SCC File No. 39270

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

Applicant
(Respondent)

-and-

DAVID SULLIVAN

Respondent
(Appellant)

AND

HER MAJESTY THE QUEEN

Applicant
(Respondent)

-and-

THOMAS CHAN

Respondent
(Appellant)

MEMORANDUM OF ARGUMENT OF THE APPLICANT, HER MAJESTY THE QUEEN, IN RESPONSE TO THE APPLICATION FOR LEAVE TO CROSS-APPEAL OF THE RESPONDENT, THOMAS CHAN

(Pursuant to Rule 30(1) of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Thomas Chan concedes that the Crown's application for leave to appeal should be granted.[1]

2. Chan also seeks leave to cross-appeal on the issue of remedy. If leave to cross-appeal is granted, and should this Court dismiss the Crown's appeal of the constitutional ruling on the validity of s. 33.1 of the *Criminal Code*, Chan will ask that this Court set aside the Court of Appeal's Order directing a new trial for Chan and substitute an acquittal or a verdict of not criminally responsible on account of mental disorder (NCR).

3. This Court should deny leave to cross-appeal. First, the Court lacks jurisdiction to hear the cross-appeal. Chan was successful in the court below: his convictions were set aside. This Court has no jurisdiction to grant a person convicted of an offence leave to appeal from an order setting aside a conviction and directing a new trial. Second, even if the Court had jurisdiction to grant leave to cross-appeal, leave should be denied: the evidentiary record is insufficient to permit a proper consideration of remedy. As the Court of Appeal recognized, the trial judge's factual findings do not support the imposition of a substituted NCR verdict or acquittal.[2] The defence of automatism was *not* raised at trial, and it cannot be said that an acquittal is inevitable absent an application of s. 33.1 of the *Criminal Code*. Nor is there a basis to substitute a verdict of NCR as this fact-driven defence was explicitly considered but rejected by the trial judge.[3]

B. The new trial directed by the Court of Appeal for Ontario

4. On June 3, 2020, the Court of Appeal for Ontario unanimously declared s. 33.1 to be of no force or effect on grounds that it violates ss. 7 and 11(*d*) of the *Charter* and is not saved by s. 1 of

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[1] The Respondent David Sullivan filed his response, opposing the Crown's leave application on September 14, 2020. The Crown did not reply and simply rests on its submissions in its application for leave.

[2] *R. v. Sullivan*, 2020 ONCA 333, ¶162-166, Application Record, Tab 7 (hereinafter "*OCA decision*").

[3] *OCA decision*, *supra*, ¶30.

the *Charter*.[4] On the issue of remedy in the companion appeal of *R. v. Sullivan*, the Court accepted the Crown's concession that a declaration of invalidity warranted substituted verdicts of acquittal.[5] When determining the appropriate remedy for Mr. Chan, the Court carefully considered but rejected Chan's request for a substituted verdict of acquittal or NCR given the factual findings of the trial judge.

5. In rejecting Chan's request for a substituted verdict, Paciocco J.A., for the Court on this issue, stated:

> Mr. Chan urges that the proper outcome is an acquittal. He contends that since the trial judge found Mr. Chan to be incapacitated, other than by reason of mental disorder, the automatism defence is satisfied. I do not agree.
>
> The trial judge made no finding that Mr. Chan was not acting voluntarily. Instead, he found that as a result of psychosis induced by intoxication, Mr. Chan was incapable of knowing that his actions would be considered wrong according to moral standards of reasonable members of society. This is not a finding of non-mental disorder automatism. A person can lack the capacity to know their acts are wrong, yet still voluntarily choose to engage in those acts.
>
> Mr. Chan sought to overcome the distinction I have identified by relying on Cory J.'s references in *Daviault* to "extreme intoxication akin to automatism or insanity". Mr. Chan argues that non-mental disorder automatism, as described in *Daviault*, encompasses his situation because his mental state was akin to "insanity" or mental disorder, even if caused by extreme intoxication. I do not accept this submission. That language was not intended to extend the non-mental disorder automatism defence beyond cases of automatism. In *Daviault*, at p. 100, Cory J. emphasized that:
>
> > "drunkenness akin to insanity or automatism" describes a person so severely intoxicated that he is incapable of forming even the minimal intent required of a general intent offence. The phrase refers to a person so drunk that he is an automaton.
>
> Since the trial judge did not consider whether Mr. Chan had reached the stage of automatism, he is entitled to a new trial, not an acquittal. [6]

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[4] *OCA decision*, *supra*.

