IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Chaulk, 2006 NSPC 48

Date: Date 20061016
Docket: 1550122
1550123
1550124
1550125
Registry: Halifax

Between:

Her Majesty the Queen

v.

Shane Lee Chaulk

Judge:	The Honourable Judge Castor H.F. Williams
Heard:	October 4, 5, 2006
Oral Decision:	October 16, 2006
Counsel:	Timothy O'Leary, counsel for the Crown Roger Burrill , counsel for the Defendant

INTRODUCTION

By the Court:

[1] A strange, disquieting and scary incident occurred in James MacDougall's apartment in the early morning of May 29, 2005. It all began after he had invited a young female neighbour, who was seeking help, into his apartment and when a young man, angry and agitated, smashed down his front door, entered, destroyed some property, threatened to kill him and his children and attacked him.

[2] After further illogical perambulations inside the apartment the young man who was at times aggressive, disrobed completely, was naked, was perspiring profusely and his body felt hot upon contact. However, after MacDougall had contained the situation and upon his arrest the man was assessed and evaluated at the Queen Elizabeth II Health Science Centre, Emergency Department where the medical opinion was that his behaviour was consistent with drug toxicity from a stimulant class of drugs.

[3] On completing an investigation, the police have charged the young man, now identified as the accused, Shane Lee Chaulk, with assault; uttering a death threat; break and enter and committing the indictable offence of assault, and mischief. The accused, however, does not deny that the allegations did occur but stated that he cannot recall his involvement, or at all.

[4] Further, he only has bits and pieces of memory recollection but, overall he suffered from dense amnesia concerning his conscious involvement, if at all. As a result, he has presented the defence of non-mental disorder automatism. This case is therefore a consideration of the applicability of the ***Criminal Code***, s.33.1 and the defence of non-mental disorder automatism.

Summary of the Relevant Evidence

(a) ***On behalf of the Crown***

[5] James MacDougall resided with his two children in an apartment building here in the Halifax Regional Municipality. His neighbours in an

adjacent apartment were two young ladies whose names he did not know. In the early morning of May 29, 2005 his daughter woke him to the sound of yelling and screaming emanating from his neighbours' apartment. When he opened his door, he saw one female neighbour outside her apartment soliciting his help. Assessing that the situation was urgent he invited her into his apartment and dialed 911**.**

[6] While he was on the phone, he heard a male voice in the outside hallway shouting a female name that he assumed was that of his neighbour. Likewise, he heard a loud pounding noise on his entrance door and, as a result, the door smashed open and a large, angry young man, a stranger, ran into the apartment. On entry, the stranger went into the living room and intentionally swept to the floor items that were on a desk**.** Additionally, when MacDougall yelled at him to stop, the man rushed at him with arms outstretched, made contact, pushed him backwards and yelled out a threat to kill him and his children.

[7] MacDougall pushed the man backward where he stood, disrobed completely and, in his naked state, again advanced. MacDougall pushed him

into a chair. When he sat in the chair, the young lady who was hiding behind it got up and tried to escape but he grabbed her by her blouse. However, he let go upon MacDougall's demand. During more episodes of exhibiting degrees of aggressive behaviour and damaging property, MacDougall observed that the man was at times agitated, was perspiring profusely and on contact, his body felt warm. Likewise, he displayed variable mood swings. Thinking that this was unusual, MacDougall enquired of him whether he had taken any drugs. He responded that he had and added that he had "taken everything." Eventually, MacDougall controlled the situation and when the police arrived they took custody of the naked perspiring stranger.

[8] Because of the stranger's persistent agitated bizarre behaviour, irrational babbling and physical condition, the police took him to the Queen Elizabeth II Health Science Centre Emergency Department for any required medical intervention. His hospital health management consisted of being initially restrained, anti-psychotic medications to sedate him and cardiology assessments. The hospital records indicated a patient's history of an "overdose on cocktail of illicit drugs including marijuana, cocaine, LSD, mushrooms and possibly others."

(b) On behalf of the accused

[9] The accused testified. Essentially, he was invited to a party where he met with some friends and strangers. There, he consumed some beers and played video games. Also, he communicated, by telephone, with his mother on two occasions to inform her of his whereabouts and his plans for the evening. However, he expressed that he was feeling bored and an acquaintance offered him a “wake up” which he described as a caffeine pill, “a little pill equivalent to taking a cup of coffee.” A further description that he gave of the “wake up” was that it was “not very big, square, white, a capsule type pill.” Nonetheless, he was familiar with a “wake up” as, in the past, he had consumed it to keep him alert and awake.

