Court of Queen's Bench of Alberta

Citation: R v Brown, 2020 ABQB 166

Date: 20200305
Docket: 180055626Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Matthew Winston Brown

Accused

Reasons for Judgment
of the
Honourable Madam Justice M.H. Hollins

---

[1] This case raises the rare defence of extreme intoxication akin to automatism.

[2] On the evening of January 12, 2018, the accused was at a small house party with friends, drinking alcohol and eating magic mushrooms. In the early morning hours and in frigid temperatures, he ran out of the house completely naked. His friends tried to find him but when they could not, they called the police. On their way, the police were re-routed to the scene of a nearby break and enter, the perpetrator of which turned out to be the accused.

[3] Janet Hamnett, a university professor who lived alone, was awoken by the sound of the glass in her sliding patio door being smashed to pieces. She thought perhaps the furnace had exploded but when she walked out of her bedroom to investigate, she was attacked. She fell to her knees and put her arms over her head and face. She could not see the person attacking her but

described him as a huge presence who beat her repeatedly around her head and on her hands and forearms with some kind of hard object. When he ran up the stairs, Ms. Hamnett went into her bathroom and locked the door. There was blood on her head, face and arms. She wrapped her left arm in a towel and waited in the bathroom.

[4] Once it was quiet, Ms. Hamnett put on her robe and ran out through the smashed-out patio door to her neighbours, the Crones, who called police. After running out of Ms. Hamnett's house, the accused was spotted by Michael Crone, who took photographs of the accused, still naked, attempting to get into a parked car in their cul de sac. When Mr. Crone approached him, the accused ran away again. He was gone by the time the police and EMS arrived and took Ms. Hamnett to the hospital. Her injuries included lacerations, a sprained wrist and a broken hand.

[5] From the Crones' neighbourhood, the accused went to another residence almost another kilometre away and broke into this home as well. Mr. and Mrs. Varshney were in their bedroom on the second floor when the accused threw a statue through the glass in their front door window. When they heard the glass breaking, Mr. Varshney yelled "Who is there?". No one responded to him, although he could hear someone yelling loudly downstairs. He and his wife called 9-1-1 and waited in their bedroom for the police.

[6] When the police arrived, they searched the Varshneys' home. Following a trail of blood, they located the accused lying on the floor of a bathroom on the main floor. He followed the police directions to come out slowly and was compliant throughout his arrest. Constable Juha said the accused was whispering and appeared confused by his surroundings. He was still naked and his feet were bruised and bloodied. He was also taken to the hospital.

[7] The accused was charged with one count of break and enter with commission of aggravated assault and one count of break and enter with commission of mischief, namely damage to property. The accused testified at trial that he has no memory of any of these events between the early morning hours at his friends' place and then waking up in the hospital. He is pleading the defence of non-mental disorder automatism, which if accepted, would result in an acquittal on these charges.

The Law

[8] In Canadian criminal law, conviction of a criminal offence requires proof beyond a reasonable doubt that the accused both physically committed the act (the *actus reus* or physical element of the crime) and that he did so knowingly (the *mens rea* or mental element of the crime).

[9] Automatism describes unconscious, involuntary behaviour. It thus negatives the requirement that the *actus reus* or physical act be done voluntarily because the automaton does not control his actions. It also negatives the *mens rea*, as the automaton does not have knowledge of his acts, therefore lacks any intention to commit a crime.

[10] A simple explanation is provided in Glanville Williams "*Textbook of Criminal Law*" (3rd ed. at page 902):

> In automatism cases the defendant is only acting in a mechanical sense – he is the unwilling author of his body's mechanical actions. The brain will be sending sufficient messages for his limbs to operate and for those movements to harm others. It is illogical to argue that automatons do not act at all in a physical sense

> but it is not illogical to argue that they did not act at all in a legal sense. The law does not target this type of acting...Automatism is not about showing that there were no actions at all, but just that the actions were not voluntary. Bodily actions become uncontrollable when a person's consciousness is sufficient for his body to act as an automaton and inflict harm, but not sufficient for him to control those harmful actions when normally he would.

[11] There are two types of automatism relevant to the criminal law; mental disorder automatism (previously called insane automatism) and non-mental disorder automatism (previously called non-insane automatism). The first is dealt with under s.16 of the *Criminal Code*. If accepted, a defence of mental disorder automatism will result in a verdict of not criminally responsible but the offender is detained pending review by a government board. On the other hand, a successful defence of non-mental disorder automatism results in an absolute acquittal.

[12] Not surprisingly, the idea of a defence which can be used to avoid culpability for any number of serious crimes and which is almost impossible to disprove, makes us uneasy. Since the inception of the defence of non-mental disorder automatism, there have been judicial, academic and parliamentary efforts to significantly restrict its availability.

