
CANADA / JUDGMENT

R. v. Alexander

2015 BCCA 484

COURT

British Columbia Court of Appeal

DECIDED

27 November 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCCA 484 R. v. Alexander

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Alexander,

2015 BCCA 484

Date: 20151127

Docket: CA42014

Between:

Regina

Respondent

And

Jo Anne Nancy Alexander

Appellant

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Chiasson

The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated
March 25, 2014 (R. v. Alexander, Vancouver Docket 26242).

Counsel for the Appellant:

T. Paisana

M. Shah

Counsel for the Respondent:

D. Layton

Place and Date of Hearing:

Vancouver, British Columbia

September 8, 2015

Place and Date of Judgment:

Vancouver, British Columbia

November 27, 2015

Written Reasons by:

The Honourable Madam Justice Stromberg-Stein

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Chiasson

Summary:

The appellant killed her husband but claimed she did not remember hitting him on his head several times with a baseball bat or a hammer. The central issue at trial was whether her actions were voluntary. She asked the trial judge to instruct the jury on both mental and non-mental disorder automatism. The judge instructed the jury only on non-mental disorder automatism. The jury convicted her of second degree murder. On appeal the appellant argued the judge erred in finding there was no air of reality to mental disorder automatism; by failing to leave both forms of the automatism defence with the jury; and by failing to instruct the jury to disregard the Crown psychiatrist's evidence that many who claim amnesia after being accused of violent crimes are lying. Held: Appeal dismissed. Having concluded there was an air of reality to the defence of automatism, the judge erred when she considered whether there was an air of reality for mental disorder and non-mental disorder automatism. The judge erred in concluding that transitory abnormal mental states can never be classified as a mental disorder. The judge erred by failing to apply a holistic approach to determine whether the appellant condition was mental or non-mental disorder automatism. Notwithstanding these errors, it was appropriate to apply the curative proviso on the basis that the errors were harmless. The judge did not err by failing to leave mental disorder automatism with the jury. The jury instruction was adequate, having been carefully crafted with the assistance of counsel to reflect that the jury would be cautioned to be skeptical of claims of automatism but that it was ultimately up to the jury to determine

credibility.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Background

- [1] The appellant, Jo Anne Nancy Alexander, does not dispute she killed her husband John by hitting his head several times with a baseball bat or a hammer. She claims she does not remember inflicting the blows but only recalls the shocking sight of her husband with a knife in his ear. The central issue at trial was whether Ms. Alexander's actions were voluntary.
- [2] Dr. Shabehram Lohrasbe testified on behalf of Ms. Alexander. It was his opinion that at the time she killed her husband she was in a dissociative state in response to trauma, which impaired her voluntariness to act and her capacity to form intent. Dr. Lohrasbe said Ms. Alexander experienced a transient temporary mental abnormality, and not a mental disorder. She had no ongoing dissociative disorder and there was nothing to suggest she had had dissociative episodes before. She may have been vulnerable to entering a dissociative state because she was under escalating stress, did not have a healthy release of tension and was depressed. Dr. Lohrasbe was clear, however, that Ms. Alexander would not have entered a dissociative state without an extremely traumatic precipitating event. Dr. Lohrasbe's opinion was based on Ms. Alexander's description of the events, and while he had no reliable method of ensuring the accuracy of her account, he found no obvious signs of deception during their interview.
- [3] Dr. Stanley Semrau testified on behalf of the Crown. In his opinion Ms. Alexander was fully capable of being aware, goal-directed and purposeful when she killed her husband.
- [4] Ms. Alexander asked the trial judge to instruct the jury on both mental and non-mental disorder automatism. A voir dire was held to determine whether there was an air of reality to the defence of automatism. The judge held there was an air of reality to non-mental disorder automatism but not to mental disorder automatism. Emphasizing Ms. Alexander's evidence that she had experienced a tremendous shock when she saw her husband with a knife in his ear, the judge found that the jury could conclude Ms. Alexander had been in a dissociative state at the time of the killing. However, the judge reasoned if Ms. Alexander had been in a dissociative state it had an "external cause"; it was only "transient"; and it was not dangerous or recurring.
- [5] The judge instructed the jury on non-mental disorder automatism. The jury convicted Ms. Alexander of second degree murder.

- [6] The appellant seeks a new trial on two grounds. First, she says the judge erred in finding there was no air of reality to mental disorder automatism by concluding that transient and non-recurring mental states are excluded from the definition of mental disorder, and by failing to leave both forms of the automatism defence with the jury. Second, she submits the judge erred in failing to instruct the jury to disregard Dr. Semrau's evidence that many who claim amnesia after being accused of violent crimes are lying.

Facts

- [7] At 13:27 on January 26, 2012, Ms. Alexander sent an email to some friends saying she had left "the kids and Mom" in "an awful fix", and "John never understood if you dig a hole and can't see your way out, it's time to stop digging." She wrote, "I can't stand it anymore"; "Some people think this is the [sic] coward's way out". She said it was the most difficult thing she had ever done. At 13:29, Ms. Alexander called 911, asked for police and said she needed someone to "take us away". She hung up and the 911 dispatcher called back three times. At 13:36, she answered the dispatcher's third call and said she had taken sleeping pills. Again at 13:43, Ms. Alexander called 911 and said she needed police and an ambulance.
- [8] At approximately 13:50 the police discovered the appellant and her husband in their bed in the master bedroom of their home in Richmond. Mr. Alexander was dead (as was the family dog). Ms. Alexander was in the fetal position, shaking, crying and panting. She appeared to be in shock. The police pulled off the bed covers and they told her to show her hands, which she did, but she did not extend her arms fully.
- [9] There was a hammer on the floor by the bed and empty containers of the sleep drugs Nytol, Sleep Aid and Zopiclone on the bedside table.
- [10] At about 14:30 the appellant was examined at the hospital by Dr. Gabriel Piper. She was quite drowsy, did not respond to questions, and appeared to refuse to cooperate with the examination. Dr. Piper concluded Ms. Alexander had symptoms of moderate ingestion of sleeping medication, the treatment for which required monitoring of her condition and waiting for the medication to wear off. Ms. Alexander told Dr. Piper she had taken about 25 over-the-counter sleeping pills, which was consistent with the doctor's observations of her symptoms on arrival.
- [11] Forensic analysis revealed the presence of diphenhydramine (contained in Nytol and Sleep Aid) and zopiclone in Ms. Alexander's system. A number of pharmaceuticals were present in Mr. Alexander's system, all within normal therapeutic levels.
- [12] Dr. Lee, an expert in forensic pathology, conducted the autopsy. She determined the cause of death was blunt force head injury. There were three points of impact on the right side of Mr. Alexander's head, which was particularly vulnerable due to recent surgery. One blow caused an 8½ to 9 cm laceration that ran almost exactly along a recent surgical scar. Underneath this laceration were skull fractures, including a caving in of the bone, which "spidered" out over an 11 by 9 cm area. This injury was severe and would have required

significant force; for example, the equivalent of being hit with a car travelling 45 to 60 kph. This injury was consistent with being caused by multiple blows by a hammer or a bat. The other two injuries, which likely would not have been fatal on their own, each consisted of a 1 cm abrasion, surrounded by a 3 by 3 cm bruise, one at the midline of the head near the hairline and the other slightly forward and to the left.