[5] *OCA decision*, *supra*, ¶183. The concession was based on the trial judge's finding that Mr. Sullivan was in a state of non-mental disorder automatism at the time of the attack on his mother and would have been acquitted of these offences but for the application of s. 33.1 of the *Criminal Code*.

[6] *OCA decision*, *supra*, ¶162-66.

C. The evidentiary record is insufficient to permit a substituted verdict

6. The constitutionality of s. 33.1 of the *Criminal Code* was litigated as a pre-trial motion. The trial judge found s. 33.1 constitutional. Consequently, the trial evidence focused on whether Chan's delusional state was due to a mental disorder, which Chan needed to prove to receive an NCR verdict under s. 16 of the *Criminal Code*. The trial judge explicitly found that the defence had not proven the NCR defence on a balance of probabilities, concluding in part that Chan's "sudden onset of psychosis … coincided directly with the ingestion and absorption of magic mushrooms" and "dissipated as the effect of the drugs wore off."[7]

7. Automatism was never advanced as a defence at trial.[8] In fact, the only evidence that addressed the issue of automatism was given by Crown witness Dr. Klassen, a forensic psychiatrist. Dr. Klassen's report noted that "[f]rom a purely psychiatric perspective, it does not appear that non-insane automatism would apply; this gentleman's behaviour appears to have been driven by delusional thinking, thus was not automatic".[9] During his testimony, Dr. Klassen was asked to explain how Chan's substance-induced psychosis would impact his capacity for criminal responsibility. Dr. Klassen replied that "most times, even people that are quite psychotic are able to appreciate the nature and quality of their acts or omissions."[10] Dr. Klassen opined that Chan's delusional state deprived him only of the capacity to know that his acts were wrong. The trial judge accepted this opinion but was not satisfied that this incapacity was the product of a mental disorder as required for an NCR verdict under s. 16 of the *Criminal Code*. The voluntariness of Chan's acts was never directly considered by the trial judge in his *Reasons for Judgment*.[11]

8. In the absence of an automatism defence, argument that the legal definition of automatism

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[7] *R. v. Chan*, 2018 ONSC 7158, ¶134.

[8] Defence counsel in submissions explicitly advised the Court that automatism was not the defence. See: Transcript, October 25, 2018, at pp. 36-37, Tab 2A.

[9] Exhibit TR31, Report of Dr. Klassen, at p. 425, Tab 2B.

[10] Transcript, October 25, 2018, at p. 41, Tab 2A.

[11] In submissions on the *Application to Re-open the s. 33.1 Constitutional Challenge* defence counsel agreed that the evidence showed that Chan was not an automaton but argued that such a finding was not required for purposes of s. 33.1 of the *Criminal Code*. See: Transcript, January 23, 2019, at pp. 7-13, 24-27, Tab 2C.

should be modified was also not advanced. Although the trial judge accepted expert evidence that Chan "would have been incapable of knowing that his actions were morally wrong"[12] at the time of the offence, other factual issues relating to the concept of moral involuntariness were not considered.

PART II – QUESTIONS IN ISSUE

9. The Court has no jurisdiction to hear Chan's proposed cross-appeal on the issue of remedy. The Court of Appeal for Ontario unanimously allowed Chan's conviction appeal and ordered a new trial. The *Criminal Code* and *Supreme Court Act* provide no avenue for the accused in Chan's position to appeal further.

10. Even if there was jurisdiction, leave should be denied because the proposed cross-appeal fails to raise an issue of law of such public importance that it ought to be decided by this Court.[13] The Court of Appeal was correct that the appropriate remedy for Chan following a finding of unconstitutionality was a new trial. The evidentiary record before this Court is inadequate to allow proper consideration of the issue of remedy (acquittal or conviction), which turns on the factual issues of voluntariness and automatism that were not resolved at trial. Granting Chan's request for a substituted verdict would unfairly deny the Crown an opportunity to litigate and develop the evidentiary record required for the proper resolution of these issues.