[13] I am going to review some of the history of this defence, not because it is imperative to do so for my verdict, but so that interested parties can understand the policy reasons for the defence of automatism and why and how its application has been restricted.

[14] Automatism, as distinct from mental disease, was first raised in Canada by an accused who claimed to have shot his wife while suffering from a temporary blackout; ***R v Kasperek***, [1951] OJ No. 504 (CA). While the Ontario Court of Appeal did express concern that things like epilepsy or diabetes might be improperly characterized as mental diseases, it rejected any possible defence of non-mental disorder automatism for Mr. Kasperek, without squarely addressing the parameters of insane versus non-mental disorder automatism.

[15] In a 1955 case in Saskatchewan, the accused was convicted of causing a fatal car accident after pleading that an eye injury had rendered him temporarily unconscious and unaware of his actions; ***R v Minor***, [1955] SJ No. 7 (CA). The Saskatchewan Court of Appeal ordered a new trial, saying that "when a person does not know what he is doing, he has a good defence to a criminal act performed by him when in that condition"; para. 16.

[16] Another early case involved a man who lost consciousness while driving home from the dentist and having had drugs administered at that appointment. The Supreme Court of Canada confirmed that voluntariness was a necessary element of the *actus reus* for any offence; ***R v King***, [1962] SCR 735 at para.7 (Tascherau, J concurring with the majority).

[17] However, as public and judicial skepticism of the defence increased, more courts began to designate automatism cases as involving a disease of the mind, thereby rendering those accused ineligible for acquittal; Holly Phoenix *Automatism: A Fading Defence*, [2010] 56 Criminal Law Quarterly 328 at page 333.

[18] For example, Lord Denning of the English House of Lords defined disease of the mind as "any mental disorder which has manifested itself in violence and is prone to recur"; ***R v Bratty***, [1961] 3 All ER 523 at page 9. Thus, the possibility of recurrent behaviour became a central consideration in the characterization of behaviour as a disease of the mind resulting in detention.

The House of Lords did leave open the possibility of an automatism defence resulting in acquittal where supported by positive evidence that the automatism resulted from a cause other than mental disorder. However, the unarticulated presumption was that mental disorders were the default explanation for automaton behaviour; ***Bratty*** at page 10**.**

[19] In Canada, ***Bratty*** was adopted to effectively narrow non-mental disorder automatism to involuntary conduct not arising from a disease of the mind. This was said to include things like hypnotic states, somnambulism (sleepwalking), drugs or a physical or psychological blow causing automatism.

[20] Psychological blow automatism was then the focus of a host of cases throughout the Commonwealth involving men attacking their wives, girlfriends and their wives' or girlfriends' new partners when their relationships ended, and then pleading that the psychological blow of the break up rendered their actions involuntary; a sampling of these at ***R v KK***, [1970] OJ No.1761 (HCJ); ***R v Parnerkar***, [1974] SCR 449; ***R v Rabey***, 1980 SCJ No.88; ***Abdul Razak bin Dalek v Public Prosecutor***, [2010] 4 MLJ 725 (Malaysian Federal Court), ***R v Bailey***, [1983] 2 All ER 503 (CA).

[21] In ***Bailey*** for example, the accused said he was in a state of hypoglycaemia caused by his diabetes when he attacked his former girlfriend's new boyfriend. The trial judge told the jury that if his incapacity was self-induced, the accused could not rely on defence of automatism. The House of Lords agreed, saying:

> Automatism resulting from intoxication as a result of voluntary ingestion of alcohol or dangerous drugs does not negative the *mens rea* necessary for crimes of basic intent, because the conduct of the accused is reckless and recklessness is enough to constitute the necessary *mens rea* in assault cases where no specific intent forms part of the charge; pp.506-507.

[22] This is known as "substituted *mens rea*" in which the voluntary and intentional act of becoming intoxicated is substituted for the intention to commit the offence actually committed while intoxicated. In Canada, substituted *mens rea* was approved in ***Leary v The Queen***, [1978] 1 SCR 29, a sexual assault case. The majority, who supported substituted *mens rea*, quoted from ***DPP v Majewski***, [1976] 2 All ER 142:

> If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent; p.145

[23] However, Dickson, J wrote an impassioned and comprehensive dissent in ***Leary*** which paved the way for the abolition of substituted *mens rea* many years later in ***R v Daviault***, [1994] 3 SCR 63.