- [13] On cross-examination, Dr. Lee agreed there was blood in Mr. Alexander's ear canal, which she commonly sees in cases of skull fractures. She agreed the blood could have resulted from a sharp force injury caused by the insertion and removal of a sharp object, like a knife but she did not note such an injury in the ear canal. Dr. Lee agreed it was possible that a small injury might have been obscured by the blood.
- [14] The police found a number of letters written by Ms. Alexander. On a speaker at the foot of the bed Ms. Alexander had left a note providing contact information for her children, David and Shannon. She wrote a letter to her grandson to say goodbye. She wrote to her mother asking for forgiveness and suggesting her mother ask her cousin, Rudy North, for help. She told her mother she was at peace and could finally sleep. There were two handwritten pages addressed to David and Shannon taped to a door in the downstairs foyer providing contact information for various people. Ms. Alexander wrote to her children:

I am so sorry. Please forgive me. We are in financial ruin. I can't deal with it and your dad anymore. My brain is yelling and I can't think. Your dad doesn't get it and he could never take care of himself so I am taking him with me. He was sleeping. He didn't feel a thing.

- [15] The police seized a Purolator envelope from Rudy North, which was dated January 26, 2012. Inside the envelope was a letter from Ms. Alexander to Mr. North explaining her "demise". She wrote, "If you dig yourself a hole, at some point, you must stop digging. I have reached that point." She said she had "left a terrible mess," and asked Mr. North to help her family financially. She provided documentation regarding her debts, income tax filings, chequing account, home insurance, lease, and items in storage. She indicated she had completed her 2011 taxes and cancelled the phones and newspaper. She enclosed a signed vehicle transfer form, to be used to help pay debts. She concluded, "People say this is the coward's way out, but for me, it's the hardest thing I have ever done."
- [16] Ms. Alexander testified at trial that she looked after her husband and their finances. Mr. Alexander had been unable to drive or work since 2003 or 2004. He refused to apply for disability or social assistance. As a result they had serious financial issues, which led to Ms. Alexander borrowing from family and friends and selling their home. In 2007 Mr. Alexander had been diagnosed with temporal lobe epilepsy. He took epilepsy medication as well as medication for diabetes, depression and blood pressure. In 2011 he chose to have surgery to control his seizures. Initially there were surgical complications but he seemed to be seizure-free and on the road to recovery. His last neurology appointment was January 23, 2012. He asked his doctor about getting his driver's license back. However, Ms. Alexander told the doctor that his sense of direction was bad, and the doctor told him he had to address that

before getting his licence back. On the way home, Mr. Alexander was furious and he felt Ms. Alexander had betrayed him. He berated and insulted her and called her names. Afterwards, he did not want her help. Around the same time, Ms. Alexander confronted her husband with the fact they did not have any money. Mr. Alexander was a compulsive shopper and spender and he told her to borrow money. For the first time, she refused to borrow money and told him he should do it himself. This caused him to retreat to his bed and into himself.

- [17] Ms. Alexander said she was having suicidal thoughts caused by feelings of tiredness and hopelessness due to their financial problems and her husband's health and unhappiness.
- [18] Ms. Alexander testified that on January 24, two days before she called 911, she heard an odd noise from the bedroom. She found her husband with a knife sticking out of his ear, thrashing and flailing under the covers. He looked like he was in pain. She walked over to him and he grabbed her hand to push the knife further into his ear. She claimed no memory of what happened next.
- [19] She did recall having a 30-second discussion with her daughter Shannon at the door. She also recalled watching TV on the bed after removing the knife. She recalled deciding to have a last lunch with her grandson the next day so she cleaned her husband's head and used the toque to hide the wounds in the event her grandson happened to open the bedroom door. Ms. Alexander recalled seeing a baseball bat on the floor at the bottom of the bed, which she assumed she had used to hit her husband because it was out of place. She recalled cleaning the house, twice taking clothes to Value Village, going to the garbage dump, and buying ice cream, dog food and sleeping pills. She picked up her grandson at daycare and looked after him for several hours. She picked up a form from the driver's license "place" to transfer her vehicle and she filled out the form. She spoke to her son and mother on the phone, cooked dinner for her grandson, and had ice cream with him and her daughter. She dropped off personal items at her daughter's suite that she wanted her children and grandson to have, including wedding rings, silver service, and electronics. She did her 2011 taxes. She wrote letters to various people. She collected various documents to assist Rudy North in sorting out her affairs and she went to the post office to courier these to him. Ms. Alexander could not remember precisely when or in which order she did all these things.
- [20] Ms. Alexander said she never thought of killing her husband and, although she had no memory of hitting him over the head, she agreed she may have done so. She testified she had been untruthful when she wrote in her letters that her dire financial situation had driven her to kill her husband and commit suicide. She claimed she said this because she did not want to leave her family and friends "with the idea that John had put a knife in his ear, that I well could've hit him over the head".

Evidence about the Mental State of Ms. Alexander

- [21] The following factors led to Dr. Lohrasbe's diagnosis that Ms. Alexander was in a dissociative state at the time she killed her husband: (1) she had no prior history of violence; (2) the killing was messy and emotional; (3) she was under escalating stress; (4) she was under built-up pressure and had no healthy release of tension; (5) she experienced the massive shock of a precipitating event; and, (6) she experienced a period of amnesia. Dr. Lohrasbe said it is possible for people in a dissociative state to behave in targeted ways and to direct their actions at the symbolic source of the trauma.
- [22] Dr. Lohrasbe agreed all of these factors, except the amnesia, were also consistent with impulsive murder. Many people commit violent acts without a history of violence. The killing was emotional, but Dr. Lohrasbe said there was no evidence of "overkill". He testified that an emotional killing is consistent with a killing out of frustration, and increased stress is a risk factor for dissociative episodes but also relevant to impulsive killing. He said an unexpected shock is also just a risk factor for dissociation. Dr. Lohrasbe agreed most episodes of dissociation occur as a consequence of a traumatic event; the more severe the trauma, the more likely the person is to dissociate.
- [23] Dr. Lohrasbe said Ms. Alexander was depressed in the period leading up to the events. She was vulnerable to dissociation because of her stress and depression. However, the immediate precipitant was the sight of her husband with a knife in his ear. He concluded there was nothing in Ms. Alexander's history to suggest she had dissociative episodes before the event; she is not suffering from an ongoing mental disorder; Ms. Alexander is not suffering from an ongoing dissociative disorder; and the condition is unlikely to recur. Dr. Lohrasbe's opinion was that it is unlikely that something similar will happen to her again because it would be hard to imagine a comparable situation; that is, a slow build-up of pressures and a horrific precipitating incident.
- [24] Dr. Semrau testified that the factors Dr. Lohrasbe relied on to reach his opinion did not suggest that Ms. Alexander was in a dissociative state when she killed her husband. All of the factors Dr. Lohrasbe considered were equally consistent with a domestic homicide.
- [25] Dr. Semrau concluded that the appellant was aware of her acts and she was purposeful when she killed her husband. He reached his conclusion from the following factors: (1) Ms. Alexander was under increasing stress, which primed her for an emotional outburst; (2) there were many objects in the bedroom; yet in reaction to the shocking event she grabbed one of the two most lethal available; (3) Ms. Alexander hit her husband three times on his head, which was the most vulnerable part of his body, and she did not hit anything else in the room; (4) there was no evidence of bizarre conduct that would suggest that her thought process was disordered; and, (5) Ms. Alexander's letters suggested she remembered the killing, so it is likely that her amnesia began after they were written.

