jury as he did because the appellant denied any involvement in the killings. It was accordingly crucial that the jury understand that the verdict of not criminally responsible was available only if the jury were satisfied beyond a reasonable doubt that the appellant "committed the act" forming the basis of the offence that was charged or an included offence[6].

53 However, it was not necessary that the trial judge go so far as instructing the jury to consider the defence of not criminally responsible only after determining that the appellant committed manslaughter, second degree murder, or first degree murder. Section 672.34 of the Criminal Code does not require that. Moreover, Lamer C.J.C. rejected the argument that "the issue of insanity arises only after both actus reus and mens rea have been proved by the Crown" in R. v. Chaulk[7]. He said:

> [I]f the accused's insanity puts the existence of mens rea for the particular offence into question, it cannot be said that mens rea has been proved by the Crown before the issue of insanity arises. The Crown cannot be said to have proved anything beyond a reasonable doubt until the end of the trial[8].

54 As for any concern that "it would be manifestly' wrong if evidence of insanity were to influence the jury's decision on whether [an] accused committed the alleged act"[9], Lamer C.J.C. also

specifically rejected the premise that an accused person can lead evidence of his mental condition so as to negative mens rea without first having the issue of criminal responsibility determined. He said:

> What if an accused's mental condition is such that it operates to negate mens rea in the particular case? ... In such a case, if the accused were to raise evidence of his mental condition (thereby putting his mental capacity in issue), the trial judge would be entitled to charge the jury on s. 16. In these circumstances, it is only when the trier of fact has rejected the defence of insanity that it may consider the evidence of his mental condition solely with respect to mens rea; this, in turn has only been allowed in cases where an accused is seeking to deny either the element of planning and deliberation or the specific intent for murder, and to instead be found guilty of a lesser, included offence (i.e., second degree murder or manslaughter). Thus, it is not true that evidence of insanity can be raised by an accused simply to deny mens rea for an offence independent of the insanity defence[10].

55 The Ontario Specimen Jury Instructions (Criminal)[11] provide the following example of an instruction on the sequence of deliberations that could have been used:

> Criminal responsibility is an issue for you to decide in this case. It involves several steps.
>
> The essential elements of every crime include (an) act(s). In this case, Crown counsel must prove beyond a reasonable doubt that (NOA) unlawfully caused (NOC)'s death.
>
> If Crown counsel has not proven beyond a reasonable doubt that (NOA) unlawfully caused (NOC)'s death, you must find (NOA) not guilty. Your deliberations would be over. You would not have to decide the issue of criminal responsibility.
>
> If Crown counsel has proven beyond a reasonable doubt that (NOA) unlawfully caused (NOC)'s death, you must decide next whether (NOA) is criminally responsible for what s/he has done.
>
> .... [Instructions concerning s. 16 defence]
>
> If Crown counsel has not satisfied you that, when s/he (NOA) unlawfully caused

> (NOC)'s death, it was more likely than not that (NOA) had a mental disorder ... then you must decide what crime (NOA) committed.

56 In my view, in this case, it was both logical and appropriate to consider the s. 16 defence before considering mens rea.

57 Nevertheless, regardless of the sequence in which the jury was instructed to determine the various issues, the important question is whether they understood that they were to consider the whole of the evidence relating to mental disorder in determining whether the appellant actually formed one of the requisite intents for murder and whether the killings were planned and deliberate. Considering the charge as a whole, I am satisfied that this jury would have understood those matters.

58 The trial judge instructed the jury to take account of "the evidence of the accused's state of mind" twice in describing the two forms of intent that can constitute intent for murder and in providing instructions concerning how to determine intent. When dealing with the first form of intent, he instructed the jury that they were entitled "as a matter of common sense to draw an inference that a sane and sober person intends the natural and probable consequences of his or her voluntary actions". However he went on to say they were "not required to make that conclusion" and then instructed the jury that they were required to consider the evidence of the accused's state of mind in determining whether he actually formed either of the requisite intents. He said:

> You may decide the [the appellant] did not intend to kill Lyrister David even though Lyrister David's death was the natural consequence of his actions. In the end you will have to consider all of the surrounding circumstances including what [the appellant] did and said, and including the *evidence of [the appellant]'s state of mind, even if it did not amount to a mental disorder exempting him from criminal responsibility,* in order to decide whether the Crown has proven beyond a reasonable doubt that [the appellant] meant to cause the death of Lyrister David. [emphasis added]
>
> ...
>
> Before you can find that [the appellant] had the necessary criminal intent ladies and gentlemen, you must be satisfied beyond a reasonable doubt that this intent is the only reasonable inference to be drawn from the proven facts. *Remember, the question at this point for you to decide is what [the appellant] did, in fact, intend.* [emphasis added]
>
> ...

