IN THE PROVINCIAL COURT

R

vs.

BRIAN LOMAX
(Cite as R v. Lomax, 2002 NSPC 31

DECISION

The Honourable Judge C. H. F. Williams, JPC
Delivered orally September 13th, 2002

Counsel: Mr. J. Scott, Crown Attorney
Mr. R. Burrill, Defence Attorney

Introduction

On November 16, 1999, Michael Aitken and Marc Quenneville were employees of the Mainway Irving Station at the corner of Robie and Charles Streets in the Halifax Regional Municipality. The Mainway Irving Station opened for business twenty-four hours daily. At 0140 hours a scruffy looking male entered the store and after a brief conversation pulled a knife from his back pocket and demanded that Aitken give him the cash from the till. Aitken and Quenneville were standing by the counter and Aitken complied with the demand by putting the money into a bag. Taking the bag the man informed them that if they called the police he would return and cut their throats. Nonetheless, Aitken called the police and described the man who was the accused.

At 0146 hours the police located the accused near Gottingen and Charles Streets walking north on Gottingen Street, an area not too far from the crime scene, still in possession of the stolen money. They arrested and charged him with robbing Michael Aitken. In his defence, the accused submitted that he was suffering from mental disorder automatism at the time of the alleged offence.

On September 14, 2001, I made a ruling on the accused's motion for a mistrial. Therefore, before I get into my analysis, I think that, to complete the record and to appreciate the history of this case, now that I have heard all the evidence, incorporating that ruling as part of my final determination would be appropriate.

My Ruling of September 14, 2001 regarding the Defendant's Motion for a mistrial

Introduction

The defendant, Brian William Lomax is on trial for robbery. He has made a motion, at the close of the crown's case, for a declaration of a mistrial on the grounds that the trier of fact has entered the arena by ordering the creation of evidence into an issue at trial when the crown was unprepared to do so, thus prompting the defendant to submit that he presumes a reasonable apprehension of bias and lack of impartiality by the trier of fact.

Summary of proceedings

We have arrived at this juncture due to the manner in which the trial has proceeded. I recall that before the hearing of any evidence, defence counsel posited that he would be presenting the defence of "insane automatism" pursuant to ***Criminal Code*** s. 16. In addition, issues under ***Criminal Code*** ss.672.11 and 672.12 may also be raised. He requested, as a result of his presentation, that the court should proceed as established in ***R. v. Swain*** (1991) 63 C.C.C. (3d) 481 (S.C.C.). In essence, counsel was asserting that the accused, at the time of the alleged offence, suffered from a mental disorder that rendered him incapable of appreciating the nature and quality of

the crime with which he was charged, without the presentation of evidence to that effect; without the Crown establishing proof of the delict and before a finding of guilt was made.

The court pointed out to defence counsel that it was quite unusual to proceed as requested without the court having the benefit of an assessment order made pursuant to ***Criminal Code*** ss.672.11 or 672.12. Defence counsel, in response, submitted that he had forwarded reports to the crown on the defence to be raised at trial but there was no court ordered assessment. Furthermore, a ***Criminal Code*** s.16 defence could be heard without a court ordered assessment, and additionally, the defence had cogent evidence that would make it unnecessary for the court to order an assessment pursuant to s. 672.11.

During discussions between the court and counsels the court observed that, prior to the trial of the issues, in the absence of an assessment order in support of the defence's submission that the accused was not criminally responsible, there would be, in law, a presumption of sanity, fitness to stand trial and criminal responsibility. It was further pointed out to counsels that on those legal presumptions, in the absence of any evidence to the contrary, the trial would proceed in the normal fashion with the crown first presenting its case. Further, the court held that the defence still had the right and the prerogative at the close of the crown's case to raise, if it so chooses, the defence of "non criminal responsibility". Additionally, as the trial proceeded, should the court have reasonable grounds to believe that an assessment order may be required the court would exercise its discretion under ***Criminal Code*** s. 672.12. The parties then agreed that a trial would proceed in the "normal fashion".

At the close of the crown's case, defence counsel asserted that he intended to rely on the defence of "not criminally responsible". He advanced that defence and represented that he was prepared to call evidence in support. He further submitted that he would not be calling evidence "on that part of the proceedings, the crown's case, and requested that the court make a finding on whether a conviction would be entered on the evidence adduced by the crown.

Further discussions ensued between the court and counsels concerning the circumstances as presented. First, the court held that it could not embrace the procedure as articulated by the defence without some evidence, as, for example, in the form of an assessment, pursuant to the provisions of ***Criminal Code*** s.672.11. Besides, since statutory protocols and procedures had been established with respect to accused persons suffering from a mental disorder leading to being declared not being criminally responsible, it would be required that the trial proceed in accordance with those established procedures. The trial would have been proceeding in the normal way until defence raises the issue of non criminal responsibility. Therefore, when the defendant raises the defence of not being criminally responsible, at any time before a finding of guilt, that defence would, in the court's opinion, trigger a

particular format and statutory procedure. This format, in the court's view, would require that the court have before it some preliminary forensic assessment of the defendant's state of mind at the time of the alleged offence.

After these discussions the defendant elected to call evidence.

Issue

(i) Should I declare a mistrial because, on my own motion, I ordered an assessment order pursuant to ***Criminal Code*** s.672.12?

(ii) Should the order for assessment create, in the mind of a reasonable person, an apprehension of bias?

Analysis

> Should I declare a mistrial because, on my own motion, I ordered an assessment order pursuant to ***Criminal Code*** s.672.12?

First, it should be clear that the trial is still ongoing and that the defendant has elected to call evidence and pursuant to ***Criminal Code*** s.650(3) it is entitled to make full answer and defence. Thus, at this stage of the proceedings, as there are no interim reliefs during a trial, it would appear that by raising these issues the defence, as of right, is expressing its views relating to the trial proceedings.