11. Denying leave to cross-appeal will not restrict this Court's ability to consider the legal availability of *all* potential remedial options. Should the Court grant the Crown leave to appeal and later find that s. 33.1 is unconstitutional, the Court may well be called on to consider the appropriate remedy where an accused's extreme intoxication renders the accused incapable of forming criminal intent, acting voluntarily, or knowing right from wrong.

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[12] *R. v. Chan*, 2018 ONSC 7158, ¶82-83.
[13] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1); *Criminal Code*, R.S.C. 1985, c. C-46, s. 691.

PART III –STATEMENT OF ARGUMENT

A. The Court should deny leave to cross-appeal for want of jurisdiction

12. The Court's jurisdiction to hear an accused's appeal is set out in ss. 691 and 692 of the *Criminal Code*.[14] Those sections include no power for the Court to hear an appeal from an order directing a new trial where the accused has been successful in the court below. Further, the accused may not obtain leave under s. 40 of the *Supreme Court Act*. Subsection 40(3)[15] explicitly precludes that result:

> (3) No Appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence. [Emphasis added.]

13. Chan relies on this Court's decision of *R. v. J.F.*[16] to argue that his application to cross-appeal falls within the statutory powers of this Court. In *J.F.*, the accused was convicted of one count and acquitted of another. The Court of Appeal majority, having found these verdicts were inconsistent, set aside the conviction and ordered a new trial. The dissent in the Court of Appeal grounded an appeal as of right to this Court. The respondent sought and was granted leave to cross-appeal to request an acquittal, instead of the new trial ordered in the court below. The Crown's appeal was dismissed, and the respondent's cross-appeal was allowed by a majority of this Court, which entered an acquittal.

14. Respectfully, the *J.F.* majority's exercise of jurisdiction to enter an acquittal appears to be inconsistent with clear statements that the Court *does not have* jurisdiction to make such an order.[17] The Court in *J.F.* did not address the question of jurisdiction or identify a statutory source of jurisdiction. Nor did the *J.F.* Court address this Court's earlier jurisprudence on this point.

15. Chan argues that the *J.F.* Court exercised jurisdiction under s. 695(1) of the *Criminal*

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[14] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 691, 692.
[15] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(3).
[16] *R. v. J.F.*, [2008] 3 S.C.R. 215.
[17] See, *e.g. R. v. Hinse*, [1995] 4 S.C.R. 597, ¶11-14; *R. v. Meddoui*, [1991] 3 S.C.R. ix; *R. v. Keegstra*, [1995] 2 S.C.R. 381, ¶27.

Code.[18] While that subsection provides that in an appeal under Part XXI.1 this Court may make "any order that the court of appeal might have made and make any rule or order that is necessary to give effect to its judgment", this Court has held that the provision does not create a right of appeal.[19] Since the Court lacks jurisdiction to grant leave to cross-appeal, leave should be denied.

B. The evidentiary record does not support an acquittal on the current understanding of the *Daviault* defence or under Chan's proposed modified version of the law

16. Even if this Court has jurisdiction to hear the cross-appeal, leave should be denied. If this Court finds s. 33.1 is unconstitutional, the appropriate verdict – conviction, or acquittal based on an application of the *Daviault* defence – will depend on the answers to factual questions that were not resolved by the trial judge and that the trial record was not generated to resolve. The record is inadequate irrespective of whether the question of remedy is assessed under the *Daviault* defence as it is understood now, or the modified version of the law Chan proposes in this Court.

17. Automatism is a reverse onus defence. As this Court held in *R. v. Stone*,[20] when this defence is raised, the accused bears the burden on a balance of probabilities to establish the involuntariness of the act, with supporting expert psychiatric or psychological evidence. In this case, the psychiatric expert evidence was that Mr. Chan was *not* an automaton. The only defence raised at trial but rejected by the trial judge was that of NCR.