> ... In the end, you look at all of the surrounding circumstances including *the evidence of [the appellant]'s state of mind*, in order to determine whether [the appellant] *actually intended* to cause bodily harm ... [emphasis added]

59 The trial judge then instructed the jury that they were entitled to take different evidentiary routes in determining the issue of intent. In doing so, he specifically told the jury that they were required to consider the medical evidence relating to the s. 16 defence:

> It would seem that the evidence is uncontradicted that both Ricardo Navarro and Glennie Navarro died as a result of ligature strangulation and Lyrister David died as a result of skull fracture consistent with the impact of a blunt object on her skull while she was in bed. *You will have to consider the medical evidence on the issue of intent to murder.* Dr. Klassen's opinion and that of Drs. Davidson, Wright and MacDonald was that the accused in their view showed no evidence of major mental disorder and that the accused denied any delusions or hallucinations that would suggest that he would not have been aware of the nature or quality of his acts or know it was wrong. *Dr. Bray's opinion was to the effect that due to a triggering event, combined with stressors imposed on Mr. David's Schizotypal personality that he likely suffered a transient psychotic break thereby depriving him, in effect, of the intent for murder.* It is for you to say from a careful examination of all of the evidence ... whether the Crown has satisfied you beyond a reasonable doubt that [the appellant] ... had the necessary intent for murder as I have defined it for you. *You must consider all of the facts surrounding the alleged killing in determining the intent of [the appellant]. All of the facts and circumstances, no matter how small or trivial, which bear on the question of intent must be carefully considered by you.* It is from this review that you will determine whether the Crown has satisfied you beyond a reasonable doubt that [the appellant] had the requisite intent for murder. [emphasis added]

60 The trial judge referred the jury to the evidence of mental disorder yet again when dealing with the issue of planning and deliberation and specifically pointed out that the evidence of the appellant's state of mind could be sufficient to negative planning and deliberation even if the jury was satisfied that he formed the requisite intent for murder:

> In considering whether the murder was planned and deliberate you should consider all of the circumstances, not only the accused's actions but also the evidence of his condition, his state of mind, and any mental disorder from which he was suffering even if it did not amount to a mental disorder exempting him from criminal responsibility. After considering all of the evidence relating to the accused's mental disorder you will ask yourself this question: Are you satisfied

> beyond a reasonable doubt that the accused undertook the planning deliberation as I have defined it for you ... [i]n other words, it is open for you to find that the planning and deliberation required to commit first degree murder might be negatived by the accused's mental state, even if you find that the accused had the necessary intent to commit murder.

61 Finally, when dealing with the issue of criminal responsibility, the trial judge referred to the issues of intent for murder and planning and deliberation on two occasions and made it clear that even if the jury rejected the s. 16 defence they were still required to consider the evidence of mental disorder when considering whether the Crown had proven the necessary intent for murder and planning and deliberation:

i) before reviewing the expert evidence relating to that issue:

> The issues as to whether certain psychological, or physical conditions are, or may be, consistent with criminal responsibility, or the lack of it, and whether those conditions have been proven to exist in this case and if they have, whether they tend to support the evidence of the Crown or the Defence that the accused did, or did not suffer from a mental disorder at the time of the killings that rendered him incapable of appreciating the nature and quality of his act or of knowing it was wrong; *did or did not have the necessary intent for murder; or that the accused did, or did not do the planning and deliberation necessary for first degree murder*, those are the issues ... [emphasis added]

ii) after reviewing the expert evidence:

> Now, if you are not satisfied on a balance of probabilities that the accused was mentally disordered to the extent of the special verdict of not criminally responsible on account of mental disorder, *you must still consider the evidence of mental disorder along with all of the other evidence in determining whether or not the accused had the necessary intent to commit the offence of murder, and on the issue of planning and deliberation* and if all of the evidence creates a reasonable doubt whether or not the accused had the necessary intent to commit the offence of murder you must find the accused not guilty of first degree murder, but guilty of manslaughter ... If all of the evidence satisfies you beyond a reasonable doubt that the accused had the intent for murder, but you have a reasonable doubt as to whether the murder was planned and deliberate ...