Nonetheless, it seems to me that in furthering an understanding of the administration of justice and without affecting the trial fairness I should address briefly the issues raised. First, it should be clear as was put by Lamer C.J.C. in ***Swain*** *supra.,* at p.505

> Given that the principles of fundamental justice contemplate an accusatorial and adversarial system to criminal justice which is founded on respect for the autonomy and dignity of human beings, it seems clear to me that the principles of fundamental justice must also require that an accused person have the right to control his or her own defence. If at any time before verdict there is a question as to the accused's ability to conduct his or her defence, the trial judge may direct that the issue of fitness to stand trial be tried before matters proceed further: see Criminal Code, s.543, now s.615. Thus, an accused who has not been found unfit to stand trial must be considered capable of conducting

his or her own defence.

I note that s.615 was repealed in 1991 and has been replaced, also in 1991, by the provisions in ***Criminal Code*** Part XX.1 - Mental Disorder provisions encompassing ss.672.1 to 672.95.

Second, the ***Criminal Code*** s. 16 states:

> 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.
>
> (2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.
>
> (3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

Thus, in our system of criminal justice, the court must ensure and avoid the occurrence, if at all possible, of any person "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", to be tried, if unfit to stand trial, or if the mental capacity for criminal intent is put in issue, **after** the close of the crown's case, to prolong the trial by permitting the defence to answer the case against him. It would appear that, in such a case, the principles of fundamental justice demands that the defendant ought not to be convicted of the offence charged.

It would not be appropriate for the court to hinder or to limit the exercise of the defendant's right to control his own defence. However, it seems to me that after the close of the Crown's case and the defendant asserts that his defence would be one that puts his mental capacity for criminal intent in issue, it would appear, at that stage, that the defendant would be averring, even if tentatively, that the crown has established a threshold liability of guilt, a sufficient case for the defendant to meet.

However, at the same time, such a submission by the defendant that he lacked the criminal intent, could convert the threshold liability of guilt into the ultimate reliability, proof beyond a reasonable doubt without being put to his defence. As a conviction cannot be entered, the trial would then proceed under the provisions of

Criminal Code Part XX.1 - Mental Disorder.

Third, a statutory regime concerning accused persons with mental disorder exists. Here, it is not argued that this statutory regime infringes the right of the defendant, if fit to stand trial, to control his own defence. What is argued is the discretion of the court to order an assessment as ostensibly that discretion could affect adversely the defendant's right to conduct his own defence in our adversarial system and it may render the trial unfair. However, we should bear in mind that the ***Criminal Code*** ss.672.11 and 672.12 state, in part:

> 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);
>
> 672.12(1) The court may make an assessment order at any stage of proceedings against the accused of its own motion, on application of the accused or, subject to subsections (2) and (3), on application of the prosecutor.

It seems to me, at this stage of the proceedings, and bearing in mind that the trial is not yet completed, in that all the evidence has not been presented, I merely state that, in my view the defence raised by the defendant, as put by Lamer C.J.C. in ***Swain,*** *supra.,* at p..509, "invoke(s) the principle of fundamental justice that the criminal justice system not convict a person who was [suffering from a mental disorder] at the time of the offence." Here, in my view, the presentations of defence counsel, in the circumstances of the case, was sufficient to constitute reasonable grounds to require an assessment order, "reasonable grounds to believe that such evidence is necessary to determine" the criminal responsibility of the defendant.

Thus, the statutory discretion to order an assessment of the accused does not impair nor restrict the defendant's right to make full answer and defence. He is fit to stand trial. Neither does it prevent him from controlling his defence. The assessment order becomes part of the trial record and nothing more. It has to be considered, assessed and weighed along with the total evidence. Further, the ordering of an assessment order is not an arbitrary interference in the trial process as it would appear that the defendant's right to control his defence is not absolute particularly when he puts

forward as his defence his mental capacity for criminal intent. At that stage, it would appear that the court is entitled to complete the picture by ordering an assessment order under ***Criminal Code*** s.672.12. See, for example, ***Swain****, supra.* Therefore the exercise of a statutory discretion, cannot in these set of circumstances, considered being the basis for a mistrial.

> Should the order for assessment create, in the mind of a reasonable person, an apprehension of bias?

As put by Cory J., in ***R. vs. R.D.S.*** [1997] S.C.J. No.84 at para. 111:

111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpre J. in his dissenting reasons in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369, at p. 394:

> [The] apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information...[The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude..."

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See Bertram, supra., at pp.54-55: Gushman, supra, at para.31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": R. v. Elrick, [1983] O.J.No.515 (H.C.), at para. 14. See also Stark, supra, at para. 74; R. v. Lin, [1995] B.C.J. No. 982 (S.C.), at para 34.

In discussing the concept of the "reasonable person" Madam Justice L'Heureux-Dube, in ***R.D.S.*** stated at paras. 36 and 37:

> 36 The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail (Committee for Justice and Liberty, supra.). The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.
>
> 37 It follows that one must consider the reasonable

> person's knowledge and understanding of the judicial process and the nature of judging as well as of the community in which the alleged crime occurred.

Further, she opines, also in ***R.D.S.*** at para. 49:

> 49 Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness if consistent with the highest tradition of judicial impartiality.

There is the presumption of judicial impartiality. The reason that the defendant suggests impartiality or bias in this case, as submitted, is that the assessment order "created evidence into an issue at trial when the crown as unprepared to do so." As I have pointed out, the trial is still in progress, and all the evidence is not before me. No decision concerning the outcome of the case has been made. Therefore, in my view, nothing ought to be said or done at this stage to put into question judicial impartiality. Consequently, following the test as cited from ***R.D.S.*** it would be difficult, on the balance of probabilities, for a reasonable person to conclude that presently there exists any basis for a reasonable apprehension of bias.

