NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Chaulk***, 2007 NSCA 84

Date: 20070710
Docket: CAC 274065
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Shane Lee Chaulk

Respondent

Judges:	Bateman, Saunders and Hamilton, JJ.A.
Appeal Heard:	June 5, 2007, in Halifax, Nova Scotia
Held:	Appeal allowed and a new trial ordered per reasons for judgment of Bateman, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	William D. Delaney, for the appellant Roger A. Burrill, for the respondent

Reasons for judgment:

[1] This is a Crown appeal from the acquittal of Shane Lee Chaulk on various charges. The events giving rise to the charges are not in dispute.

[2] In the early morning of May 29, 2005 there was a disturbance at an apartment building located at 39 Towerview Drive, Halifax. James MacDougall, who lived in apartment 91, was awakened by his teenage daughter and got up to investigate. He could hear loud yelling and screaming from the hallway, dominated by a male voice. In the hallway and terrified was Mr. MacDougall's female neighbour from apartment 90. He brought her into his apartment, locked and dead-bolted the door and dialled 911. As he was talking to the 911 operator, his door was broken in. Mr. Chaulk entered and threw the contents of Mr. MacDougall's desk, a computer and a large television onto the floor. An angry Mr. Chaulk, who is large in stature, yelling that he was going to kill Mr. MacDougall and his children, rushed Mr. MacDougall.

[3] Mr. MacDougall was able to contain Mr. Chaulk and calm him somewhat. Mr. Chaulk then removed all his clothes placing them in a pile at his feet. Spotting the female neighbour, he grabbed her by the blouse. She was able to break loose and run from the apartment. The police arrived at the apartment to find Mr. MacDougall pressing Mr. Chaulk against a wall to subdue him. He was naked, sweating profusely and babbling, vacillating between compliant and combative. They handcuffed him and took him to the hospital.

[4] He was charged with assaulting Mr. MacDougall (s. 266(a) **Criminal Code**); threatening to cause bodily harm to Mr. MacDougall (s. 264.1(1)(a) **Criminal Code**); break, enter and committing assault (s. 348(1)(b) **Criminal Code**) and mischief by wilfully damaging property (s. 430(4) **Criminal Code**).

[5] Mr. Chaulk was tried before Castor H.F. Williams J.P.C., who acquitted him of all charges, accepting Mr. Chaulk's defence of non-mental disorder automatism/extreme intoxication in relation to the first three charges. That decision is reported as **R. v. Shane Lee Chaulk**, 2006 NSPC 48; [2006] N.S.J. No. 407 (Q.L.); 248 N.S.R. (2d) 243. There is no appeal of the finding that Mr. Chaulk was operating in an automatic state when he committed the offences. The issue here is whether the judge erred in concluding that Mr. Chaulk's intoxicated state

was not “self-induced”. His conclusion turned on the evidence of Mr. Chaulk’s drug and alcohol consumption that night.

ISSUES

[6] The Crown says the judge erred in law, in three ways:

- In excluding the evidence of Dr. Margaret Dingle with respect to the drugs Mr. Chaulk said he had consumed prior to the events;

- In excluding Mr. MacDougall’s evidence about the drugs Mr. Chaulk said he had consumed;

- In adopting an incorrect legal test to determine whether Mr. Chaulk’s intoxication was “self-induced” as used in s. 33.1(1) of the **Criminal Code**.

ANALYSIS

[7] It was Mr. Chaulk’s defence that he committed the offences while extremely intoxicated and was therefore unable to form the necessary intent to commit the crimes. The Crown said that Mr. Chaulk’s intoxication was “self induced”, therefore s. 33.1 of the **Criminal Code** precludes his reliance on the defence of extreme intoxication for all but the property offence.

[8] In addressing the circumstances leading up to the events in question, Mr. Chaulk testified that after speaking briefly to an acquaintance “Mike”, he attended a party at apartment 90, arriving sometime between 10:30 and 11 p.m. Mr. Chaulk did not know Mike’s surname. Upon arrival he was met by Mike who introduced him to the two young women who lived in the apartment. He recognized some other acquaintances from school including someone named “Matt”, whose surname he also did not know. Over the course of the next few hours Mr. Chaulk played video games and poker, consuming several beer (the number varied in his testimony from six to eight beer). He might have had some marijuana.

