SC CR 77 005

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

B J

Trial Held at Frobisher Bay, Northwest Territories
November 9, 1977 1976?

Judgment of the Court Filed February 7, 1977

Found Guilty - Sentence Reserved

Reasons for Judgment of:

The Honourable Mr. Justice C. F. Tallis

Counsel on the Hearing:

Mr. B. Fontaine, for the Crown

Mr. P. Knoll for the Accused

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REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE C. F. TALLIS

The Accused B J stands charged that "he as a male person, on or about the 7th day of May, A.D. 1976 at or near Frobisher Bay in the Northwest Territories did unlawfully have sexual intercourse with E J , a female person not his wife and under the age of 14 years, contrary to Section 146 of the Criminal Code."

The trial of this matter has now been concluded. Counsel have delivered both oral and written arguments in which all the issues have been fully canvassed.

Section 146 of the Criminal Code defines the offence charged in the following terms:

"146. (1) Every male person who has sexual intercourse with a female person who

(a) is not his wife, and

(b) is under the age of fourteen years,

whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life."

In this particular case there is little, if any, dispute as to the facts. At the trial Counsel for the Crown and the Accused signed an admission of facts which is filed pursuant to the provisions of the Criminal Code. From the Admission of Facts and other evidence adduced, the following, inter alia, material facts have been established beyond a reasonable doubt in my mind:

(1) The Accused B J is a male person of 27 years of age.

(2) E J named in the Indictment is a female person and was 11 years of age on May 7, 1976.

(3) That the accused had sexual intercourse with E J in a bedroom of the house of L N at Frobisher Bay, Northwest Territories on the 7th day of May 1976.

(4) E J is not the wife of the Accused.

(5) On May 7, 1976 the accused was living at the house of K and L N in Frobisher Bay, Northwest Territories. E J was also living in the same house. L N is her married sister.

From the foregoing it will be seen that intercourse admittedly took place with E J . Under the circumstances I do not feel that it is necessary for me to outline in detail

all the evidence that was adduced. I am satisfied that the witnesses L N , Constable Brian Ross and Corporal L. McAllister are credible witnesses but their evidence in relation to the issues involved merely supplements the admitted facts.

At the time of this alleged offence the accused was admittedly under the influence of liquor. E J described him as being in a drunken condition. She was told by the accused to come to his bed and go beside the wall side of the bed. She indicated she did this because she was afraid of him. The accused told her to take her pants off. She did this. He took his clothing off with the exception of his shorts and then joined her in bed. The accused then took her panties off, took his own shorts off and had sexual intercourse with her.

The alleged offence took place at approximately 10.45 p.m. on May 7, 1976. At 11.55 p.m. on the same date a breathalyzer test on the accused gave a reading of .120. A further test at 12.08 a.m. on May 8, 1976 gave a reading of .130 with respect to the accused.

The accused gave evidence in this particular case. Two psychiatrists were called by the defence: Dr. John Atcheson and Dr. K. McKay. With the agreement of the Crown certain other medical reports were filed on behalf of the accused.

The accused is 27 years of age. He is now very fluent in both English and his native tongue. Apparently he started drinking quite heavily even when he was quite young. In 1973

he was seriously injured in a car accident in Ottawa. He sustained head injuries of a serious nature. These injuries are detailed in the medical report of Dr. Schowalter. However it should be noted that even prior to this accident in 1973 the accused by his own admission drank large quantities of alcohol from time to time with the result that he would wake up not knowing where he was or what he had done the previous evening.

In February of 1976 the accused indicated that he was staying in Frobisher Bay. To use his own words, he said that he used liquor as an escape. On February 27, 1976 he became involved in heavy drinking and this culminated in his being charged with the following offence:

> "That he as a male person, on or about the 27th day of February, A.D. 1976, at or near Frobisher Bay in the Northwest Territories did indecently assault N A , a female person contrary to Section 149 of the Criminal Code."

In his evidence he indicated that he recalled a number of matters prior to this alleged incident but because of drunkenness he did not recall any of the details concerning the alleged offence.

The accused was released on bail with respect to the N A charge. A preliminary hearing was held and the accused was personally present so that he heard the particulars of the alleged assault on N A whose birthday was stated to be February 13, 1971. After the preliminary hearing the accused went to work at Strathcona Sound. He worked there for

seven weeks and returned to Frobisher Bay around the end of April 1976.

On May 7, 1976 the accused recalls drinking on the afternoon of that date. He recalls going to a bar and also a club where liquor is sold. However, he does not recall any of the events concerning E J . He recalls waking up in jail.

The accused in his evidence stated that after the first incident involving N A he didn't have a deep conviction that he shouldn't drink. However after the E J incident he realizes that he shouldn't drink.