Trial Evidence

The evidence for the Crown disclosed that in the early morning of November 16, 1999, the accused entered the Mainstay Irving Station on the corner of Robie and Charles Streets in the Halifax Regional Municipality. He approached the cashier, Michael Aitken, and his colleague, Marc Quenneville, and said that he was sent to do a job. When they advised him, on his enquiry, that the cashier had money in the till, the accused reached into his back pocket and pulled out a four-inch serrated edge steak knife and demanded the money. Aitken placed the tray and all the money from the till, between $500 and $600, into a bag and gave it to the accused. On receiving the money and before leaving the store the accused informed them that should they call the police, he, would return and cut their throats. He went onto Charles Street. The robbery was recorded on a store security videotape.

After the accused left the store Aitken called the police, informed them of the robbery and gave them a description of the perpetrator. A Halifax Regional Police patrol in the area located the accused near

Charles and Gottingen Streets heading north on Gottingen Street, still in possession of the bag with the stolen money. They arrested him for the offence of robbery and chartered and cautioned him.

During the robbery, Aitken observed that the accused's demeanour was normal. Also, he did not detect any presence of alcohol. However, he noted that the accused had a thin face, a bloodshot left eye and that he was scruffy looking.

On a search incidental to arrest, the arresting officer, Constable Jarrett Morgan, seized from the accused a knife, Exhibit 2, that was similar to the knife used in the robbery. In addition, he testified that the accused was not combative nor argumentative and did not smell of alcohol. Further, when advised of his rights to call a lawyer, the accused informed them that he did not wish to do so. Overall, the police, in their contact with the accused, did not observe anything unusual or out of the ordinary in his conduct or demeanour.

Evidence for the accused highlighted his physical, emotional and mental states before and after the robbery. The testimonies of Shirley Nazer, Craig Gallivan, Sharon Lomax, the ex-wife of the accused, and the accused himself addressed the issues from a lay person's perspective. Additionally, the testimonies of Dr. Donald Faye, a general medical practitioner, Dr. Gerald Gray, a psychiatrist, and Dr. Peter Scott Theriault, a forensic psychiatrist, provided expert opinion evidence in their qualified field of expertise.

In summary, the testimonies of Shirley Nazer and Sharon Lomax, the accused's wife who suffered from schizophrenia and drug abuse, described their perceptions of the accused's physical appearance and mental state at an unspecified time in November 1999, before the incident. However, on my observations as they testified and in assessing their testimonies with the total evidence, I concluded that their testimonies were unreliable and in the final analysis were of little assistance in determining the critical issues raised by the accused.

Craig Gallivan was a graduate student in psychology who had almost daily contact with the accused in October and November 1999. He noted that the accused had lost some weight and was at times unable to control his emotions. His testimony, however, was based upon what the accused told him and his personal observations. According to his testimony, the accused confided to him personal issues concerning the relationship between him and his wife Sharon. On the evening of November 15, 1999 he and the accused were together for two and one half hours. They spoke about many things, drank alcoholic beverages, and the accused was crying as he discussed his relationship with his wife. Gallivan noted that the accused had a vacant look in his eyes, was emotionless and disoriented in his speech. Nevertheless, he had no reason to suspect that the accused was on any prescribed medication. In any event, he advised the accused to go to Liquor Store on Clyde Street, to "buy some booze and get drunk." When he last saw the accused, to his understanding, the accused was going to the liquor store which was also in an area where the accused could possibly meet his wife where he suspected that she was working as a prostitute .

Gallivan related that on November 16, 1999 he was again with the accused. He recounted that the accused informed him that he, the accused had robbed a gas station on Robie Street. The accused

told him that two persons were present and that he could not believe his own actions as it "seemed like someone else." He informed Gallivan that he left with a cash register in a bag but that he was caught. Gallivan testified that the accused was coherent but upset when he related the experience and event.

The accused testified. He described three broken marriages, drug abuse and a history of psychological counseling and intervention. On a referral from Dr. Donald Faye, in 1995, he was a patient of Dr. Gerald Gray whom he saw for insomnia and anxiety and obsessive compulsive disorder. He described how he met his present wife Sharon whom he knew was a prostitute and a drug abuser. Yet, he married her after a short period of acquaintance and endured her unfaithfulness. Relevant, however, to his defence was that on October 11, 1999, his wife informed him, in detail, of her sexual dalliances with a neighbour. This information devastated him emotionally and he sought professional help for depression. However, this event was not the only one in which he was aware that his wife was engaged in sexual activities with the neighbour and others. He recalled a similar incident when she was released from the Abby Lane Hospital, a psychiatric hospital, where she had been admitted for schizophrenia, in September 1999. In any event he left his wife and the matrimonial home on October 28, 1999 and lived at several other locations including the "Y". Although he broke up with his wife he was still concerned about her welfare as he knew that she had returned to prostitution. He even saw her on the street on two occasions but had no physical contact with her.

Between October 28 and November 16, 1999 he stated that the only person with whom he had almost daily contact was Craig Gallivan as he seemed to be the only person concerned about his welfare. Also, during this period, the accused narrated that he was not eating well, was losing weight, became listless and suffered from insomnia. On November 15, 1999, he recalled being with Gallivan and speaking about his wife. Further, he recalled going to the liquor store on Clyde Street, as suggested by Gallivan, and returning to the "Y" where he was staying and consumed alcohol.

Additionally, the accused remembered travelling northward on Brunswick Street toward the north end of the city hoping that he would see his wife. He described his feeling as if he were walking on air and remembered being in an apartment making enquiries about his wife. In this apartment, he recalled that he discussed with the occupants the proposal that he would pay them money if they would find his wife. The next thing he recalled was that he was in a brightly lit room. He, however, remembered walking "into the place" where he saw two persons by a counter. He testified that he pulled a knife out of his pants and spoke to them and "they took the money and put it in a plastic bag." Taking the bag, he testified that he told them: "If you call the police I will come back and kill you." He was on his way back to the apartment, with the money, when the police stopped and arrested him.