The Law

The Defence of Automatism

[26] Automatism is "a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action": R. v. Stone, [1999] 2 S.C.R. 290 at para. 156.

[27] Mr. Justice Doherty provided a more detailed definition of automatism in R. v. Luedecke, 2008 ONCA 716, at para. 54:

Automatism refers to involuntary conduct that is the product of a mental state in which the conscious mind is disassociated from the part of the mind that controls action. A person in a state of automatism may perform acts, sometimes complicated and apparently purposeful acts, but have no control over those actions.

[28] A defence of automatism amounts to a denial of the voluntariness component of the actus reus of the offence. A person who is unable to control whether to perform an act, or how to perform an act, cannot be said to have committed the act voluntarily. Conduct which is not voluntary cannot be criminal: Stone at paras. 169-170; Luedecke at para. 56.

[29] There are two forms of the automatism defence: mental disorder automatism and non-mental disorder automatism. A successful defence of mental disorder automatism leads to a finding of not criminally responsible by reason of mental disorder (NCRMD). In contrast, a successful defence of non-mental disorder leads to an acquittal: Stone at para. 157.

Two-Step Framework

[30] In Stone, the Supreme Court of Canada identified a two-step process to be undertaken by the trial judge when assessing a claim of automatism. The first step requires the trial judge to determine whether the accused person has established a proper evidentiary foundation for a defence of automatism. The second step requires the trial judge to determine which form of automatism should be left with the trier of fact.

1. The Evidentiary Foundation

[31] At the first stage, the accused must lead evidence upon which a properly instructed jury could find, on a balance of probabilities that the accused acted involuntarily: Stone at para. 182. To meet this burden the accused must: (1) claim that his or her actions were involuntary at the relevant time; and, (2) present expert psychiatric evidence confirming the claim: Stone at paras. 183-184. The expert evidence need only be "logically probative"; that is, evidence which if accepted by the jury would tend to support the defence of automatism: R. v. Fontaine, 2004 SCC 27 at para. 89.

2. Determining Which Branch of Automatism

Role of the Trial Judge

- [32] If the accused person has established a proper foundation for a defence of automatism, it falls to the trial judge to determine which form of automatism should be left with the trier of fact: *Stone* at para. 193; *R. v. S.H.*, 2014 ONCA 303 at para. 72.
- [33] This determination turns on whether the accused's alleged condition is a mental disorder. Whether a particular condition is a mental disorder is a question of law for the trial judge to decide. The jury does not decide this question: *R. v. Bouchard-Lebrun*, 2011 SCC 58 at para. 61. The trial judge is not bound by medical evidence since experts often do not take into account the policy component of the analysis: *Bouchard-Lebrun* at para. 62. In *Bouchard-Lebrun* the issue was whether self-induced intoxication caused by drug use was a mental disorder within the meaning of s. 16 of the Criminal Code. The Court mandated the trial judge to use the *Stone* holistic approach to make this determination.

Definition of "mental disorder"

- [34] A mental disorder is defined by s. 2 of the Criminal Code as a "disease of the mind". The legal concept of a disease of the mind is very broad and embraces:

any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion: *R. v. Cooper*, [1980] 1 S.C.R. 1149 at p. 1159.

- [35] A disease of the mind is a legal definition with an important policy component. The policy behind the definition is to control persons thought to be dangerous. An accused person who lacks conscious choice because of a dangerous and potentially recurring disorder would fall under mental disorder automatism; this person would not be entitled to an outright acquittal, but would be subject to continued detention and monitoring: *Luedecke* at para. 62. Notably, the case authorities turn on the application of the holistic approach which incorporates these policy concerns, and not on the precise words of the definition of "disease of the mind".

The Holistic Approach

- [36] The Court in *Stone* adopted a holistic approach to determine whether the accused person's specific condition was a disease of the mind. The starting point in the application of the holistic approach is the presumption that the accused's condition is a disease of the mind. The judge must determine whether the evidence takes the accused's condition out of this category. It is only in rare cases that automatism is not caused by mental disorder: *Stone* at para. 199.

- [37] An example of such a 'rare case', described in Luedecke at para. 63, would be when all of the following are true: (1) the accused suffered a single incident of automatism; (2) it was triggered by a specific external event; (3) the trigger is unlikely to recur; and, (4) the event could have caused a dissociative state in a normal person.
- [38] The holistic approach involves consideration of three factors: (1) the internal cause factor; (2) the continuing danger factor; and, (3) other policy concerns: Stone at para. 203. A judge should use an individualized analysis, taking into account the specific circumstances of each case: Bouchard-Lebrun at para. 77. Further, a judge should be "especially meticulous" in applying the holistic approach (and not simply rely on the internal cause factor) when the mental condition of the accused indicates an underlying mental disorder and the evidence also suggests that there was a triggering event: Bouchard-Lebrun at para. 88.
- (1) The internal cause factor
- [39] The purpose of the internal cause factor is to determine whether the accused person's condition arose from something internal to the accused (such as the accused's psychological or emotional make-up) as opposed to a specific external factor (for example, a psychological blow): S.H. at para. 80. An internal cause suggests that the accused's condition is a disease of the mind.
- [40] Under this factor, the trial judge must consider the nature of the trigger and determine whether a normal person in the same circumstances could have reacted to it by entering an automatistic state. This comparison is based on a contextual objective test. The accused's reaction to the trigger must be assessed from the perspective of a similarly situated individual: Stone at paras. 204, 210.
- [41] The comparison should not make use of the subjective psychological make-up of the accused. For example, evidence that the accused was depressed or emotionally disturbed is not relevant to determining the reaction of an ordinary person. However, objective evidence of the relationship between the accused and the victim would be relevant. So would other objective circumstances of the accused: Stone at paras. 209-211. The more the evidence suggests that a normal person would be susceptible to the trigger, the more likely the trigger is external: Bouchard-Lebrun at para. 71. Evidence of an extremely shocking trigger is required to show that a normal person might have reacted to the trigger by entering an automatistic state: Stone at para. 205.
- [42] The "ordinary stresses and disappointments of life" do not amount to an external cause. Automatism caused by stress or everyday events is presumed to be triggered by factors internal to the accused: Stone at para. 207.