In this particular case I have already mentioned that Dr. Atcheson gave evidence on behalf of the accused. His evidence was given in detail and as I understand it there are no real differences of opinion between him and Dr. McKay who also gave evidence on behalf of the accused.

In view of the importance of this evidence I arranged to have it transcribed with copies being furnished to both Counsel. I should add that Dr. Atcheson gave his evidence in a very fair and frank manner with a view to assisting the Court in dealing with this matter. It should be observed that Dr. Atcheson has wide experience in the field of psychiatry and has had the opportunity to work with the Inuit in the Eastern Arctic.

Dr. Atcheson in dealing with the background of the accused stated as follows:

"Q. Could you tell us what you have observed after looking at all those report and considering the offence charged; what are your findings with respect to the accused?

A. Well, on examination of the accused he was a very cooperative young man of 27 years, I believe. He provided me in a very articulate manner and excellent English with his life history, the history of his development, and this information corresponded very accurately with the data that had been provided to Doctor MacKay.

Without reviewing that in depth, the point to me, or, I would make the point that in his early developmental years he suffered from tuberculosis, and he has been at the Sanatorium in Hamilton, Ontario and, in fact, English became his first language. He returned to his people speaking English, and perhaps not too articulate at that point in his native tongue, and I comment on that because, in fact, it indicates one of the difficulties in the life development of an individual who has been removed from his early environment and comes back speaking another basic language. There is a period of accommodating to the new security you have with your family, and I think this explains some of the personality characteristics of this gentleman, and I comment on it for that purpose.

It was my opinion that he was an extremely intelligent man, and that not only had he mastered his own native tongue very fluently, but the concepts he used and the vocabulary he used, in my opinion, would justify a clinical opinion that he is of above-normal intelligence, and probably in the higher range quotient. He has that high intelligence. He presented no

"unusual mental content as he shared with me his feelings. There was no evidence that he has ever suffered from any form of serious mental disorder. There is, however, evidence that -

THE COURT:

Q. If I may just interrupt, when you are using the term "no serious mental disorder" are you using it in the context of a psychiatrist's view of mental disorder?

A. I am using it in the concept of psychiatric mental disorder, where he has difficulty in identifying reality and may experience false perceptions and hallucinations that may operate in delusional thinking or false beliefs, beliefs that are not based on rational truths. He has not shown that type of disorder at any time.

MR. KNOLL:

Q. Please continue.

A. In terms of personality, he admits to me that he has always been a questioning person, and I think this relates back to the deprivation in his early years, to try and identify with the new culture, really his own; that he always questioned authority, but that this questioning seemed to be more on the level of intellectualism, looking for value systems, rather than being the type of aggressive behaviour and disorder that one sometimes sees in children and adolescents.

He described to me his educational process, and his further education in Churchill.

" The next factor perhaps that is of marked significance is that in terms of his sexual development, it commenced to be a heterosexual behaviour, and by that I mean, obviously sexual intercourse, sexual relationships, sexual play with the opposite sex. There is no evidence that he has an interest in his own sex in that area. There is no suggestion in the inquiry and in the material that showed that he had any sexual deviation. His relationships have been, as a rule, with his peer group, although occasionally when a young boy at the age of 10 or 11 he had sexual intercourse with the opposite sex who would be several years older. That is the only discrepancy in this age or peer group relationship sexually, and I think one has to assess this in the light of the cultural differences in this area. I make this point because, in my opinion, one of the issues that is going to concern the court is the question of deviation or dangerousness in terms of a deviant sexual problem.

Q. Are you suggesting that in this culture his sexual experiences at an early age are not uncommon or are not abnormal?

A. I would not think that would be uncommon. In our culture in the south we are following a different life style and a different community of living and perhaps sometimes a false prudishness about such issues."

With respect to the accused's use of alcohol Dr. Atcheson had this to say:

" In terms of his habits in the use of alcohol, which again seemed to be a significant issue, he had been drinking from a fairly early age periodically, gradually with some increasing intensity. He had experienced periods when he had consumed enough alcohol to become unconscious or to pass out, and periods when he had been drinking in which he would have lapses of memory. This again is not uncommon in someone who drinks excessively, that there will be periods of an unusual fragmented type of memory, where there are periods in the course of the drinking that the blood alcohol affects the brain and where it is not registering intake. It is seeing and doing and behaving but very often not registering the fact of any permanent memory storage.

Q. Would these times have been in the late '60s or the last couple of years that he had been talking about or did he indicate the number of occasions it happened?