[9] It was Mr. Chaulk's evidence that he was getting bored and planned to leave the party. Matt offered him a "wake-up pill", which he took. He described the pill in direct examination:

> A. It's kind of . . . it's not real big. It's square, white. That's about it, I believe.
>
> Q. Okay. And when it was provided to you, what format was it provided to you? How was it given to you?
>
> A. He just handed it to me.
>
> Q. Okay. What's it look like though?
>
> A. It's just like a white paperish-type square thing. I don't know. It's like a capsule.
>
> Q. A white paperish square?
>
> A. It's kind of like a capsule size pill, flat thing. I don't know.

[10] Mr. Chaulk further testified that he was familiar with wake-up pills as over-the-counter caffeine pills. He thought the substance offered by Matt would help him stay awake.

[11] After taking the pill Mr. Chaulk continued to play cards. Within an hour or two his heart was pounding and things were looking weird. He attempted to call his mother but without success. He had no further recollection of specific events until he awoke in hospital around 10:30 a.m. the next morning. He did not recall his conversations with the doctors at the hospital.

[12] Dr. Margaret Dingle was working the QEII emergency room from 2 p.m. to 9 p.m. on the day of Mr. Chaulk's admission, he having been admitted around 8 a.m. that day in an agitated and confused state. He was first seen by a Dr. Petrie who opined that his state was consistent with exposure to chemicals or stimulant-type drugs. He administered Haldol and Ativan to control the agitation and sedate Mr. Chaulk.

[13] Dr. Dingle's notes of her interaction with Mr. Chaulk were admitted by consent. In addition she testified at the trial. She first consulted with him at 5 p.m. Having received the results of blood work and electrocardiogram tracings, she was concerned about the possibility of heart injury. She interviewed Mr. Chaulk to determine what, if any, drugs or medications he might have used leading up to his admission to hospital. Dr. Dingle acknowledged that she had no present recollection of her consultation with Mr. Chaulk. Her chart note indicated, however, that in response to asking him if he had taken drugs he told her he had consumed a mixture of acid, ecstasy and marijuana. She did not record the questions asked of Mr. Chaulk but testified that it is her practice to ask open-ended questions, rather than those that suggest an answer.

[14] Dr. Syed Akhtar, forensic psychiatrist, called by the defence opined that there was a reasonable probability that Mr. Chaulk's mental state fulfilled the criteria of non-insane automatism on the night in question. Dr. Akhtar had interviewed Mr. Chaulk in September 2005 at the request of the defence. Mr. Chaulk told Dr. Akhtar that he had been a heavy user of marijuana, starting in his teens and had tried ecstasy once but did not like its effects. He said he had not consumed alcohol or drugs that night, before arriving at the party. He further advised the doctor that he drank eight "Cold Shots" (bottles of high alcohol beer) at the party. When he was feeling pretty good he was offered and took a piece of paper with something on it. He was told it was caffeine. He reported to Dr. Akhtar that he had smoked a marijuana joint before consuming the beer.

[15] At trial Mr. Chaulk denied that he had tried ecstasy in the past, contrary to his report to Dr. Akhtar, and said his marijuana consumption that night had been limited to a puff. He testified that he does not consume illicit drugs other than, occasionally, some marijuana. He said he had never taken ecstasy or LSD and did not know that LSD was sometimes delivered on paper as "blotter acid".

(i) Mr. Chaulk's Statements about Drug Consumption

[16] The first two issues on appeal relate to the judge's treatment of the evidence about Mr. Chaulk's consumption of intoxicating substances immediately prior to the events in question.

[17] Counsel had agreed that Dr. Dingle's records were admissible at trial for the truth of their contents. The Crown says the judge erred by ignoring this agreement and effectively denying the admission of Dr. Dingle's evidence. As a result, submits the Crown, the judge failed to consider the fact that Mr. Chaulk had reported drug use to Dr. Dingle, in conflict with his evidence of drug use at trial.