[24] In ***Daviault***, the complainant was an older woman, partially paralyzed and confined to a wheelchair. One evening, she invited the husband of one of her friends to her residence. He brought a 40-ounce bottle of brandy, having already consumed 7-8 beers. The complainant drank part of a glass of brandy and fell asleep. When she awoke later, the accused sexually assaulted her. He testified that he had no recollection of the events. A medical expert testified that, given

his historical alcohol use and his intake that night, the accused could have been suffering an episode of amnesia-automatism or blackout, in which state he would have had no awareness of his actions. The trial judge acquitted on the basis of a reasonable doubt about the accused's intent to commit the offence given his extreme intoxication akin to automatism. The Quebec Court of Appeal overturned the conviction but the Supreme Court of Canada reversed that decision and ordered a new trial.

[25] The minority in ***Daviault*** maintained that while our criminal justice system does not condone the punishment of morally innocent people, "individuals who render themselves incapable of knowing what they are doing through the voluntary consumption of alcohol or drugs can hardly be said to fall within the category of the morally innocent"; para.105.

[26] However, the majority in ***Daviault*** would not abide the prospect of a criminal conviction in the absence of proof of the mental element of the offence, which was said to infringe ss.7 and 11(d) of the *Charter of Rights and Freedoms*. As Justice Cory explained:

> In my view, the mental element of voluntariness is a fundamental aspect of the crime which cannot be taken away by a judicially developed policy. It simply cannot be automatically inferred that there would be an objective foresight that the consequences of voluntary intoxication would lead to the commission of the offence. It follows that it cannot be said that a reasonable person, let alone an accused who might be a young person inexperienced with alcohol, would expect that such intoxication would lead to either a state akin to automatism, or to the commission of a sexual assault. Nor is it likely that someone can really intend to get so intoxicated that they would reach a state of insanity or automatism; para.43.

[27] The majority confirmed that intoxication could serve as a defence in the rare circumstances of extreme intoxication akin to automatism, but only where the accused could establish the defence on the balance of probabilities through his own evidence and that of experts; para.63.

[28] Less than a year after ***Daviault*** abolished the concept of substituted *mens rea*, the federal government legislatively reinstated substituted *mens rea* for some offences. Section 33.1 of the *Criminal Code* reads:

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

[29] In the case before me, the accused challenged the constitutionality of s.33.1 of the *Criminal Code*, arguing that the defence of non-mental disorder automatism ought to be available to him on the charge of aggravated assault, not just on the break and enter charge. That application was heard and granted by my brother, Justice deWit; ***R v B***, 2019 ABQB 770. He concluded that s.33.1 offends ss.7 and 11 of the *Charter of Rights and Freedoms* in a manner not justified by s.1 of the *Charter*, which echoes the reasoning of many other Canadian trial courts since s.33 was enacted. As a result of Justice deWit's decision, it was open to this accused to present a defence of extreme intoxication akin to automatism in respect of both charges.

[30] The burden on the accused claiming non-mental disorder automatism was further refined in ***R v Stone***, [1999] SCJ No. 27. In that case, the accused had informed his wife that he was travelling from Alberta to Vancouver to visit his children from his first marriage who still lived with his ex-wife. When his wife threatened to follow him there in her car, he acceded to her demands to ride along with him. On the journey, his wife was said to have relentlessly criticized, demeaned and taunted him with regards to their marriage, their sex life, his children and her infidelities.

[31] At some point, the accused stopped the car. He testified that he remembered hearing a "whooshing" sound but was otherwise unaware of what was happening. When he became aware of his surroundings again, he saw a knife in his hand and his wife slumped over in the vehicle. He had stabbed her 47 times in an allegedly dissociative state triggered by her "exceptionally cruel, psychologically sadistic and profoundly rejecting" comments to him throughout their trip.

[32] Following on ***Daviault***, ***Stone*** confirmed that the accused bore not just the evidentiary but the legal burden of showing his actions were involuntary; para.179. The rationale for requiring the accused to prove a defence, which is not typically required of any accused[1], may be found in the court's apparent discomfort around the defence of non-mental disorder automatism illustrated in this passage:

> An appropriate legal burden applicable to all cases involving claims of automatism must reflect the policy concerns which surround claims of automatism. The words of Schroeder JA in *R v Szymusiak*, [1972] 3 OR 602 (Ont CA) at p.608 come to mind:
>
> > ...a defence which in a true and proper case may be the only one open to an honest man, but it may just as readily be the last refuge of a scoundrel.

[33] With Justice deWit's ruling in this case declaring s.33.1 of the *Criminal Code* to be unconstitutional, the reasoning of ***Daviault*** and ***Stone*** governs the burden of proof on Mr. Brown. In order to be acquitted, he must prove on a balance of probabilities that he committed these offences involuntarily. To do so, it is said that he must provide expert psychiatric evidence. I am also to consider the evidence of other witnesses which may corroborate or contradict the plausibility of his claims of involuntariness.

