CITATION: *Malogorski v Kidd* [2012] NTMC 049

PARTIES:	MARK MALOGORSKI
	v
	JAMES KIDD
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	CRIMINAL
FILE NO(s):	21102146
DELIVERED ON:	21 December 2012
DELIVERED AT:	Darwin
HEARING DATE(s):	Date of final submissions 26 October 2012
JUDGMENT OF:	Dr Lowndes SM

CATCHWORDS:

CRIMINAL LAW – VOLUNTARY CONDUCT – OTHER CULPABLE MENTAL STATES OF INTENTION AND FORESIGHT – ROLE OF INTOXICATION IN RELATION TO CRIMINAL RESPONSIBILITY

Criminal Code ss 7 and 31
Falconer v R (1990) 65 ALJR 20 applied
Charlie v R [1998] 7 NTLR 152 applied

REPRESENTATION:

Counsel:

Prosecution:	P Usher
Defendant:	L Bennett

Solicitors:

Prosecution:	Director of Public Prosecutions
Defendant:	

Judgment category classification:	B
Judgment ID number:	[2012] NTMC 049
Number of paragraphs:	118

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21102146

BETWEEN:

MARK MALOGORSKI
Plaintiff

AND:

JAMES KIDD
Defendant

REASONS FOR DECISION

(Delivered 21 December 2012)

Dr John Allan Lowndes SM:

BACKGROUND

1. On 10 August 2012 the Supreme Court of the Northern Territory, exercising appellate jurisdiction, remitted this matter to the Court of Summary Jurisdiction and directed the magistrate who originally heard the matter to deal with the matter according to law.

2. The Supreme Court concluded that, in acquitting the defendant of the charge of unlawful assault, the presiding magistrate did not disclose his reasoning process and did not deal with the vital issues in the case. The identified error of law on the part of the magistrate was a failure to give adequate reasons.

3. The magistrate was found to have erred in a number of respects:

1. The magistrate did not identify the acts that constituted the physical element of the alleged assault and did not consider whether those acts were voluntary in light of all of the evidence. Those acts were said to be the initial punching of the victim to the head and then, upon her covering up, punching her to the top of the head, followed by throwing her to the ground, and, finally, striking her in the presence of the police officers. The reasons for decision did not reveal how the magistrate addressed the physical element of each of the actions said to constitute the assault, nor the basis upon which the magistrate concluded that the prosecution had not established that the acts were voluntary.

2. The magistrate failed to address the evidentiary issues identified by the appellant suggesting the relevant awareness on the part of the defendant. The relevant evidence included the evidence of the friends of the defendant that he acted aggressively towards them, and then was apologetic for what he had done (suggesting he was aware of the nature of his physical actions) and the evidence that the defendant first attacked the victim in response to her threat to call the police, she then left to call the police, the police arrived and when the victim reappeared the defendant immediately became angry, tried to attack her and succeeded in striking her (all of which indicated a series of voluntary acts on the part of the defendant and an intention on his part to attack the victim as an identified individual). The magistrate did not make relevant findings of fact, and did not disclose a basis for concluding that the prosecution had not established that the defendant had the relevant intent or foresight (as required by *Criminal Code* s 31). There was no consideration of the thought processes of the defendant at the time of the relevant acts nor whether they were intended. Nor was there any consideration of whether the defendant had the requisite foresight in all the circumstances.

4. I now proceed to deal with those vital issues.

THE UNDISPUTED FACTS

5. The physical elements of the alleged assault were never in dispute. The defendant admitted that he performed all of the physical actions constituting the assault. What was in dispute was that he voluntarily performed those actions with the requisite intent or foresight.

6. I find that the defendant initially punched the victim (JM) to the top of her head, and then upon her covering up, punched her to the top of the head,

followed by throwing her to the ground, and finally, striking her in the presence of the police officers.

WERE THE ACTS OF THE DEFENDANT VOLUNTARY?

7. Section 31(1) of the *Criminal Code* (NT) provides that a person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

8. In *R v Breedon* [1993] NTLR 119 at 130 the Court of Criminal Appeal was of the view that the question of the voluntariness or otherwise of an offender's act is addressed by s 31 (1) of the *Criminal Code.*[1] As s 31 applies to the offence of assault (contrary to s 188(a) of the Code), the prosecution carry the burden of proving, inter alia, that the acts which constitute the alleged assault (the various identified instances of the application of force to the victim) were voluntary. The requisite standard of proof is "beyond reasonable doubt".

9. The requirement of voluntariness has received very little judicial consideration in the Northern Territory.

10. In *McMaster v R* (1994) 4 NTLR 92 at 99 Gray AJ made the observation that s 31(1) was "doubtless intended to give expression to the common law principle that a person is not criminally responsible for unintended conduct". His Honour went on to say:

> In *Ryan v The Queen* (1967) 121 CLR 205 at 216 Barwick CJ said:
>
> > In my opinion, the authorities establish, and it is consonant with principle, that an accused is not guilty of a crime if the deed which would constitute it was not done in the exercise of his will to act. See also *R v Connor* (1980) 146 CLR 64.

[1] Presumably, the requirement of voluntariness is either subsumed under the element of "intention" or is implicit in the notion of an "act", that is to say, an "act" must be voluntary in order to qualify as an "act". The Supreme Court of the Northern Territory has on occasions suggested that the word "act" must be understood as meaning "voluntary act": see Gray "Criminal Responsibility Under Section 31 of the Criminal Code (NT) (2002) 26 Crim LJ 175 at 186. See *Sandby v The Queen* unreported NT Court of Criminal Appeal 19 October 1993, p 7 cited by Gray.

> Section 23 of the Queensland Criminal Code 1982 (the equivalent of s 31) provides that "a person is not criminally responsible for an act or omission which occurs independently of the exercise of the will". I take this to be another form of expression of the same principle.

11. His Honour's observations point to the similarity between the first limb of s 23 of the Queensland Criminal Code and s 31(1) of the Territory Code,[2] and also to the similarity between both provisions and the common law concept of "the exercise of the will".

12. The phrase "occurs independently of the exercise of the will", as appears in s 23 of the Criminal Code (Qld), is a compendious term that "comprehends the doctrines of voluntariness, intention and recklessness".[3]

13. Voluntary conduct is traditionally understood to be conduct which is under the mental control of a person. In order for an act to be voluntary the act must have been under the mental control of the person – which means that the conscious mind of the person must have directed the act. Put another way, the act must have been caused by the conscious exercise of powers of choice. Voluntariness requires a consciousness of what one is doing. Voluntary conduct is conduct which is directed by a conscious decision of a person, when there has been an opportunity to choose differently. According to the traditional conception of a voluntary act, there is no additional requirement that the person must have understood what he or she was doing.