Expert Testimonies

Dr. Donald Faye was qualified to give expert opinion in the general practice of medicine. He was the accused's family doctor from 1996. He saw the accused on September 29, 1999, and discussed with him his antidepressant and anti-anxiety medications. Another visit was on October 16, 1999. Then,

the accused was distressed concerning his wife and her activities and was tearful and upset. However, the doctor made no major change in the accused's treatment regime and prescribed only a mild sedative. The accused informed that he had an appointment with Dr. Gray, a psychiatrist. Dr. Faye saw him again on October, 19, 1999 concerning mood swings but prescribed no treatment. Another visit occurred on October 22, 1999 when the accused complained of insomnia. Again the doctor did not prescribe any change in medication. On October 29, 1999, the accused again visited his doctor. He presented with some physical bruising and related a history of a severe beating that was consistent with the doctor's findings on examination.

Dr. Faye remarked that on that day, before him, he "saw a shattered man a man whose will had been kicked out of him physically and emotionally." The accused was despondent, felt that no one cared about him and expressed hopelessness. Nonetheless, the doctor did not prescribe any medication nor made any referrals. The accused saw Dr. Faye again on November 3, complaining of insomnia and anxiety but the doctor did not give him any medication. On November 12, the accused attended and complained of the same problems and this time the doctor prescribed a small dose of an anti-anxiety medication. Finally, on November 19, he visited and complained of poor appetite and weight loss.

Dr. Gerald Gray, psychiatrist, was qualified to give opinion evidence on the diagnosis of mental disorders. He saw the accused briefly in 1990 and 1996. On October 27, 1999, he saw the accused on a referral for general anxiety level and insomnia. The doctor observed that the accused's speech was stressed but "nothing marked". They discussed issues concerning the accused's relationship with his wife that were stressors in the accused's life. They arranged a follow-up for November 24, 1999. On November 24, 1999, Dr. Gray observed that the accused's anxiety level was high. The accused spoke about the robbery on Robie Street and had more discussions about his wife. Then, Dr. Gray did not give the accused any medications and did not hospitalize him as he did not feel that the accused condition was chronic.

Dr. Peter Scott Theriault, forensic psychiatrist, was qualified to give opinion evidence on diseases of the mind, mental abnormalities causing mental impairment including dissociative states. The accused engaged him to "look into the robbery issues." He interviewed the accused on April 3, 2000, and submitted a report outlining his opinion, eventually tendered at trial as Exhibit 4. In his report Dr. Theriault opined at pp.4-5:

> In summary then, Mr. Lomax was involved in a chaotic and volatile relationship in which he oscillated between desperate attempts to "save" his wife and intense feelings of humiliation and despair over her behavior and the relationship itself. He suffered a series of psychological blows as a result, the most intense of which was the event wherein she had sex with the neighbor and described it in detail to the accused. He recounts the development of dissociative phenomena thereafter and although this is not directly corroborated by contemporaneous accounts there is clear evidence of a serious and persistent deterioration in his mental state in the weeks leading up to

> the robbery, with clear report, from Mr. Gallivan of a man in great psychological distress on the night of the alleged offence itself.
>
> Dissociation is a phenomenon wherein there is a disruption in the normally integrative function of cognition (thinking), behavior, sensation and affect (feeling state). Braun (1988) has written about the BASK model of dissociation; B- behavior, A- affect, S-sensation, K- knowledge. Using this model, and assuming that Mr. Lomax is accurate and truthful in his accounting of the events it can be seen that he was showing evidence of dissociation prior to and during the alleged offence. Prior to the offence he showed amnesia (BASK - i.e. all elements) as well as a peculiar sense of "lightness" (S, sensation) and numbness (A, affect). During the night of the 15th he showed a complex variety of dissociative phenomena, with periodic amnesia, loss of any sense of affective awareness, and behavior divorced from awareness of the rational behavior. In my opinion all this would sufficiently impair the awareness of Mr. Lomax at the time of the alleged offence to render his action "involuntary"...
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> ....
>
> In my opinion, there is evidence that Mr. Lomax suffered from a pre-existing psychiatric condition and that therefore there were both internal and external causes for the dissociative episode. In addition, it could not be said that this condition would not recur at some point in the future should similar circumstances recur. Mr. Lomax has a history of problematic interpersonal relationships, and in reference to the relationship between he and Sharon, continues to have strong feelings towards her and, in fact, lived with her again (with similarly disastrous results) for a period of time after the alleged offense. This leads me to conclude that the defence of "insane" automatism applies to the situation at hand.

The Crown, in rebuttal, called Dr. Risk Kronfli, forensic psychiatrist. He was also qualified to give opinion evidence on diseases of the mind, mental abnormalities causing mental impairment including dissociative states. His report, tendered as Exhibit 6, was under my Assessment Order pursuant to ***Criminal Code*** s.672.13. In his report, Dr. Kronfli opined at pp.5-6:

> In arriving at this conclusion, one must take into consideration that Mr. Lomax did have a level of intent (mens rea) associated with a crime, clearly indicated by (1) he made a choice to do something wrong (identified by having a concealed weapon, going to the Irving Store (2) that this choice was freely made (No psychosis, delusions, threats, etc... and (3) that he knew or at least could appreciate the