[34] For the reasons that follow, I find that the accused does satisfy his burden of proving, on a balance of probabilities, that he is not guilty of the offences charged because he was in a state

[1] See, for example, David Paciocco "Death by Stone-ing: The Demise of the Defence of Simple Automatism", (1999) 26 Criminal Reports 273.

of non-mental disorder automatism, namely delirium, which meant that he was not acting voluntarily in the commission of these offences nor with knowledge of his acts.

The Evidence

[35] Mr. Brown is now 29 years old and was just shy of 27 years old at the time of the offences. He lives in Calgary and currently works at a local gym. However, he was born and raised in Truro, Nova Scotia and ended up in Calgary by virtue of his elite amateur hockey career.

[36] After playing hockey in a number of different cities across Canada, the accused moved to Calgary in the fall of 2011 to begin his educational program in Business Administration at Mount Royal University. In 2017-2018, his last year at MRU, he was the captain of the MRU hockey team. He was expecting to graduate in the spring of 2018 and begin a job with Imperial Oil. That did not happen. As a result of these events, he was expelled from MRU, at least temporarily, and lost his job opportunity with Imperial Oil. I say this not to garner undue sympathy for Mr. Brown, particularly in light of the experiences and injuries suffered by his victims, but to record the impacts of these events on his life as well.

[37] On the evening of January 12, 2018, about 8:00 p.m., the accused headed to his friend's home to hang out with his buddies and relax. In addition to the host, Darnell, their friend Brendan was also there. They began drinking shortly after the accused arrived, beginning with Moscow Mules, a drink made with ginger beer and vodka. Darnell and the accused alternated making these drinks for the three of them and the accused estimated that he had approximately 6 - 7 of these over the course of the evening, along with a few beers.

[38] When he arrived, there was a sandwich bag full of dried magic mushrooms on the kitchen counter. The accused had consumed magic mushrooms on only one prior occasion, a couple of years earlier while houseboating. He said he had had a positive experience on that occasion and believed that magic mushrooms generally gave one a fuzzy but positive feeling. He said they began snacking on these magic mushrooms about 10:00 p.m. that evening, using a kitchen scale to measure out approximately ½ gram portions. He thought he consumed about 1 gram later that evening, after which he reports beginning to feel loose and a bit buzzed, although still in control.

[39] As the evening wore on, the accused continued to consume magic mushrooms but in smaller doses, ½ gram or less. Although the bag initially contained a total of 28 grams, or 1 ounce, there was no reliable evidence as to the amount consumed by the accused over the course of the night, nor frankly any reliable evidence as to the amount of alcohol consumed simultaneously.

[40] The two girlfriends of the other two males there arrived at about midnight, after which they continued drinking, playing games and listening to music. The accused testified that he remembered playing beer pong about 1:30 am and that he was "feeling the mushrooms a bit" and then "a lot". He said he felt "wonky", like he was "losing [his] grip on reality". When pressed to describe this, he said he did not know where he was and thought he might have been blacking out a bit as he has no memories beyond playing beer pong. He testified that the next thing he remembers was waking up in the hospital and seeing a blurred vision of his girlfriend's face and then waking up a second time in a jail cell.

[41] He has no memory of taking off his clothes at Darnell's house, nor anything that followed that, including breaking into the Hamnett or Vashney residences or assaulting Ms. Hamnett, or his arrest. It was common ground that he knew none of the victims at all. Notwithstanding he remembers nothing, he believes the evidence presented that he committed the offences as described.

[42] The accused has no criminal record and no history of any mental illness. He hypothesized that it was "definitely the magic mushrooms" that caused his behaviour that night, as he said he "would never do anything like that unless I was out of my mind". He testified that he had never before broken into anyone's home or even ever broken glass on purpose.

[43] Claire Erickson was a friend of the accused and the girlfriend of Brendan. On the evening of January 12, 2018, she and her friend Janessa had been working at the Peter Lougheed Hospital and when they finished their shift, they joined their respective boyfriends at Darnell's. The accused was there as well, although his girlfriend was not as she was working that night.

[44] Claire testified that she could tell that the boys had already had a few drinks before they arrived around midnight. She and Janessa had some drinks as well. Claire said she saw the bag of magic mushrooms on the counter and was told that the men had already taken some. She was not sure whether she consumed any mushrooms that night or not. It was a casual affair. The friends played board games and beer pong and eventually settled in to watch a movie.

[45] Ms. Erickson said that she did notice as the night wore on that the accused was "not himself", becoming quieter and more withdrawn. She said she thought he had actually gone to bed a couple of times but then would be back up again. As they were beginning the movie, about 3:45 a.m., she noticed him standing naked by the front door. He said nothing but opened the door and ran out. They opened the door and called out to the accused but he did not answer. After looking for him for about 10 or 15 minutes and having already called the police, they did spot him running. They called out to him but he ran away again, as we now know, to Ms. Hamnett's home.

