CITATION: R. v. AYANLE HASSAN ALI, 2018 ONSC 2838

DATE: 20180514

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN	Kathleen Healey and Sarah Egan for the Crown
– and –	
AYANLE HASSAN ALI	Nader R. Hasan and Maureen Addie for Ayanle Hassan Ali

MacDonnell, J.

A. Overview of the Decision

[1] On April 3, 2018 the defendant Ayanle Hassan Ali appeared before this court for trial on an indictment charging him with nine counts of committing indictable offences "for the benefit of, at the direction of or in association with a terrorist group" contrary to s. 83.2 of the *Criminal Code*. The indictable offences underlying those nine counts are three allegations of attempted murder (counts 1, 2 and 3), two allegations of assault causing bodily harm (counts 4 and 5), three allegations of assault with a weapon (counts 6, 7 and 8) and one allegation of carrying a weapon for the purpose of committing an offence (count 9). With the consent of the Crown, the defendant re-elected to be tried by a Superior Court judge sitting without a jury, and he entered pleas of not guilty to all counts.

[2] There is no dispute that on March 14, 2016 the defendant attended at the Canadian Forces Recruiting Centre at 4900 Yonge Street in Toronto, that he was armed with a knife, that he immediately began to attack the uniformed military personnel he encountered, and that he wounded several persons before he was overpowered and subdued. The attack was motivated by the defendant's radical religious and ideological beliefs, but there is no dispute that the formation of those beliefs was in large part precipitated by mental disorder. One of the beliefs that the defendant had formed in his mentally disordered state was that killing Canadian military personnel was justified because the military was fighting in Muslim lands.

[3] While it is common ground that the defendant had become radicalized, there is no evidence of any connection between him and any other person or group in relation to the attack. The Crown

does not allege that the defendant committed the offences "for the benefit of, at the direction of or in association with" anyone but himself.

[4] Section 83.2 of the *Criminal Code* provides, in part, that "every one who commits an indictable offence… for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence…" The position of the Crown is that even if a person acts alone in furtherance of a personal terrorist agenda and without regard to any other entity, the person is liable to conviction under s. 83.2. The Crown submits that a person who is acting on his own can be both the person who commits an indictable offence for the benefit of a terrorist group and the terrorist group for whose benefit the indictable offence is committed. In taking that position, the Crown relies heavily on the fact that Parliament has defined "terrorist group" to include an "entity" that has as one of its purposes or activities the facilitation or carrying out of terrorist activity, and that it has defined "entity" as including a single person.

[5] The position of the defence is that "s. 83.2 requires a separate identity between the defendant who commits the predicate offence and the terrorist group for whom the predicate offence was committed."[1] The defence submits that the Crown's interpretation of s. 83.2 leads to absurd results. Further, the defence submits that in enacting s. 83.2 "Parliament was not intending to target individuals working alone, but to provide additional censure to people who commit indictable offences to assist terrorist groups. This provision thus reflects *the core purpose* of Part II.1 of the Criminal Code."[2] As there is no evidence of a connection between the defendant and any other person or group, the defence submits that the defendant is entitled to an acquittal on each of the charges under s. 83.2.

[6] The defence acknowledges that a finding of not guilty on the s. 83.2 charges would not end the trial. The included offences of attempted murder, assault causing bodily harm, assault with a weapon and carrying a weapon for the purpose of committing an offence would remain for consideration. In relation to those charges, the defence submits that the proper verdict is that the defendant is not criminally responsible on account of mental disorder.

[7] Prior to trial, an order was made pursuant to s. 672.11 of the *Criminal Code* for an assessment of the defendant's mental condition in relation to the issue of criminal responsibility. Dr. Philip Klassen was nominated by the Crown to conduct the assessment. Dr. Gary Chaimowitz conducted a separate assessment at the request of the defence. Both doctors have stellar reputations in the field of forensic psychiatry and both are very well qualified to express opinions in the areas of concern in this case. Both prepared reports that were filed in the trial and both testified *viva voce*

[8] Section 16 of the *Criminal Code* provides that no person is criminally responsible for an act committed while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or of knowing that the act was wrong. Section 16 further provides that everyone is presumed *not* to suffer from a mental disorder so as to be exempt from criminal responsibility until the contrary is proven on a balance of probabilities.