> wrongfulness of what he chose to do(clearly stated to the victims that they should not call the police, that if he comes back in a few seconds and finds out that they did, he would kill them). It is of note that the level of intent is completely different from motive. Motive is that which tempts the mind to engage in an act whereas intent refers to using a certain means to affect certain results. Therefore, motive leads to intent, however, for our assessment, we are only concerned with the presence of intent. Mr. Lomax did not suffer from a mental disorder at the time of the alleged offence that rendered him incapable of (a) appreciating the nature and quality of his actions or (b) knowing that they were wrong.
>
> The nature and quality of the act refers to the physical consequences of that act. Therefore, the phrase refers to the ability to process and perceive the consequences/impact of that act to be performed. The meaning of wrong at one point, was felt that it meant morally wrong, however, in Cooper vs R. in 1979, the Supreme Court clearly made reference to wrong as applying only to legally wrong. Recent rulings (R v. Chaulk, 1990; R v. Ratti, 1991; R v. Landry, 1991) however, have once again restated the meaning of wrong as it applies to s. 16 as morally wrong according to an understanding of the moral standards of society. Therefore, if someone was aware that the actus reus of the offence was legally wrong and appreciated the nature and consequences of the actus reus yet believed it to be morally justified due to the impact of a substantial mental disorder, that person would have a successful defence under s. 16. It is clear that this is not the case in this situation.

Issue

Was the accused, at the time of the offence, suffering from a mental disorder that rendered him incapable of appreciating the nature and quality of his act or of knowing that his act was wrong?

Relevant Statutory Provisions

The ***Criminal Code***, s.16, states:

> 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.

> (2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.
>
> (3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

The ***Criminal Code*** s.343, states:

> Every one commits robbery who
>
> > (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
> >
> > (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
> >
> > (c) assaults any person with intent to steal from him; or
> >
> > (d) steals from any person while armed with an offensive weapon or imitation thereof.

Analysis

A. What is automatism ?

In ***Rabey v. the Queen,*** [1980] 2 S.C.R. 513, the court held that unless a state of automatism can be attributed on evidence to some cause external to the mind of the accused, it must be related to a plea of insanity. Further, as set out by Dickson J., as he then was, at p. 552:

> In principle, the defence of automatism should be available whenever there is evidence of unconsciousness throughout the commission of the crime, that cannot be attributed to fault or negligence of his part. Such evidence should be supported by expert medical opinion that the accused did not feign memory loss and that there is no underlying pathological condition which points to a disease requiring detention and treatment

Writing for the majority in ***Stone***, Bastarache J., set out the legal principles of automatism at paras.

156 -161:

156. I therefore prefer to define automatism as a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action.

157. Two forms of automatism are recognized at law: insane automatism and non-insane automatism. Involuntary action which does not stem from a disease of the mind gives rise to a claim of non-insane automatism. If successful, a claim of non-insane automatism entitles the accused to an acquittal. In Parks, supra, La Forest J. cited with approval, at p. 896, the following words of Dickson J. speaking in dissent in Rabey, supra, 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.

158 . On the other hand, involuntary action which is found, at law, to result from a disease of the mind gives rise to a claim of insane automatism. It has long been recognized that insane automatism is subsumed by the defence of mental disorder, formerly referred to as the defence of insanity. For example, in Rabey, supra, Ritchie J. adopted the reasoning of Martin J.A. of the Ontario Court of Appeal. In R. v. Rabey (1977), 17 O.R. (2d) 1, Martin J.A. stated, at p. 12:

> Automatism caused by disease of the mind is subsumed under the defence of insanity leading to the special verdict of not guilty on account of insanity, whereas automatism not resulting from disease of the mind leads to an absolute acquittal... .

159. Likewise, in dissent in Rabey (S.C.C.), Dickson J. noted, at p. 524:

> Automatism may be subsumed in the defence of insanity in cases in which the unconscious action of an accused can be traced to, or rooted in, a disease of the mind. Where that is so, the defence of insanity prevails.

160. More recently, in Parks, supra, La Forest J. confirmed that insane automatism

> falls within the scope of the defence of mental disorder as set out in s. 16 of the Code when he noted that where automatism stems from a disease of the mind, the accused is entitled to a verdict of insanity rather than an acquittal (p. 896). See also R. v. Chaulk, [1990] 3 S.C.R. 1303, at p. 1321.
>
> ....
>
> 161. Accordingly, a successful claim of insane automatism will trigger s. 16 of the Code and result in a verdict of not criminally responsible on account of mental disorder. Thus, although courts to date have spoken of insane "automatism" and non-insane "automatism" for purposes of consistency, it is important to recognize that in actuality true "automatism" only includes involuntary behaviour which does not stem from a disease of the mind. Involuntary behaviour which results from a disease of the mind is more correctly labelled as s. 16 mental disorder rather than insane automatism. For purposes of consistency, I will continue to refer to both as "automatism". However, I believe the terms "mental disorder" automatism and "non-mental disorder" automatism rather than "insane" automatism and "non-insane" automatism more accurately reflect the recent changes to s. 16 of the Code, and the addition of Part XX.1 of the Code

B. The legal test for automatism

It would appear from my reading of the authorities, that the burden, on the balance of probabilities, is on the accused. He must satisfy the evidential or "proper foundation" burden by asserting involuntariness and confirming it with psychiatric evidence. Generally, he would have to provide evidence of of a trigger or "psychological blow" in order to satisfy this evidentiary burden. As was expressed by Bastarache, in ***Stone***, at paras. 192 -193:

> 192. To sum up, in order to satisfy the evidentiary or proper foundation burden in cases involving claims of automatism, the defence must make an assertion of involuntariness and call expert psychiatric or psychological evidence confirming that assertion. However, it is an error of law to conclude that this defence burden has been satisfied simply because the defence has met these two requirements. The burden will only be met where the trial judge concludes that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. In reaching this conclusion, the trial judge will first examine the psychiatric or psychological evidence and inquire into the foundation and nature of the expert opinion. The trial judge will also examine all other available evidence, if any. Relevant factors are not a closed category and may, by way of example, include: the severity of the triggering stimulus, corroborating evidence of bystanders,