[18] In support of this submission the Crown refers to several points in the decision which, says the Crown, demonstrate that rather than weigh Dr. Dingle's evidence, the judge declined to admit it. The judge wrote:

> [28] By way of example only: To what extent, if at all, is his present memory a recount of what did in fact precede the event in MacDougall's apartment? Were his hospital history and utterances one of an operating mind so that the information allegedly given is reliable and become an admission against interest? Was his subsequent reporting of the pre-events, at the party, a genuine recall or something told to him that, in the circumstances, he accepted as true? The answers to these questions, in my view, would have provided some assistance in determining, without any reasonable doubt, the primary issue of his knowledge of what he ingested and his voluntary conduct. Additionally, in my opinion, the Crown neither canvassed nor fixed the period or the extent and duration of his dense amnesia for me to determine positively and without a doubt that his alleged reporting to anyone was that of an operating mind with bona fides recall. Consequently, neither can I fill those critical evidential gaps nor can I speculate.
>
> [29] Further, I do not doubt the accuracy of the hospital records concerning his reported history. However, the doctors, as would be expected in a busy Emergency Department as the QEII, did not have an individual recollection of the accused as a patient. They were relying upon the hospital records as past recollection recorded. The accused, however, testified that he did not recall giving the information on drug usage much less the type of drugs as he only can remember bits and pieces of the evening's events. Thus, in my opinion, there is insufficient evidence for me to determine positively and without a doubt that his alleged reporting was reliable and trustworthy. I say so when I consider that, according to Dr. Akhtar, despite these bits and pieces of memory it did not mean that for the whole episode he was consciously in control of his actions.
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> . . .
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> [31] However, I accept and find that the accused['s] behaviour was consistent with drug toxicity from a stimulant class of drugs. But critically, there is insufficient or no evidence for me to find, beyond a reasonable doubt, the specific, if at all, illicit drug or drugs that were in his body at the time of the

> incident as the Crown presented no pharmacological or toxicological screening evidence of his blood when at the hospital, or at all. Thus, in my opinion, and I conclude and find that scientifically and beyond a reasonable doubt, his alleged self-reporting of the ingestion of drugs, specified of unspecified, was never confirmed.
> (Emphasis added)

[19] The judge's references to the concern that Mr. Chaulk's account to Dr. Dingle was not of an "operating mind" does suggest that the judge was addressing the admissibility of the evidence, rather than weighing it.

[20] In the alternative, the Crown says if the judge did admit Dr. Dingle's evidence, he wrongly applied the criminal standard, "beyond a reasonable doubt", to the weighing of the individual pieces of evidence (**R. v. Morin**, [1992] 3 S.C.R. 286 at pp. 295-96).

[21] The Crown says there can be no doubt that the judge failed to consider Dr. Dingle's evidence when one looks at his repeated references to there being no evidence of drug use contradicting that of Mr. Chaulk:

> [32] Although I have some problems with the accused version of events surrounding his conduct of his drug consumption that led to his bizarre behaviour, he has raised the probability, in the absence of any contradictory evidence, that he might be telling the truth. In any event, I accept and find that he has laid the proper foundation to rebut the normal presumptions of volition and mental capacity to commit the offences. Consequently, I think that the burden remains on the Crown to establish beyond a reasonable doubt that the accused defence can succeed and that he comes within the ambit of the *Criminal Code*, s. 33.1. *R.v. Vickberg*, [1998] B.C.J. No. 1034 (B.C.S.C.).See Also *R. v. W.(D.)*, [1991] 1 S.C.R. 742, *Rabey v. The Queen* (1980), 54 C.C.C. (2d) 1 (S.C.C.), at p. 26.
>
> . . .
>
> [35] However, I have only the sworn, uncontradicted evidence of the accused that when he indicated that he was bored an acquaintance gave him a "wake up". He knew how to recognize a "wake up" as he, in the past, had used it to keep him alert and awake with no emotional or physical adverse effects. According to him, a "wake up" was a caffeine pill "a little pill equivalent to taking a cup of coffee." and "not very big, square, white, a capsule type pill." In any event, he asserted that the acquaintance gave him a piece of paper with something on it representing it to be a "wake up". In his view, the item looked like a "wake up" with which he