> you must find the accused not guilty of first degree murder but guilty of second degree murder. [emphasis added]

62 Considering the charge as a whole I am satisfied that the trial judge made it clear to the jury that they were required to consider all of the evidence relating to mental disorder when deciding whether the appellant formed the specific intent for murder and whether the murders were planned and deliberate.

63 Turning to the adequacy of the trial judge's review of the evidence of mental disorder relating to intent and planning and deliberation, the appellant's specific concern is with the portion of the charge quoted in paragraph 59, in which the trial judge reviewed the expert evidence relating to whether the appellant suffered a psychotic episode. The appellant submits that by limiting his review of the evidence at that point to a summary of the experts' conclusions concerning the s. 16 defence, the trial judge created a risk, if the jury rejected Dr. Bray's evidence that he experienced a psychotic episode, that they would not consider the evidence relating to schizotypal personality disorder and depression when deciding whether he actually formed the specific intent for murder and whether the murders were planned and deliberate, as well as an additional risk that the jury would use the evidence of mental disorder as affirmative evidence of planning and deliberation.

64 I am not persuaded that the appellant was prejudiced by the manner in which the trial judge reviewed the evidence of mental disorder for three reasons.

65 First, as already noted, the trial judge instructed the jury repeatedly that they were required to consider the evidence relating to mental disorder on the issues of whether the appellant formed the specific intent for murder and whether the murders were planned and deliberate. In addition to the medical evidence quoted at paragraph 59, the trial judge referred specifically to the lay witnesses' evidence that the appellant appeared depressed in the first part of his charge dealing with issues other than the s. 16 defence. When he reviewed the evidence relating to the s. 16 issue, the trial judge referred to Dr. Bray's evidence that the appellant suffered from a schizotypal personality disorder and depression. As already noted, after concluding his instructions on that issue, he told the jury that they had to consider all of the evidence relating to mental disorder on the issues of intent and planning and deliberation if they rejected the s. 16 defence. Although I agree that the trial judge's review of Dr. Bray's evidence focused on the likelihood that the appellant suffered a psychotic break, in my view, that was a reflection of the nature of her evidence as opposed to an omission by the trial judge.

66 Second, although experienced defence counsel at trial objected to the trial judge's instructions to the jury concerning the sequence of their deliberations, he did not object to the trial judge's review of the evidence of mental disorder as it related to specific intent for murder and planning and deliberation.

67 Third, I reject the appellant's contention that the structure of the charge or the manner in which the trial judge reviewed the evidence could have mislead the jury into using the evidence of mental

disorder as affirmative evidence of planning and deliberation if they rejected the s. 16 defence.

68 Dr. Bray testified, for example, that the number and variety of weapons used were "not the choice of somebody who was reasoning and fully functioning". If the jury rejected Dr. Bray's opinion concerning the s. 16 defence and also concluded that the appellant formed one of the requisite intents to kill, they were still obliged to consider that type of evidence on the issue of whether the killings were planned and deliberate. I agree that, if the jury rejected Dr. Bray's opinion concerning the significance of the crime scene evidence, they may have used the evidence concerning the number and variety of weapons as evidence of planning and deliberation. However, I do not agree that that means that the jury used the evidence of mental disorder as evidence of planning and deliberation. The jury was entitled to reject Dr. Bray's opinion concerning the significance of the crime scene evidence and to use that evidence to draw its own inferences concerning planning and deliberation. Although it would have been preferable had the trial judge referred to Dr. Bray's opinion when he dealt with the issue of planning and deliberation, as already noted, he instructed the jury specifically that they were required to consider the evidence relating to mental disorder on the issue of planning and deliberation and also told the jury that the evidence of the appellant's state of mind could negative planning and deliberation even if the jury was satisfied that the appellant actually formed the intent for murder.

69 I would not give effect to this ground of appeal.

iii) Did the Trial Judge err in failing to instruct the Jury on Circumstantial Evidence in relation to the s. 16 Defence?

70 The appellant contends that the trial judge committed reversible error by failing to specifically instruct the jury that it was open to them to infer that the appellant suffered a psychotic episode based on circumstantial evidence even if that was not the only inference available on the evidence. He submits that the evidence of the Crown experts that a s. 16 defence was not available to the appellant absent evidence from him concerning his mental state at the time of the killings made such an instruction a necessity.

71 I disagree. The key issue is whether there is any real risk that the jury thought that they could only draw an inference that the appellant suffered a psychotic episode at the time of the killings if that was the only inference available on the evidence. In my view, there is no such risk.