[43] The Court in *Stone* recognized that the internal cause factor may not be helpful in all situations. It is a factor for trial judges to consider in cases where they deem it useful. In particular, the internal cause approach may not be helpful when the line between internal and external causes is blurred and it is impossible to classify the trigger as internal or external: *Stone* at paras. 203, 206, 218.

(2) The continuing danger factor

[44] The purpose of the continuing danger factor is to assess the likelihood of the recurrence of violence. A condition which presents an ongoing danger to others is more likely to be treated as a disease of the mind: *Stone* at para. 212; *Bouchard-Lebrun* at para. 73. A danger will only be recurring if it is likely to arise again independently of the accused's voluntary behaviour. The danger must persist despite the will of the accused: *Bouchard-Lebrun* at para. 74.

[45] The judge may consider any of the evidence to assess this factor. Two issues are especially relevant: (1) the psychiatric history of the accused; and, (2) the likelihood that the alleged trigger of the automatistic episode will recur: *Stone* at para. 214.

[46] If the accused has a documented history of automatistic states, the condition is likely recurring. Also, if the accused engaged in violence while in an automatistic state (including the occasion leading to the criminal charge) the likelihood that violence will recur is enhanced. The lack of a history of automatistic-like states does not necessarily indicate that violence will never recur: *Luedecke* at para. 87; *Stone* at para. 215.

[47] When there is no prior history, the trial judge should also assess the risk that the alleged trigger of the automatism will recur. The inquiry here is simply whether the alleged trigger is likely to recur, and not whether the accused will be violent if the trigger recurs. The greater the risk that the trigger will repeat in the accused's life, the greater the danger to the public, and thus the condition is more likely to be classified as a disease of the mind: *Luedecke* at para. 91; *Stone* at paras. 216-217.

(3) Other policy considerations

[48] The purpose of this branch of the holistic approach is to allow trial judges to consider the policy concerns that encompass automatism. These considerations are especially important when neither the internal cause nor the continuing danger factors provide a definitive answer to whether the accused's condition is a disease of the mind: *Stone* at para. 218.

[49] The major policy consideration is whether it is necessary to protect the public from the accused by using the procedure in Part XX.1 (mental disorder) of the Criminal Code: *Bouchard-Lebrun* at para. 75; *Stone* at para. 218. For example, if the accused has a pre-existing condition, but does not require any special treatment and is not a threat to others, a trial judge could find that the condition is not a disease of the mind: *Bouchard-Lebrun* at para. 75.

Standard of Review

- [50] The question of what mental conditions constitute a disease of the mind is a question of law. The trial judge's assessment of whether the accused's condition satisfies the legal test for mental disorder is a question of mixed law and fact because it involves an assessment of the evidence: *Stone* at para. 197.
- [51] In the present case, the appellant does not contest the trial judge's findings of fact, but challenges the legal effect of those findings. This involves the proper application of a legal standard, which is a question of law: *Luedecke* at paras. 47-50; *S.H.* at paras. 45-49.

Voir Dire Ruling on Air of Reality to Automatism Defence

The Trial Judge's Findings of Fact

- [52] The trial judge relied on the following facts in her ruling on whether there was an air of reality to the defence of automatism (*R. v. Alexander*, 2014 BCSC 554):
- In the period leading up to the event, Ms. Alexander was feeling stressed and depressed from the following circumstances: (1) the death of her brother; (2) caring for her husband; (3) dire financial circumstances; and, (4) not expressing her emotions: para. 13.
 - The trigger for Ms. Alexander's automatism was the sight of her husband with a knife in his ear: para. 16.
 - Ms. Alexander's dissociative episode was transient: para. 18.
 - There was no evidence that Ms. Alexander experienced other dissociative episodes: paras. 18-19.
 - There was no evidence that Ms. Alexander had a dangerous or recurring disorder: paras. 18-19.
 - The likelihood of a dissociative episode recurring is "pretty slim": para. 18.
 - Most dissociative states occur as a result of a traumatic event. The more severe the trauma, the more likely dissociation is to occur: para. 23.
- [53] The trial judge first described the air of reality test, citing the general principles from *Fontaine* and *R. v. Cinous*, 2002 SCC 29: paras. 4-8. Next, she considered the definition of automatism from *Stone*: paras. 9-10. She then considered whether there was an air of reality to mental disorder automatism: paras. 11-20. Finally, she examined whether there was an air of reality to non-mental disorder automatism: paras. 21-27.
- [54] The judge discussed the law that distinguished the two forms of automatism, citing a passage from *Luedecke* and a paragraph from Mr. Justice Binnie's dissent in *Stone*.

- [55] The excerpt from Luedecke contained: (1) the definition of a disease of the mind; (2) the policy considerations behind this definition; (3) the presumption from Stone that the accused's condition is a disease of the mind; and, (4) Doherty J.A.'s example of a rare case when the accused's condition would be classified as non-mental disorder automatism.
- [56] Binnie J.'s dissent in Stone provides a summary of Martin J.A.'s examination of the three possible sources of 'psychological blow' automatism in *R. v. Rabey* (1977), 37 C.C.C. (2d) 461 (Ont. C.A.), *aff'd* [1980] 2 S.C.R. 513. Martin J.A. held that automatism triggered by the "ordinary stresses and disappointments of life", in the absence of another credible explanation, is deemed to be a disease of the mind.

The Trial Judge's Application of the Law to the Facts

- [57] In applying the law to the facts, the judge began with the assumption that Ms. Alexander's condition was a disease of the mind: para. 12. She noted that Ms. Alexander experienced stress and depression in the period leading up to the killing: para. 13. She recognized that if these factors were the trigger for Ms. Alexander's automatistic state, then the automatism would be internally caused and characterized as mental disorder: para. 15. However, the judge found that there was another credible explanation for the automatism; namely, the sight of Mr. Alexander with a knife in his ear. This was an external cause: para. 16.
- [58] The judge then noted Dr. Lohrasbe's evidence that Ms. Alexander's condition was transient; Ms. Alexander never had dissociative states in the past; and the episodes were unlikely to occur in the future. There was no evidence that Ms. Alexander had a dangerous or recurring disorder: paras. 18-19. The judge stated that the definition of disease of the mind excludes transitory mental states which are unlikely to recur: para. 17. She concluded that the assumption that Ms. Alexander's condition was a disease of the mind was rebutted and there was no air of reality to mental disorder automatism: para. 20.
- [59] The judge found that, assuming the truth of the supporting evidence, there was an air of reality to non-mental disorder automatism: para. 26. She noted Dr. Lohrasbe's testimony that most dissociative states are caused by traumatic events: para. 23. Before reaching this conclusion, the trial judge repeated the passage from Stone that it is only in rare cases that automatism is not caused by a mental disorder: para. 26.

