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 on Cross-Appeal*
*(Respondent)*

*– and –*

**THOMAS CHAN**

*Respondent/*
*Applicant on Cross-Appeal*
*(Appellant)*

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# REPLY BOOK
# RE: REPLY OF THOMAS CHAN TO RESPONSE TO APPLICATION FOR LEAVE TO CROSS-APPEAL

(Pursuant to Rule 31 of the *Rules of the Supreme Court of Canada*)

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**Matthew R. Gourlay**
**Danielle Robitaille**
**HENEIN HUTCHISON LLP**
235 King St. East, First Floor
Toronto, ON M5A 1J9
Tel: 416-368-5000
Fax: 416-368-6640
Email: mgourlay@hhllp.ca
drobitaille@hhllp.ca

*Counsel for the Respondent/*
*Applicant on Cross-Appeal, Thomas Chan*

**Michael Sobkin**
331 Somerset St. West
Ottawa, ON K2P 0J8
Tel: 613-282-1712
Email: msobkin@sympatico.ca

*Agent for Counsel for the Respondent/*
*Applicant on Cross-Appeal, Thomas Chan*

**ORIGINAL TO :** The Registrar of this Honourable Court
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

**AND TO :**


**Joan Barrett**
**Michael Perlin**
**Jeffrey Wyngaarden**
**ATTORNEY GENERAL OF ONTARIO**
Crown Law Office – Criminal
720 Bay Street, 10th Floor
Toronto, ON M7A 2S9
Tel: 416-326-4600
Fax: 416-326-4656
Email: Joan.Barrett@ontario.ca
Michael.Perlin@ontario.ca
Jeffrey.Wyngaarden@ontario.ca

*Counsel for the Applicant/*
*Respondent on Cross-Appeal,*
*Her Majesty the Queen*

**Nadia Effendi**
**BORDEN LADNER GERVAIS LLP**
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9
Tel: 613-369-4795
Fax: 613-230-8842
Email: neffendi@blg.com

*Agent for Counsel for the Applicant/*
*Respondent on Cross-Appeal,*
*Her Majesty the Queen*

**Stephanie DiGiuseppe**
**Annamaria Enenajor**
**Karen Heath**
**RUBY SHILLER ENENAJOR DIGIUESPPE**
402-197 Spadina Avenue.
Toronto, ON M5T 2C8
Tel: 416-964-9664
Fax: 416-964-8305
Email: sdigiuseppe@rubyshiller.com
aenenajor@rubyshiller.com
kheath@rubyshiller.com

*Counsel for the Respondent,*
*David Sullivan*

**Marie-France Major**
**SUPREME ADVOCACY LLP**
340 Gilmour St., Suite 1000
Ottawa, ON K2P 0R3
Tel: 613-695-8855 ext. 102
Fax: 613-695-8580
Email:mfmajor@supremeadvocay.com

*Agent for Counsel for the Respondent,*
*David Sullivan*

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**REPLY TO RESPONSE TO APPLICATION FOR LEAVE TO CROSS-APPEAL**
(Pursuant to Rule 31 of the *Rules of the Supreme Court of Canada*)

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**Matthew R. Gourlay**
**Danielle Robitaille**
**HENEIN HUTCHISON LLP**
235 King St. East, First Floor
Toronto, ON M5A 1J9
Tel: 416-368-5000
Fax: 416-368-6640
Email: mgourlay@hhllp.ca
drobitaille@hhllp.ca

*Counsel for the Respondent/*
*Applicant on Cross-Appeal, Thomas Chan*

**Michael Sobkin**
331 Somerset St. West
Ottawa, ON K2P 0J8
Tel: 613-282-1712
Email: msobkin@sympatico.ca

*Agent for Counsel for the Respondent/*
*Applicant on Cross-Appeal, Thomas Chan*

***Overview***

1. First, the Respondent Thomas Chan disputes the Crown's contention that the Court lacks jurisdiction to hear his cross-appeal. The Court has heard at least one other cross-appeal in procedurally identical circumstances.[1] To the extent there is uncertainty on the jurisdictional point, it should be addressed on the appeal proper with the benefit of full argument. The cross-appeal engages the very same issues that will be joined on the Crown's main appeal (if leave is granted) and would not expand the debate or the record before this Court.