A. He indicated a number of occasions to me. One occasion, for example, was because it resulted in his hospitalization in Ottawa Civic Hospital with a very severe head injury. I believe, if my notes serve me, it was 1973, in December of 1973, that while intoxicated he had taken a car. He claimed that he could not remember this. I think this claim could not be debated because of the subsequent events. The loss of memory was related to the alcohol, as I explained it will become obvious it is a true bill of amnesia at that point.

" The car was wrecked by his condition and his inability to drive. He was taken to Ottawa Civic Hospital, and the records from there indicate a serious head injury. It was called a concussion. It could be identified, the areas of the brain that were concussed or bruised by the blow that he had received, and they were - one was the frontal region of the brain, the cortex on the right side, and the other was the temporal area, the area in this part of the brain.

Q. That is the left side?

A. On the left side. This would be suggestive of a very intensive blow to the head in which there had not only been direct damage here because of the blow but also what is called a contra coup effect, the pressure being transmitted through the fluid in the brain and bouncing off the other side of the brain, and I think it is important that there is an injury noted on two sides simply to identify the intensity of that blow and the contra coup effect, or else there were two blows, and that is not likely.

Q. Would that blow have affected the other side of the head that had not been struck?

A. It would be my opinion that would be likely. As a result of this he was described as being in a state of coma, and some coma for approximately four weeks, perhaps a little better. It is obvious that the clinical findings did not merit surgery at that time, but it does indicate there was a diffuse damage and pressure within the skull that would cause this. There was then as a result

" of this what is called a retrograde amnesia, that is, a period preceding the accident, preceding the event itself, which had been knocked out from his memory. This is common in head injuries. It tends to improve somewhat, but there was a lapse of probably a week to ten days as far as we can determine or his memory will now permit us to determine prior to the accident itself which is lost. As he ably put it, 'I thought it was 1974 and there only nine months in the year.' It was again an interesting abstraction to make.

Following this head injury - he had prior that been employed at the I.T.C. in Ottawa. He had been given a task that was a difficult one of producing a newspaper for the organization. The task orientation, that capacity after the accident was destroyed. He was not capable of this any more because of the memory loss and his condition, and he returned to Frobisher Bay.

THE COURT:

Q. Prior to this accident where he received the head injury, is there any history of memory lapses from excessive use of liquor?

A. Yes, he told me there were occasions - and that is the only evidence I have to go on - when he would have what is commonly called alcoholic black-outs.

Q. And how far back did these alcoholic black-outs go as far as you were able to ascertain?

A. I would think that they go back probably ten years.

Q. When he was a young man or a youngster?

A. Yes.

On the question of alcohol amnesia and behaviour while drinking, Dr. Atcheson stated as follows:

"Q. Would it be fair to say then that once you were saying that perhaps at the time that this offence is alleged to have occurred that he was suffering from alcoholic amnesia?

A. I believe he does not remember, yes.

Q. What about at the time itself that the offence is alleged to have taken place; can you tell us your opinion as to whether he would be acting consciously or automatically?

A. I would have to describe it as a state of impaired consciousness. It has not perhaps reached the point of total automatism. There are periods of behaviour that appear more relevant than others. He has no fragments of that memory that I can discover.

THE COURT:

Q. When you use the term "impaired consciousness", you mean, impaired by alcohol?

A. Yes.

MR. KNOLL:

Q. Would that impaired consciousness also be as a consequence of the brain injury?

A. I find it very hard to make a direct relationship between the two. It is rather with the sexual relationship, more drinking because of the problem that the brain injury created. The question of whether or not he is more prone to respond to the lower levels of alcohol because of the brain injury, in the reports from the Alberta Hospital there was no substantial brain abnormality in the electroencephalogram with measured doses

" of alcohol, so really I do not comment beyond an impression.

Q. Doctor MacKay in the evidence given on October 27th that is in that transcript suggested to the court that his condition at the time was a combination of the alcohol intake and the brain injury; would you agree with that?

A. There has been work which Doctor MacKay indicated in his report, following World War 2, of trauma and injuries to the brain, which are very common, that the tolerance level of alcohol is less in certain types of brain injury. For example, there was a concern when this young man was released from the Ottawa Hospital that he might have epileptic seizures. Now, it proved that he did not have, but the prediction that he might under these conditions and injuries was such that he was placed back in the community on an anti-convulsant drug. There is a degree of predictability related to brain injury. If epilepsy had appeared as a result of this injury, fits, he would very likely precipitate them by alcohol. Individuals with seizures from brain injuries will find that drinking is absolutely to be abstained from because it will increase the potential. In that sense I think that is the sort of theory which indicates the relationship between brain injury and alcoholic intake which is measurable because you have a fit. It is most difficult to measure with the way you think or how you behave. Feelings and acting-out behaviour is much more difficult, and I think that is the

" reason that one does not have a good scientific design. We would like to have a research design of the evidence in the way of testing intention under these conditions, in the way we can test other functions, but this intent is very nebulous.