> was familiar and he thought that it was, in fact, a "wake up". He swore that he was not familiar with "acid" or the form in which it is dispensed. Similarly, he swore that he did not take any acid or other intoxicating illicit drugs.
>
> [36] Similarly, The police investigation disclosed that in the apartment where the accused and his friends partied, the walls were damaged and the room was in disarray. However, the Crown presented no evidence to shed light on or to disclose the cause of the damage to the walls, the activities of the persons present and what, if any, drugs were consumed at the party and by whom. As a result, I have only the sworn, uncontradicted version of events by the accused who stated that, at the party, they did not consume any illicit drugs, except perhaps marijuana.
> (Emphasis added)

[22] Mr. Chaulk told Dr. Dingle that he had consumed a mixture of acid, ecstasy and marijuana. Respectfully, contrary to the statements of the trial judge, this was some evidence contradicting that of Mr. Chaulk that he had consumed only some beer and, what he thought was, a wake-up pill. Mr. Chaulk's professed lack of knowledge of what drug(s) he had taken was central to his defence. It was incumbent upon the judge to weigh Dr. Dingle's evidence along with all of the evidence of Mr. Chaulk's drug consumption. Instead, with respect, he excluded Dr. Dingle's evidence from consideration. Consequently, the judge did not address the material inconsistencies in the evidence arising from the trial testimony of Mr. Chaulk and the evidence of what he disclosed to Dr. Dingle as contained in her records.

[23] I do not accept Mr. Chaulk's explanation that the judge did, in fact, weigh the whole of the evidence but simply used unfortunate language. The reasons for judgment here were not a hastily delivered oral following trial, where misstatements can occur. The judge reserved his decision and wrote at length. The reasons demonstrate that the judge did not consider all of the evidence on a material issue. Alternatively, on a most generous reading of the reasons, the judge erred by applying the criminal standard to the individual items of evidence.

[24] There was evidence, in addition to Dr. Dingle's, contradicting Mr. Chaulk's own account of his drug use that night. Mr. MacDougall testified that when he subdued Mr. Chaulk during his rampage he asked him if he had been doing drugs, to which Mr. Chaulk responded "Yes, lots of them". The judge's references to there being no evidence of consumption contradicting that of Mr. Chaulk noted

above, raise equally the inference that he declined to admit and therefore weigh the evidence of Mr. MacDougall.

[25] I cannot say that had the trial judge admitted and properly weighed the contradictory evidence of consumption the verdict would necessarily have been the same (**R. v. Vézeau**, [1977] 2 S.C.R. 277, [1976] S.C.J. No. 71 (Q.L.)).

[26] While the appeal must be allowed on these grounds it is appropriate here to consider the further ground as well.

(ii) The Legal Test for Self-Induced Intoxication

(a) The History - Automatism and Intoxication

[27] Automatism is a term used to describe unconscious, involuntary behaviour by a person who, though capable of action, is not conscious of what s/he is doing. (**R. v. Rabey**, [1980] 2 S.C.R. 513, [1980] S.C.J. No. 88 (Q.L.)). The defence of automatism is successfully invoked in circumstances of a criminal act committed unconsciously. Automatism further divides into that caused by a disease of the mind and that which is not - the latter referred to as non-insane automatism. Automatism resulting from a disease of the mind is a "mental disorder" recognized as a defence in s. 16 of the **Criminal Code**.

[28] Non-insane automatism, as explained by Cory J., writing for the majority of the Court in **R. v. Daviault**, [1994] S.C.J. No. 77 (Q.L.),;[1994] 3 S.C.R. 63 at p. 75, provides a defence to criminal behaviour because it speaks of an absence of intention to perform the prohibited act:

> With this concept of a crime established it soon came to be accepted that in certain situations a person who committed a prohibited physical act still could not be found guilty. A number of examples come to mind. For instance, if a person in a state of automatism as a result of a blow on the head committed a prohibited act that he was not consciously aware of committing, he could not be found guilty since the mental element involved in committing a willed voluntary act and the mental element of intending to commit the act were absent. Thus neither the requisite *actus reus* or *mens rea* for the offence was present. The result would be the same in the case of a person who had an unexpected reaction to medication which rendered him totally unaware of his actions. Similarly, if an accused, during an epileptic seizure, with no knowledge of what he was doing, shot and

> killed a victim, he could not be found guilty of murder since both the ability to act voluntarily and the mental element of the intention to kill were absent. In all these instances the accused simply could not have formed the requisite intention to commit the prohibited act. Further, it was long ago recognized that a person suffering from a mental illness coming within the scope of what is now s. 16 of the *Criminal Code* could not be found guilty. That result may have arisen either from the recognition of the inability of a mentally ill accused to form the requisite intention, or from the realization that the nature and quality of the prohibited act was not appreciated by the accused.