[10] In the circumstances, he accepted and ingested the “wake up”. This was about 0100 hours. After consuming the “wake up” he continued to drink more beers but soon began to feel unusual as his heart was hurting and things began to look weird and fuzzy. He vomited and thought that he was

having a heart attack as his heart felt like it was bursting out of his chest. He felt scared and nervous. Running out of the apartment into the hallway, he unsuccessfully tried to call his mother but he asked the people in the apartment to call 911 as he was afraid that he was having a heart attack. He has no further memory of events until he awoke in the hospital.

[11] Nonetheless, he did have a recollection of being in a hallway and seeing one of his friends standing with Super Mario when he asked them to call 911. Yet, he had never seen MacDougall before this event and did not recall being in MacDougall's apartment. Likewise, he cannot recall having contact with MacDougall's neighbour. Further, he had no idea where his clothes were and he had no recollection of doing anything with them.

[12] In cross-examination he admitted that it was unwise to mix drugs and alcohol. Further, although he was aware of many types of drugs, he was not familiar with the term "blotter" or that "acid" came in a paper form. However, he was not sure that what he ingested was a pill as it was some type of white capsule, but he thought that he knew what he was taking. However, he did know the difference between a pill and a piece of paper.

[13] Even though he had no specific memory of what happened that evening he however could recall bits and pieces of what occurred. Realizing that he was charged with the present offences he visited Dr. Syed Akhtar, a forensic psychiatrist, in preparation for his defence. As a result, his reporting of the event to the doctor was truthful and as accurate as he could remember. Furthermore, his memory of the evening's events up to the time that he consumed the "wake up", was not impaired by any alcohol or drugs.

Opinion Evidence

(a) *On behalf of the Crown*

[14] Dr. Margaret Dingle was one of the attending Emergency Room doctors. She obtained a history from the accused and noted that he was admitted for agitation and confusion. Similarly, she stated that the physical findings were that he had consumed stimulant chemicals or drugs. As a result, they gave him anti-psychotic sedative medications. Likewise, on her enquiry, he informed her that he had ingested acid, ecstacy and marijuana. She also

expressed that as there were concerns about his heart condition because of the effects of the ingested drugs, they also consulted with a cardiologist. Although they did not do any tests to determine what drug was in his body, based upon his hospital medical information and test results she opined that his behaviour was consistent with drug toxicity from a stimulant class of drugs.

(b) On behalf of the Accused

[15] Dr. Syed Akhtar is a forensic psychiatrist. He explained his approach in determining the accused mental state on the evening in question. After conducting an interview with the accused he opined that there was a high probability that the accused mental state fulfilled the criteria of automatism. Here, he was satisfied that the acts of the accused were the result of an external agent, drugs or alcohol. Further, he was satisfied that the acts were uncharacteristic, inappropriate, contextually non-goal directed and without any rational motive. Moreover, the accused lack of memory recall was genuine and suggested that he suffered from dense amnesia and he was not in conscious control of his actions.

[16] The accused medical records also assisted the expert in arriving at his conclusions. As there was nothing in the accused mental structure for him to behave as he did the doctor opined that there was a high probability that at the time of the offence the accused was in a state of non-mental disorder automatism. The doctor's report is tendered and admitted as Exhibit 5.

Issues

[17] I think that the real issue is not whether the accused was in a state of non-mental disorder automatism at the time of the alleged offences but rather did he voluntarily consume illicit drugs or was reckless concerning his ingestion of illicit drugs to the extent that his pre-offence conduct accords him no exemption from the provisions of the ***Criminal Code*** s.33.1, or a valid defence? In other words, was he in a state of self-induced intoxication? Or, did he recklessly ingest a substance that he had reasonable grounds to know might be dangerous and which, as a result, rendered him unaware of or incapable of consciously controlling his behaviour?

Relevant Legislation

The ***Criminal Code***, s. 33.1 states:

> **33.1(1) When defence not available**
> 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).
>
> **33.1(2) Criminal fault by reason of intoxication**
> 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.
>
> **33.1(3) Application**
> 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.

Theories of the Accused and the Crown

(a) Of the Accused

[18] The theory of the defence, as I understand it, was that the accused did not voluntarily consume any substance that he reasonably knew would trigger the state of not being able to control his actions. Moreover, in the set of circumstances, he cannot be said to be willfully blind as he genuinely thought that he was consuming a “wake up” that in the past, emotionally and physically, had benign effects upon him.