72 The trial judge concluded his general instruction on circumstantial evidence with the following statement:

> However, before basing a verdict on circumstantial evidence, *that is a verdict of guilty on circumstantial evidence*, you must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the facts so proven. [emphasis added]

In my view, he made it clear that the restriction on drawing inferences applied to a verdict of guilty only.

73 Moreover, I see no basis for concluding that the jury would have interpreted the evidence of the Crown experts as a restriction on their ability to draw inferences. The Crown experts expressed their opinion concerning the availability of a defence of not criminally responsible. The defence expert reached a different conclusion. The trial judge told the jury that they were required to take the law from him. It would have been obvious to the jury that the evidence of the experts related to their own opinions and did not constitute a restriction on the jury's functions.

iv) Did the Trial Judge err in charging the Jury on the Process of Finding Facts?

74 The appellant contends that the trial judge erred by instructing the jury to apply the law to the "pool of facts" formed by the evidence they accepted. He submits that this instruction eliminated from the jury's consideration evidence, which they did not accept, but which could give rise to a reasonable doubt and contravened the principle enunciated by this court in R. v. Miller (1991), 68 C.C.C. (3d) 517 (Ont. C.A.) at 543-545.

75 The impugned passage occurred in the early part of the charge where the trial judge described for the jury the process of finding facts:

> You should begin your task of measuring the weight of evidence of the various witnesses by examining the whole of the evidence that you feel is necessary in coming to a finding of fact. *Take the facts that you feel you need for your task and put them in a pool. In other words, create a pool of facts. Apply the law as I will shortly be explaining it to you, apply that to the pool of facts.* and in that manner you will determine whether or not the Crown has proven each ingredient of each count in the indictment beyond a reasonable doubt ... *[y]ou* simply sort through the evidence, accept what you choose to accept, reject what you choose to reject and then examine what is left and you make your findings of fact. Place that fact in the pool and apply the law to that pool and in that manner you will be able to determine whether or not you are satisfied that that element or ingredient of the offence has been established beyond a reasonable doubt. [emphasis added]

76 I agree that it would have been preferable had the impugned instruction not been given. Nevertheless, in my view, this preliminary general instruction must be considered in the context of subsequent more specific instructions.

77 The trial judge instructed the jury in accordance with W.(D.)[12] on two separate occasions, once in relation to alibi, and on a second occasion in relation to their approach to contradictory evidence. I will refer to a brief portion of the instructions on contradictory evidence only:

> Now, the issue of criminal responsibility aside, there is contradictory evidence in

> this case on the essential matters, that is the constituent elements of the offence and the identity of the accused as perpetrator ... I direct you that, leaving aside for a minute the issue of criminal responsibility, you must consider the essential matters on the following basis, after having assessed all of the evidence. First, do you accept the evidence favouring the accused including his testimony on these matters and find it to be factually true when weighed against the contradictory evidence. If so, you must acquit the accused. *Second, leaving aside the issue of criminal responsibility, even if you do not find as a fact that the evidence favouring the accused on these matters is true, but you have a reasonable doubt as a result of it, you must also acquit the accused.* Thirdly, leaving aside criminal responsibility, even if you do not have a reasonable doubt on these matters as a result of the evidence favouring the accused because you reject that evidence as untrue, you must still determine whether the Crown has convinced you of the guilt of the accused beyond a reasonable doubt on the basis of evidence which you do accept and do find to be factually true. *Keep in mind,* the issue of criminal responsibility aside, *you are not compelled to choose between the evidence favouring the Crown and the evidence favouring the accused on essential matters particularly if each version appears to be credible in the sense that you are unable, after reasonable and thorough deliberation, to determine which witnesses are telling the truth. Rather, the issue of criminal responsibility aside, the Crown bears the burden of proving the accused's guilt beyond a reasonable doubt.* [emphasis added]

78 Taken as a whole, the trial judge told the jury that they could only convict on the basis of evidence that they accepted and that reasonable doubt could be founded on the evidence. Later, he communicated clearly, and in a specific context, that the jury was obliged to consider, and give effect to, evidence that they neither accepted nor rejected. I see no realistic possibility that the jury was misled by the prior instruction.

v) Was the Crown's Closing Address Improper?

79 The appellant contends that Crown counsel's closing address to the jury was improper in two respects:

i) Crown counsel expressed his personal opinion to the jury by characterizing a verdict of not criminally responsible as a travesty and by submitting that the victims and society deserve a "fair and just verdict"; and

ii) Crown counsel challenged the integrity of the defence by saying "it is almost like Mr. David comes to this court and he is trying to divorce himself from the defence that is being put before you ... His lawyer and Dr. Bray must be acting upon his instructions in putting forward to you the defence that ... I am not criminally responsible".