[29] LaForest J., writing for the majority of the Court in **R. v. Parks**, [1992] 2 S.C.R. 871, S.C.J. No. 71 (Q.L.), explained automatism as negating the element of voluntariness (at p. 896):

> Automatism occupies a unique place in our criminal law system. Although spoken of as a "defence", it is conceptually a sub-set of the voluntariness requirement, which in turn is part of the *actus reus* component of criminal liability. A useful introduction is found in the dissenting reasons of Dickson J. (as he then was) in *Rabey v. The Queen*, [1980] 2 S.C.R. 513, at p. 522:
>
> > Although the word "automatism" made its way but lately to the legal stage, it is basic principle that absence of volition in respect of the act involved is always a defence to a crime. A defence that the act is involuntary entitles the accused to a complete and unqualified acquittal. That the defence of automatism exists as a middle ground between criminal responsibility and legal insanity is beyond question. Although spoken as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act.
>
> One qualification to this statement should be noted. When the automatistic condition stems from a disease of the mind that has rendered the accused insane, then the accused is not entitled to a full acquittal, but to a verdict of insanity; see *Bratty v. Attorney-General for Northern Ireland*, [1963] A.C. 386 (H.L.), at pp. 403-4 and 414. The condition in that instance is referred to as insane automatism, and the distinction between it and non-insane automatism is the crucial issue in this appeal.

[30] Historically, intoxication was not a defence to any crime. As the criminal law evolved, this rule was gradually relaxed and the defence of intoxication was permitted for crimes of specific but not general intent (**R. v. Leary**, [1978] 1 S.C.R. 29, [1977] S.C.J. No. 39 (Q.L.)). With the judgment in **R. v. Daviault**,

supra, the majority of the Court recognized that in situations of intoxication so extreme as to be akin to automatism an accused will be incapable of either performing a willed act or of forming the minimal intent required even for a general intent offence. Thus the defence of extreme intoxication was recognized for general intent crimes.

[31] The case law is inconsistent as to whether extreme intoxication which produces a state "akin" to automatism is simply a sub-set of "non-insane" automatism or is treated as a separate condition (see, for example, **R. v. Revelle** (1979), 48 C.C.C. (2d) 267 (Ont. C.A.), aff'd [1981] 1 S.C.R. 576 and **R. v. Daviault**, **supra**). The distinction is not germane here.

(b) Self-Induced Intoxication and Criminal Code s. 33.1

[32] The recognition of the defence of extreme intoxication for general intent crimes in **Daviault**, **supra**, provoked a legislative response in the form of s. 33.1 of the **Criminal Code** which precludes that defence in the case of self-induced intoxication where the offence charged includes as an element, assaultive behaviour:

> 33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).
>
> (2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
>
> (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person. (Emphasis added)

[33] Both parties approached this case as one of extreme intoxication. Once it was accepted by the trial judge that Mr. Chaulk was acting in a state akin to

automatism, the remaining issue was whether s. 33.1 precluded him from arguing that he did not have the requisite mental element for the “assault” or that his conduct was not voluntary due to his automatic state. The constitutionality of s. 33.1 was and is not challenged. At issue is the meaning of “self-induced intoxication”.

[34] It was common ground that the “wake-up pill” was, in fact, some form of intoxicating substance. The Crown said Mr. Chaulk’s extreme intoxication was self-induced within the meaning of s. 33.1 because he should have known in accepting the “pill” he risked intoxication. Mr. Chaulk said he honestly thought he was taking a caffeine pill and, therefore, his state was not “self-induced”.