14. However, the notion - and requirement - of voluntariness was substantially extended by the majority (Mason CJ, Brennan and McHugh JJ) in *R v Falconer* (1990) 65 ALJR 20:

> Mrs Falconer is criminally responsible for discharging the gun only if that act were "willed", that is, if she discharged the gun "of her free will and by decision" (per Kitto J in *Vallance* at 64) or by 'the making of a choice to do so' (per Barwick CJ in *Timbu Kolian* at 64). The notion of "will" imports a consciousness in the actor of the nature of the act and a choice to do an act of that nature. In *Mamote – Kulang* (at 81) and *Timbu Kolian*

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[2] Similarly, in *Pregelj v Manison* (1987) 51 NTR 1 at 13 Nader J remarked upon the striking similarity between s 23 of the Criminal Code (Qld) and s 31 of the Criminal Code (NT).
[3] See Howard *Australian Criminal Law* 2nd ed p 398.

(at 64) Windeyer J added "some element of intention" to the notion of the will but, with great respect, such an addition might cause confusion between will and intent in the Code in much the same way as voluntariness is liable to be confused with general intent in the context of the common law: see *He Kaw Teh* 157 CLR 523 at 569-72. Barwick CJ was alive to the distinction between will and intent in *Ryan*. He noted that intent usually relates to consequences, whereas will relates to the act done (the deed, as his Honour calls it), the doing of which is ordinarily presumed to have been willed...

The requirement of a willed act substantially, if not precisely, corresponds with the common law requirement that an offender's act be done with volition, or voluntarily ... the requirement of a willed act imports no intention or desire to effect a result by the doing of an act, but merely a choice, consciously made, to do an act of the kind done. In this case, a choice to discharge the gun.

In the absence of some contrary evidence, it is presumed - sub silentio, as Barwick CJ said – that an act done by a person who is apparently conscious is willed or done voluntarily. That presumption accords with, and gives expression, to common experience. Because we assume that a person who is apparently conscious has the capacity to control his actions, we draw an inference that the act is done by choice. Keeping steadily in mind that the concepts of will and voluntariness relate merely to what is done, it would be an exceptional case in which a person, apparently conscious, committed an act proscribed as an element in a criminal offence without choosing to do so – or, at the least, without running the risk of doing so. The presumption that the acts of a person, apparently conscious, are willed or voluntary is an inference of fact and, as a matter of fact, there must be good grounds for refusing to draw the inference. Generally speaking, grounds for refusing to draw the inference appear only when there are grounds for believing that the actor is unable to control his actions. Although the prosecution bears the ultimate onus of proving beyond reasonable doubt that an act which is an element of an offence charged was a willed act, or at common law was done voluntarily (*Woolmington v The Director of Public Prosecutions* [1935] AC 462; *R v Mullen* (1938) 59 CLR 124), the prosecution may rely on the inference that an act done by an apparently conscious actor is willed or voluntary to discharge that onus unless there are grounds for believing that the accused was unable to control that act.

15. Although the decision in *R v Falconer* does not directly deal with s 31(1) of the *Criminal Code* (NT), given the absence of any detailed analysis undertaken by Northern Territory courts of the voluntariness requirement subsumed under the provisions of that section – and given the substantial similarity between s 23 of the Queensland Criminal Code and s 31(1) of the Territory Code, as well as the tendency for the High Court in recent times to

adopt a consistent approach to interpreting general provisions for criminal responsibility in the Code jurisdictions - the analysis of the notion of the "will" or the concept of voluntariness undertaken in *Falconer* is a persuasive guide as to how the voluntariness requirement (implicit in s 31(1) of the Code) should be interpreted and applied.

16. In light of the conventional view of the requirement of voluntariness and extended notion of voluntariness as expounded by the majority in *Falconer*, the question is: were the acts of the defendant (said to constitute the assault) voluntary?

17. Before considering all of the evidence that was before the Court, and determining whether the prosecution has discharged the requisite burden of proof, mention needs to be made of s 7 of the Territory Code and the effect that voluntary intoxication may have on a person's criminal responsibility.

18. It is clear from the provisions of s 7(1) of the Criminal Code (NT) that intoxication may, in some cases, be regarded for the purposes of determining whether a person is guilty or not guilty of an offence:

> In all cases where intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence –
>
> (a) it shall be presumed evidentially that, until the contrary is proved, the intoxication was voluntary; and
>
> (b) unless the intoxication was involuntary, it shall be presumed evidentially that the accused person foresaw the natural and possible consequences of his conduct.

19. As observed by Nader J, there is an interaction between voluntary intoxication and s 31 of the Code:

> ... intoxication can operate as a defence (again improperly so called) only indirectly in as much as it may raise doubt as to the accused's intention or foresight and, if it does so it operates by virtue of section 31.[4]

20. Section 7(1) was judicially considered by the Court of Criminal Appeal in *Charlie v R* [1998] 7 NTLR 152.

21. Martin CJ made the following observations as to the nature of the presumption created by s 7(1)(b) and its relationship to s 31(1):

> The legislature has carefully expressed the nature of the presumptions in the two parts of s 7(1) quite differently. The classification of presumptions is dealt with at some length in *Cross on Evidence* (Aust ed, 1991), commencing at para 7245. Here, the basic fact is that the intoxication was not involuntary, from which the conclusion is drawn that the accused foresaw the natural and probable consequences of his conduct. The effect of the provision is that the presumption may be made, and thus provide some evidence of that fact. That does not disturb the burden of proof resting upon the Crown to show beyond reasonable doubt that the accused foresaw the possible consequences of his conduct as required by s 31. What must be looked at is the whole of the evidence including the presumed fact. However, the burden or onus of proof remains with the Crown (see also Ligertwood, *Australian Evidence* (2nd ed), para 6.16 and 6.17).[5]

22. Angel J also considered the effect of s 7(1)(b) on the persuasive burden of proof:

> Section 7(1)(b) establishes an evidentiary presumption only. There is no shift of the burden of proof. It is for the Crown throughout to prove its case beyond reasonable doubt. Section 7(1)(b) permits a jury to draw an inference in the absence of any evidence to the contrary. In the present case there was evidence of intoxication and a question for the jury was whether, given that evidence, the appellant at the time of the stabbing foresaw the death of the deceased as a possible consequence of his conduct. It was incumbent upon the Crown throughout to prove that element. It was not open for the jury simply to presume that the appellant foresaw the possibility of death because of s 7 without considering the evidence of intoxication. The jury was to have regard to all the evidence and consider whether the Crown had proved the necessary element beyond reasonable doubt. It was not correct for the learned trial judge to say: "The Crown don't actually have to prove that element. They are entitled to rely upon the evidential presumption in the Act." It was not for the jury to

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[4] Justice Nader "The Criminal Code in the Northern Territory", paper delivered at the Australian Bar Association Conference, Bali, 1980, p 26.
[5] [1998] 7 NTLR 152 at 157.