2. Second, the Respondent disagrees with the Crown that the trial record contains inadequate findings for the relief he seeks. *Daviault* provides a defence where the accused acted under the influence of extreme intoxication "akin to automatism **or insanity**."[2] The trial judge found as fact that Thomas Chan acted in the grips of insanity, which deprived him of the ability to distinguish right from wrong.[3] But for s. 33.1 of the *Code*, he would have been entitled to an acquittal. This Court may choose to modify or reject its own prior holding in *Daviault*, but it is presumptuous for the Crown to assume the Court will do so before the appeal is even heard. If the core holding of *Daviault* survives and s. 33.1 does not, the Respondent would be entitled to an acquittal. By granting leave to cross-appeal, the Court will be able to grant him that relief if it sees fit.

***The jurisdictional issue should be addressed on the appeal proper***

3. The Applicant Crown has argued that this Court has no jurisdiction to grant leave to cross-appeal, relying on cases from the 1990s concerning the interplay between *Criminal Code* and *Supreme Court Act* appeal rights. However, in a more recent case, in the exact same procedural circumstances that are present here, the Court in *J.F.* granted the accused leave to cross-appeal against the Court of Appeal's order for a new trial. There, the accused had succeeded in winning a new trial at the Court of Appeal; the Crown appealed to this Court; and the accused successfully sought leave to cross-appeal on the basis that an acquittal should have been ordered instead of a

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[1] *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215
[2] *R. v. Daviault*, [1994] 3 S.C.R. 63, at p. 73, *per* Cory J.
[3] Reasons for Judgment, at para. 90

re-trial. This Court agreed, and ultimately entered an acquittal.[4] No other case cited by the Crown involves procedural circumstances identical to that of the Respondent in the case at bar.

4. In *Barnes*, the accused had obtained a stay of proceedings on the basis of entrapment. The Court of Appeal set aside the stay and ordered a new trial. The accused appealed to this Court. The Crown did not seek leave to cross-appeal, but nonetheless argued that the Court should, in dismissing the accused's appeal, vary the order below to reinstate the convictions. Invoking his earlier decision in *Guillemette*,[5] Lamer J. held that s. 695(1) does not give the Court jurisdiction "in all circumstances" to make an order that it believes "the Court of Appeal could have and should have made."[6] In cases "[w]here there is no appeal by the Crown, **an accused** cannot leave this Court with less than what he gained from the court of appeal."[7] There is no suggestion in *Barnes* that the same principle would bar the **accused** from seeking to vary the result below when the case is already before the Court on a Crown appeal.

5. The Crown also relies on *Hinse*, where the Court held that the accused had no ability under the *Criminal Code* to challenge a stay of proceedings entered by the Court of Appeal. However, it held that the stay of proceedings amounted to an ancillary order granted under s. 686(8), giving rise to an avenue of appeal pursuant to s. 40(1) of the *Supreme Court Act*. The precise question that arises here was not resolved.

6. This Court does not appear to have ever held that an accused, **facing a Crown appeal taken under s. 693(1)(b)**, is disentitled from invoking s. 695(1) to secure leave to cross-appeal in order to vary the order made by the Court of Appeal. None of the policy concerns militating against reading a free-standing right of appeal into s. 695(1) operate when it is invoked as an adjunct to an existing Crown appeal. It would not open the door to superfluous defence appeals where the accused got most but not all of what he sought in the Court of Appeal. And it would not produce

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[4] The Crown refers to the "*J.F.* majority's" exercise of jurisdiction, but it should be noted that the sole dissenter, Deschamps J., disagreed with the result on substantive grounds. Accordingly, all seven judges who heard the case were presumably satisfied that the Court had jurisdiction.