[35] “Self-induced intoxication” as used in s. 33.1 was considered by Owen-Flood J. in **R. v. Vickberg**, [1998] B.C.J. No. 1034 (Q.L.) (S.C.). Vickberg was charged with attempted murder (specific intent) and assault with a weapon (general intent) in stabbing the victim. Vickberg raised the defence of automatism. The question was did he commit the act in a state of non-insane automatism (or extreme intoxication) induced by the over-consumption of prescription drugs. It was the Crown’s position that by reason of s. 33.1 he had no defence to the general intent offences charged.

[36] Vickberg, a heroin addict, had been prescribed Clonidine and Imovane to alleviate his addiction. He awoke on the day in question depressed and hopeless. He had no heroin. He took six to eight Clonidine tablets and did not recall taking any further pills. In fact, he had taken 60 Clonidine and 20 Imovane tablets as well as one Paxil. In the course of determining whether the intoxication had been self-induced Owen-Flood J. set out the following test:

> 68 The defence contends that "the act of self-induced intoxication is the predicate act upon which this section purports to establish moral blameworthiness." Clearly, the term "self-induced" was intended to be given meaning, otherwise the word "intoxication" alone would have been used. I am in agreement with the defence that "self-induced" must mean something more than simply the accused himself ingesting the pills, as opposed to someone else administering them. I am satisfied that <u>for intoxication to be self-induced, the accused must intend to become intoxicated, either by voluntarily ingesting a substance knowing or having reasonable grounds to know it might be dangerous, or by recklessly ingesting such a substance</u>. I am unable to find, beyond a reasonable doubt, that Vickberg's intoxication was self-induced as this term is

> used in s. 33.1. Therefore, I hold that s. 33.1 is inapplicable to the facts of this case.
> (Emphasis added)

[37] The **Vickberg** definition has been widely cited in secondary sources, including in *Guide to Criminal Evidence* (Hon. Jean-Guy Boilard (Carswell: Cowansville, 1991), updated to March 2007, at 0.288); C.E.D. Criminal Law – Defences IV.5(c)§214, and in the various annotated criminal codes.

[38] The meaning of self-induced intoxication was considered, as well, in **R. v. Brenton**, (1999), 180 D.L.R. (4th) 314 (N.W.T.S.C.), [1999] N.W.T.J. No. 113 (Q.L.), rev'd (on other grounds) at [2001] N.W.T.J. No. 14 (Q.L.)(C.A.). This was a summary conviction appeal. There the accused, a boarder at the victim's home, after smoking some marijuana with her, sexually assaulted her. His defence was automatism caused by extreme intoxication. At trial there was expert evidence about his likely extreme intoxication, which the trial judge found sufficient to raise a reasonable doubt. Both the trial judge and Vertes J., on the appeal, rejected the appellant's argument that because he consumed a relatively small amount of marijuana, it could not be said that he intended to become intoxicated or should have known that he would become intoxicated. He smoked the marijuana simply to relax. Because the result was an unintended and unexpected outcome, the intoxication, said the accused, was not "self-induced". In response to this argument Vertes J. stated the test for "self-inducement" this way:

> [31] I cannot agree with the appellant's submission. Generally speaking, <u>if the ingestion of a drug (or alcohol) is voluntary and the risk of becoming intoxicated is within the contemplation or should be within the contemplation of the individual, then any resulting intoxication is self-induced</u>. Involuntary intoxication is generally confined to cases where the accused did not know he or she was ingesting an intoxicating substance (such as where the accused's drink is spiked) or where the accused becomes intoxicated while taking prescription drugs and their effects were unknown to the accused. This is fairly basic law.
>
> . . .
>
> [34] In this case, the appellant knew that the substance he was ingesting was marijuana. He voluntarily smoked it. He knew that it could have an intoxicating effect. Indeed it is reasonable to conclude that he intended it to have an intoxicating effect to some degree (he wanted to relax so he could sleep). He

> expected it to have an effect on him. What he did not expect, or intend, was the extent of that intoxicating effect. In my opinion, this was a situation of self-induced intoxication and the trial judge came to the correct conclusion. (Emphasis added)

[39] Trial counsel, as well as the judge here, accepted the **Vickberg** definition of "self-induced intoxication". The Crown says the judge, although purporting to apply the **Vickberg** test did not in fact do so and in that regard he erred.