The Judge's Errors

- [60] When assessing Ms. Alexander's claim of automatism it is my view that the judge erred in three ways by departing from the Supreme Court of Canada's two-step framework set out in Stone.
- [61] The first error concerns the judge's application of the air of reality test by combining the two-step approach into one step. The approach prescribed by Stone is to first decide whether the accused person has established a proper evidentiary foundation for the defence of automatism. It is at this first stage that the air of reality test is applied to the defence of

automatism as a whole. Then, if the accused has established an evidentiary foundation, it is the judge who must characterize which form of the defence of automatism, mental disorder or non-mental disorder, to leave with the jury. The air of reality threshold does not apply at this stage of the analysis.

- [62] The threshold question which the judge considered in this case was first whether there was an air of reality to the defence of automatism. She did not consider the specific requirements that an accused person must establish in the context of a defence of automatism; that is, (1) claim that his/her actions were involuntary; and, (2) present expert evidence confirming the claim: *Stone* at paras. 183-184. However, the judge correctly cited the air of reality test from *Fontaine and Cinous* and concluded that there was an air of reality to the defence of automatism.
- [63] However, having concluded there was an air of reality to the defence of automatism, the judge erred when she queried whether Ms. Alexander had established an air of reality first for mental disorder, and then for non-mental disorder, automatism.
- [64] In my view, the second error in the judge's analysis was her apparent conclusion that transitory abnormal mental states can never be classified as a mental disorder. The judge focused on the definition of disease of the mind and not on the application of the holistic approach. This led her to focus on whether Ms. Alexander's condition was a transitory abnormal mental state as opposed to weighing the factors from *Stone*. "Transitory mental states such as hysteria or concussion" are an exception from the definition of disease of the mind as formulated by the Supreme Court of Canada in *Cooper*. However, the definition of disease of the mind must now be interpreted in light of the holistic approach and the mere fact that a mental state is transitory does not automatically mean it cannot be characterized as mental disorder automatism: *Bouchard-LeBrun* at para. 70. The application of the holistic approach must be used to determine whether the individual accused's condition is mental or non-mental disorder automatism. It is still necessary to apply the internal cause and continuing danger factors and consider the policy concerns to properly classify the condition.
- [65] Thirdly, it is my view that the judge erred by failing to apply the holistic approach to determine whether Ms. Alexander's condition was mental or non-mental disorder automatism. While her analysis does, in fact, examine some aspects of the holistic approach, the judge failed to consider other aspects. With respect to the internal cause factor, the judge did not consider how a normal person in similar circumstances to Ms. Alexander's would have reacted to the trigger. This comparison is necessary to determine whether a trigger is internal or external. As for the continuing danger factor, the judge did examine whether Ms. Alexander's condition was recurring and she did state that Ms. Alexander had no history of violence. However, the continuing danger factor involves two considerations: (1) the accused's history of dissociative states; and, (2) the likelihood that the alleged trigger will recur. The judge acknowledged Ms. Alexander had no history of dissociative states but she did not explicitly consider the likelihood that the trigger would

recur.

Application of the Curative Proviso

[66] Notwithstanding the judge's errors, in my view this is a case where it is appropriate to apply the curative proviso on the basis that these errors are harmless. I reach this conclusion because a proper application of the holistic approach supports the judge's characterization of Ms. Alexander's condition as non-mental disorder automatism and the evidence does not provide a basis for leaving mental disorder automatism with the jury.

[67] Section 686(1)(b)(iii) of the Criminal Code provides:

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(b) may dismiss the appeal where

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred,

[68] There are two categories of error that may be cured by s. 686(1)(b)(iii). The first category, and the one that is relevant in this case, is "an error that is harmless on its face or in its effect." The proviso ensures that an appellate court need not overturn a conviction on the basis of an error that could not have affected the verdict: *R. v. Van*, 2009 SCC 22 at para. 35. This category includes cases where the judge makes a serious error of law, but it does not prejudice the accused. In this situation the appellate court must be able to trace the effects of the error to ensure that it would make no difference to the verdict: *R. v. Khan*, 2001 SCC 86 at para. 30.

[69] In *Khan*, the Court cited *Stone* as an example of a case where a trial judge made a "harmless" error of law: *Khan* at para. 30. In *Stone*, the trial judge erred in applying the evidentiary burden and relying on precedent instead of considering the internal cause and continuing danger factors. However, the Court held at paras. 226-227 as follows:

[226] Turning to the disease of the mind stage of the automatism analysis, I note that the evidence in this case raised only one alleged cause of automatism, Donna Stone's words. Based on this evidence, the trial judge found that only mental disorder automatism should be left with the jury. This conclusion was based primarily on a finding that the present case is indistinguishable from *MacLeod*, *supra*. Such reliance on precedent fails to reveal what effect, if any, the internal cause factor, the continuing danger factor and other policy factors had on the decision to leave only mental disorder automatism with the jury. This is not in accordance with the holistic approach to the disease of the mind question set out in these reasons. However, the internal cause factor and the continuing danger factor, as well as the other policy factors set out in this Court's decisions in *Rabey* and *Parks* all support

the trial judge's finding that the condition the appellant alleges to have suffered from is a disease of the mind in the legal sense. In particular, the trigger in this case was not, in the words of Martin J.A. quoted in this Court's decision in Rabey, at p. 520, "extraordinary external events" that would amount to an extreme shock or psychological blow that would cause a normal person, in the circumstances of the accused, to suffer a dissociation in the absence of a disease of the mind. Accordingly, I find that the trial judge nevertheless reached the correct result on the disease of the mind question. As previously noted, in such a case, only mental disorder automatism must be put to the jury. There is no reason to go beyond the facts of this case in applying the rules discussed above.