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[1] Defendant's Factum, paragraph 25

[2] *ibid*, paragraph 28, emphasis in the original

[9] It is the opinion of both Dr. Klassen and Dr. Chaimowitz that at the time of the attack the defendant was suffering from a mental disorder, namely schizophrenia. Both doctors were of the view that notwithstanding his mental disorder the defendant was capable of appreciating the nature and quality of his acts and of knowing that his acts were *legally* wrong. However, both doctors also concluded that he was incapable of knowing that his conduct was *morally* wrong.

[10] The Crown and the defence jointly submit that the opinions of Dr. Klassen and Dr. Chaimowitz should be accepted and that the defendant should be found not criminally responsible. They disagree, however, with respect to whether he should also be found not guilty on the s. 83.2 charges.

[11] As I have said, the defence position is that s. 83.2 requires that the terrorist group for whom the underlying offence is committee have a separate identity from the person who commits the underlying offence. They submit that completely apart from any issue of criminal responsibility the defendant is entitled to an acquittal on the s. 83.2 charges because it is not alleged that the "terrorist group" for whom he is said to have committed the underlying offences had an identity that was separate from him. The Crown's position is that a separate identity is not required.

[12] In seeking an acquittal on the s. 83.2 charges the defence advanced an alternative submission, namely that the defendant should be found not guilty *because* he is not criminally responsible for the conduct that forms the basis of the underlying charges:

> Given that there would be no completed predicate offence — because Mr. Ali is NCR on the predicate offence — there is no completed "indictable offence" for the purposes of triggering consideration of the greater offence contained in s. 83.2. Accordingly, a finding of *NCR* in relation to the *predicate offence* and a finding of *not guilty* on *the greater offence* of s. 83.2 would be the appropriate disposition.[3] [emphasis in the original]

[13] The defence was unable to point to any authority for the proposition that a finding that a defendant is not criminally responsible can be used as a basis for an acquittal. They suggest that this is because of the nature of the *actus reus* of a s. 83.2 offence, which requires not only a completed predicate offence but also proof of addition elements. However, s. 83.2 is far from unique in that respect. Section 267, which creates the offences of assault causing bodily harm and assault with a weapon, is structured the same way.[4] Carried to its logical conclusion, the defence argument would entitle a person charged with first degree murder on the basis of s. 231(5), and who is found to be not criminally responsible for the unlawful act that caused death, to both a verdict of not criminally responsible *and* a verdict of not guilty of first degree murder.

[14] In the course of the oral submissions I made it clear that I was having considerable difficulty with this argument. It is unnecessary, however, to come to a final conclusion with respect to it because I agree with the defendant's main submission, namely that a person who commits an indictable offence alone in pursuit of a personal terrorist agenda is not captured by s. 83.2.

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[3] Defendant's factum, paragraph 23

[4] See also ss. 85(2), 247(2), 249(3), 249.4(3), 270.01, 270.02, 272(1), 357 and 467.12.

[15] The Crown rests its interpretation of s. 83.2 almost entirely on the wording of the provision. Statutory interpretation cannot be conducted entirely on the wording of legislation. Rather, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[5] Approaching the question in that manner leads inexorably to the conclusion that the intention of Parliament in enacting s. 83.2 was to proscribe *associative* conduct that supports, facilitates and contributes to terrorist activity, not to capture the kind of lone-wolf criminal behavior engaged in by the defendant.

[16] Accordingly, the defendant is found not guilty on each of the nine counts of committing indictable offences for the benefit of, at the direction of or in association with a terrorist group.

[17] It is common ground that the defendant is not entitled to be acquitted of the included offences of attempted murder, assault causing bodily harm, assault with a weapon and carrying a weapon. The facts agreed to by the parties establish that he committed the *actus reus* of each of those offences and that he did so with the requisite intent. However, the parties jointly submit that the opinions of Drs. Chaimowitz and Klassen should be accepted, that the court should find that at the time of the attack the defendant was by reason of mental disorder incapable of knowing that his conduct was morally wrong, and that he should be found not criminally responsible for each of the included offences.

[18] I am not bound to accept the opinions of Dr. Chaimowitz and Dr. Klassen: it is for the *court* to determine whether the criteria for a verdict of not criminally responsible have been established and that determination is to be made on the basis of the evidence as a whole. Expert testimony such as that provided by the doctors is admissible but not determinative. Having said that, both doctors provided a very thorough and persuasive explanation for their conclusions, and after a consideration of all of the evidence I accept their opinions.