> consider whether the evidence of the appellant's intoxication established, on the balance of probabilities, a negative. [6]

23. Kearney J agreed with Angel J as to the effect of s 7(1)(b) of the Code.

24. The effect of the presumption is that notwithstanding a person's state of intoxication, he or she is presumed evidentially to have foreseen the natural and probable consequences of his or her conduct through their drink (or drug) – clouded or alcohol (drug) – influenced mind.

25. Although the Court of Appeal in *Charlie* did not address the effect of the evidential presumption on the voluntariness of an accused person's conduct the section implicitly gives rise to an evidential presumption that the conduct of an accused person was voluntary.[7] However, it necessarily follows that s7(1) (b) only provides some evidence that the conduct of an accused person was voluntary – and does not disturb the onus placed on the prosecution to prove beyond reasonable doubt that the conduct of the accused was voluntary.

26. In my opinion, the Criminal Code of the Northern Territory provides scope for a common law "O'Connor defence" based on voluntary intoxication. In *R v O'Connor* [1979-1980] 146 CLR 64 at 71-72 Barwick CJ accepted that there may be cases where a person is in such a state of intoxication that his bodily movements are divorced from the will so that they are not truly voluntary. The Chief Justice acknowledged other cases where, whilst the state of intoxication was not so complete as to preclude the exercise of the will, the level of intoxication was sufficient to prevent the formation of an intent to do the physical act involved in the offence charged.

27. Where an accused wishes to rely upon voluntary intoxication for the purposes of determining his or her criminal responsibility, he or she carries an evidential burden – that is to say the accused bears the onus of raising the

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[6] (1998) 7 NTLR 152 at 171.
[7] See *Malogorski v Kidd* [2012] NTSC 58 at [12].

issue of intoxication as negating the voluntariness of their physical act/s or the intent to do those physical act/s. It is trite law under the Code that once the issue (or what might loosely be said to be a defence) is raised it is for the prosecution to negative that "defence", and prove beyond reasonable doubt that the defendant voluntarily and intentionally did the acts constituting the offence as charged.

28. The first question that arises is what evidence is required to raise the issue of intoxication. The answer to that question is probably best found in the following extract from the judgment of Barwick CJ in *v O'Connor* supra at 88:

> If the evidence, if accepted, is not such as to be capable of raising a reasonable doubt as to either of the basic elements, voluntariness or actual intent, there being no other material to suggest a lack of voluntariness or actual intent, that evidence can be withdrawn from the jury's consideration. It will have had no more than a tendency to establish that though the accused acted voluntarily and with the requisite intent, he was influenced in what he did in a state of insobriety. They should be told that if the evidence does not raise in their minds a reasonable doubt as to voluntariness or actual intent they may put that evidence out of their minds in considering the accused's guilt or innocence.
>
> But if the evidence is capable of raising a doubt either as to voluntariness or the existence of an actual intent, the jury should be told that if the evidence raises in their minds a reasonable doubt as to voluntariness or actual intent, it is for the Crown to remove that doubt from their minds and to satisfy them beyond reasonable doubt that the accused voluntarily did the act with which he is charged and that he did so with the actual intent appropriate to the crime charged. They should be instructed as to the meaning and scope of voluntariness and as to the precise intent which the crime charged requires. It would be proper in these cases to tell a jury that the fact that a man does not later remember what he did does not necessarily indicate that his will did not go with what he did or that he did not have the necessary intent.

29. Although these observations were made in the context of a non –code jurisdiction, they have, in my opinion, equal application to the Criminal Code (NT).

30. For the purposes of discharging the evidential burden, the defence must adduce or be able to point to evidence (in the prosecution case) that properly raises the issue. The evidence must relate to the degree of intoxication, and not merely to the fact of intoxication: "the mere fact that D was intoxicated does not logically involve that D was intoxicated to such a degree as to have acted involuntarily or without mens rea".[8] Furthermore, "amnesia respecting the time at which the act charged was committed does not of course involve in itself that D was intoxicated to the relevant degree,[9] although it may be of evidential significance".[10]

31. What evidence then does the defence rely upon as raising the matter of intoxication in the present case?

32. In my opinion, there is a significant body of evidence before the Court that relates not only to the fact – but the degree - of intoxication of the defendant, and which properly raises the issue of intoxication for the purposes of determining the defendant's criminal responsibility.

33. First, there is evidence from Louis Bremand who said that the defendant had on the night in question taken "two little tabs of acid" and smoked some marijuana, both of which are well known intoxicants.

34. Secondly, Cailun Symons gave evidence of the abnormal behaviour of the defendant towards Loius Bremand. More particularly, the witness said that after swinging his fists and arms at Loius Bremand the defendant calmed down and stopped swinging - and was observed to be standing there and appeared to be "freaking out", and "looking around". According to the witness the defendant did not seem to know what was going on. The witness went on to say that the defendant went "in and out" of aggressive behaviour

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[8] (1981) 6 A Crim R 259.
[9] See *R v O'Connor* (1980) 146 CLR 64 at 72-73 per Barwick CJ; *R v Murphy* (1980) 2 A Crim R 418 at 423.
[10] See Gillies *Criminal Law* 4th ed p 218.

mostly directed at Loius Bremand – and kept saying "no, no, no". He seemed to be out of control. At one point the defendant was heard to say "no, no, no, what's going on". This vacillating behaviour lasted about half an hour. The witness then gave evidence that after suddenly leaving his room the defendant ran out yelling "No, no, no", and swinging his arms. The witness said that the defendant grabbed a broom and started swinging it around smashing things. He was yelling "no" while doing that. The witness stated that the defendant then dropped the broom and ran into the street yelling "no, no. no".

35. This witness' evidence is relevant to the primary issue – and that is whether the defendant's conduct at the time of the alleged offence was voluntary in the conventional sense, or in the extended sense expounded by the majority in Falconer.

36. Significantly, the witness said that the defendant appeared to be "freaking out". The term "freaking out' is commonly used to describe the conduct of a person who is having an extreme reaction – usually adverse - to something, especially a drug induced experience: see Macquarie Dictionary.

37. The fact that he was "looking around" and kept saying "no, no, no" for no apparent reason suggests that he was responding to a situation or predicament that did not in fact exist. This suggests that the defendant was hallucinating at the time – in light of the evidence that he had earlier taken two tabs of acid and smoked some marijuana.

38. The witness' opinion that the defendant did not seem to know what was going on - and indeed on one occasion had said "no, no, no, what's going on" and appeared to be out of control - suggests a lack of awareness or consciousness on the part of the defendant as to what he was doing, and an inability to control his actions at the time he was under the observation of the witness.