[40] The judge said:

> [41] However, for me to be satisfied beyond a reasonable doubt that the accused intoxication was self-induced the Crown must show by some reliable evidence that he voluntarily ingested a substance knowing or having reasonable grounds to know it was dangerous or that he, with this knowledge, was reckless as to the consequences. I think that it is not enough to say that the accused "voluntarily" ingested an illegal substance and was "reckless" as to the effects of the drug after consumption. It therefore seems to me that in order to establish self-induced intoxication, the Crown must prove that the accused not only knew what he took, but that he intended to take it, knew the effects of consumption or was reckless as to the effects and that the purpose of taking it was his intention to experience its effect, known or unknown. . . . (Emphasis added)

[41] If the judge is intending to say that the substance must be illegal and that the accused must know precisely what substance s/he took, I would respectfully disagree. Nor would I agree that the Crown must prove that his or her purpose in taking the substance was to experience its effects.

[42] In **R. v. King**, [1962] S.C.R. 746, the accused was convicted of driving a motor vehicle while his ability to do so was impaired by a drug, contrary to s. 223 of the **Criminal Code**. Prior to the offence King had received an anaesthetic at his dentist's office preparatory to the extraction of two teeth. Before the procedure he signed a form warning him not to drive after the procedure and was verbally warned again when the extraction was complete. However, his evidence that he did not remember the warnings and was unfamiliar with the effects of the drug and did not know he was impaired when he drove his car was accepted by the trial judge. In dismissing the Crown appeal from the acquittal, Ritchie J., for the Court, considered the meaning of voluntary impairment. He wrote at pp. 963-64:

> If the driver's lack of appreciation when he undertook to drive was induced by voluntary consumption of alcohol or of a drug which he knew or had any reasonable ground for believing might cause him to be impaired, then he cannot, of course, avoid the consequences of the impairment which results by saying that he did not intend to get into such a condition, but if the impairment has been brought about without any act of his own will, then, in my view, the offence created by s. 223 cannot be said to have been committed.
>
> . . .
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> It seems to me that it can be taken as a matter of "common experience" that the consumption of alcohol may produce intoxication and, therefore, "impairment" in the sense in which that word is used in s. 223, and I think it is also to be similarly taken to be known that the use of narcotics may have the same effect, but if it appears that the impairment was produced as a result of using a drug in the form of medicine on a doctor's order or recommendation and that its effect was unknown to the patient, then the presumption is, in my view, rebutted.

[43] **R. v. Mavin** [1997] N.J. No. 206 (Q.L.)(C.A.); 154 Nfld. & P.E.I.R. 242 concerned a conviction for impaired driving. Mavin consumed what he thought was one valium pill, drank a beer, and settled down to watch television. His next recollection was driving a car and bumping into the rear of an automobile stopped at a crosswalk. When the accused returned home, he found bottles indicating he had drunk four beers and had taken four sleeping pills, not valium. It was his position that his intoxication was involuntary. He was convicted at trial and his summary conviction appeal was dismissed. On further appeal, in addressing the question of “voluntariness” the court citing the above passage from **R. v. King**, **supra**, accepted the Crown’s theory of voluntary intoxication. Writing for the court, Marshall J.A. said:

> [51] Crown counsel counters in arguing that "voluntary" in the context of s. 253(a) refers to consumption and the mens rea of the offence is voluntary consumption, i.e. self induced intoxication. He contends it is sufficient if an individual takes alcohol or a drug knowing what he or she is consuming. Such was the situation in this case, he points out, inasmuch as the evidence establishes that Mr. Mavin knowingly and deliberately consumed beer and a pill, which he intended to be a double dosage of the valium he had grown accustomed to taking from his spouse's store of medications, and that he had admitted knowing such a course was a dangerous one. The Crown maintains Mr. Mavin's resulting intoxication has, accordingly, to be deemed self-induced or voluntary and he

> must, under the law, accept the consequence which flow out of his actions. ...
> (Emphasis added)

[44] In **R. v. Rushton**, [1963] 1 C.C.C. 382 (N.S.S.C.A.D.) a taxi driver suffering from a cold took several times the normal dosage of cough medicine notwithstanding labelling which advised that the medicine contained codeine and chloroform and cautioned a limited dose. He became involved in a car accident and was convicted of impaired driving. Although there was evidence that the taxi driver had not read the label, this Court applied **King**, **supra** and dismissed the appeal, agreeing with the trial court that the consumption of the intoxicating substance was voluntary.