[19] The defendant's attack on the personnel at the Recruiting Centre was terrorist activity within the meaning of Part 11.1 of the *Criminal Code.* It was a deeply disturbing assault on one of the pillars of Canadian peace and security. Pursuant to s. 16 of the *Criminal Code*, however, a person who commits acts that would otherwise constitute a crime, even a grave crime, is exempt from criminal responsibility if it is established on a balance of probabilities that the person was by reason of mental disorder incapable of knowing that his acts were morally wrong. That exemption reflects the commitment of the criminal law to the requirement of moral blameworthiness and to the principle that individuals should not be subjected to punishment if, because of a mental disorder, they lacked the capacity to reason right from wrong and thus to choose between right and wrong.

[20] In the result, the defendant is found not guilty on all nine counts of committing indictable offences for the benefit of, at the direction of or in association with a terrorist group. He is found not criminally responsible on the counts of attempted murder included in counts 1, 2 and 3, on the counts of assault causing bodily harm included in counts 4 and 5, on the counts of assault with a

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[5] *Rizzo and Rizzo Shoes (Re)*, [1998] S.C.R. 27, at para. 21

weapon included in counts 6, 7 and 8, and on the count of carrying a weapon for the purpose of committing an offence included in count 9.

B. The Relevant Facts

(i) The Defendant's Background

[21] At the time of the incident giving rise to the charges the defendant was just short of his 28th birthday. He was born in Montreal but his family moved to Toronto when he was two or three years of age. He is the second eldest of his parents' four children. His older sister is an optometrist, the middle sister works in the IT field, and the youngest is in her final year of studies in computer science at the University of Toronto.

[22] At the material time, the defendant was living at home with his mother and his sisters. His parents had been separated for about seven or eight years. His mother has suffered with paranoid schizophrenia for many years and among her delusions was the belief that her husband was trying to poison her. Because of that, she told him to leave. Since the separation, the defendant's father has maintained a good relationship with all four children.

[23] For the most part, the defendant's early years were unremarkable. There was never any physical or emotional abuse within the home. The family was described as "very mainstream Muslim, not at all fundamentalist". Until he was in high school, the defendant did well academically, and indeed he had achieved very high grades. His sisters described him as "a nice brother", bright, and a perfectionist with a love of learning.

[24] Unfortunately, signs of a deterioration in the defendant's mental health began to appear when he was in his mid-teens. He was hearing voices, which he believed were from djinns – genie-like spirits that form part of Islamic mythology. He started to think that the government was monitoring him through his cell phone and on the internet because he is Muslim. His academic performance suffered, but he was nonetheless able to gain entry to the University of Toronto in the physical sciences. His grades in university were substandard.

[25] The defendant had an interest in chemical engineering and after two years at the University of Toronto he left to attend the University of Calgary as a visiting student. His grades in Calgary were not good and he was not permitted to enroll as a regular student. He returned to the University of Toronto feeling demoralized and adrift. His attendance at school became sporadic and he left the University in 2012 when he was 24 years of age.

[26] The defendant's mental deterioration became more noticeable after he returned from Calgary. He stopped seeing friends and spent long periods of time cleaning the house, spending time in his room, talking to himself or staring at the wall. He would stay up all night and sleep all day. He complained that the djinns were interfering with his ability to concentrate. He seemed distracted. One of his sisters described him as appearing lobotomized.

[27] In the weeks leading up to the attack, the defendant perceived that he was receiving messages from "everywhere" – from the television, the radio and other people. He believed that the messages were coming from the government and he found them very bothersome. His resentment toward the government was exacerbated by his belief that Canada had sent military forces to fight in Muslim lands, and specifically that it had sent jets to bomb Syria. He decided to

respond by becoming a martyr. He searched online for information about the virtues of martyrdom, but he did not look at the websites of ISIS or Al Qaeda or any other terrorist organization. It is common ground that he became radicalized on his own, and that when he decided to act he did so in furtherance of the interests of no person or entity other than himself.

(ii) The Circumstances of the Attack

[28] The Canadian Forces Recruiting Centre is in the federal government building at 4900 Yonge Street in Toronto. The North York Office of Passport Canada is also located there. The defendant had first gone to the building to obtain passports for himself and his mother. Surveillance video showed him returning to the area in the days before the attack.