39. The fact that the defendant slipped in and out of aggressive behaviour for no apparent reason suggests that the defendant's mental functioning was significantly impaired at the time, and that he was from to time responding to stimuli not apparent to those present at the time. In other words, it suggests that he was suffering from and responding to hallucinations. Furthermore, the erratic and vacillating conduct of the defendant is an indicia of an inability to control one's actions.

40. In my opinion the evidence given by the witness Symons calls into doubt the mental capacity of the defendant to control his actions at the time – that is the actions of the defendant in swinging his fists and arms at Loius Bremand, and grabbing a broom and swinging it around, smashing things. The evidence suggests that the defendant was suffering from an impaired or altered state of consciousness such as to call into question whether the actions performed by the defendant were directed by the conscious mind of the defendant.

41. The witness' evidence also calls into doubt whether there was a consciousness on the part of the defendant as to the nature of any of the acts done by him, and whether he had made a choice to do any act of that nature.

42. Thirdly, there is the evidence of Loius Bremand that after taking the tabs of acid and smoking a joint of marijuana the defendant all of a sudden "snapped". In the words of the witness, the defendant went "a bit crazy". Mr Bremand said that the defendant then started saying "no, no. no", and flailing at him at the same time. The witness said that the defendant then apologised for his behaviour – saying "I'm sorry, no. no. no I'm sorry, what's going on, what's going on, just freaking out, sorry". The witness then gave evidence that the defendant jumped on his back and started choking him. The defendant had his arm around Mr Bremand's throat screaming "no, no, no". The witness said that although the defendant then apologised for his behaviour, he did not know what was going on. The witness said that when

the defendant started to swing the broom and saying "no, no, no" it "just seemed like he went mad".

43. The evidence of this witness has similar relevance to the evidence given by the witness Cailun Symons – it goes to the mental capacity of the defendant to control his actions at the material time, as well as to the consciousness on the part of the defendant of the nature of his acts and whether he had made a choice to do any act of that nature.

44. Despite the fact that the defendant apologised for his behaviour (which might suggest an awareness on the part of the defendant as to the nature of his actions) the crux of Mr Bremand's evidence is that the defendant did not appear to know what was going on and was "freaking out". Both these things suggest that the defendant was suffering from an impaired, clouded or altered state of consciousness. It does not necessarily follow that because a person apologises for their conduct that they were at the time of engaging in that conduct are able to control their actions or were conscious of the nature of their act, and had made a choice to do an act of that nature.

45. Again there is reference in Mr Bremands' evidence to the defendant uttering the words "no, no, no" for no apparent reason throughout the incident and his erratic behaviour. These aspects indicate that the defendant's mental functioning was significantly impaired, and that he was suffering from and responding to hallucinations. Furthermore, the phrases used by Mr Bremand in describing the defendant's conduct – "all of a sudden snapped", "went a bit of crazy" and "he went mad" - suggest an inability on the part of the defendant to control his actions. Mr Bremand's evidence also suggests that the defendant was not at the time conscious of the nature of his acts and had not made a choice to do any act of that nature.

46. Fourthly, there is the evidence given by Dr McRae.

47. The doctor said that she observed the defendant at the hospital to be very agitated and combative, and to behaving in a manner consistent with intoxication from drugs. The witness said that she had been given a history of the defendant having taken drugs earlier that night. She believed that he was yelling and not communicating in intelligible English – in her words, he was not able to "hold a conversation". The witness told the Court that the defendant was taken to the "high acuity area", which is the resuscitation area. That area is reserved for people requiring medical care. The doctor gave evidence that when she observed the defendant he was "hyper alert", and appeared to be hallucinating. She added that "he was hallucinating which goes with somebody who's, who's not you know, able to have a normal conversation". The witness went on to say that he presented with dilated pupils and a raised temperature, and was unable to co-operate. The doctor added that he was incoherent and non-co-operative - in her own words "that's when someone cannot control themselves". She said that he was aggressive and yelling, and was "throwing himself around the bed ... in the medical area". The witness stated that the defendant was deemed to be unsafe, and was sedated with benzaodiazepine (to help him calm down) and secured to the bed. The witness said that the dose the defendant received was not a "huge dose", higher doses being commonly administered for "aggressive people in emergency". However, the doctor added "it's a case by case depending on what people require". She said that after being sedated the defendant calmed down over a period of time, and became co-operative in terms of being able to respond to questions, and obey common instructions. The defendant was then discharged from hospital into the care of his mother.

48. The evidential value of the doctor's evidence is also significant. Dr McRae expressed the opinion that the defendant certainly appeared to be under the influence of a substance – and he was hallucinating and unable to control himself. Furthermore, the degree of his intoxication warranted medical

intervention. The doctor's evidence goes directly to the mental capacity of the defendant to control his actions at the material time – as well as to his consciousness of the nature of his acts at the time of the alleged offence and whether, at that particular time, he had made a choice to do any act of that nature.

49. Fifthly, the evidence of the two police officers who arrived at the scene throws some light on the defendant's mental capacity to control his actions at the material time, and the degree of consciousness on the part of the defendant as to the nature of his acts at the material time.

50. Constable Lindsay said that the defendant was mumbling and incomprehensible. He stated that "he was basically looking through us" – saying "yes, no, yes no nothing". The witness went on to say that he was not looking directly at anyone: "he did not look as though he was focusing on anyone". According to the officer, the defendant was acting robotically – "just swinging and yelling". The witness said that the defendant continued to utter "yes, no" after he was apprehended by Senior Constable Milde and himself.

51. During cross-examination, Constable Lindsay agreed that the defendant's actions were totally out of control and were erratic and aggressive.

52. The probative value of Constable Lindsay's evidence lies in the fact that the defendant did not appear to be focusing on any one individual (contrary to the prosecution case), and was basically "looking through us". This suggests a state of dissociation, which calls into doubt the defendant's mental capacity at the time to control his actions as well as his consciousness of what he was doing at the time and nature of any act done by him. Furthermore, the fact that the defendant was observed to be acting "robotically" suggests that his conscious mind was not directing his acts at the material time.

53. Senior Constable Milde said that he observed the defendant to be yelling and waving his arms around. He was yelling and screaming words to the effect of "no, no, yes, yes", and was swearing. The witness said that the defendant appeared to get angry when he saw the victim come around the corner of the house, and then threw a punch at her. He said that Constable Lindsay tackled the defendant to the ground. The defendant was kicking and still yelling out the same words over and over again. He continued to yell the same words after being placed in the police van, and was still yelling those words when he arrived at the hospital.