[5] *Guillemette v. The Queen*, [1986] 1 S.C.R. 356

[6] *R. v. Barnes*, [1991] 1 S.C.R. 449, at p. 466

[7] *Ibid*. (emphasis added)

the unfairness noted in *Barnes* where an accused, having exercised his right to appeal to this Court, would risk leaving the Court in a worse position than that in which he entered it. Reading s. 695(1) to provide a procedural vehicle for an accused in Thomas Chan's situation to seek to vary the order below makes practical sense and prejudices no one. Rather, it gives this Court the ability – having granted leave – to step into the shoes of the Court of Appeal and make the order that ought to have been made below.

7. That is precisely what this Court permitted in *J.F.*, without commenting on the jurisdictional issue. The Crown has suggested that the Court in *J.F.* simply did not advert to its own jurisdiction and went on to hear (and ultimately *allow*) a cross-appeal it had no business entertaining in the first place. While this could be true, it is not a determination the Court should make without full argument. The public and the profession would not benefit from the Court resolving an inconsistency in the jurisprudence in this manner. Instead, leave to cross-appeal should be granted and, if necessary, the parties can address this issue in their submissions on the appeal proper.

8. Indeed, it appears that it is the Court's usual practice to have the parties address difficult jurisdictional issues on the appeal proper, where it can have the benefit of full argument. For example, in the pending cases of *R. v. Albashir* (39277) and *R. v. Mohsenipour* (39278), the accused have appealed as of right to this Court from the judgment of the British Columbia Court of Appeal overturning the trial judge's decision to quash certain counts in an indictment. On October 26, 2020, the Court wrote to the parties directing them to address in their appeal factums whether the quashing of a count is tantamount to an acquittal for the purposes of the Court's jurisdiction under s. 691(2)(b) of the *Code*.[8]

9. Likewise, in *R. v. Li* (38903), the parties were asked to provide written submissions in their appeal factums on the jurisdiction of the Court to hear an appeal as of right where the Court of Appeal had set aside a stay of proceedings and entered a conviction.[9] Ultimately, the Court decided that there was an appeal as of right (See 2020 SCC 12).

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[8] Reply Book, Tab 2.

[9] See order of Justice Karakatsanis in *Cheung Wai Wallace Li v. Her Majesty the Queen* dated January 16, 2020 reported on the online docket.

10. The same approach should be taken here. The objection raised by the Crown reveals an ambiguity in the law which the Court should expressly resolve.

***The record is sufficient to enable the Court to decide whether Thomas Chan should receive a new trial, an acquittal, or a verdict of NCR***

11. The Applicant has argued that the evidentiary record is insufficient to determine whether Thomas Chan was entitled to an acquittal (or NCR verdict) instead of a new trial. Respectfully, this argument rests on a tenuous reading of the facts and law which assumes the very points in issue. Namely: is substance-induced insanity equivalent to automatism in law, as held by the majority in *Daviault*? Should the "*Cooper* exclusion" continue to bar NCR verdicts where a mentally disordered state arose principally from the consumption of drugs? The Crown's claim that the record is insufficient presupposes that the Court will adopt its view that the drug-induced origin of Thomas Chan's psychotic state somehow places him outside ordinary principles of criminal culpability.

12. The core factual finding of the trial judge was that, when Thomas Chan killed his father and wounded his step-mother, he was "***incapable of knowing that his actions were morally wrong***."[10] This amounted to a state of "insanity," which the majority in *Daviault* treated as legally equivalent to "automatism." The doctrinal status of *Daviault* is inseparable from the constitutionality of s. 33.1, the issue before the Court on the Crown's appeal.

13. It should therefore be up to this Court to assess the legal implications of the trial judge's key finding in light of the (un)constitutionality of s. 33.1 and the fundamental principles of criminal culpability flowing from *Daviault*, *Ruzic*,[11] and elsewhere. It should scarcely need pointing out that people who are unable to distinguish between right and wrong are not normally subject to criminal punishment for acts committed while in that state: that is the very purpose of s. 16 and the principles of fundamental justice that underpin in. The Crown's contention that Thomas Chan's consumption of mushrooms should place him beyond the protection of this fundamental guarantee is, at the very least, open to question. And it should be for this Court to decide, with the benefit of full argument, whether the Crown's argument should be given effect.