> corroborating medical history of automatistic-like dissociative states, whether there is evidence of a motive for the crime, and whether the alleged trigger of the automatism is also the victim of the automatistic violence. I point out that no single factor is meant to be determinative. Indeed, there may be cases in which the psychiatric or psychological evidence goes beyond simply corroborating the accused's version of events, for example, where it establishes a documented history of automatistic-like dissociative states. Furthermore, the ever advancing state of medical knowledge may lead to a finding that other types of evidence are also indicative of involuntariness. I leave it to the discretion and experience of trial judges to weigh all of the evidence available on a case-by-case basis and to determine whether a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities.
>
> 193. Only if the accused has laid a proper foundation for a defence of automatism will it be necessary for the trial judge to determine whether mental disorder or non-mental disorder automatism should be left with the trier of fact. If the trial judge concludes that a proper foundation has not been established, the presumption of voluntariness will be effective and neither automatism defence will be available to the trier of fact. In such a case, however, the accused may still claim an independent s. 16 defence of mental disorder

C. Assessment of psychiatrist opinion evidence

The forensic psychiatrists' opinions of Dr. P. Scott Theriault, tendered as Exhibit 4 and Dr. R. Kronfli, in rebuttal, tendered as Exhibit 6, combined with their viva voce testimonies, examined the accused's mental processes, including his emotions, to determine the reasons for his behavior, the causes of his actions and whether these causes were external or internal to him. However, the opinions asserted two conflicting viewpoints concerning the same conduct. I remind myself, however, that conflicting expert evidence does not require a choice between the experts. Their opinions are factors that I am obliged to consider in determining the ultimate issue of guilt beyond a reasonable doubt. Further, as with all other witnesses, I may accept all, part or none of their evidence. ***R. v. Molnar*** (1990), 55 C.C.C. (3d) 446 (Ont. C.A.).

Here, I find that both forensic psychiatrists were well qualified in their area of expertise. In addition, I do not doubt their impartiality. Therefore, in assessing their evidence critically, I must first consider the facts and assumptions underlying each opinion, that is, whether those assumptions have been established in evidence. Second, I must also consider the relevance of their evidence to a fact in issue and any other evidence in relation to that fact. ***R. v. Stone***, [1999] 2 S.C.R. 290.

I find that both opinions portrayed the accused as an individual with a mind-bent or a value system

that directed him toward a certain conscious goal - the forlorn hope of saving his wife from a life of prostitution and drug addiction. Further, he tended to behave in a habitual or characteristic manner whenever his wife had a lapse in her mental health status or engaged in prostitution. He would become depressed and suffer from anxiety. Additionally, they espoused that he would act consistently according to this attitude every time she misconducted herself.

Additionally, his unadaptable mind-set was also indicative of an emotional involvement that made him distort or oppose factual evidence concerning his relationship with his wife. His doctors and friends counselled him, to no avail, that his relationship with his wife was a negative one and was inimical to his good mental health. His behavior, either based on negative emotions or opposition to actuality, manifested itself in depression, anxiety and insomnia, as he was unwilling to reverse his thinking to conform to actuality. He knew that she was a prostitute, suffering from schizophrenia with a drug addiction. Further, he knew that she engaged in prostitution to support her drug addition despite his best efforts to help her.

Thus, in the sensitive relationship that existed between him and his wife the picture that emerged was that he was emotionally vulnerable. This resulted in non-rational emotional reactions on his part. Notwithstanding this, however, he was able to use this emotional energy in conjunction with rational thoughts and behavior. Here, it appeared that he had a motive, to obtain money to pay someone to find his wife. He appeared preoccupied with the thought to "rescue" her, and, he was, subjectively and objectively, determined to achieve this intention. Objectively, he appeared to have had rational thought and behavior. Subjectively, it appeared that his conduct might have had internal stressors affect. Legally, however, the issue is not his psychological maturity or immaturity but an objective comparative balance between his mental attitude, his emotions and his actions.

Here, the accused relied on the opinion of Dr. Theriault to buttress his assertion that he acted involuntarily at the time of the alleged offence. Further, he contended that at the time of the offence he suffered from mental disorder automatism. It is clear from the evidence that Dr. Theriault's opinion was based on the self- reporting by the accused on how he dealt with relationships. It was also based on the assumption that the accused was being truthful. However, the doctor was not privy to the accused's past psychological documentary history nor did he speak to any health professionals who had prior dealings with the accused. In short, he had no corroborative documentary evidence from the institutions with which the accused reported that he had contact. Dr. Theriault opined that the accused suffered a psychological blow on October 11, 1999, when his wife related to him, in details, her sex for drugs activity with the neighbour. This episode, the doctor asserted was the trigger to the accused's dissociative state followed by a series of blows as a result of his wife's continuing lifestyle.

The accused, according to this view, remained in a fluctuating state of dissociation of an unspecified or indefinite duration. This state was manifested in the symptoms of insomnia, anxiety and weight loss. Additionally, he had periods of amnesia which would suggest a total disconnect between conscious awareness of what was going on around him. Thus, on what the accused told him, although he had no record of any prior dissociative episodes, Dr. Theriault concluded that the accused was predisposed to dissociative personality problems.

Because of this fluctuating state of dissociation it may have been difficult for other health professionals to detect, for example, when the accused saw Dr. Faye and Dr. Gray. However, there is credible evidence which I accept, that Dr. Faye saw the accused seven times prior to the index offence between September 29, 1999 and including November 12, 1999. Dr. Faye saw him for depression, anxiety, mood swings, insomnia and an assault. However Dr. Faye made no hospital nor psychiatric referrals. When Dr. Gray, a psychiatrist, saw the accused on October 27, 1999, for general anxiety level and insomnia, his speech was stressed but nothing marked. Dr. Gray, however, did not give him any medications nor hospitalize him as he did not feel that the accused's condition, as presented, was chronic.