[19] Consequently, with respect to the ***Criminal Code***, s.33.1(2) he has rebutted the presumption of the voluntary consumption of intoxicating substances to be exempt liability for the charges of assault, break and enter and committing assault and the uttering of death threats. Similarly, concerning the mischief charge, he has proved on the balance of probabilities, supported by expert evidence, that his state of mind was non-mental disorder automatism at the time of that offence and which would afford him, in the circumstances, a valid defence to that charge.

(b) Of the Crown

[20] On the other hand, the Crown essentially submitted that the accused was at a party and was emboldened, through his consumption of alcohol to experiment with illicit drugs. Because he took something from an acquaintance without asking any questions he voluntarily ingested a non-prescribed drug and was reckless as to the consequences of his voluntary actions. Furthermore, he was coherent and could converse with the doctors at the hospital and his utterances, as allegedly reported and recorded, can be considered as admissions against interest**.** Additionally, his testimony was inconsistent with what he stated to Dr. Akhtar concerning his drug consumption and that affected his credibility and reliability on the issue of voluntariness and self-induced intoxication. Therefore, he is legally liable on all counts on the information.

Finding of Facts and Analysis

[21] First, I think that I should separate the accused confused state of mind as was observed after he was in MacDougall's apartment and his apparent lucid state of mind and his recall of the events of the early part of the evening when he was at the party. It is clear, and I do not doubt that nothing impaired his memory recall of events before and immediately after he consumed the purported "wake up". He recalled vividly going to the party and who were present. Likewise, he recalled speaking to his mother and what they discussed. Furthermore, he recalled drinking beers and playing video games and then poker. Additionally, he recalled the acquaintance giving him the purported "wake up" that he voluntarily accepted and voluntarily ingested. There was no coercion and all seemed in order.

[22] Second, I accept his testimony that he cannot recall what occurred for a period of time after he ingested the "wake up" and, if anything occurred in MacDougall's apartment he was not in conscious control of his actions and therefore acted involuntarily. His testimony, on that point, is supported by Dr. Syed Akhtar, the forensic psychiatrist. According to Dr. Akhtar, upon his

interview of the accused and the review of relevant medical and investigation documentation he was satisfied that the acts of the accused were the result of ingestion of drugs or alcohol, external agents.

[23] Furthermore, Dr. Akhtar was satisfied that the reported acts of the accused were uncharacteristic, inappropriate, contextually non-goal directed and without any rational motive. Moreover, in his opinion, the accused lack of memory recall was genuine and, in effect, he suffered from dense amnesia and he was not in conscious control of his actions. However, as there was nothing in the accused mental structure for him to behave as he did the doctor opined that there was a high probability that at the time of the offence the accused was in a state of non-mental disorder automatism.

[24] Here, the evidence is that the accused appeared to be confused, acted irrationally; had constant mood swings from being very angry and aggressive and less so; acted without motive and was non-goal directed and appeared under the influence of some stimulant drug. I accept and find this body of evidence to be credible, reliable and trustworthy. Consequently, in my opinion, supported by the expert psychiatric evidence, the accused

submission of the facts has an air of reality and he has satisfied me on the evidentiary burden for the defence of automatism as, on the balance of probabilities, I find that he acted involuntarily. See: ***R.v. Cinous,*** [2002] 2 S.C.R.3, 2002 SCC 29.

[25] Additionally, the evidence is that the accused, at the time, not only appeared confused but that he perspired profusely and, on contact, his body felt warm and slippery. Besides, for no apparent reason, he disrobed completely and stood naked in the home of a stranger. Likewise, he did not seem to understand, when under arrest, what the police was telling him and his conduct would swing from being compliant to noncompliant to commands. Also, be was babbling and was saying that he was “on the bridge of the [star ship] Enterprise,” and about his space adventures. I accept and find this body of evidence to be credible, reliable and trustworthy.

[26] In Dr. Akhtar’s opinion, the accused conduct was not goal directed. MacDougall was a total stranger and, contextually, the accused had no motive to break down his door, threaten or attack him. Furthermore, he was satisfied that the acts of the accused were uncharacteristic, inappropriate and without

any rational motive and probably triggered by the external cause of his ingestion of drugs and alcohol. Moreover, he has no history of similar involuntary conduct and there was nothing in his mental structure for him to behave as he did. Consequently, according to the expert, there was a high probability that the accused, at the time of the offences, was in a state of non-mental disorder automatism. As a result, I am satisfied and find that on the balance of probabilities, the accused state of automatism was one of non-mental disorder automatism. See: ***R.v. Stone***, [1999] 2 S.C.R. 290, 134 C.C.C.(3d) 353, 24 C.R. (5th) 1.