Q. Would it be proper to say then that this brain injury would be a contributing factor to whatever is being done or his condition.

A. I believe that to be true.

Q. Can you give us the relative weight - there are two contributing factors and one is the alcohol and one is the brain injury; is it possible to give weights to the final consequences?

A. The only logic I could apply is that he drank excessively prior to the automobile accident and the concussion. It may be that that excessive drinking was one of the reasons that the accident occurred but, in fact, there was no evidence to substantiate this type of behaviour, acting out, that is alleged, so I think one might say there has been another variable, that a different pattern of behaviour emanates from this man when he drinks. (The underlining is mine.)

In dealing with the term impaired consciousness Dr. Atcheson had this to say:

"Q. The term you used was impaired consciousness. To what extent would his consciousness have been impaired; is this a complete impairment? Would he have been at all conscious of what he was doing?

"A. It is very hypothetical. When you observe a person through that process of drinking to that blood level and putting them in that type of situation, it is very hard to respond to that. From having observed many people with an alcohol problem, the problem of memory with alcohol, it is my opinion - and I use the word "fragmented", it is disjointed - it is that there are several little pieces of what is happening to you you can recall but since it does not fit together in any one thing, it tends to be meaningless. If one has that feeling and they feel they have behaved very badly under the influence of alcohol, and state they cannot remember it, it is a very painful statement for them, and they can recall little pieces of it, and the suggestion can be, since you can recall that why cannot you recall that one? It may be a type of selection that the brain is able to achieve, but it seems to me it is a random phasing out of the impaired fragmented memory, and since it does not all join in one piece, it is dismissed as, "I cannot remember it." I cannot speak beyond that without watching a person through a sequence of observation.

Q. At the time this offence or alleged offence would have been committed, can you give us an opinion as to whether he would or not have known what he was doing?

A. I think the question is based - when did the loss of memory, if it is a true bill, occur? "Did you know what you were doing?" and afterwards the blood level was received and it was a horrendous thing to do and he would repress it in the brain, what he did, and would forget before or after the fact. I have a feeling that the loss or fragmented memory and the impaired level of consciousness preceded the act and was a part of the process of the act, but to what degree and how com-

" plete I cannot say, but I believe that was there, that impairment.

Q. Would it be fair to say is it your opinion that he would not have known what he was doing?

A. If part of knowing is to store the event itself, then he does not know, and I think we can concede that he would know that to know something is to have it as part of you, and to say, can he walk, could he perform this act at that time, the answer is, yes. The officer saw him walk, and saw that he was not looking intoxicated. Did he know how to walk? He knew how to walk because his brain was functioning, and he was able to walk, and the brain was functioning - it is that type of issue that is involved.

THE COURT:

Q. I suppose his mind could be sexually oriented at the time without him now remembering it?

A. I made that point because I thought it was important."

Counsel for the accused raised the question of Section 16 of the Criminal Code with Dr. Atcheson. In this connection Dr. Atcheson stated as follows:

"MR. KNOLL:

Q. If he would not appreciate the nature of the sexual act, could you give us an opinion as to whether he would have appreciated the nature and quality of the act as a whole?

THE COURT:

Now you are really getting into the question of insanity.

"MR. KNOLL:

I am moving that way.

THE COURT:

I think the Doctor is quite familiar with the M'Naghten Rules and the provisions of the Criminal Code.

A. Yes, it would be my opinion that he would not come under the Section 16 concept of disease of the mind. That is one of the difficulties, of course, because a man has taken in a chemical substance that makes his mind function inappropriately, and I think this is an issue perhaps for discussion, and for the moment I would not think it would apply as being a mental disorder.

Q. Disease of the mind, with due respect to the court, I believe has been liberally interpreted. Would the brain injury he had be something that would affect his mind?

A. It was not affecting it in the way that would apply in these issues, in my opinion.

Evidence was adduced with respect to intention of a sexual nature and in this regard Dr. Atcheson made the following remarks:

"Q. Having developed this sexual intention previous to it, you indicated that at a certain point he became fragmented in his consciousness? Would that intention have gone then or would he consciously at that time continue that intention? Do you understand what I mean?

A. Yes, I believe I do. I think the intention of being involved in

" sexual behaviour, being stimulated to think about that, and then forming a specific intention to carry out the particular act that I have heard described, I do not think that latter specific intention is involved. I think it is too diffuse at that point. I think his brain is not operating in those terms. It is a complex term.