[29] On March 14, 2016, after arming himself with a large kitchen knife that he concealed in a folder, the defendant went to the Recruiting Centre. When he entered, Corporal Ryan Kong attempted to address him in order to screen him for entry. The defendant immediately attacked Corporal Kong, punching him repeatedly in the head before slashing and stabbing at him with the knife, causing a three-inch gash to the Corporal's arm.

[30] The attack on Corporal Kong was interrupted by Petty Officer Bressette, who jumped over a desk and armed himself with a chair. Bressette used the chair as a shield and forced the defendant away from Kong. The defendant tried to attack Bressette with the knife but Bressette was able to ward him off. The defendant then ran past Bressette and into the Recruiting Centre.

[31] Sergeant Gerhardt was in an office close to the entrance of the Centre. When she heard the commotion she ran from her office. The defendant gave chase, swinging the knife at her and barely missing the back of her neck. He then encountered Sergeant Castillo who had slipped on spilled coffee and fallen to the floor. He slashed the knife at Castillo's upper torso and head area. Castillo suffered a small superficial nick to his mid-chest area but it is uncertain whether this was caused by the fall or by the knife.

[32] The defendant then ran to the rear of the Centre. A door in this area leads to a room where potential recruits were engaged in aptitude testing. The door was partially shut and other officers blocked the defendant's entry. The defendant was cornered by Petty Officer Bressette, Sergeant Karistinos, and Sergeant Dar. The situation was chaotic. Petty Officer Bressette threw a photocopier and a garbage can at the defendant and Sergeant Dar used a football tackle to take him to the floor. Sergeant Karistinos issued a loud command to the defendant to stop resisting, but the defendant got up and came toward Karistinos with the knife. Karistinos responded with a "brachial stun", hitting the defendant in the neck with a straight arm bar and knocking him off balance. The defendant was pinned to the floor by three or four officers. He did not appear to be reacting to the pain or discomfort of having so many people on top of him. He appeared to be incoherent and unresponsive to the officers' commands and at times he was laughing, smiling, and giggling, as if he was "on something".

[33] Petty Officer Bressette grabbed the defendant's iPod. He noticed that the open file on the screen was the Quran. Sergeant Dar, who was raised as a Muslim and who had served a lengthy tour of duty in Afghanistan, observed that the defendant was muttering a prayer, and he alerted other officers to search the defendant for secondary devices. The defendant was stripped to his underwear but no devices were found. The attack had lasted less than a minute

[34] When the paramedics arrived, they observed that the defendant was arching his back putting his head between his knees, and making incomprehensible noises. One of the paramedics asked the defendant if he knew where he was and why he was there. The defendant responded that Allah had sent him "to kill people". Witnesses described him as frequently laughing and sometimes retching. At times his affect appeared to be "flat", or "lost in the clouds." At other times he appeared to be having a seizure, with his eyes rolling back in his head.

[35] Subsequent to the defendant's arrest the police executed a search warrant at his residence. A notebook was located with a number of entries that the defendant had made in the month prior to the attack. In those entries he referred to his everyday struggles, his paranoid ideation about being subject to surveillance by the government, his thoughts around jihad and martyrdom, and how he could find a way to break free of the distractions and thoughts in his head so that he could be a productive member of society.

[36] On page 10 of the notebook, the defendant wrote:

> I am free from these kuffar hypocrites and mushrikeen. It is not befitting for a Muslim to remain weak, like prey before them, it just isn't. I have a licence to kill, I have a green light to kill. One soldier is all it takes, just one. I can't let those fools play games with me. I've been ready and willing for a while now. I have no love for this dunya.

[37] On page 32, the defendant wrote:

> ...In my mind, however, I always think that Allah (SWT) has my back, even though I be wholly unprepared. Indeed, I don't have money for rockets or AK-47s, for grenades, for so much other weaponry that I see people fighting real wars with. I don't even know of anyone to buy weapons from. I have no choice but to save up and buy them, which likely will mean fighting a protracted psychological war or fight tooth and nail. All I get right now are kitchen knives. I want stuff from this world, but I'm not getting it, that bothers me. I feel like everyone is getting a sip of it but me.

[38] The police searched every electronic device found on the defendant's person at the time of his arrest and in his home at the time of the execution of the search warrant. There is no evidence of any connection between the defendant and any other person or group. The Crown does not allege that he carried out the attack at the Recruiting Centre for the benefit of, at the direction of or in association with anyone but himself.