54. During cross-examination, Senior Constable Milde initially said that at the time he observed the defendant's behaviour at the victim's residence the defendant probably fitted the description of a person who was "hallucinating and responding to imaginary objects and grabbing at things". However, he added that he could not say whether he was hallucinating. But he did say that the defendant was probably "trying to push things away".

55. Under further cross-examination, the witness stated that the defendant was obviously under the influence of something at a fairly high level. He agreed that the defendant's behaviour was unusual to say the least, relative to the general population. When it was put to him that the defendant was "going psycho", Senior Constable Milde replied "Yeah you could say that".

56. Although Senior Constable Milde's evidence portrays the defendant's actions as being more focused and purposive (particularly in relation to the victim) than disclosed in the account given by Senior Lindsay, it is significant that Senior Constable Milde's first impression was that the defendant was hallucinating at the time. It is also significant that the witness thought that the defendant was probably trying to push things away – which one might consider to be consistent with a person who is responding to hallucinations or imaginary objects. However, it is clear that the witness considered that the defendant was significantly under the influence of some

substance, and was acting so unusually as to meet the description of someone who was "going psycho". In my opinion, Senior Constable Milde's evidence also calls into question the defendant's mental capacity to control his actions at the time of the alleged offence, as well as creating a doubt as to the consciousness on the part of the defendant as to the nature of any act done by him at the material time – and whether he had made a choice to do any act of that nature.

57. Sixthly, there is the evidence of the victim JM. JM gave evidence that when she came upon the defendant he was yelling "No" and freaking out. She said that he was screaming and "really jerking and freaking out, yelling "no, no, no". When the witness warned the defendant that she would call the police if he did not leave her premises, he lunged forward towards her and punched her several times in the face. JM said that she put her hands up to block the punches, but the defendant started pounding the top of her head. The defendant then threw her onto the ground. The witness said that before the defendant had punched her she thought he might have said "leave me alone" as well as yelling "no, no".

58. During cross-examination, the witness stated that when she first saw the defendant she did not know if he was yelling at her and if he saw her. She went on to say that she observed the defendant to be "jerking and flailing his arms and like" at her, as though he was trying to get her to go away; and that he was yelling the aforesaid words at her because she was standing right in front of him, and there was no one else behind her.

59. Still under cross-examination, JM said that when the defendant uttered the words "no, no" she took that to mean he was telling her to go away. The witness subsequently said that she did not know what he meant by those words.

60. When taken to the statement that she had made to police in relation to the incident - where she stated "he just kept yelling "no, no" it looked like he

had no intention of leaving ... he just kept pacing around and jerkily waving his arms around and it looked like he was trying to push something away" – the witness said "Yes, that could be what I interpreted". JM then gave evidence that she assumed the defendant was pushing something away. She stated: "I don't know if it was towards me or what – I don't know what he was doing". The witness then added that she assumed it was her as she was standing in front of him.

61. Although the bulk of the evidence given by JM points to the defendant's actions being focused and deliberate – and therefore voluntary and intentional - the following aspects of the witness' evidence need to be noted:

- The fact that the defendant was "freaking out" suggests impaired mention functioning and consequential lack of ability to control one's actions;
- The "jerkiness" of the defendant's movements suggests a degree of lack of co-ordination between the mind and body and, therefore, an inability to control one's actions;
- The fact that the defendant appeared to be "pushing something away" is indicative of a person who is responding to hallucinations and imaginary objects;
- The fact that the defendant was again heard to utter words to the effect of "no, no" suggests that the defendant was reacting to some stimuli not apparent to anyone else, but which at the time posed a threat to the defendant;
- The absence of any evidence from JM about the renewed attack on her when the police arrived – in particular the absence of any evidence from her about the defendant targeting her at that time - means that Senior Constable Milde is alone in suggesting that the defendant was targeting the victim as an identified individual on the occasion in question.[11]

62. These aspects of JM's evidence bear upon the defendant's state of mind at the material time, and are relevant to a consideration of the defendant's

[11] Note the countervailing evidence given by Constable Lindsay.

mental capacity to control his actions, and his consciousness as to the nature of his acts, and whether he had made a choice to do any act of that nature.

63. Finally, there is the evidence of the defendant himself which is to the effect that he has no memory of the incident, which is the subject of these proceedings. As previously mentioned, "amnesia respecting the time at which the act charged was committed does not of course involve in itself that D was intoxicated to the relevant degree, although it may be of evidential significance". The defendant's loss of memory is something that may be taken into account with other evidence that goes to the degree of the defendant's intoxication.

64. Some of the evidence relating to witnesses' observations of the defendant's behaviour and the apparent effects of his state of intoxication relates to a period prior to the alleged criminal conduct (the evidence of the defendant's friends), while some of the evidence relates to a period after the alleged criminal conduct (the evidence of Dr McRae); and some of the evidence relates to a period that either coincides with or is in close proximity to the alleged criminal conduct (the evidence of JM and that of the two police officers). The evidence before and after the alleged criminal conduct is relevant to whether the defendant's actions at the time of the alleged criminal conduct were voluntary because there is a sufficient temporal connection between the alleged criminal conduct and the defendant's conduct and presentation before and after that conduct to render the latter probative of his mental state at the time of the alleged offending – namely his mental capacity to control his actions.

65. In my opinion, the issue of intoxication insofar as it relates to the voluntariness of the actions of the defendant constituting the physical elements of the alleged offence has been squarely raised on the evidence. The evidence before the Court is capable of raising a reasonable doubt as to the voluntariness of the actions of the defendant – either in terms of the

conventional analysis of the voluntariness requirement, or in terms of the analysis in *Falconer.*

66. It now remains to consider the countervailing evidence pointing to the voluntariness of the defendant's actions, and determine whether or not on the whole of the evidence the prosecution has established beyond reasonable doubt that the actions of the defendant were voluntary.

67. First, as previously mentioned, the prosecution can avail itself of the evidential presumption created by s 7(1) (b) of the Code. However, the evidential presumption has only a limited effect. The Court needs to remind itself that the provision only provides some evidence of the relevant fact – and does not disturb the legal or persuasive burden borne by the prosecution. What must be examined by the Court is the whole of evidence, including the presumed fact.

68. Secondly, as highlighted in *Malogorski v Kidd* [2012] NTSC 58, the prosecution relied upon the following evidence as being probative that the acts of the defendant were both voluntary and intentional:

- The evidence of the defendant's friends that the defendant acted aggressively towards them and then was apologetic for what he had done, suggesting that he was aware of the nature of his physical actions; and

- The evidence that the defendant first attacked JM in response to her threat to call the police, she then left to call the police, the police arrived and when JM reappeared the defendant immediately became angry, tried to attack her and succeeded in striking her, all of which indicated a series of voluntary acts on the part of the defendant and an intention on his part to attack JM as an identified individual.