Q. Would he perhaps have been operating, because of learned behaviour and also perhaps because of his proposed intention on that night?

A. Those things could all be part of what happened, yes.

Q. Is that a conscious involvement?

A. Impaired consciousness.

THE COURT:

Q. As I understand it, you are in the situation where you have sort of a general intention arising from the sexual orientation you have been talking about, and can you then pinpoint the specific intent, and this is the area you have in effect segregated?

A. I have segregated it. I think he could form the intention for sexual activity but I do not think he formed the specific intention to perform this act."

On further questioning by Counsel for the accused with respect to insanity and automatism Dr. Atcheson stated:

"Q. Doctor Atcheson, just to sum up for this morning some of the evidence that you gave yesterday,

" roughly speaking, I understood that first off perhaps you would not feel that this is a case for Section 16, is that correct?

A. That is correct.

Q. I also understood you to say that perhaps this man was not, in your opinion, acting in a state of automatism but was perhaps acting in an automatic sense?

A. What I was trying to interpret was that although he was not acting in a state of total automatism, he was behaving, carry out certain acts in a state of diminished consciousness in which there were periods in which he was not storing a memory of what he was doing; he could not recall later; and as a result of that, he was performing these acts in a state where he did not have the total judgment that would usually enter into a decision. If I could make a comparison, if I were severely intoxicated, you might request of me that I perform some acts for you such as taking the car and driving it to the airport. I might do that. Whether I am doing that in the voluntary sense, I am not doing it with the total decision-making I would make in my own impaired state. At that point judgment would enter into time, place, and condition, and I would say "I do not volunteer to do that." If, on the other hand, something has removed this cerebral cortex of mine that allows me to make judgments and I make them on the basis of past information in toto, I might do many things voluntarily but without that element of judgment, and it is that element - the element of judgment is, in my opinion, deeply impaired in the condition this man has described to me, in the blood

" levels I have heard about, and also his capacity to recall them, to retain his memory of the total act, in my opinion, is seriously impaired. That to me is different than total automatism.

Q. Doctor, you say it is not a state of total automatism; is it a state of partial automatism?

A. Yes, one could use that concept.

THE COURT:

Q. And the liquor that was consumed would be a factor in that?

A. Yes, indeed, it would.

Q. A very decisive factor?

A. Yes.

Q. And aggravated in this case by the pre-existing, or the pre-existing condition would be aggravated by the consumption of liquor?

A. In my opinion, yes.

In cross-examination on the issue of black-outs it was dealt with by Dr. Atcheson as follows:

"Q. Is it fair to say that after the accident or even before the accident Mr. J was aware of these black-outs due to his drinking?

A. I believe that he was.

Q. And you also said it was your conclusion that he was very dangerous when drinking and that he was unpredictable?

A. Yes.

Q. And is the main cause of these black-outs even now, even after the accident -

" and let us accept there was a black-out at the time of the offence - would the main cause of these black-outs be alcohol?

A. In my opinion, it would.

Q. And the effect of the brain injury would be simply to increase the possibility of black-outs at a lower level -

A. I believe that is true, yes.

Q. You have, I believe, arrived at your conclusion on the hypothesis that the blood alcohol level at the time of the alleged offence was 125 milligrams per 100 millilitres of blood?

A. Yes, that is what I understood.

I have deliberately quoted at length from the evidence of Dr. Atcheson because of the defences that I must consider in connection with this charge.

In view of the fact that the accused through his counsel raised the question of insanity in questioning Dr. Atcheson I feel that I must consider this matter in the present case. On the evidence I am satisfied that there is no evidence of insanity to be considered by the Court in this case. I have already referred to Dr. Atcheson's evidence and having regard to the legal tests set forth in Section 16 of the Criminal Code I find there is no evidence of mental illness within the meaning of that Section.

In arriving at this conclusion I have considered the following, inter alia, authorities: *Chartrand v. The Queen*,

26 C.C.C. (2d) 417 (S.C.C.); *Schwartz v. The Queen*, 29 C.C.C. (2d) 1 (S.C.C.); *Regina v. Johnson*, 28 C.C.C. (2d) 305 (N.B.S.C. - Appeal Div.)

In this particular case learned Counsel for the accused has also raised the defence of drunkenness to this charge. It is urged that a crime under Section 146 of the Criminal Code involves a specific intent that must be proved beyond a reasonable doubt by the Crown. Learned Counsel submits that in a crime of "specific intent" drunkenness may be a defence where the condition of the accused was such that there is a reasonable doubt as to whether he is unable to form such an intent. Specific reference is made to the case of *R. v. Vandervoort* (1961) 130 C.C.C. 158 in this connection.