(iii) The Psychiatric Evidence

[39] Prior to trial, an order was made pursuant to s. 672.11 of the *Criminal Code* for an assessment of the defendant's mental condition in relation to the issue of criminal responsibility. Dr. Philip Klassen was nominated by the Crown to conduct the assessment. Dr. Gary Chaimowitz conducted a separate assessment at the request of the defence. Dr. Klassen is Vice-President for Medical Affairs at Ontario Shores Centre for Mental Health Services. Dr. Chaimowitz is the Head of Service for the Forensic Psychiatry Program at St. Joseph's Healthcare in Hamilton. Both doctors have stellar reputations in the field of forensic psychiatry and both are very well qualified

to express opinions in the areas of concern in this case. Both prepared reports that were filed in the trial and they also testified *viva voce*.

[40] After reviewing the defendant's history, and in particular the significant decline in his social functioning in the years leading up to the events of March 14, 2016, Dr. Klassen reported:

> I'm not able to identify any cause for this gentleman's functional decline, and reported (and observed) symptom burden, *other* than a psychotic illness. While this gentleman has voiced some extremist sentiments … I do not identify personality disorder, and a problem with addictions, or other mental disorder to account for his functional decline. Given this gentleman's family history, his history of functional decline, his reported paranoid and referential delusions, and his auditory hallucinations, and given the timeframe over which these symptoms have been present, I believe this gentleman meets the criteria, as articulated in the DSM-5, for schizophrenia. [emphasis added]

[41] Dr. Klassen described schizophrenia as a major mental illness that tends to have its onset, in males, in the second or third decade of life. Once present, schizophrenia is a lifelong condition. Dr. Klassen explained that "the symptoms of schizophrenia are most prominently symptoms of psychosis, wherein psychosis is generally defined as the presence of delusions, hallucinations, grossly disorganized thought and behaviour, or some combination of these…"

[42] In Dr. Klassen's opinion, an appraisal of the defendant's criminal responsibility is complicated by the defendant's lack of insight into his illness and by his religious ideation, which appeared to Dr. Klassen to have been "front and centre" at the time of the material events. Dr. Klassen believed that the "radicalization" of the defendant's thinking may have been a by-product or consequence of his illness:

> As this gentleman lost control of his thinking, and his function declined, he made efforts to regain control of himself and his life. Initially, in 2010, he sought treatment for ADHD. There are also reports that he at times engaged in obsessional cleaning, which could be understood similarly. In the years immediately following, this gentleman appears to have turned to a more rigid, fundamentalist appreciation of Islam, albeit in the absence of appreciable external influences; I would submit that his increasing religiosity may have been in part the product of illness (common for people with schizophrenia), albeit I would tend to favour that this gentleman may have sought to restore order in his mind (so to speak) through more rigid adherence to Islamic guidance.

[43] Dr. Klassen opined that over time, the defendant became more agitated by the symptoms of his illness – for example, feeling watched or intimidated by the government or assaulted by devils. The sense that others know what one is doing or thinking can be intensely frustrating to people with schizophrenia. Dr. Klassen noted that the defendant made reference to Jihad in his diaries, that he had shown interest in extremist sentiments, and that he had consistently stated that his goal was martyrdom. In the end, Dr. Klassen concluded:

> Mr. Ali clearly appreciated the nature and quality of his acts or omissions at the material time, insofar as he was aware that he was attacking Canadian soldiers, and that his intention was to kill them, using a knife.
>
> The issue of whether Mr. Ali might be found not criminally responsible due to mental disorder, to the undersigned, turns on whether this gentleman was able to know that his actions were morally wrong at the time; I have no doubt that he believed that they were legally wrong.
>
> Mr. Ali's motivation to attack the Canadian soldier on the day in question appears entirely consistent with extremist ideology, taking into account his self-report and his diaries. I can't exclude the possibility that two, independent, processes, may have been at play; it's possible that there were two parallel streams of change, one involving Mr. Ali's radicalization, and another involving schizophrenia, illness symptoms. It seems less likely to me, however, that these two lines of thinking truly evolved independently; it seems more likely to me that one influenced the other. As indicated above, it's my sense that this gentleman gravitated toward a more rigid ideology to "splint" his thinking, his failures and his functional loss, and also to help manage his symptom burden. His symptom burden included paranoid ideation, and referential delusions. To the extent that his evolving illness led to compensatory religious extremism, along with delusional thinking and agitation, this gentleman may have been compromised as regards "rational perception" or "rational choice", in terms of his thinking about the moral wrongfulness of his actions. I would, admittedly somewhat tentatively, support (from a purely psychiatric perspective) a defense of not criminally responsible due to mental disorder, on these grounds. [emphasis added]

[44] In his *viva voce* evidence, Dr. Klassen reinforced that opinion. He testified that the defendant's years-long descent into schizophrenia "concluded with a rather intense delusional and emotional experience on that day into such a fashion that I would say he was significantly compromised in terms of rational perception and rational choice regarding the moral wrongfulness of his actions."