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[10] Reasons for Judgment, at para. 90
[11] *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687

14. The Crown attempts to evade the consequences of the trial judge's central finding by invoking cases in which accused were convicted of murder despite having suffered from a delusional mental disorder.[12] But these cases merely reflect the reality that some people who commit crimes while mentally disordered will not be able to satisfy the statutory prerequisites for the NCR defence in s. 16. This is irrelevant to Mr. Chan because the trial judge found unequivocally that he *did* meet the test for an NCR verdict: he was incapable of knowing his actions were morally wrong. An NCR verdict was unavailable, however, due to the "*Cooper* exclusion."[13]

15. The Crown appears to argue that because violent behavior was a "reasonably foreseeable" consequence of taking magic mushrooms, he should be held criminally liable for the actions he carried out in a delusional state while he was incapable of distinguishing between right and wrong. There is no air of reality to this proposition. Indeed, it was explicitly contradicted by the trial judge, who (in sentencing the accused) characterized his condition as "**not** reasonably foreseeable."[14] And in his reasons for judgment at trial, the trial judge found as fact that Thomas Chan had done mushrooms before and experienced nothing but pleasant effects. On this record, the notion that extreme violence was a reasonably foreseeable consequence of Mr. Chan's decision to get high with his friends simply does not withstand scrutiny.

16. In effect, the Crown's foreseeability claim is an attempt to reinstate the consequence-based culpability rationale of s. 33.1 itself: namely, that the relevant fault lies in becoming intoxicated in the first place. But this Court will only ever reach the cross-appeal if it agrees with the Court of Appeal that this is a constitutionally inadequate form of fault, rendering s. 33.1 unconstitutional. In that eventuality, the Crown's claim that ingesting mushrooms somehow provides a foreseeability-based route to criminal liability becomes a kind of "zombie" substitute for the unconstitutional s. 33.1. At the very least, it cannot be assumed in advance that this Court would choose to resurrect a constitutionally defunct mode of liability in this manner.

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[12] Response of the Crown to the Application for Leave to Cross-Appeal, at para. 20
[13] *R. v. Bouchard-Lebrun*, 2011 SCC 58, [2011] 3 S.C.R. 575, re-affirming *R. v. Cooper*, [1980] 1 S.C.R. 1149
[14] Reasons for Sentence, para. 45

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 29th day of October, 2020

Matthew Gourlay

Danielle Robitaille

Supreme Court of Canada
Registry

Cour suprême du Canada
Greffe

October 26, 2020

Ritchie Sandford McGowan
Attn: Marilyn E. Sandford, Q.C.
1200 - 1111 Melville Street
Vancouver, British Columbia
V6C 3V6

Criminals Appeals and Special Prosecutions
Attn: Lara Vizsolyi
900-840 Howe Street
Vancouver, British Columbia
V6Z 2G3

Narwal Litigation LLP
Attn: Joven Narwal
900-777 Hornby Street
Vancouver, British Columbia
V6Z 1S4

Dear Counsel,

RE: *Tamim Albashir*
*v.*
*Her Majesty the Queen*
File No.: 39277

-and between-

*Kasra Mohsenipour*
*v.*
*Her Majesty the Queen*
File No.: 39278

I write to you further to the filing of the notices of appeal as of right in the aforementioned matters on August 7, 2020.

At the direction of Justice Moldaver, the parties are invited to provide written submissions in their appeal factums addressing this Court's jurisdiction to hear these appeals as of right, in particular whether an order quashing certain counts on an indictment because they are unconstitutional is tantamount to an acquittal as required by s. 691(2)(b) of the *Criminal Code*.

Yours truly,

David Power
Acting Registrar

301, rue Wellington Street, Ottawa, Ontario, Canada K1A 0J1
Tel./Tél. : 613 996-8666 • 1 844 365-9662 • Fax/Téléc. : 613 996-9138
Internet : www.scc-csc.ca • E-mail/Courriel : registry-greffe@scc-csc.ca

c.c.: Mr. Robert E. Houston, Q.C.
Mr. Michael J. Sobkin