Learned Counsel for the Crown took the position that if drunkenness is to be considered as a possible defence, this Court should follow the principles outlined in *R. v. Boucher et al*, 39 C.R. 242; 40 W.W.R. 663; (1963) 2 C.C.C. 241 and *R. v. Leary*, (1975) 31 C.R.N.S. 199 (B.C.C.A.).

Regardless of the approach which is taken in this particular case I do not feel that drunkenness is a defence to this charge. The offence involved in this particular case is defined by statute. Where the female person involved is proved to be under 14 years of age, as is the case in these proceedings, the absence of consent is not an essential ingredient of the offence which must be proved beyond a reasonable doubt. Furthermore,

the language of the Section makes it quite clear that an honest mistake of fact or an honest belief as to the age of the female person involved is no defence.

Under the circumstances, even if the evidence did establish that the drunkenness of the accused was of such a character that he mistakenly believed that the female person was in fact consenting to the act of intercourse, this would not constitute a defence to the charge.

I feel that the principles enunciated in *R. v. Majewski* (1976) 62 C.A.R. 262 are applicable in this case. The accused's actions resulted from a condition that he induced in himself by consuming intoxicating liquor and in my view this statutory offence does not require proof by the Crown of any specific intention.

In arriving at this conclusion I would like to acknowledge the assistance I have obtained from the following article: *An Untrimmed "Beard": The Law of Intoxication as a Defence to a Criminal Charge* by Alan D. Gold, 19 C.L.Q. 34.

I turn now to a consideration of the defence of Automatism which has been strongly urged by Counsel for the accused. I have already quoted extensively from the evidence of Dr. Atcheson and in discussing this aspect of the case I will not repeat that evidence. On the issue of Automatism Counsel for the accused has frankly stated his position in summary form as follows:

"1. IT IS RESPECTFULLY SUBMITTED that the Crown must prove that the acts of the accused (in both instances) were conscious, and voluntary, as actus reus is a required constituent of every offence, and that the defence of non-conscious involuntary act, or non-insane automatism, is one open to an accused in the Canadian Courts and this Honourable Court.

2. IT IS RESPECTFULLY SUBMITTED that there is considerable evidence before the Court which indicates that the actions of the accused (in both instances) were not conscious, voluntary ones.

3. IT IS RESPECTFULLY SUBMITTED that the acts of the accused were not dependant on, and only on, drunkenness, from alcohol consumed, but were also, at the least, an integral consequence of a serious blow the accused had received to his brain in 1973, and furthermore that the acts would not have occurred had there been no such injury.

4. IT IS RESPECTFULLY SUBMITTED that the Crown has not satisfied its burden of proving the actus reus in either instance, as the acts have not been established as being conscious, voluntary ones, and furthermore that the Crown has not adequately answered the defence, raised by the expert medical evidence, being that the acts were not sufficiently conscious and voluntary to establish the offences, or non-insane automatism.

5. IT IS RESPECTFULLY SUBMITTED that the evidence disclosed a good defence and that the accused is entitled to the benefit of the considerable doubt established; therefore the charges should be dismissed."

The law in respect to the defence of Automatism was carefully dealt with by Culliton, C.J.S. in *Regina v. Hartridge*, 56 W.W.R. 385; 48 C.R. 389, (1967) 1 C.C.C. 346, 57 D.L.R. (2d) 332. After reviewing the authorities, Culliton, C.J.S. stated as follows at pp. 410-3 [C.R.]:

> " I now turn to a consideration of automatism due to the voluntary consumption of alcohol or drugs. At least since the decision of the House of Lords in *Director of Public Prosecutions v. Beard*, [1920] A.C. 479, it has been the accepted law, both in England and in Canada, that voluntary intoxication is not a defence to a criminal charge unless it amounts to insanity within the meaning of the M'Naghten Rules, or unless the intoxication has produced in the accused a mental and physical condition which renders him incapable of forming a "specific intent" where the existence of such an intent is essential to constitute the offence with which he has been charged. At p. 500 Lord Birkenhead said in part:
>
> > '... the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter.'
>
> In *Atty. Gen. for Northern Ireland v. Gallagher*, [1963] A.C. 349, [1961] 3 All E.R. 299, 45 Cr. App. R. 316, [1963] 3 W.L.R. 619, Lord Denning, in discussing drunkenness as a defence, at p. 381, propounded these propositions:
>
> > '1. If a man is charged with an offence in which a specific intention is essential (as in

" 'murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intention, is an answer: see: *D.P.P. v. Beard*, [1920] A.C. 479, 501, 504. This degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing (see *Regina v. Moore* (1852), 3 Car. & K. 319, 175 E.R. 571), as where, at a christening, a drunken nurse put the baby behind a large fire, taking it for a log of wood (Gentleman's Magazine, 1748, p. 570); and where a drunken man thought his friend (lying in his bed) was a theatrical dummy placed there and stabbed him to death ("The Times,' January 13, 1951). In each of those cases it would not be murder. But it would be manslaughter.