[46] Ms. Hamnett described being attacked physically by a "huge presence". She was hit repeatedly around her head and then on her forearms, wrists and hands with a hard object later identified as a broken broom handle. She described the force applied as "massive" and said she was hit many times with no pausing between the blows. She said the accused was screaming, both during the attack and afterwards as he went upstairs in her home, but did not use any words.

[47] She showed amazing presence of mind to protect herself in the bathroom, tend to her own wounds and then to get to her neighbours to call for help. There was nothing in her testimony that I found to be incredible or even exaggerated and her evidence is completely accepted.

[48] Michael Crone, Ms. Hamnett's neighbour, testified that after he went outside towards Ms. Hamnett's house and then turned to come back to his own house, he saw someone in the cul de sac at another's neighbour's car opposite to his house. His first thought was to yell at the person to stop them from breaking into the vehicle but when he realized the person was naked, he backed off. Rather than confronting the accused, he took photos of the accused trying to get into various vehicles in the cul de sac. Mr. Crone testified that it appeared that when the accused saw Mr. Crone, he ran away again headed west.

[49] Mr. Crone did say that he could see wetness on the accused's back, although could not say whether that was sweat or if the accused had fallen in the snow. He did confirm that the

accused was not wearing shoes. Between the fact that the accused was naked in such cold weather, had assaulted Ms. Hamnett and then proceeded to stay in the cul de sac trying to break into successive vehicles, Mr. Crone's impression was that the accused was "whacked out" on some type of intoxicant.

[50] Mr. Pratap Varshney lives with his wife, Kamlesh, in Springbank. They were both asleep when they were awoken at about 5:00 a.m. by the sound of the glass in their front door being shattered. Mr. Varshney yelled "who is there?" and heard someone yelling loudly but not using any discernable words. It was later discovered that the accused had picked up a statue from the front porch and thrown it through the glass inset in the front door. In doing so, he had thrown the statue through the front foyer area and damaged a railing above the ceiling. I take this to be an indication that a significant amount of force was used by the accused to break through the door to the Varshney's home.

[51] Ms. Varshney confirmed her husband's account of the incident, including hearing the accused screaming from the front door although not using any words.

[52] We also heard testimony from a number of Calgary Police Service officers, all of whom described the accused as moving and speaking very slowly, appearing to be waking up or appearing to be confused.

Expert Evidence

Dr. Mark Yarema

[53] Dr. Mark Yarema is a physician and medical toxicologist. He is a clinical professor and adjunct professor in emergency medicine at both the University of Calgary and the University of Edmonton. He holds several fellowships and certificates in emergency medicine. He is the Chief of Alberta Health Services Section of Clinical Pharmacology and Toxicology.

[54] Dr. Yarema is also the current Medical Director of Alberta's Poison and Drug Information Service (PADIS), a position he has held for approximately 10 years. In both his role with PADIS and in hospital emergency rooms, Dr. Yarema deals regularly with the effects of significant drug consumption. With respect to hallucinogens alone, he will field 80 -120 calls per year and see approximately 4 patients in emergency each month.

[55] He said that there is not as much research on psilocybin intoxication as other substances because it is not as common an intoxicant as other substances. He is also familiar with alcohol poisoning but explained that most cases that get referred to PADIS or seen in hospital involve the ingestion of alcohol with other substances, not on its own.

[56] Dr. Yarema is able to diagnose hallucinogen toxic syndrome and to describe the effects of magic mushrooms or psilocybin on the human body, although he had never met the accused. He was qualified to give expert opinion evidence on toxicology, the effects of consuming psilocybin and alcohol, including the effects of consuming both together and the effects of alcohol and psilocybin on the accused at the time of the offences.

[57] Magic mushrooms are used as a recreational intoxicant because of their pleasurable effects, namely heightened senses including exceptionally bright or vivid colours or patterns, and a loss of inhibitions. While both Dr. Dalby and Dr. Yarema likened psilocybin to LSD, a synthetic hallucinogen, Dr. Yarema also drew a parallel to serotonin, a naturally occurring substance produced in and by our own bodies which generates good feelings, moods or

emotions. At toxic levels, however, magic mushrooms can induce delirium, including an altered level of consciousness, a lack of orientation and inability to focus or to employ judgment. A person may experience psychosis, including hallucinations or delusions.