Nonetheless, there was no evidence of any prior documented episodes of dissociative state. In addition, none of his attending physicians recommended any medical or psychiatric follow-ups. Further, Dr. Theriault did not diagnose any dissociative identity disorder, he merely spoke of a dissociative state as a symptom or a possibility of a symptom of a combination of factors-malnutrition, anxiety, insomnia and depression. I think, therefore, that these are evidential findings of facts that depreciate the assumption that the accused was in a fluctuating dissociative state evidenced by a "persistent deterioration in his mental state in the weeks leading up to the robbery."

Referring to the robbery and without identifying the pre-existing psychiatric condition that afflicted the accused, Dr. Theriault asserted that as a result of that unspecified condition there were both external and internal causes for the accused's dissociative episode. He asserted, in his report at p.5

> During the night of the 15th [Mr. Lomax] showed a complex variety of dissociative phenomena, with periodic amnesia, loss of any sense of affective awareness, and behavior divorced from awareness of the rational behavior. In my opinion all this would sufficiently impair the awareness of Mr. Lomax at the time of the alleged offence to render his action "involuntary"

In effect, he testified that the events of the night as related to him by the accused, the accused was interested in finding his wife, but given his state of mind he could not chose between good and bad options and his actions were automatic. Given the disastrous relationship with his wife and his vague recall of the event the accused had a disease of the mind, in a state of dissociation and not able to appreciate the nature and quality of his act or knowing that it was wrong.

On the evidence before me, however, I find that the accused had memory of the robbery. The fact that he could not recall everything because he was distressed prior to the robbery does not mean, in my view, that he did not remember it. Prior to going to the station, he had memory of asking someone to find his wife and that he would pay them to do so. Thus, he had motive, to obtain money to pay someone to find his wife. He had memory of entering the station, memory of showing the knife, receiving money and threatening to return and kill the station employees if they called the police. Even if as he stated that he had lost memory after the event such loss of memory is not a defence in itself as long he was conscious at the time of the event. ***Bratty v. Attorney-General for***

Northern Ireland, [1963] A.C. 386 at p. 409, (cited with approval in ***Stone***.) Therefore, from this perspective, it is reasonable to conclude, and I do, that the accused could appreciate that he was taking someone's property without their consent and that what he was doing was wrong. He had presence of mind to warn them not to call the police or he would kill them.

Further, the Mainway Irving Station opened twenty-four hours daily and was situate in the neighbourhood where the accused made his proposal to pay money to find his wife. If, however, as he testified, that he had never been in the station then he would have had selected it because it was open and was the most likely place where he could obtain money. It was not a place where he habitually or routinely visited so that he would, without any thought processes, go to it. Thus, from this perspective, it is reasonable to conclude, and I do, that his arrival at the station was neither an unconscious nor a random act. These findings of facts, in my view, reduced the plausibility of the accused's claim that he acted involuntarily.

The testimonies of Aitken, and the police which I accept, do not point to anything unusual about the accused's demeanour or appearance at the time of the robbery or soon thereafter. They related no abnormal behaviour on his part. When the police arrested him and recited to him his legal rights, he informed them that he did not wish to call a lawyer. On this point, I accept the assessment of Dr. Kronfli and find that the accused, at the time of the robbery and soon thereafter, could take and assimilate information and could make decisions that were goal oriented. These findings of facts, in my view, further diminished the accused claim that he was in a dissociative state.

He does not contend and neither does Dr. Theriault that anything said or done to him by anyone that evening, particularly his wife, if indeed she remained the psychological trigger, was "exceptionally cruel, psychologically sadistic or profoundly rejecting." It seems to me, and I find from the total evidence, that the accused did not suddenly discover on the evening of November 15, 1999 that his wife was a drug addict, a prostitute and suffered from schizophrenia. If this were the case I could readily accept it to be a traumatic bombshell for the average individual. However, here, the accused sought out and found that sort of person. He lived with her for a time, married her and had his ups and downs. He knew well before November 16,1999, that she exchanged sex for drugs and that she engaged in prostitution on a regular basis. Further, he moved out of the matrimonial home on October 29, 1999 and had no further physical contact with her although he saw her on the street on two occasions before the robbery. Therefore, it seems to me that the event of October 11, 1999 given his knowledge of his wife's lifestyle could not be characterized as "exceptionally cruel, psychologically sadistic or profoundly rejecting" to constitute a psychological blow still operating on November 16, 1999, causing a dissociative state.

Overall, it seems to me that the accused was suggesting that the psychological blow he ostensibly suffered was of so great a magnitude that it would have unhinged the ordinary person thus qualifying as an external induced automatism which has nothing to do with a disease of the mind in any organic or medical sense. At the same time, however, he was submitting that the trauma was ongoing and fluctuating, and, given his own psychological make up, the court should, contrary to corroborative psychological evidence, characterize his condition as a disease of the mind. Then, a finding of NCRMD would be consistent with Dr, Theriault's evidence that the unconscious nature of his

conduct excluded an appreciation of the consequences.

This brings me to Dr. Kronfli's report and opinion. It was comprehensive in the sense that it included the same references as that of Dr. Theriault but also relied upon the past documented psychological history of the accused. These documents included information from the outpatient's services of the Nova Scotia Hospital and the QE2 Hospital. He also viewed the videotape of the robbery recorded by the store's security camera. He remarked at pp. 4-5 of his report that:

> Some of the hospital contacts obtained by Mr. Lomax are somewhat indicative. On October 30th, Mr. Lomax had full blood work, including electrolytes and blood picture. These were all normal. There was no indication in any of the hospital contacts prior, or after, the index offence, of any abnormality in his medical and physical condition. His lab work on November 19th, again was normal, at the Dartmouth General Hospital. A Nova Scotia Hospital assessment very shortly after the index offence on November 19th, identifies that he is suffering from a substance abuse disorder and an adjustment disorder. The assessing psychiatrist at the time also identified extensive cluster B traits on Axis II. Previous contacts at the QEII also identified several emergency room visits with complaints of no sleep and also identified excessive use of benzodiazepines. Mr. Lomax during the assessment of November 19th, 1999 attempted to gain admission to the Nova Scotia Hospital and when this was refused stating that he would need to be admitted to the Abbie Lane, he reports that they would not admit him and that they would only offer him short stay.