2. If a man by drinking brings on a distinct disease of the mind such as delirium tremens, so that he is temporarily insane within the M'Naghten Rules, that is to say, he does not at the time know what he is doing or that it is wrong, then he has a defence on the ground of insanity: see *Regina v. Davis*, (1881), 14 Cox C.C. 563, and *D.P.P. v. Beard*, [1920] A.C. 479.'

In Canada the law is well settled that drunkenness disabling the accused from forming the intent which is an essential element in the crime of murder, will reduce a crime from murder to manslaughter: *MacAskill v. The King*, [1931] S.C.R. 330, 55 C.C.C. 81, [1931] 3 D.L.R. 166; and the cases referred to in Tremeear's Criminal Code, 6th ed., at p. 72.

While there is ample authority that when, through the voluntary consumption of alcohol, the accused is rendered in-

"capable of forming a specific intent, where the existence of such intent is essential to constitute the offence with which he has been charged, this will be a defence to that particular charge. I can find no authority, however, that the same circumstances would be a defence to a criminal act where *mens rea* is an essential element of the offence as distinct from a specific intent. What authority there is indicates that voluntary drunkenness, even to the point where the accused is acting in a state of automatism, would not be a defence in the latter case.

In *Regina v. King*, [1962] S.C.R. 746, 38 C.R. 52, 133 C.C.C. 1, 35 D.L.R. (2d) 386, the Supreme Court held that *mens rea* was an essential ingredient of the offence of driving while impaired under s. 223 of the Criminal Code. The following comment of Ritchie J., at p. 763, is, I think, indicative of the Court's view of the limitation of the defence of drunkenness:

> ' If the driver's lack of appreciation when he undertook to drive was induced by voluntary consumption of alcohol or of a drug which he knew or had any reasonable ground for believing might cause him to be impaired, then he cannot, of course, avoid the consequences of the impairment which results by saying that he did not intend to get into such a condition, but if the impairment has been brought about without any act of his own will, then, in my view, the offence created by s. 223 cannot be said to have been committed.'

Again, in *Regina v. George*, [1960] S.C.R. 871, 34 C.R. 1, 128 C.C.C. 289, while the Court was not required on the facts as found by the learned trial judge, to determine whether voluntary drunkenness would be a defence to a charge of assault, Fauteux J., at p. 879, had this to say:

" ' Hence, the question is whether, owing to drunkenness, respondent's condition was such that he was incapable of applying force intentionally. I do not know that, short of a degree of drunkenness creating a condition tantamount to insanity, such a situation could be metaphysically conceived in an assault of the kind here involved.'

On the authorities as I interpret them, and understand them, I must conclude that when the only evidence upon which a defence of automatism may be founded is drunkenness, then only the defence of drunkenness should be put to the jury. I adopt as a proper statement of the law in this respect the remarks of Lord Denning in the *Bratty* case, when at p. 414 he said:

' When the only cause that is assigned for an involuntary act is drunkenness then it is only necessary to leave drunkenness to the jury, with the consequential directions, and not to leave automatism at all.'

To summarize the law as I believe it to be, two basic principles must be kept in mind:

(1) Where the possibility of unconscious acts depends on, and only on, the existence of a defect of reason from disease of the mind within the M'Naghten Rules, the defence is one of insanity and not of automatism;

(2) Where the possibility of an unconscious act depends on, and only on, drunkenness, then, depending upon the evidence the defence is either insanity or drunkenness, and not automatism.

Thus, when effect is given to these two principles, it is obvious that the area in

> "which automatism is a defence warranting a complete acquittal, is indeed restricted. It would be both inadvisable and difficult to attempt to define with certainty the ambit of such a defence. I think it is sufficient to say that it is a matter of law for the trial judge to determine whether a defence of automatism lies when the evidence is that the cause thereof is something other than a disease of a mind or drunkenness. In this category would fall automatism due to injury, such as was recognized by the Court in *Regina v. Minor*, supra, and *Regina v. Bleta*, supra; or when the person was in a state of somnambulism. Too, it would lie where an unconscious act ensued from the taking or administration of a drug when the effect thereof was unknown to the recipient, or of the effects of which he had not been advised: *Regina v. King*, supra. See also the judgment in *Hill v. Baxter*, [1958] 1 Q.B. 277, [1958] 1 All E.R. 193, 42 Cr. App. R. 51, for some interesting observations. I would also add that when the defence is other than insanity, no burden rests upon the accused to establish his defence; the burden of proof of proving beyond a reasonable doubt every essential ingredient of the offence charged remains on the prosecution throughout in accordance with the law as stated in *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462."