[58] Magic mushrooms are generally consumed as an edible, either dried or soaked into a tea. Dried mushrooms will contain a higher potency because the psilocybin is not diluted into liquid. The average consumption is 1-5 grams per time and a lethal dose is estimated at an unfathomable 17 kilograms. However importantly, it is extremely difficult to determine dosages of psilocybin in amounts of magic mushrooms. Because they grow in the wild, the amount of active ingredient can vary widely between samples. Further, because psilocybin acts on serotonin receptors, the effects will vary between individuals.

[59] As Dr. Yarema reviewed medical literature put to him in cross-examination, he agreed that the majority of harms caused by people with hallucinogen toxic syndrome from magic mushrooms in particular were harms caused to themselves and not to others. There are reported cases of various injuries and even deaths from people jumping off of balconies or out of windows but no outright aggression directed to another person. However, Dr. Yarema testified that a person suffering from delusions and hallucinating could become aggressive if panicked.

[60] As mentioned, Dr. Yarema did not know the accused and did not interview him personally. Prior to his testimony, Dr. Yarema reviewed the transcripts of the evidence given beforehand in this trial which included all the Crown witnesses and Mr. Brown himself. His opinion was that the accused was likely experiencing delirium during the alleged offences and was unaware of his surroundings.

[61] Although he could not say with certainty, he opined that the accused may have been suffering from delusions as a common effect of psilocybin intoxication. If in such a state of delirium, Dr. Yarema explained that the accused would have had no control over his actions and a highly altered level of consciousness. In typical patients, this will often manifest itself in groaning, inability to vocalize or respond to questions and a willingness to fight.

[62] Dr. Yarema's review of the evidence at trial included the observations of others that the accused had lost touch with reality and was unresponsive to people trying to communicate with him, that he showed lack of judgment and disorientation by remaining outside naked in frigid temperatures, that he was "roaring" and incoherent. Consistent with the expected resolution of symptoms arising from hallucinogen toxic syndrome, he noted that the accused's vital signs began to normalize by about 6:00 – 8:00 a.m. that morning as indicated in the medical records.

[63] Based on the evidence from trial, Dr. Yarema opined that the accused was in a state of automatism at the time of the alleged offences.

Dr. Thomas Dalby

[64] Following a *voir dire*, Dr. Thomas Dalby was qualified to give expert evidence in forensic psychology, neuropsychology and psilocybin intoxication delirium acute hyperactivity and to opine of the presence of mental disorders in the accused before, after and during the alleged offences.

[65] Dr. Dalby is a licensed registered psychologist who has worked in forensic psychology in both hospital and private sector environments for over 40 years. He has testified in the areas of forensic and neuropsychology as an expert witness hundreds of times and has taught related courses at the university level for over 30 years.

[66] While he was quite candid that he had never diagnosed a patient with psilocybin intoxication delirium acute hyperactivity before, it is a recognized condition in the DSM-5[2] and he is therefore qualified to do so. While psilocybin use is not typically correlated with criminal behaviour and thus Dr. Dalby's experience with this intoxicant is limited, he has studied and written extensively on the impact of drugs on the human brain and on behaviour.

[67] Dr. Dalby met with Matthew Brown in May of 2018, a few months following the alleged offences. He interviewed the accused for about 2-3 hours about his background, his physical and mental health history and his history of using intoxicants. He described the purpose of this interview to observe the accused's behaviour, language and emotions, to gather the accused's information about his family and background and to ask him about the events of the morning of January 13, 2018. With regards to the latter, Dr. Dalby said that the accused acknowledged committing the offences with which he had been charged but had no memory of the events. His report says that the accused recalled some feelings when the events were discussed with him but could provide no narrative of what had happened.

[68] He also gathered information about the accused from third parties who know the accused and from the police report and photos from the incident of January 13, 2018. All the people who knew the accused who spoke with Dr. Dalby told him that they believed that the accused had had no mental health issues prior to the time of the alleged offences. This was consistent with the testimony of several of the accused's colleagues from hockey and from university who said they had never known him to be violent or disrespectful of people or property.

[69] Dr. Dalby also conducted a personality assessment inventory of the accused, described as a rather broad-based and general assessment tool. The tool uses standard questions, the answers to which are used to provide a computer-generated report. Based on his interviews of the accused and others and on the personality assessment inventory, Dr. Dalby found no evidence of any mental disorder in the accused before or after the time of the offence.

[70] Further, based on the information he had regarding the accused's behaviour at the time of the offence and the information regarding the consumption of psilocybin immediately beforehand, he concluded that the accused was in a state of short-term but acute delirium at the time. He described such a state as including the following indicia:

i. Not knowing where you are or who you are;
ii. Being confused;
iii. Not recognizing people whom you know;
iv. Losing sense of time;
v. Inability to process or respond to information;
vi. Inability to focus or to pay attention;
vii. Deficiencies in motor and/or language functions;
viii. Experiencing hallucinations and/or delusions;
ix. Significant sensory disturbances;
x. Feelings of disorientation, anxiety and panic, including a heightened "fight or flight" response;
xi. Increased heart rate, blood pressure and body temperature; and
xii. Inability to retain memories of events during delirium.