[27] However, in my opinion, the critical issue is not his accepted state of non-mental disorder automatism but how he got into that mental state. Although I think that there may be issues of credibility and reliability concerning the accused pre-version recollection of the events, I do not doubt the medical opinion that he suffered from dense amnesia. The Crown, however, and in my view, did not challenge whether this amnesia extended over his whole evening's memory recall or only was confined to his unawareness of events pertaining to the alleged incidents.

[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.

[30] Nonetheless, I think that the critical issue of self-inducement, recklessness or the voluntary or involuntary ingestion of any intoxicants, if at all, is a question of fact that can only be answered satisfactorily by an assessment of the total evidence. Therefore, in my opinion, the fact that the hospital records indicate, for the purposes of his health care management while a patient, that he suffered from an overdose on drugs, neither addressed nor answered the critical issue of how the drugs got into his body. From the medical perspective his physical symptoms and appearance indicated to experienced emergency room doctors that his condition was consistent with the consumption of stimulant chemicals or drugs. Blood work

was done but the immediate medical concern, after the administration of anti-psychotic drugs, was the condition and functioning of his heart.

[31] However, I accept and find that the accused 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.

[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.

[33] The Crown's position was that the accused voluntarily ingested an illicit substance and was reckless as to the consequences. Because the accused accepted a non-prescribed drug from an acquaintance without asking questions, he must accept the consequences of his voluntary ingestion. The taking of the drug was self-induced and while in this state of self-inducement his attack on MacDougall, smashing down his door and attacking him and threatening him was a marked departure from the standard of reasonable care generally recognized in Canadian society.

[34] I do not doubt that the accused smashed down MacDougall's front door and entered his apartment. Further, I do not doubt that the accused damaged property belonging to MacDougall and that he also assaulted and threatened to kill him and his children. I accept and find accordingly.

[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.

[37] I, however, think that to fall within the ambit of s.33.1 the accused condition must amount to self-induced intoxication and his conduct must be a marked departure from the standard of reasonable care generally recognized in Canadian society. In ***R.v. King*** (1982), 67 C.C.C. (2d) 549, (Ont.C.A.), Martin J.A. delivering the judgment of the Court said:

> The law has always distinguished between voluntary or self-induced intoxication and involuntary intoxication. Where automatism is produced by self-induced intoxication, only the defence of drunkenness should be left with the jury: R. v. Hartridge, [1967] 1 C.C.C. 346, 57 D.L.R. (2d) 332, 48 C.R. 389. On the other hand, automatism produced by involuntary intoxication is a complete defence. Involuntary intoxication may occur: (a) where a person is made intoxicated by the fraud or stratagem of another. e.g., where, unknown to him, someone has placed a drug in his drink or (b) where he has taken a drug bona fide prescribed by his physician without being aware of the effect: see R. v. King (1962), 133 C.C.C. 1, 35 D.L.R. (2d) 386, [1962] S.C.R. 746; Smith and Hogan, Criminal Law, 4th ed. (1978), p. 186.

[38] In ***R.v. Hornish*** (1991), 68 C.C.C.(3d) 329 (Alta. C.A.), cited by Owen-Flood J., in ***Vickberg***, *supra*. , at para 54, Fraser J.A., delivering the judgment of the Court stated at p. 338:

> To prove that an accused voluntarily consented to the consumption of intoxicating substances, the Crown must prove two things: first, that the accused was aware of the fact of consumption and secondly, that he actively agreed to it.

[39] The Court continued 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.).

[40] Here, it may well be, as stated by the accused, that the “wake up” was not an intoxicant. But, it is not for me to engage in the classification of drugs as intoxicants or non-intoxicants without the benefit of some medical evidence. What matters here is that whatever substance the accused ingested left him in a state of impaired mental function.

[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. See: ***Hornish***, *supra.*

[42] Here, the accused testified that his acquaintance represented to him that he was receiving a "wake up". The evidence supports the inference that the accused, on being bored, as he was playing poker and video games, wanted to have something to keep him alert and awake. A "wake up", from his experience, would do it. So, he accepted what he believed was "wake up" and his purpose of taking it was not to become intoxicated but to be alert and to stay awake.

[43] In response to the suggestion by the Crown that it was possible that he knowingly took "acid" on a piece of paper, the accused stated that he did not

know “acid” or how it was distributed. The substance he accepted looked like the familiar “wake up”. The further inference is that if he knew that it was not a “wake up” he would not have consumed it and, as a result, he was the victim of a fraudulent representation. Thus, contextually I do not think that it can be said that he was reckless as he knew what he took might be dangerous. I find that in his mind, and from his experience, as he put it, the “wake up” that he believed that he ingested would have had no adverse mental or physical effect upon him. There is no contradictory evidence.