[45] Thus, I conclude, since **R. v. King**, **supra** the courts have consistently held that "voluntary intoxication" means the consuming of a substance where the person knew or had reasonable grounds for believing such might cause him to be impaired. (See also **R. v. McDowell** [1980] O.J. No. 488 (Q.L.); 52 C.C.C. (2d) 298 (Ont. C.A.) *per* Martin J.A. at para. 14) In **Regina v. Mack** (1975), 22 C.C.C. (2d) 257 (Alta. S.C.A.D.) Prowse J.A., commenting upon **R. v. King**, **supra** at p. 264 said:

> The effect of this decision is that if an accused knew or had any reasonable grounds for believing that the consumption of drugs or alcohol might cause him to be impaired, such evidence supports the conclusion that his condition was due to the voluntary consumption of drugs or alcohol and that intoxication voluntarily induced by itself does not rebut the rebuttable presumption that a man intends the natural consequences of his acts.

[46] Nor must the accused contemplate the extent of the intoxication or intend a certain level of intoxication. In **R. v. Honish** (1991), 68 C.C.C. (3d) 329; [1991] A.J. No. 1057 (Q.L.) (Alta.C.A.), aff'd **R. v. Honish**, [1993] 1 S.C.R. 458; [1993] S.C.J. No. 12 (Q.L.), the accused, after consuming alcohol had tried to kill himself by taking 45 tablets of an anti-depressant and 15 tablets of a sleeping pill. He had no memory thereafter of his involvement in a motor vehicle accident. The defence argued that the intoxication was involuntary because he did not know and had no reasonable grounds for believing that the drugs would cause him to be impaired. The trial judge found, as a fact, that Honish was warned by his doctor not to consume alcohol or other medication while taking the drugs and that there was a

warning label on the bottle. Fraser J.A., as she then was, writing for the court, said at p. 339:

> . . . The law concerning responsibility for one's acts following voluntary ingestion of intoxicating substances does not require that the consumer know to a nicety what the effect of the intoxicating substances will be. It is enough that he knows it might be dangerous and is recklessly indifferent with respect to ingestion or as to warnings relating to the effects of ingestion: *R. v. Rushton* [1964] 1 C.C.C. 382, 48 M.P.R. 271 (N.S.C.A.); *R. v. Szymusik* (1972) 8 C.C.C. (2d) 407, [1972] 3 O.R. 602, 19 C.R.N.S. 373 (C.A.) (Ont. C.A.).] In this case, the evidence supports the conclusion that Honish's consumption of the intoxicants falls within the category of reckless indifference.

[47] Synthesizing these authorities, the two judges dealing expressly with s. 33.1 would both apply an objective element to the issue of self-induced intoxication: **Vickberg**, **supra**, - " . . . voluntarily ingesting a substance knowing or having reasonable grounds to know it might be dangerous . . . "; **Brenton**, **supra**, - ". . . the risk of becoming intoxicated is within the contemplation or should be within the contemplation of the individual...". This approach is consistent with the cases pre-dating the introduction of s.33.1: **R. v. King**, **supra**, in giving meaning to ‘voluntary impairment', - " . . . knew or had any reasonable grounds for believing might cause him to be impaired..."; **R. v. McDowell, supra**, - " . . . knew or ought to have known that his ability might thereby be impaired.". I would therefore express the test for self-induced intoxication as follows:

(i) The accused voluntarily consumed a substance which;
(ii) S/he knew or ought to have known was an intoxicant and;
(iii) The risk of becoming intoxicated was or should have been within his/her contemplation.

[48] As I would allow the appeal on other grounds it is unnecessary to consider here how the judge's misstatement of the test would have affected the result.

DISPOSITION

[49] I would allow the appeal and order a new trial.

Bateman, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.