[2] Diagnostic and Statistical Manual, 5th ed., 2013 revision

[71] These indicia are consistent both with the criteria in the DSM-5 for psilocybin intoxication delirium acute hyperactivity and with the third-party observations of the accused on the morning of January 13, 2018.

[72] Dr. Dalby agreed with Crown counsel that there were no reported cases of a person suffering psilocybin intoxication and hurting someone else, as opposed to themselves. However, similar to Dr. Yarema, Dr. Dalby opined that it was reasonably foreseeable that a person who is disoriented and paranoid could become aggressive.

[73] Dr. Dalby's conclusion was that the hallucinogenic psilocybin was the "clear causative factor" to explain the accused's behaviour, despite accepting that no one could definitively say how much psilocybin the accused actually ingested. Similar to Dr. Yarema's testimony, Dr. Dalby's review of the medical literature on the effects of psilocybin consumption indicated that it is virtually impossible to regulate the potency of the psilocybin consumed from natural magic mushrooms.

[74] Dr. Dalby admitted in cross-examination that the information he had been given by the accused at his interview – that he had consumed 4-5 units of alcohol – was inconsistent with the testimony of the accused at trial, namely that he had consumed 14-18 drinks that night. Dr. Dalby also admitted that with multiple intoxicants it would be impossible to track the trajectory of the psilocybin effects over time.

[75] Dalby agreed that regular alcohol abuse would affect the predicted impacts of another intoxicant. However, he also opined that even 14-18 drinks at a time might be acute intoxication but would not necessarily indicate chronic alcohol abuse, which I accept as logical.

[76] While no expert witness was able to give precise predictions of the interaction of psilocybin with alcohol, I accept the evidence of Dr. Yarema that the combination of two intoxicants which both inhibit judgment and impair one's senses would worsen those effects. Therefore, the disparity of the accused's self-reported consumption of alcohol, in my view, does not affect the medical opinion evidence of his condition at the time of the alleged offences.

[77] Dr. Dalby completely rejected the proposition put to him in cross-examination that the accused was simply demonstrating drunken behaviour and even more vehemently rejected the proposition that the accused intended to commit these offences. According to Dr. Dalby, the accused had no conscious control of his actions during the time the alleged offences were committed.

[78] By his own admission Dr. Dalby's opinion was based on the third-party descriptions of the accused's behaviour. Crown counsel argued that this amounted to circular reasoning i.e. saying that the accused's behaviour was evidence of delirium and then explaining that behaviour as being a result of delirium.

[79] While I sympathize with the difficulty in confronting a defence of this nature, I do not agree with that characterization of the evidence. There are multiple sources, including the DSM-5, the two expert witnesses at trial and a host of medical literature exhibited at trial which all describe the kinds of behaviour associated with drug-induced extreme intoxication and do so without reference to this case. When those descriptions are compared with the behaviours of the accused, we have an objective standard by which to assess his behaviour.

Conclusions on the Accused's State of Mind

[80] ***R v Stone*** made it clear that, to be successful in a plea of non-mental disorder automatism, an accused should present supporting expert psychiatric evidence. Mr. Brown has done so.

[81] The list of diagnostic criteria in the DSM-5 for substance intoxication delirium includes:

A. A disturbance in attention;

B. A short period of time over which the disturbance develops;

C. Disturbance in cognition (memory deficit, disorientation, language, perception);

D. No other pre-existing condition to explain the disturbances;

E. Evidence of substance intoxication.

[82] Dr. Dalby also provided the court with his more expansive checklist for intoxication delirium, as outlined above, in support of his diagnosis of psilocybin intoxication delirium acute hyperactivity. Dr. Yarema agreed that lack of judgment, disorientation, incoherence, unresponsiveness and a "fight or flight" posturing were all consistent with extreme intoxication akin to automatism.

[83] ***Stone*** also directs me to consider the corroborating evidence of bystanders, who had these observations:

(a) Multiple witnesses reported the accused being non-verbal, roaring like an animal or yelling but still being unresponsive to them, including to his own friends;

(b) On that note, he did not appear to recognize his friends when they were calling for him to come back;

(c) He was arguably behaving with some degree of paranoia, continuing to run away notwithstanding that he was naked in very cold temperatures;

(d) He appeared disoriented and confused (broke into two strangers' homes and was trying to get into strangers' cars);

(e) He was not oriented to his own physicality; he was outside for well over an hour completely naked in the middle of the night in approximately minus 20° temperatures. He also injured his feet, cutting them on broken glass and/or perhaps on ice;

(f) He may have been sweating, notwithstanding the temperatures, although no witness could say that reliably;

(g) When the police found him in the Varshneys' guest bathroom, he still appeared disoriented, moving and speaking very slowly. One officer described him as appearing to wake up; and

(h) When he was transported to the hospital, the accused had elevated blood pressure, heart rate and body temperature.