The appellant claims that the impugned comments resulted in a miscarriage of justice.

80 Although I agree that it would have been preferable had Crown counsel not made comments expressing his opinion, I reject the appellant's contention that the comments caused a miscarriage of justice.

81 Defence counsel objected to Crown counsel's comment that a verdict of not criminally responsible would be a travesty and requested that the trial judge give a curative instruction. The trial judge told the jury to "disregard the personal opinions of both counsel as to the guilt or innocence of the accused; as to whether or not any verdict is or is not a travesty". Defence counsel made no further comment. In my view, it is apparent that the trial judge's instructions were sufficient to dispel any prejudice that may have arisen through Crown counsel's improper expression of opinion.

82 As for the contention that Crown counsel challenged the integrity of the defence and suggested that there was something deceitful or inappropriate being done, I do not read the impugned passage that way. During the course of his closing address, defence counsel asked the jury to consider that the appellant confabulated, rather than admit that he had no memory of the things he was being asked to answer for". Defence counsel also said the following, by way of comment on the inconsistent defences:

> Now that means that I, as his counsel, am asking you to consider the defence of mental disorder at the time of the offence, which renders him not criminally responsible. [The appellant], of course, himself, doesn't promote the same defence.

83 Rather than being a suggestion of something improper, Crown counsel's comments were a response to the manner in which the defence was conducted and the specific comments of defence counsel in his closing address. Again, I note that experienced defence counsel took no exception to the impugned comments at trial.

vi) Did the Trial Judge err in failing to exclude the Evidence obtained as a result of the Warrantless Entry by Police into the Appellant's Residence?

84 As already noted, the police observed bloodstained clothing when they entered the appellant's apartment without a warrant on Wednesday, April 20, 1994. They seized the clothing after obtaining a warrant, and, eventually obtained a further warrant authorizing them to obtain a blood sample from the appellant for purposes of D.N.A. analysis.

85 Following a voir dire, the trial judge ruled that the challenged evidence was admissible. Although he found that the warrantless entry into the appellant's apartment was not specifically authorized by statute[13] and that it therefore constituted a breach of the appellant's rights under s. 8 of the Canadian Charter of Rights and Freedoms, he concluded that exclusion of the evidence would

bring the administration of justice into disrepute. In particular, the trial judge found that the police honestly and reasonably believed that they should enter the appellant's apartment to ascertain whether he was a victim or to question him as a possible suspect; and that the entry, and the limited search conducted to fulfill those purposes, were therefore reasonable based on exigent circumstances. He noted that the bloodstained clothing was real evidence discovered in plain view. He also found that the breach of the appellant's Charter rights was committed in good faith; that the police would have had reasonable and probable grounds for obtaining a search warrant prior to the date of the appellant's arrest, in any event, based on evidence discovered at the crime scene; and that the bloodstained clothing and the results of the D.N.A. analysis were important pieces of evidence relating to a serious charge. Although he recognized the high level of privacy associated with the appellant's residence, on balance, he concluded that the evidence should be admitted.

86 The trial judge's ruling was made without the benefit of R. v. Godoy[14] and R. v. Golub[15], which recognize the legal authority of police to enter a dwelling house where public safety is in issue provided the police actions are reasonable and do not involve an unjustified use of police power. In light of those decisions, the appellant concedes that a warrantless entry of a dwelling house for the purpose of preserving life is authorized by law. However, he submits that the trial judge's findings that the police honestly believed that the appellant was injured or dead in his apartment when they entered it and that they entered the appellant's apartment as a result of "exigent circumstances" are unreasonable. He also submits that that conclusion precludes a finding on appeal that the entry was authorized by law and that it undermines the trial judge's finding that the breach was committed in good faith.

87 In the alternative, even if this court finds that the entry was authorized by law, the appellant submits that the plain view doctrine does not extend to observations made during an emergency entry. The seizures therefore remain a breach of the appellant's s. 8 Charter rights.

88 In either case, given the serious nature of the Charter breach involving a warrantless search of a dwelling house, the appellant submits that the trial judge erred in failing to find that admission of the evidence would bring the administration of justice into disrepute.

89 I reject the appellant's submissions. In my view, the trial judge's findings of exigent circumstances and good faith on the part of the police were available on the evidence, and I see no other error in his s. 24(2) Charter analysis. It is accordingly unnecessary that I determine whether the plain view doctrine can apply to legitimize seizure of items observed during the course of an emergency entry.