69. As previously stated, the fact that the defendant apologised to his friends for his behaviour vis a vis his friends earlier on the night does not necessarily undermine the defence case.

70. Although the evidence given by JM, on its face, points to the defendant having made a conscious decision to strike the victim – and therefore having

acted voluntarily and intentionally - that evidence has to be viewed and considered in light of all of the surrounding and contextual circumstances, and the other evidence given by JM.

71. Prior to entering the victim's premises the defendant had been interacting with his two friends in a manner indicating an inability to control his actions and a lack of consciousness on his part as to the nature of his acts.

72. Prior to and just after asking the defendant to leave her premises on the first occasion JM said that the defendant was yelling "no" and kept yelling "no" and was "freaking out". She added that he was screaming and "really jerking and freaking out, yelling "no, no, no". As stated earlier, those parts of JM's evidence bear upon the defendant's state of mind at the material time, and are relevant to a consideration of the defendant's mental capacity to control his actions, and his consciousness as to the nature of his acts, and whether he had made a choice to do any act of that nature.

73. What follows is the warning given by her to the defendant to call the police if he does not leave the premises and the defendant's apparent reaction to that warning, and subsequent continuing attack on the victim. That evidence needs to be viewed in light of the defendant's antecedent conduct – and indeed his conduct after the incident.

74. Although the defendant lunged towards the victim after she gave the warning, and proceeded to assault her, it does not necessarily follow that his physical actions were, in fact, a response to the warning, particularly in light of the defendant's antecedent behaviour.

75. The fact that the defendant struck out against the victim after the warning may have been purely coincidental,[12] leaving open the real possibility that when he struck the victim he lacked the mental capacity to control his

[12] There is no evidence of the defendant having said anything to the victim before striking her by way of response to the warning, which might indicate that the defendant had consciously made a choice to do an act of the nature that was in fact done.

actions and consciousness of the nature of his acts due to his state of intoxication.

76. It also bears noting that when the victim warned the defendant that if he did not leave the premises she would call the police the defendant could have simply left the premises or remained. What he did was the least rational thing he could have done in response to the warning. That in itself prompts consideration as to whether the defendant had at the time the mental capacity to control his actions.

77. Extreme caution needs to be exercised in treating the defendant's apparent reaction to the warning by JM to call the police as demonstrating the defendant's mental capacity to control his actions or his consciousness of the nature of his acts at the time such as to make his acts truly voluntary.

78. The fact that when the police arrived and JM reappeared the defendant, according to Senior Constable Milde, became angry and attacked the victim once again is not necessarily demonstrative of voluntary conduct on the part of the defendant.

79. Significantly, there is no corroborative evidence from the victim.

80. As noted earlier, Constable Lindsay's evidence that the defendant was "looking through us" and not focusing on anyone – and was acting robotically and was totally out of control – tends to contradict Senior Constable Milde's evidence and undermine the voluntariness of the defendant's conduct during police presence.

81. Furthermore, part of Senior Constable Milde's evidence also tends to undermine the voluntariness of the defendant's conduct at the time he observed the attack on JM.

82. It is imperative to examine the defendant's conduct (said to constitute the continuing assault) as a whole. It is not simply a matter of identifying and

isolating the various acts of the defendant, which have a temporal nexus, and pointing to evidence that supports the voluntariness of the defendant's conduct in relation to a particular act going to make up the continuing assault. It is artificial to do so.

83. A holistic approach requires the Court to look at the whole of the evidence relating to the defendant's conduct at the time of and during the alleged continuing assault, and to determine whether the evidence as a whole is sufficient to establish that any one or more of the alleged acts of the defendant were voluntary. Whether or not a particular act was voluntary can only be determined by a careful examination of the evidence specific to that act along with evidence that relates to the voluntariness of other temporally connected acts.

84. Furthermore, the overall conduct of the defendant in relation to the alleged assault must also be viewed through the lens of the evidence relating to the defendant's state of mind and conduct both before and after the alleged assault – such evidence to be accorded such weight as the Court considers proper.

85. There is, in my opinion, an ample body of evidence, both in the prosecution case and the case for the defence, which points to the involuntariness of the defendant's conduct at the time of the alleged offence. That evidence needs to be considered along with all of the other evidence, including those aspects of the evidence that indicate that the defendant's actions were voluntary and the presumed fact that the defendant's conduct was voluntary.

86. Having regard to the whole of the evidence, I am unable to be satisfied beyond reasonable doubt that when (after being warned by the victim that she would call the police if he did not leave the premises) the defendant lunged forward towards the victim and punched her in the face several times, and then proceeded to pound the top of her head, before throwing her onto the ground, he was acting voluntarily. Nor I am satisfied, on the whole

of the evidence, that the defendant voluntarily struck the victim after the police had arrived.

87. In my opinion, the evidence raises the very real possibility that at the time of the alleged offence the defendant was in a state of impaired, clouded or altered consciousness due to the ingestion of a combination of drugs and their hallucinatory effects. The evidence also raises the equally real possibility that as a result of that state of impaired, clouded or altered state of consciousness the actions of the defendant were not truly voluntary. At the same time the evidence raises the very real possibility that at the material time the defendant did not have mental control over his actions – that he was unable to control his actions – and that he was not conscious of the nature of his acts and had not made a choice to do any act of that nature.

88. In my opinion, the countervailing evidence relied upon by the prosecution is not sufficiently cogent to remove those very real possibilities and put beyond reasonable doubt that the defendant was at the time of the alleged offence able to control his actions, was conscious of the nature of his acts and had made a choice to do an act or acts of that nature.

89. Whether one relies upon the traditional conception of voluntariness or the *Falconer* formulation of the requirement of voluntariness, the prosecution has, in my opinion, failed to prove the voluntariness of the defendant's conduct.

DID THE DEFENDANT INTEND THE RELEVANT ACTS OR PERFORM THOSE ACTS WITH THE REQUISITE FORESIGHT

90. In order to incur criminal responsibility for his conduct the defendant must have not only acted voluntarily but intended the act of applying force to JM.[13]

[13] See s 31(1) of the Criminal Code.

91. It is strictly unnecessary to consider whether or not the defendant intended to do the acts constituting the alleged offence because, as a matter of legal principle, an act cannot be intended unless it was voluntary. Voluntariness is an indispensable condition for intent. However, because, as a matter of law, a voluntary act may still be unintended – and in the event that I have erred in my primary finding that the acts of the defendant have not been proved to have been voluntary – I turn to consider whether the defendant intended any one of the acts alleged as constituting the assault.