[44] On the evidence that I accept, I have reasonable doubt that the accused voluntarily ingested an illegal substance with the intention of becoming intoxicated or that he was reckless as to what he took and about its effects. In my view, the accused did not arrive at his state of non-mental disorder automatism with the requisite degree of voluntariness. The expert psychiatric evidence supports the conclusion that the accused was not consciously in control of his actions during the commission of the offences. Consequently, I am of the view that the accused, in the particular circumstances of this case, has rebutted the presumption of voluntariness and, as a result, the defence of non-mental disorder automatism is available to him. In my opinion, the

Crown has not disproved this defence. Therefore, I conclude and find that the factual and legal requirements for the defence of non-mental disorder automatism exist in this case.

[45] Further, as I have found that the accused must intend to become intoxicated by voluntarily ingesting a substance that he knew or had reasonable grounds to know was dangerous or was reckless as to ingesting it, I am unable to find, beyond a reasonable doubt, that his intoxication was "self-induced" as this term is used in s.33.1.

[46] I have found that the accused state of non-mental disorder automatism was not self-induced. Likewise, I have found that he did not intentionally and voluntarily become intoxicated. Furthermore, I concluded and found that when he smashed down MacDougall's door and committed an assault; attacked MacDougall, and threatened to kill him and his children, the accused was unaware of his actions. However, was his consumption of a "wake up" such a marked departure from the reasonable standard of consumption of "wake up" in Canadian society? There is no evidence on the point. Consequently, I have a reasonable doubt that his conduct and medical condition would

represent a voluntary interference with the bodily integrity of another person or that it was a marked departure from the standard of reasonable care generally recognized in Canadian society. Therefore, I conclude and find that s.33.1 is inapplicable to the facts of this case.

[47] The charge of mischief is not within the parameters of s.33.1. I have concluded and found that his degree of intoxication as a result of ingesting a stimulant class of drug rendered him incapable of controlling his action; produced in him a state of dense amnesia concerning the incident and he was in a state of automatism. The law requires that the prohibited act be willed and performed voluntarily. In ***R.v. Daviault***, [1994] 3 S.C.R.63, [1994] S.C.J. No.77, Cory J., writing for the majority stated at para. 66:

> A person in a state of automatism cannot perform a voluntary willed act since the automatism has deprived the person of the ability to carry out such an act. It follows that someone in an extreme state of intoxication akin to automatism must also be deprived of that ability. Thus a fundamental aspect of the actus reus of the criminal act is absent. It would equally infringe s. 7 of the Charter if an accused who was not acting voluntarily could be convicted of a criminal offence. Here again the voluntary act of becoming intoxicated cannot be substituted for the voluntary action involved in sexual assault. To do so would violate the principle set out in Vaillancourt, supra. Once again to convict in the face of such a fundamental denial of natural justice could not be justified under s. 1 of the Charter.

[48] Thus, as opined by Dr. Akhtar, at the time of the incident the accused was in a mental state where his actions were not willed or voluntary. The expert opinion was, that there was a high probability that the accused was in a state of non-mental disorder automatism. Thus, I conclude and find, on the balance of probabilities, that his extreme mental condition was a result of ingesting a toxicant that rendered him incapable of consciously controlling his behaviour. Consequently, in the circumstances, he is entitled to the defence on non-mental disorder automatism on the principles outlined in ***Daviault***, *supra*.

Conclusion

[49] I am satisfied that the accused has established, on the balance of probabilities that at the time of the incident he was suffering from non-mental disorder automatism. Thus, on that point, he has met the evidential burden. However, I am not satisfied that the Crown has met the persuasive burden and has proved beyond a reasonable doubt that the accused acts were

voluntary or the result of self-induced intoxication as the term is used in the ***Criminal Code*** s.33.1.

[50] I have found that there was no evidence to support the representation that the accused conduct was a voluntary interference with the bodily integrity of another person or that it was a marked departure from the standard of reasonable care generally recognized in Canadian society. Consequently, I concluded and found that the provisions of the ***Criminal Code*** s.33.1 are inapplicable to the facts of this case and the accused is entitled to the defence of non-mental disorder automatism. Furthermore, as the accused degree of intoxication rendered him incapable of acting with a voluntary will he is also entitled to the defence of extreme intoxication to the point of non-mental disorder automatism on the principles outlined and preserved in ***Daviault***.

[51] In the result, I find the accused not guilty on all counts of the Information tried before me. Acquittals will be entered on the record.

J.