- [227] In the end, I must conclude that no substantial wrong or miscarriage of justice occurred in the present case. Even if I had found that the trial judge erred in applying the evidentiary burden at the proper foundation stage of the automatism analysis, this error could only have benefitted the appellant. Although the trial judge did not apply the holistic approach to disease of the mind established in these reasons, he reached the correct result on this issue. There is no reasonable possibility that the verdict would have been different had the errors not been made; see *R. v. Bevan*, [1993] 2 S.C.R. 599. I would therefore dismiss this ground of appeal.
- [70] In the present case, while the judge's errors on their face may appear serious, it is my view that a proper application of the internal cause factor, the continuing danger factor and other policy concerns all support the judge's conclusion. Thus, in the circumstances of this case, the judge's legal errors were harmless in their effect.
- [71] The judge properly began her analysis from the correct starting point that the presumption is that automatism is caused by a mental disorder. She presumed Ms. Alexander's condition was a mental disorder and then determined that the evidence took the condition out of this category: para. 12. She noted repeatedly that it is only in rare cases where automatism is not caused by mental disorder: paras. 11, 26. She endorsed Doherty J.A.'s comments about when such a rare case would occur. As discussed earlier in these reasons, Doherty J.A. suggested that non-mental disorder automatism is generally limited to situations when: (1) the accused suffered a single incident of automatism; (2) it was triggered by a specific external event; (3) the trigger is unlikely to recur; and, (4) the event could have caused a dissociative state in a normal person: Luedecke at para. 63. In fact, the judge's reasons mostly track Doherty J.A.'s criteria.
- [72] The judge examined (without naming it) the internal cause factor. She considered the possibility that Ms. Alexander's episode was triggered by stress and depression in the period leading up to the events: paras. 13-16. However, she relied on Dr. Lohrasbe's evidence that the sight of the knife in Mr. Alexander's ear was the trigger for the episode: para. 16.
- [73] It is important to note that Dr. Lohrasbe never testified that Ms. Alexander's stress, escalating tension and depression caused the dissociative episode. These factors were characterized by Dr. Lohrasbe as vulnerabilities or risk factors. Dr. Lohrasbe repeatedly

stated that the "immediate precipitant" or "the precipitating event" was the sight of Mr. Alexander with a knife in his ear. Dr. Lohrasbe referred to the trigger as "horrific", "extremely traumatic" and "massive, unexpected". When asked by Crown counsel to clarify his diagnosis, he stated: "I'm not diagnosing her with an ongoing disorder. I'm saying that she was in a dissociative episode in response to trauma." [Emphasis added.] Thus while there is some evidence of internal factors that may have contributed to the appellant entering a dissociative state, Dr. Lohrasbe's evidence is clear that Ms. Alexander would not have entered a dissociative state without an extremely traumatic event. The other factors were vulnerabilities. There is no expert evidence that the dissociative episode would have occurred without a precipitating event.

- [74] The judge did not consider the reaction of a similarly situated person to the trigger, which was necessary to determine whether the trigger was truly external. Evidence of an extremely shocking trigger is required to show that a normal person could have reacted to the trigger by entering an automatistic state: Stone at para. 205. However, given the evidence of Dr. Lohrasbe's evidence referring to the trigger as "horrific", "extremely traumatic" and "massive, unexpected", Ms. Alexander's alleged trigger could reasonably fall into this category.
- [75] The comparison of Ms. Alexander to a similarly situated normal person must take into account Ms. Alexander's circumstances, including her relationship with her husband: Stone at paras. 209-210. Thus, the comparison would be to consider whether a woman who was in significant financial difficulty and who spent years caring for her chronically ill husband would react to the sight of her husband with a knife in his ear by entering a dissociative state? It is apparent in the circumstances, given the nature of the comparison and the horrific trigger, that it is possible that a normal person could react to it by entering a dissociative state.
- [76] In this case, where the line between internal and external causes is blurred, it is especially important to consider the continuing danger factor and policy concerns.
- [77] The judge partly addressed the continuing danger factor. She noted that Ms. Alexander did not have a history of dissociative disorders, but she did not explicitly consider the likelihood of the alleged trigger recurring. Not only does common sense suggest that Ms. Alexander's trigger is never going to recur, in fact Dr. Lohrasbe testified that it would be hard to imagine a comparable situation of built-up pressures and a precipitating horrific incident. Although the judge incorrectly referred to the likelihood of dissociative episodes recurring, instead of the likelihood of the triggering event recurring, she did refer to this evidence of Dr. Lohrasbe at para. 19 of her reasons. The absence of a continuing danger militates in favour of non-mental disorder automatism.

- [78] Finally, the policy considerations support the judge's conclusion that Ms. Alexander's condition was non-mental disorder automatism. As the judge noted, the evidence suggests that Ms. Alexander is not suffering from an ongoing dissociative disorder: paras. 18-19. Even if she is still experiencing depression or stress, there is no evidence to suggest that she is a risk to the public or that the procedures in Part XX.1 of the Criminal Code should apply to her: Stone at para. 218.
- [79] Despite her errors, in my view the judge reached the correct result in characterizing Ms. Alexander's condition as non-mental disorder automatism. No substantial wrong or miscarriage of justice occurred in this case, and thus, as in Stone, this is an appropriate case to apply the curative proviso.
- [80] I would not accede to this ground of appeal.

Leaving Jury with both Mental Disorder and Non-Mental Disorder Automatism

- [81] Ms. Alexander relied on three cases to suggest that the judge erred by not leaving both mental and non-mental automatism with the jury. At best, these cases support the proposition that in rare cases a trial judge may leave both with the jury.
- [82] The first case she relied on was S.H. In S.H., Watt J.A. stated that it is the role of the trial judge to decide whether mental disorder or non-mental disorder automatism should be left with the jury: para. 72. He noted in a footnote that in some cases, for example when there is conflicting evidence on the disease of the mind issue, both types of the defence may be left to the jury but he did not refer to any authority for this statement. Further, and in any event, he did not state that a judge must put both types of automatism to the jury if there is conflicting evidence - only that a judge may do so.
- [83] Ms. Alexander also relied on R. v. Ansari, 2008 BCSC 1517. Ansari provides very little support for the argument that both types of automatism can be left with the jury. In Ansari, the Crown applied to have the defence of automatism taken from the jury on the grounds that there was no air of reality to the defence: Ansari at para. 1. McEwan J. applied Stone and Fontaine and held that there was an air of reality to the defence of automatism and that, "automatism and mental disorder will both be put to the jury for its consideration": Ansari at paras. 15-17. The judge did not address in any detail which form of automatism should have been left with the jury. The judge did not refer to the definition of "disease of the mind". Nor did he apply the holistic approach from Stone. The decision only considered the first stage of Stone: whether the accused established a proper evidentiary foundation for a defence of automatism.
- [84] The final case that Ms. Alexander relied on was R. v. Revelle (1979), 48 C.C.C. (2d) 267 (Ont. C.A.), aff'd [1981] 1 S.C.R. 576. In Revelle, the expert evidence suggested that the accused was in a dissociative state due to several factors including brain damage, alcohol consumption, grief, poor physical health and deep-seated anger. The trial judge left the defences of insanity, drunkenness and non-mental disorder automatism with the jury. Martin J.A. held

that the trial judge erred in leaving non-mental disorder automatism with the jury. The expert evidence suggested that the accused's dissociated state would not have occurred but for the brain damage he suffered. Martin J.A. held that in this case the brain damage was a disease of the mind and not an external factor. In obiter, Martin J.A. noted that it is possible for an accused, who is suffering from a disease of the mind, to raise the defence of non-mental disorder automatism. He gave the example of a person who is suffering from a disease of the mind who, as a result of a blow to head, goes into an automatistic state. However, Martin J.A. stressed that whether there is evidence of an external factor capable of producing non-mental disorder automatism is a question for the trial judge and the jury should not be left to search for an external factor.