In short, Dr. Kronfli opined that as the accused complained of poor nutrition and insomnia, his electrolytes balance would be affected. However, his full blood work prior to the robbery and soon after the robbery were normal. In testimony, he submitted that the lab work showed no physical illness that would impact on his mental condition or otherwise. Further, he found no documentation of any illness that would precipitate a dissociative state. Additionally, he found no documentation of a dissociative disorder. These factors, in his opinion, taking in the context of the physical and mental examinations of the accused would address the issue as it relates to the accused's purported fluctuating dissociative state. In his view, these factors diminished the plausibility of the existence of such a condition.

As I understand his testimony, Dr. Kronfli was not denying that the accused suffered from stress. He posited however that stress did not lead to a disease of the mind. Stress was a symptom of many things. Based upon the documentation that he reviewed and his interview of the accused Dr. Kronfli concluded that the accused was not acting involuntarily and did not suffer from a disease of the mind.

D. Evidential findings of fact

On my assessment of the witnesses as they testified and my assessment of their testimonies with the

total evidence, I accept and find that the relevant and material facts are:

1. The accused sought out and married someone whom he knew was a prostitute and a drug addict. He also knew that she suffered from schizophrenia.

2. On October 11, 1999, the accused wife described to him, in detail, her sexual activity with a neighbour. He was aware that she exchanged sex for drugs and engaged in prostitution before and after this incident.

3. The accused left the matrimonial home October 28, 1999, and had no further physical contact with his wife.

4. The accused had a past psychiatric history with diagnoses of substance abuse, antisocial personality disorder, depression and adjustment disorder. He has no documented evidence of a psychotic illness, any past mental disorder or memory problems.

5. The accused saw health professionals weeks immediately before the robbery but none diagnosed any mental disorder or psychosis.

6. On November 15, 1999, after drinking with a friend the accused decided to go look for his wife. He made a proposal to strangers that he would pay them money if they found his wife.

7. In the early morning of November 16,1999, armed with a knife, the accused went the Mainway Irving Station, a twenty-four hour daily station, showed the attendants the knife and demanded money. When he received the money he threatened to kill the attendants if thy were to call the police.

8. When the police arrested and chartered him he informed them that he did not wish to call a lawyer.

9. Neither the police nor the station employees noted anything unusual or abnormal in the accused's demeanour at the time of the robbery or immediately thereafter..

In my opinion, on the total evidence, there was no evidence of any complex chemical reactions that affected the mental state of the accused. Further, there was no documented history of automatistic-like dissociative states, no documented evidence of a psychotic illness, any past mental disorder or memory problems. The triggering stimulus or the "shock" to commit the actual robbery on the night in question, as presented by the accused, in my view and with all respect, was vague and exaggerated, unsupported by credible evidence and any corroborating medical history. In my view, the evidence of the store employee and the police point out that the accused had presence of mind and that he acted in a normal manner and was goal oriented. Before going to the store, the accused made a proposal to persons unknown that he would pay them money to find his wife. Thus, he had

motive.

In short, the crime can be explained without reference to the alleged automatism and there is the legal presumption that people do act voluntarily. Consequently, on the evidence adduced, I am not satisfied that, on the balance of probabilities, the accused has established a proper foundation for a defence of automatism.

E. Was the condition of the accused a disease of the mind.

The psychological blow alluded to by the accused was that his wife told him that , " the neighbour was fucking me with a dildo and we had a good time." This information he said caused his mind to "shut down." The question here, in my mind, is whether an ordinary man of the accused's age and circumstances who had knowledge of his wife's unfaithfulness and her lifestyle and have lived with her with this knowledge recently discovered that she was engaged in something that she habitually engaged in would have entered a state of dissociation as a result of no contact with her on the evening of the offence?

Applying the "internal cause theory" as posited in Stone, paras. 204-211, and given my analysis with respect to the mental automatism defence, I find support in the opinion of Dr. Kronfli, which I adopt, and for the reasons stated, I find that at the time of the offence the accused did not suffer from a disease of the mind that rendered him incapable of appreciating the nature and quality of his act or of knowing that it was wrong.

Given the recorded psychological history of the accused and the fact, on the evidence that he had no contact with his wife, it is difficult to predict that the triggering effect would recur. It is clear that the accused has some issues of interpersonal relationships to be resolved . On the evidence before me, and applying the "continuing danger theory" given the absence of documented evidence of a history of dissociative state, it diminishes the likelihood that automatism would occur or recur. Again, I find support for this view in the testimony and the report of Dr. Kronfli which I accept. Thus, at this point in time, in my opinion, it does not appear that society requires protection from the accused so that he should be subjected to evaluation under the regime contained in Part XX.1 of the Code.

Conclusion and Disposition

On the evidence before me, I find and conclude that the accused did not suffer from mental disorder automatism. I was not satisfied, on the balance of probabilities, on the evidence that I accept, that the accused had established a proper foundation to meet the defence of mental disorder automatism. I also find and conclude, on the evidence that I accept, that at the time of the offence the accused did not suffer from a s. 16 mental disorder. Consequently, I am satisfied, on the totality of the evidence that the crown has proved beyond a reasonable doubt that the accused did on November 16,1999 rob Michael Aitken, as charged. Accordingly, I find him guilty of the offence of robbery and will enter

a conviction on the record.