92. The meaning of "intent" was considered at length by Brennan J in *He Kaw Teh* (1984) 157 CLR 568-570:

> Intent, in one form, connotes a decision to bring about a situation so far as it is possible to do so - to bring about an act of a particular kind or a particular result. Such a decision implies a desire or wish to do such an act or to bring about such a result. Thus when A strikes B (the "act") having decided to or desiring or wishing to strike him, it can be said that he intends to strike B. Intent, in another form, connotes knowledge. This appears more clearly if we divide an action, somewhat artificially, into a mere movement and the circumstances that are an integral part of the action and which give its character. When A strikes B, his action can be divided into A's movement of his fist and B's presence in the path of A's movement. Although A's movement may be voluntary, he is not said to strike B intentionally unless he knows that B (or someone else) is in the path of his moving fist. If mens rea were imported into an offence defined as striking another - a definition that does not include a result - two states of mind would normally be involved: voluntariness of movement and an intention to strike another - and intention is, for all practical purposes, established by knowledge that another person is, or is likely to be, in the path of the movement. If the definition is extended to include a result - causing bodily harm - the statute may prescribe a further mental element: ordinarily a specific or special intent to cause bodily harm ...
>
> Voluntariness and general intent are distinct mental states. General intent and specific intent are also distinct mental states. General or basic intent relates to the doing of the act involved in the offence; special or specific intent relates to the results caused by the act done. In statutory offences, general or basic intent is an intent to do an act of the character prescribed by the statute creating the offence; special or specific intent is an intent to cause the results to which the intent is expressed to relate. Both general and specific intent may be established by knowledge: the former by knowledge of the circumstances which give the act character, the latter by knowledge of the probability of the occurrence of the result to which the intent is expressed to relate. But existing circumstances can be known

> more certainly than the probability of the occurrence of a future result, and therefore specific intent is usually established by proof of a desire or wish to cause the prescribed result, whereas general intent is usually established by proof of knowledge of the circumstances prescribed by the statute as defining the act involved in the commission of the offence. Of course, proof of an actual desire or wish to do an act of the proscribed character is proof of a general intent, but for practical purposes knowledge of the circumstances which give the act its character when an act is voluntarily done is the ordinary form of intent to do it.

93. To say that a person intended a particular act in the sense discussed by Brennan J is tantamount to saying the person meant to do the act. In *Williams v The Queen* [1978] Tas SR 98 at 102 Neasy J said:

> I think it is correct to say in simple terms that a voluntary and intentional act is a willed act, one which the person was aware he was doing and meant to do.

94. This meaning of "intention" is consistent with the meaning accorded to "intention" in s 43AI of the *Criminal Code* , namely:

> A person has intention with respect to conduct if he or she means to engage in that conduct.

95. The prosecution bears the onus of proving beyond reasonable doubt that the defendant meant to do the act constituting the alleged assault upon JM, being the application of force to her without her consent.

96. As noted by the Supreme Court, in exercising its appellate jurisdiction, the voluntary intoxication of the defendant is relevant to determining the intent of the defendant at the material time.[14]

97. As with voluntariness, the defence carries the evidential burden of raising intoxication as a matter relevant to the existence of an actual intent to do the act or acts at the material time. If the evidence is capable of raising a reasonable doubt as to the defendant's actual intent, it is for the prosecution to remove that doubt, and to satisfy the Court beyond reasonable doubt that

[14] *Malogorski v Kidd* [2012] NTSC 58 at [9].

the defendant intended to do the charged act: *The Queen v O'Connor* [1979-1980] 146 CLR 64.

98. In raising lack of intent, the defence relies upon the same body of evidence relied upon by it to negate the voluntariness of the defendant's conduct.

99. With a view to proving the requisite intent, the prosecution relies upon the same body of evidence used to establish the voluntariness of the defendant's conduct. In particular, the prosecution relies upon the body of evidence that shows that the defendant was deliberately targeting the victim, and which indicates an intention on the part of the defendant to attack JM as an identified individual. The prosecution also relies upon the evidential presumption in s 7(1) (b) of the Code – namely that the defendant is evidentially presumed to have foreseen the natural and possible consequences of his conduct.[15]

100. Even if the defendant's conduct was voluntary at the time (which I have not found to be the case), I am not satisfied beyond reasonable doubt, on the whole of the evidence, that the defendant meant to apply force to JM as an identified individual on each of the occasions identified in the prosecution case.

101. There is a body of evidence that indicates that the defendant was not deliberately targeting the victim:

(a) Constable Lindsay's evidence was to the effect that the defendant was "looking through us" and not focusing on us – and was acting robotically. That evidence came from an independent witness who observed the final application of force to the victim.

(b) In her statement to police JM made some observations about the defendant early into her interaction with the defendant, which included him "jerkily waving his arms around" and looking as though he was "trying to push something away". In her evidence, JM stated: "...that could be what I interpreted". JM went on to say that she assumed the defendant was pushing something way. She

[15] This evidential presumption goes some way towards establishing the intent of the defendant at the material time.

said "I don't know if it was towards me or what – I don't know what he was doing". JM added that she had assumed it was her as she was standing in front of him. This evidence does not sit comfortably with the hypothesis advanced by the prosecution that the defendant was deliberately targeting the victim. The evidence that the defendant appeared to be pushing something away is indicative of a person who is responding to hallucinations or imaginary objects – which is the hypothesis put forward by the defendant as a basis for negating intent.

(c) JM gave evidence of the defendant uttering words to the effect of "no, no", which suggests that the defendant was reacting to some stimuli not apparent to anyone else, but which at the time presented as a threat to the defendant. Both police officers who attended the scene also gave evidence of the defendant uttering similar words – again indicative of the defendant reacting to something other than the victim as an identified individual.

(d) There is also evidence from the defendant's two friends that they heard the defendant utter similar words earlier in the evening. There is therefore some continuity in the defendant's behaviour starting with the incident with the two friends and carrying over into the incident with JM. The defendant appears to be consistently responding to some stimuli that is not apparent to anyone else, but which poses a threat to him.

(e) The defendant's two friends and JM all agreed that the defendant appeared to be "freaking out" – which is descriptive of the conduct of a person who is having an extreme reaction (usually adverse) to something, especially a drug induced experience. Their evidence suggests that the defendant was hallucinating. The very real possibility that the defendant was suffering from hallucinations is strengthened by the evidence that the defendant had taken two tabs of acid and smoked some cannabis earlier in the night and Dr McCrae's opinion that the defendant was hallucinating at the hospital.

102. As pointed out by Brennan J in *He Kaw Teh* proof of the requisite intent entails proof of an intent to do an act of the character prescribed by the offence–creating provision. Again as stated by Brennan J, intent – in the general or basic sense – may be established by knowledge of the circumstances which give the act character.