18. The jurisprudence of this Court and provincial appellate courts has established that conduct motivated by delusions is voluntary. Indeed, in *R. v. Whittle*,[21] Sopinka J. for this Court, upheld the admission of Whittle's confessions to murder that were made while Whittle's schizophrenia was florid. The existence of auditory hallucinations that compelled his confession were found not to deprive Whittle of an operating mind and thus his statements were made voluntarily.

19. Conduct motivated by delusions is also not generally immune to criminal liability. In *R. v. Ratti*, Lamer C.J. held"[i]t is not sufficient to decide that the appellant's act was a result of his delusion. Even if the act was motivated by the delusion, the appellant will be convicted if he was

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[18] *Criminal Code*, R.S.C. 1985, c. C-46, s. 695(1).
[19] *R. v. Barnes*, [1991] 1 S.C.R. 449, at pp. 464-66.
[20] *R. v. Stone*, [1999] 2 S.C.R. 290, ¶183-187, 192.
[21] *R. v. Whittle*, [1994] 2 S.C.R. 914, ¶50-54.

capable of knowing, in spite of such delusion, that the act in the particular circumstances would have been morally condemned by reasonable members of society".[22]

20. Consequently, the existence of delusions at the time of the offence will not necessarily deprive an accused of the voluntariness or specific intent for predicate offences, including murder.[23] As explained by Dr. Klassen in this case, delusion-driven conduct is distinct from automatism.

21. The *Daviault* defence only applies in cases involving automatism. The evidence at trial did not establish automatism. As such, in the event that s. 33.1 is held unconstitutional in this Court, a new trial will be required to determine whether the *Daviault* defence is available to Chan. Although the evidence suggests Chan knew what he was doing but was, as the trial judge found, "incapable of knowing that his actions were morally wrong", the question of physical involuntariness was not resolved by the trial judge. The record is lacking on this issue because it was not a live factual issue at trial. The parties should have an opportunity to adduce evidence relevant to that issue.

22. Chan's proposed cross-appeal also seeks to expand the *Daviault* principles and the concept of automatism to include conduct that, while *physically voluntary*, is *morally involuntary*. The evidentiary record at trial was not developed to address this argument.

23. Chan first suggests that delusion-driven behaviour is necessarily morally and / or physically involuntarily leading inevitably to either an acquittal or a verdict of NCR, depending on whether the conduct is the product of a mental disorder. Under this approach, moral and physical volition are indistinguishable for purposes of criminal responsibility. Chan relies on Cory J.'s references in *Daviault* to extreme intoxication "akin to automatism or insanity."[24] However, as Paciocco J.A. correctly noted in the court below, *Daviault*'s focus was intoxication so extreme

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[22] *R. v. Ratti*, [1991] 1 S.C.R. 68, at p. 80.

[23] For instance, convictions for murder committed by individuals suffering from a delusional mental disorder that may have been active at the time of the offence have been upheld by appellate courts. See for example: *R. v. Dobson*, 2018 ONCA 589, ¶24; *R. v. Richmond*, 2016 ONCA 134, ¶54-55; *R. v. Campione*, 2015 ONCA 67, ¶30-31, 39-41; *R. v. Woodward*, 2009 ONCA 911, ¶5.

[24] *R. v. Daviault*, [1994] 3 S.C.R. 63.

that the accused "is an automaton".[25]

24. Second, Chan relies on *R. v. Ruzic*, where this Court recognized the requirement of moral voluntariness as a principle of fundamental justice under s. 7 of the *Charter* since only "behaviour that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability."[26] To date, however, our law has not equated delusional behaviour with a lack of volition, either physical or moral.[27]

25. There are two reasons that leave to cross-appeal should not be granted to consider this submission.

26. First, leave to cross-appeal need not be granted for the Court to consider Chan's proposed change of the law. If the Crown's application for leave to appeal is granted, it is conceivable that the Court will be called upon to consider Chan's proposed change to the law. To determine whether s. 33.1 – which barred access to the *Daviault* defence in this case – is constitutional, the Court may well consider the scope of that defence. As such, contrary to Chan's submission, this Court does *not* require the "full panoply of remedial options at its disposal" to facilitate a consideration of whether moral voluntariness should result in an acquittal in the absence of s. 33.1.