- [85] Revelle was affirmed by the Supreme Court of Canada in a two-paragraph judgment. Revelle was decided before *Stone*, which substantially changed the analysis of automatism defences: *Luedecke* at para. 81.
- [86] In my view, the structure and application of the holistic approach supports the conclusion that the judge should only leave one version of the defence with the jury, except in the rarest of cases. As the Court stated in *Bouchard-Lebrun*, trial judges "should determine on a case-by-case basis whether the mental condition of each accused is included in or excluded from the definition of "disease of the mind": at para. 77. The trial judge must characterize the cause of the automatism as either mental disorder or non-mental disorder. Even if the accused alleges multiple causes of his or her automatism, it would only be in rare cases that both forms of the defence could be left with a jury. This approach is consistent with the application of and policy concerns of the holistic approach. In some circumstances it may be difficult to classify the accused's condition based on the internal cause or continuing danger factors. If both factors are inconclusive, the judge can use policy concerns to answer the "fundamental question"; that is, whether society requires protection from the accused: *Stone* at para. 218.
- [87] I do not find that this case is one of those rare cases where both forms of automatism could be left with the jury. There was no evidentiary basis to support mental disorder automatism. In fact, Dr. Lohrasbe's evidence suggests otherwise, and simply does not provide support for mental disorder automatism.
- [88] In my opinion, the trial judge did not err by failing to leave both forms of automatism with the jury.

The Jury Instruction on Expert Evidence

- [89] Ms. Alexander submits that the trial judge should have instructed the jury to completely disregard Dr. Semrau's evidence that many people who claim amnesia are lying.
- [90] To properly assess the impact of Dr. Semrau's evidence, it is important to place it in context with the evidence of the defence expert, Dr. Lohrasbe, and the jury charge as a whole.

[91] In examination-in-chief Dr. Lohrasbe stated there was no way of knowing for sure whether Ms. Alexander was making up her story. However, he saw no features of malingering in his interview with Ms. Alexander. In cross-examination, Dr. Lohrasbe accepted the DSM definition of malingering, which says that malingering should be strongly suspected in cases where criminal charges are pending. Dr. Lohrasbe said he did not strongly suspect malingering in every case, but agreed that it is always a factor to consider. He testified that a significant proportion of people charged with violent crimes claim not to remember the events. Dr. Lohrasbe discussed a time when one of his patients was faking amnesia. Looking back, Dr. Lohrasbe thought there were likely other times that a patient was feigning. Dr. Lohrasbe agreed that, in the context of serious crimes, lack of memory is the most common form of malingering and the easiest to fake. He agreed that a claim of amnesia that covers a criminal act can arouse suspicion and there is no methodology to confirm whether the claim is true or false.

[92] In examination-in-chief, Dr. Semrau agreed with Dr. Lohrasbe's evidence about the number of people accused of homicides who say they cannot remember the events. He noted that in his own experience and in "the general belief", many of these claims are feigned. In cross-examination, Dr. Semrau said the psychiatric literature and his own clinical experience are the sources of his belief that a fairly substantial portion of people who claim amnesia are faking. He stated there is no consensus in the psychiatric community about the percentage of people whose claims of amnesia are feigned. Dr. Semrau agreed that just because others have been dishonest in the past, does not mean that Ms. Alexander was lying. He testified as follows:

Q And you're not suggesting that even if others have been dishonest in the past, that means that Ms. Alexander is?

A Of course not.

[93] Further, Dr. Semrau noted that forensic psychiatrists do a poor job of identifying malingering.

[94] Ms. Alexander's trial counsel raised a concern about Dr. Semrau's remarks that many people who claim amnesia are lying. Counsel was not worried about the statistic that one-third to two-thirds of people who commit violent crimes claim amnesia. Counsel suggested that the judge's jury instructions should include a caution that Dr. Semrau's statement should not be used to assess the credibility of Ms. Alexander. Crown counsel requested that the judge include language that forensic psychiatrists have a healthy skepticism towards claims of amnesia. The judge noted that the instruction tied in with a general caution to the jury, derived from *Stone*, that the jury approach automatism with skepticism.

[95] In *Stone*, the Court provided guidance for trial judges in formulating jury instructions in the case of automatism. A judge should begin by reviewing the policy considerations which surround automatism. There are two principle considerations. The first is the potential that the accused could have been feigning automatism. The second is the risk of harm to the

administration of justice if people who commit a violent crime are acquitted on the basis of automatism: Stone at paras. 176, 220. Trial judges should refer the jury to specific evidence on the following factors (Stone at para. 220):

- i. The severity of the triggering event;
- ii. Whether there was corroborating evidence of bystanders;
- iii. Whether the accused has a documented history of dissociative states;
- iv. Whether the accused had a motive for the crime; and,
- v. Whether the alleged trigger of the automatism was also the victim of the violence.

[96] The Supreme Court of Canada has affirmed that these factors should be used to provide structure and guidance to triers of fact: Fontaine at paras. 86-88.

[97] Ms. Alexander argues that Dr. Semrau's testimony went beyond the scope of proper expert opinion when he testified that a substantial number of amnesia claims in homicide cases are feigned and he had patients who, when confronted by him, admitted they were lying. Ms. Alexander submits this was the type of testimony that the Court found improper in *R. v. Sekhon*, 2014 SCC 15.

[98] The accused in *Sekhon* was charged with importation and possession for the purposes of trafficking of cocaine. Border officials found 50 kilograms of cocaine in Mr. Sekhon's truck when he attempted to cross from Washington State into British Columbia. The sole issue at trial was whether the accused had knowledge that the cocaine was secreted in his truck: para. 17. In convicting Mr. Sekhon, the trial judge relied on expert testimony from a police officer regarding the habits and customs of drug couriers. The officer testified that he had never encountered the use of a blind courier in the approximately 1000 investigations he had conducted: para. 20.