The law in connection with the defence of Automatism was recently considered by McIntyre, JJ.A. in *R. v. Berger*, 27 C.C.C. (2d) 357 at pp. 378-9 where he had this to say:

> " An attack was also made on the Judge's charge on the defence of automatism. It was said that he was in error in saying that the evidence of the accused on this subject must be corroborated, that he failed to say the defence could be applied to semi-conscious acts and that he mis-stated the burden of proof and failed to review the evidence on this subject.

" The defence of automatism was limited to non-insane automatism. In such cases as *Bratty v. Attorney-General for Northern Ireland*, [1963] A.C. 386, and *R. v. Parnerkar* (1971) 5 C.C.C. (2d) 11, 16 C.R.N.S. 347, [1972] 1 W.W.R. 161, in the Saskatchewan Court of Appeal, and in the Supreme Court of Canada at 10 C.C.C. (2d) 253, 33 D.L.R. (3d) 683, [1974] S.C.R. 449, this defence is dealt with. It is clear that this defence is recognized in this country (see as well *R. v. Cusack* (1971), 3 C.C.C. (2d) 527 at p. 532, 1 Nfld. & P.E.I.R. 496, and *Bleta v. The Queen*, [1965] 1 C.C.C. 1, 48 D.L.R. (2d) 139, [1964] S.C.R. 561. The defence has, however, a limited application. Automatism may be described as unconscious, involuntary behaviour, the state of a person who though capable of action is not conscious of what he is doing. It means an unconscious involuntary act where the mind does not go with what is being done: see *R. v. K* (1970) 3 C.C.C. (2d) 84, [1971] 2 O.R. 401, *per* Lacourciere, J. Where on the evidence it is indicated that this condition is the result of a disease of the mind the defence of insanity should be put to the jury and where it results from intoxication by alcohol or a drug the defence of drunkenness should be put. The defence of non-insane automatism should be put to the jury only where the evidence indicates that the condition of automatism results from a cause other than insanity or intoxication. Success in establishing this defence will result in an acquittal whereas the defence of insanity carries its special verdict of not guilty by reason of insanity and a successful defence of drunkenness merely reduces what would otherwise be murder to manslaughter. In applying the defence of automatism it is clear from the authorities referred to above that there is no burden of

> "proof imposed upon the appellant in raising this defence beyond pointing to facts emerging either from his own evidence or that of the Crown which indicate the existence of such a condition. Once this is done the Crown must discharge its ordinary burden of proving the act of the appellant to have been conscious and voluntary beyond a reasonable doubt. If on the whole of the evidence the jury is left in doubt on this issue the accused is then entitled to be acquitted.

I have carefully considered the evidence adduced at this trial with the above principles in mind. On the evidence I find that the actions of the accused on the night in question and particularly at the time of the alleged offence were not wholly involuntary and unconscious. There is no doubt that the accused had been drinking liquor in excessive quantities and was affected by it. I am satisfied that his loss of memory was caused by the excessive consumption of liquor. The head injury sustained by the accused in 1973 may have lowered his tolerance to liquor but the principal or primary cause of his difficulties stem from the excessive consumption of liquor. Prior to his accident in 1973 the accused had alcohol amnesia and particularly after February of 1976 he was fully aware of his inability to handle liquor.

I have no doubt that the consumption of liquor caused the accused to lose some of his inhibitions and embark on a course of conduct that he would not do if he was not under the

influence of liquor. There are marked similarities between the facts of this case and the facts in *D.P.P. v. Majewski* (1976) 62 C.A.R. 262.

Even if the evidence did establish that the acts of the accused were unconscious and involuntary in a legal sense such a condition would be attributable to drunkenness. In my opinion the head injury sustained in 1973 would not bring into play the reasoning that is applied in cases such as *R. v. Minor* (1955) 15 W.W.R. 433 and *R. v. Pellerin* 1975 C.S.P. 310. In this case I have already held that drunkenness is not a defence to this charge.

After carefully considering the law and evidence I am satisfied beyond a reasonable doubt that the accused is guilty. I would like to express my appreciation to both Counsel for their able arguments in this matter. Before passing sentence I will hear submissions of Counsel.

Dated at Yellowknife, Northwest Territories this 7th day of February, 1977.

C. F. Tallis

C. F. Tallis, J.S.C.