27. Second, even if the Court ultimately accepts Chan's proposed changes to the law, the record before the Court does not allow for a substituted verdict of an acquittal. The evidentiary record and factual findings at trial do not establish moral involuntariness, as that term is understood in the case law. An accused's behaviour will not be excused as morally involuntary if he or she voluntarily assumed a foreseeable risk that circumstances producing moral involuntariness would arise. So, for example, an accused cannot rely on the defence of duress if the accused voluntarily joined a criminal organization, knowing that he or she might be pressured to engage in criminal activity.[28]

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[25] See paragraph 5, above.
[26] *R. v. Ruzic*, 2001 SCC 24, ¶45-47.
[27] See e.g. *R. v. Courville*, [1985] 1 S.C.R. 847, aff'g [1982] O.J. No. 154 (C.A.); *R. v. Oommen*, [1994] 2 S.C.R. 507, ¶31.
[28] *Criminal Code*, R.S.C. 1985, c. C-46, s. 17; *R. v. Ruzic*, 2001 SCC 24, ¶70. Also see *R. v. Li* (2002), 162 C.C.C. (3d) 360 (Ont. C.A.), ¶20-26; *R. v. Aravena*, 2015 ONCA 250, ¶107-113.

28. Chan's claim that he is entitled to an acquittal on the theory of moral involuntariness rests on a factual assertion that his "psychotic break and violent actions were neither foreseen *nor* reasonably foreseeable" (emphasis in original).

29. This factual assertion is very much in issue. As noted in the Crown's application for leave to appeal, the Crown's position is that the risk of extreme intoxication *was* reasonably foreseeable as this is a "normal" reaction to the ingestion of illegal hallucinogens. However, the issue was not fully explored at trial. For instance, during closing submissions at trial, reference was made to Dr. Klassen's report which noted Chan's prior experience with paranoid ideations when using cannabis and Dr. Klassen's testimony that this issue ought to have been explored further in his assessment but was not.[29] It is reasonable to expect that the foreseeability of Chan's psychotic break would be the subject of additional evidence, which the parties at trial had no reason to believe would be relevant. In short, a new trial is required. The record certainly does not support a finding that the risk was *not* reasonably foreseeable, as would be required to entitle Chan to an acquittal on his modified interpretation of the law.

30. Finally, Chan argues that he should receive an NCR verdict because "the trial judge simply misapplied *Bouchard-Lebrun* to exclude a finding of NCR in this case".[30] Chan, in making this submission, has not articulated any error of law in the trial judge's analysis. As Paciocco J.A. correctly noted in the court below, Chan's arguments on this point in the Court of Appeal were "largely fact driven".[31] As such, it is unclear that this argument rests on a pure question of law, as would be required for this Court to intervene.

31. In all the circumstances, if s. 33.1 is unconstitutional, a new trial is required. The trial record was simply not generated to resolve the factual issues that will arise if this Court determines s. 33.1 is unconstitutional. Fairness to both parties demands a new trial.

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[29] Transcript, November 1, 2018, p. 25, Tab 2D.
[30] Chan, Memorandum of Argument, ¶54.
[31] *OCA decision*, *supra*, ¶30.

PART IV – COSTS

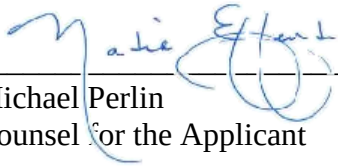
32. The applicant makes no submissions as to costs.

PART V – ORDER REQUESTED

33. The applicant requests that the respondent Chan's application for leave to cross-appeal be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

Joan Barrett
Counsel for the Applicant



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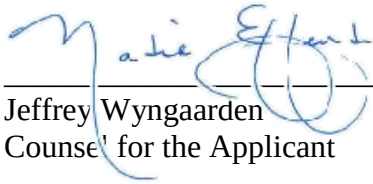

Jeffrey Wyngaarden
Counsel for the Applicant

Dated at Toronto this 20th day of October, 2020.

PART VI – AUTHORITIES CITED

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