[84] Mr. Brown testified himself that he began to feel "wonky" in the early morning hours of January 13, 2018 and that he has no memories or ability to describe what happened after that. While I appreciate that the nature of an automatism defence may logically minimize the value of

the accused's own evidence, I accept Mr. Brown's testimony that he does not remember these events. I accept that, unlike virtually every other case involving a plea of non-mental disorder automatism, he did not know Ms. Hamnett or the Varshneys and had absolutely no motive to break into their homes or to hurt them.

[85] Numerous witnesses testified that the accused was not a violent person and that to hurt someone or damage someone else's property was completely out of character for him. Ms. Erickson said that the accused had no reputation for violence and that his behaviour that morning was completely out of character for him. She said that she believed the accused to be generally respectful of people's property and space and that he was an honest person. Her words were that his behaviour had "no connection" to him. This was echoed by his character witnesses, many of whom had known the accused for a long time and from various aspects of his life.

[86] His family, friends and the medical history given to Dr. Dalby all indicate no history of mental illness, no recurrences of anything similar and thus no reason to believe that the source of this delirium was internal nor likely to recur.

[87] I therefore accept that Mr. Brown was suffering from extreme intoxication akin to automatism or what was described during the trial as a form of substance intoxication delirium. I accept that the cause of this was external, namely the ingestion of magic mushrooms or psilocybin. I also accept that there is no indication of any likelihood of recurrence, which would have required some evidence of a particular susceptibility of this accused to the effects of psilocybin along with some evidence of a pattern of substance abuse, none of which was presented.

Conclusion

[88] This case has been unusual in many respects. While the law on automatism is relatively clear, at least at this point in time, the facts of this case were very difficult.

[89] I believe that Mr. Brown's apology to his victims was a genuine apology and that he is truly remorseful, not just in general but specifically for the physical, emotional and mental pain that he has caused these people.

[90] The permanent effect of these events on Ms. Hamnett cannot be minimized. She was attacked in her own home, having done absolutely nothing to provoke, invite or allow such an attack. Her injuries not only required surgery but ongoing intensive physiotherapy and occupational therapy. She will never likely have complete recovery of the use of her hand. I also accept that the post-traumatic stress and anxiety she described continuing to experience is horribly real.

[91] Although not physically injured, the Varshneys were also terrified in their own home, again having done absolutely nothing to precipitate the accused breaking the glass in their front door and entering their home while they hid, not knowing what might happen to them.

[92] The experiences of the Varshneys and of Ms. Hamnett were awful and will undoubtedly continue to cast a negative and possibly fearful pall on their lives for a long time. It is difficult to look at these victims and tell them that the law is not going to hold anyone accountable for that, notwithstanding that we know exactly who committed the offences against them.

[93] The law presumes that all persons, including Mr. Brown, are acting voluntarily. However, in the wake of ***Daviault*** and ***Stone***, and the finding of Justice deWit on the constitutionality of s.33.1 of the *Criminal Code*, the law also says that an accused is able, upon a proper evidentiary foundation, to negative the presumed voluntariness of his actions on a balance of probabilities. In my opinion, Mr. Brown has done so.

[94] Another unusual aspect of this case is that I believed the testimony of every witness at trial and doing so was no bar to reaching a verdict.

[95] I believed the description of Mr. Brown that was given by his friends and colleagues, both on the night in question and how that contrasted with his normal bearing. I believed Mr. Brown's testimony of what he did – and did not – remember and the lack of any explanation or motive for his actions. I accepted the expert evidence on the indicia of extreme intoxication akin to automatism. I believed the testimony of Ms. Hamnett and the Varshneys and of the police officers, all of whom testified as to the accused's appearance and his behaviour. Quite simply, every material piece of evidence supported the defence of automatism.

[96] While the defence of automatism is said to be rarely available – and there may be solid policy reasons for that – there is no question in my mind that it is appropriately applied in this case.

[97] Acquittals shall be entered on both counts of the indictment.

Heard on November 12, 13, 14, 18, 19, 20 & 22, 2019.
Dated at the City of Calgary, Alberta this 5th day of March, 2020.

M.H. Hollins
J.C.Q.B.A.

Appearances:

Mr. Matthew Block
for the Crown

Mr. Sean Fagan
for the Accused