[99] The Supreme Court of Canada held that the officer's testimony was inadmissible because it was neither relevant nor necessary to whether Mr. Sekhon himself had knowledge of the drugs. The evidence was not legally relevant because the guilt of Mr. Sekhon could not be determined by reference to the guilt of other, unrelated accused persons. The evidence was not necessary because determining whether Mr. Sekhon knew about the drugs was not beyond the knowledge and experience of the trial judge. It was not a matter that was technical or scientific: para. 49. The Court noted that this type of anecdotal evidence is highly prejudicial. The officer's evidence would have required the accused to prove that, despite the experience of the expert, his case was different. In effect, the evidence would have placed the burden of proving the mens rea on the accused instead of the Crown: para. 50.

- [100] When expert evidence goes beyond its proper scope, the judge should not assign any weight to the evidence: para. 48. Thus, the judge in Sekhon erred by relying on the officer's testimony. In the end, a majority of the Court applied the curative proviso to dismiss the appeal and uphold the convictions: paras. 52-58.
- [101] Because Sekhon originated from a judge alone trial, the Court did not consider in detail how a jury should be instructed when an expert's evidence strays beyond its proper scope. The Court did note in passing that in such cases "a remedial instruction advising the jury to disabuse their minds of the inadmissible evidence will generally suffice": para. 48.
- [102] In my view, Sekhon can be distinguished in several ways. First, the context was different. In Sekhon, the expert's evidence concerned whether the accused was aware that the drugs were in his vehicle. The Court noted that the officer's evidence effectively relieved the Crown of its burden to prove mens rea: para. 50. The trial judge explicitly relied on the inadmissible evidence in reaching his verdict: paras. 34-36.
- [103] In this case, the expert evidence concerns automatism. In the context of automatism, the accused bears the burden of proving that his or her actions were involuntary on a balance of probabilities: Stone at paras 179. Dr. Semrau's evidence did not have the effect of reversing a burden of proof. The policy concerns about feignability are part of the reason why the Court in Stone placed the burden of proving involuntariness on the accused: Stone at paras. 176-179. Even without Dr. Semrau's evidence, the jury could have inferred that accused persons often lie about automatism. It is evident from the jury charge as a whole that the law approaches the defence of automatism with skepticism and the judge highlighted that automatism may be easy to fake and that it would be unacceptable if serious offences were routinely excused on the basis of a claim of automatism.
- [104] Second, the evidence of Dr. Semrau was less prejudicial than that of the expert in Sekhon. In Sekhon the officer testified that in the course of investigating about 1000 cases of cocaine importation, he never once encountered a blind courier. The obvious implication of that testimony was that Mr. Sekhon could not possibly be telling the truth.
- [105] In the present case, the jury heard evidence from both experts that claims of amnesia should be approached with skepticism. Dr. Lohrasbe testified that he always considers the possibility that a patient accused of a serious crime is faking amnesia. Dr. Semrau testified that a "very substantial portion" of amnesia claims are dishonest. In cross-examination he stated that this claim was based on his own personal experience and the general consensus in psychiatric literature. He clarified that he was not suggesting that Ms. Alexander was lying and he noted that forensic psychiatrists do a poor job of detecting feigning.

- [106] Expert evidence that touches on an accused's credibility may be admissible if it is outside the knowledge or experience of a jury: *R. v. Marquard*, [1993] 4 S.C.R. 223 at p. 248-249; Sekhon at para. 49. As the Court in *Marquard* held, this type of evidence is permissible to put "the witness's testimony in its proper context": *Marquard* at p. 249. Feigning is part of the psychiatric experience with amnesia and part of the context in which a jury should consider the defence of automatism: *Stone* at paras. 176, 220.
- [107] In my view, because of these differences between the present case and the circumstances in *Sekhon*, the judge, in her jury instruction, was not required to use identical words to those suggested in *Sekhon*.
- [108] The judge instructed the jury about the evidence given by the two expert witnesses, as follows:
- Two forensic psychiatrists testified as expert witnesses. Both stated that they approach the topic of amnesia with a healthy skepticism. They described the literature and their understanding as being that a range of between 33 and 70 percent of people who are charged with serious violent offences claim amnesia. Dr. Semrau suggested a belief that many of them are lying. I instruct you that this evidence is to be taken as a demonstration of the professional skepticism with which they approach the topic. It is not an opinion or determination of whether Ms. Alexander is telling the truth. That is for you to decide.
- [109] Both experienced counsel confirmed that the judge's proposed jury instruction was appropriate.

Appellate Review of Jury Instructions

- [110] An appellate court, when reviewing a jury charge, must consider the alleged error in the context of the charge and the trial as a whole. A trial judge is allowed flexibility in instructing the jury. The precise words used in the jury charge are a matter of discretion for the trial judge and will depend on the circumstances of the case. It is the overall effect of the instructions that matters: *R. v. Araya*, 2015 SCC 11 at para. 39.
- [111] An accused is entitled to a properly instructed jury, not a perfectly instructed one. If perfection were the standard, no jury charge would pass appellate review: *R. v. Jacquard*, [1997] 1 S.C.R. 314 at paras. 1-2.
- [112] It is the trial judge's obligation to properly instruct the jury; however, it is expected that counsel will assist the trial judge and identify aspects that may be problematic in the charge. A failure to object to a jury charge is not determinative; however, trial counsel's position at trial is an important factor to consider when evaluating complaints raised on appeal: *Jacquard* at paras. 35-38; *R. v. Purchase*, 2015 BCCA 211 at paras. 3-4.

The Trial Judge's Limiting Instruction was Adequate

- [113] Ms. Alexander argues that the trial judge ran afoul of Sekhon by placing some weight on Dr. Semrau's evidence in the jury charge. She claims that the judge should have told the jury to completely disregard his evidence.
- [114] Defence counsel was highly involved in discussing and commenting on the instructions before they were given to the jury. He expressed concern with Dr. Semrau's statement that a high number of amnesia claims are feigned. He cited Sekhon when requesting a limiting instruction that the "comment should not be used to assess the credibility of the accused in this case". The judge incorporated defence counsel's suggestions and noted in her charge that Dr. Semrau's statements were not a determination of Ms. Alexander's credibility. She told the jury that whether Ms. Alexander was telling the truth was for them to decide. While the trial judge did not use the words 'disregard' or 'disabuse your minds', defence counsel did not suggest she use these words.
- [115] After discussing the amended charge, defence counsel agreed that it covered his concerns and was appropriate in the circumstance. Counsel and the trial judge were aware that the jury would be cautioned to be skeptical of automatism claims. They attempted to craft a charge that would reflect both this, and the fact that it was ultimately up to the jury to determine credibility.
- [116] In my view the jury instruction was adequate. In any event, if necessary, this is a case where I would apply the curative proviso. I would not accede to this ground of appeal.

Conclusion

[117] I would dismiss the appeal.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Chiasson"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/15/04/2015BCCA0484.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-alexander-2015>

Prepared on 29 October 2026 · Esheria