90 The appellant points to a variety of factors as demonstrating that there was no objective basis for the police to believe that he was in his apartment when they entered and that the trial judge's finding that the police reasonably believed that is unreasonable. He relies, in particular, on the evidence that the victims were reported missing as of Monday morning, that a neighbour reported seeing the appellant on Monday evening, that the police did not enter the appellant's apartment until

approximately 28 hours after the discovery of victim's bodies, that the police acknowledged that entering the appellant's apartment to search for evidence was a high priority, and that the decision to enter was not made until after the police had obtained an opinion from a justice of the peace that they lacked sufficient grounds for obtaining a warrant.

91 However, the trial judge relied on a number of other factors, pointing in the opposite direction, to make his findings. In particular, he noted that the police were involved in a fast developing and fluid investigation that had already led to the discovery of three bodies; that the police had made efforts to locate the appellant but had not yet succeeded; that the police did not yet have reasonable and probable grounds to view the appellant as a suspect, although there were genuine grounds for viewing him as either a possible victim or a possible suspect; that there were other possible suspects as well; and that one of the officers who testified indicated that the justice of the peace informed him that the police did not require a warrant to search for bodies. The trial judge made a specific finding that the police had more reason to suspect that the appellant was a victim than they had had to suspect the occupants of the Adjala residence were victims when they entered their home the day before. In my view, it was open to the trial judge to reach his conclusion that "the officers' purpose in entering ... was ... that they were concerned not only with their duty to interview [the appellant] as a possible perpetrator, but also with their duty to notify him as next of kin of his family's death, and also with their duty involving concerns for his safety as a possible victim".

92 As for the trial judge's s. 24(2) Charter analysis, I agree with his conclusion that the bloodstained clothing would inevitably have been discovered prior to the appellant's arrest. There is accordingly no merit in the appellant's submission that the blood samples taken pursuant to the D.N.A. warrant amount to conscriptive evidence, as the ability to obtain the D.N.A. warrant does not depend on evidence that could only have been obtained through the warrantless entry. The appellant concedes that the bloodstained clothing was real evidence that is non conscriptive. The trial judge recognized the significant privacy interest in the appellant's residence but found that the seriousness of the breach was diminished by the good faith of the police and exigent circumstances. He also recognized that the evidence in issue was not necessarily crucial to the Crown's case, but found it to be important evidence relevant to a serious charge. In my view, the appellant has failed to demonstrate a material error in the trial judge's reasoning and I see no basis for interfering with his conclusion on the s. 24(2) analysis.

93 I would not give effect to this ground of appeal.

Disposition

94 For the reasons given, I would dismiss the appeal.

SIMMONS J.A.
WEILER J.A. -- I agree.
SHARPE J.A. -- I agree.

1 The appellant did not pursue a seventh ground of appeal concerning the trial judge's instructions to the jury on reasonable doubt.

2 (1838), 168 E.R. 1136.

3 Relying on R. v. Chaulk (1990), 62 C.C.C. (3d) 193 (S.C.C.) at p. 207.

4 In Chaulk, Lamer C.J.C. and MacLachlin J. both recognized that a s. 16 defence could operate in other ways aside from negating mens rea at pp. 204-211 and p. 263.

5 R. v. Allard (1990), 57 C.C.C. (3d) 397 (Q.C.A.).

6 Section 672.34 of the Criminal Code provides:

> Where the jury ... finds that an accused committed the act or made the omission that formed the basis of the offence charged, but was at the time suffering from mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), the jury ... shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder.

7 (1990), 62 C.C.C. (3d) 193 (S.C.C.).

8 At p. 210.

9 This concern was expressed in R. v. Saxell (1980), 59 C.C.C. (2d) 176 (Ont. C.A.) and repeated in R. v. Swain (1991), 63 C.C.C. (3d) 481 (S.C.C.).

10 At p. 210.

11 Published in 2002.

12 D.W. v. The Queen (1991), 63 C.C.C. (3d) 397 (S.C.C.).

13 On the voir dire, the Crown relied on s. 42(1) of the Police Services Act, R.S.O. 1990, c. P.15 as justifying the entry.

14 (1997), 115 C.C.C. (3d) 272 (Ont. C.A.) aff'd. (1998), 131 C.C.C. (3d) 129 (S.C.C.).

15 (1997), 117 C.C.C. (3d) 193 (Ont. C.A.).