103. The offence creating provision – s 188 of the *Criminal Code* – provides that any person who assaults another is guilty of an offence. Assault, inter alia,

means "the direct or indirect application of force to a person without his consent". [16] The word "person" as used in s 187 of the Code is to bear its ordinary meaning, namely a human being, as distinguished from an animal or a thing: see *The Macquarie Dictionary*.

104. In order for the defendant to have intended the acts constituting the alleged assault the prosecution must establish beyond reasonable doubt that at the time he performed the bodily movements that resulted in the application of force to JM he knew that JM (or some other person) was – or likely to be - in the path of those movements. Put another way, the prosecution must prove beyond reasonable doubt that the defendant intended to do an act of the character prescribed by s 188 (1) of the Code.

105. The hypothesis (consistent with innocence) advanced by the defence is that at on each occasion the defendant struck JM the defendant was hallucinating as a result of having taken the tabs of acid and smoking some cannabis earlier in the night. At the hearing of the appeal the following submission was made on behalf of the defence:

> ...of someone (referring to the defendant) who throughout is someone who's hallucinating. Who knows your Honour whether she's a physical thing that has presented itself to him as a hallucination for example.[17]

106. According to this submission, the defendant could not have intended the acts constituting the assault as he did not at the time have the requisite knowledge of the circumstances which gave the acts character. For example, if the defendant thought that he was attacking a demon or some other imaginary object which was not actually present, rather than a person, then he would not have known the essential features of his acts, namely the activity of applying force to a human being – and in particular JM as an identified individual.

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[16] See Criminal Code s 187.

[17] See p 8 of the transcript of the proceedings in the Supreme Court on 1 August 2012. It is significant that the appellate court did not dismiss the defence submission. The court merely noted that the relevant issue and evidence had not been addressed by the presiding magistrate.

107. On the whole of the evidence, I am unable to be satisfied beyond reasonable doubt that the defendant was not at the material time suffering from hallucinations – that is false sensory perceptions in the absence of any external stimulus (visual hallucinations). Nor am I able to be satisfied beyond reasonable doubt that the defendant knew at the material time that JM – being a person within the meaning of the offence creating provision - was in path of his bodily movements, which resulted in the application force to her. I cannot discount the very real possibility that he was at the material time intending (in the sense of meaning) to assault something other than a person (namely JM).

108. In arriving at the latter conclusion I have reminded myself that a person's own intention is a subjective state of mind which is to be objectively tested by reference to the whole of evidence, which is relevant to the fact in issue.[18] Although intention can be inferred from the outward circumstances of a person's conduct, such an inference can only be the basis of a finding of guilt when those circumstances are such that no reasonable doubt is left as to the defendant's possession of the intention required to be proved.

109. The end result is that I am left with a reasonable doubt that the defendant meant to do any of the following acts: punched the victim to the head, and then upon her covering up, punched her to the top of the head followed by throwing her to the ground, and finally striking her in the presence of the two police officers.

110. It should be noted that two witnesses were called in the defence case to testify as to the defendant's good character.[19] Both witnesses testified to the effect that the defendant had no violent or aggressive tendencies, and that the behaviour attributed to him was most unlike the defendant. Doubtless, that evidence was put before the Court to be considered (by the Court) as a

[18] See *The Queen v Vallance* 108 CLR 56 at 82 per Windeyer J.
[19] See the evidence given by John Whipps (pp 15 – 18 of the transcript of proceedings on 5 March 2012) and Colin Rubens (pp 19-20 of the transcript).

factor affecting the likelihood of the defendant committing the offence charged.

111. During the course of my deliberations I have directed myself as to the use to which the character evidence should be put. Although character evidence in some circumstances can be a factor affecting the likelihood of an accused person committing an offence, I have reminded myself that people of good character can commit offences whilst in a state of intoxication, which they would never commit while sober. At the end of the day, the character evidence has played no part in instilling a reasonable doubt in my mind as to the defendant's guilt.

112. It warrants saying that since the High Court's expanded explanation of the requirement of voluntariness in *Falconer* the distinction between voluntariness and general (or basic) intent has become blurred. By incorporating in the notion of voluntariness a requirement that the actor be conscious of the nature of the act and choose to do an act of that nature, the High Court in *Falconer* substantially – if not completely – equated the requirement of voluntariness with that of general or basic intent. If that be a valid observation, then the defendant should be excused from criminal responsibility solely on the basis that his conduct was not voluntary, there being no need to consider the defendant's further mental state.

113. Having found that the defendant did not intend any of the acts constituting the alleged assault, I turn to consider whether the defendant had the requisite foresight as prescribed by s 31(1) of the Code in relation to any of the alleged acts.

114. The relevance of the mental element of foresight was raised at the hearing of the appeal:

> The magistrate discussed s 31 of the *Criminal Code* and stated that it was necessary for the prosecution to establish that the respondent foresaw as a

possible consequence of his bodily movements that an act of assault would occur. His Honour said that:

> People can't be held responsible purely for bodily movements; they have to have the accompanying intent and foresight. And so if you happen to strike somebody and use bodily movements to do that, unless you have foreseen as a possible consequence of your conduct that that bodily movement would constitute an act of assault, then you cannot be held criminally responsible.[20]

The magistrate held that the prosecution had not satisfied the onus of proof on this issue. The appellant accepted that the test posed by the magistrate was an appropriate test in this regard.

115. Voluntariness is as much a precondition for foresight as it is for intent. It follows that if the conduct of the defendant was not voluntary (which was my primary finding) then the defendant could be found to possess foresight (as required by s 31(1)).

116. However, in the event that I have erred in concluding that the prosecution has failed to prove that the conduct of the defendant was voluntary, has the prosecution proved beyond reasonable doubt that the defendant foresaw as a possible consequence of his conduct the application of force to JM?

117. On the whole of the evidence, including the evidential presumption created by s 7(1) (b) of the Code, I am unable to be satisfied beyond reasonable doubt that when the defendant performed the various bodily actions and movements ascribed to him he foresaw as a possible consequence of his conduct the application of force to JM as an identified person. There is a very real possibility (capable of creating a reasonable doubt), which has not been negated by the prosecution, that when the defendant performed the bodily movements or actions ascribed to him:

(a) he was responding to a stimulus not apparent to anyone else due to the fact and degree of his intoxication;

(b) he was unaware of the presence of JM, or her possible presence, due to his state of intoxication; and

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[20] *Malogorski v Kidd* [2012] NTSC 58 at [15] – [16]

(c) he, therefore, did not foresee as a possible consequence of his conduct any application of force to JM.

DECISION

118. For the reasons set out in this decision I find the defendant not guilty of the offence as charged. Accordingly, the charge is dismissed.

Dated this 21st day of December 2012

Dr John Allan Lowndes

STIPENDIARY MAGISTRATE