[45] Dr. Chaimowitz agreed that the defendant was suffering with schizophrenia at the material time. Like Dr. Klassen, he acknowledged that appraising the defendant's criminal responsibility was not an entirely straightforward matter. He noted that the defendant's thoughts about killing soldiers had persisted for some time and that the defendant felt that he would be morally justified in doing so. The key question for Dr. Chaimowitz was whether the defendant's perception of justification was driven by ideology or by psychosis. In the end, he settled on the latter:

> My view is that Mr. Hassan Ali was driven by his psychotic symptoms (involving delusions around being targeted by government agents) to attack members of the Canadian Armed Forces, as a route to martyrdom. Mr. Hassan Ali was driven by a sense of persecution that he experienced as a function of his psychosis. In other words, the compulsion for martyrdom, in his particular case, was fueled by ongoing and relentless delusional ideation. He felt persecuted; like he was in a war and therefore felt compelled to act in the way that he did. In his flight or fight analogy,

> both of those actions were actions that had their origin in his compulsion to take action at the recruiting centre on that day originated in, and was fueled by, his overwhelming distressing persecutory delusions.

[46] In the summary that he provided of his conclusions, Dr. Chaimowitz stated:

> At the time of the Index Offence, Mr. Hassan Ali, although likely influenced by both ideology and his delusions, began considering martyring himself. It was specifically the psychosis that turned ideas into action for him. It appears to me that at the time of the Index Offence, Mr. Hassan Ali appreciated the nature and quality of what he was doing, namely stabbing soldiers in an attempt to martyr himself, but most importantly, felt that what he was doing was correct from a moral perspective, based on his delusions. This is a man who, notwithstanding thinking about, and perhaps even embracing some jihadist ideology, had up until that time never demonstrated any violence to others. It was the delusions that interfered with his thinking that removed the idea that what he was thinking about doing was morally wrong, and from a moral perspective, based on his psychotic symptoms, he now felt both entitled and compelled to act out in a way that he did.
>
> Thus, on the balance of probabilities, it is my opinion that Mr. Hassan Ali, at the time of committing the offences charged against him, was psychotic and that psychosis was sufficiently intense that it deprived Mr. Hassan Ali of the ability to know that his actions were wrong from a moral perspective.
>
> [emphasis added]

[47] Dr. Chaimowitz considered an alternative hypothesis, namely that "notwithstanding the fact that [the defendant] was psychotic, notwithstanding the fact that he felt he was being persecuted, notwithstanding the fact that he was psychotically 'green-lighted' to go ahead and do what he did, [he] committed these acts purely as a function of his belief… in the legitimacy of martyrdom for reasons he previously identified." If that were so, Dr. Chaimowitz believed, "his psychotic symptoms …would not have sufficiently impaired his ability to know what he was doing was right or wrong, and he in fact would… notwithstanding his active psychosis, [be] able to discern what he was doing was wrong from a moral perspective." In the end, however. Dr. Chaimowitz rejected that hypothesis. He stated:

> Notwithstanding the fact that he has Schizophrenia and the Schizophrenia was active at the time of the Index Offence, and that Schizophrenia may have influenced his thinking and behaviours at the time of the offence, it is conceivable that Mr. Hassan Ali's actions were driven more by jihadist ideology than they were by his delusions. I think that is a possibility, but when looking at the entirety of his history, the change in his behaviour, the escalation in his symptoms, and the conviction with which these delusions from his mental illness drove his behaviour, on the balance of probabilities I prefer the conclusion that it was his mental disorder that drove him to do what he did, and that mental disorder deprived him of the knowledge of the wrongfulness of his actions when he committed the offences charged against him.

> For those reasons, I believe Mr. Hassan Ali meets criteria for a Section 16(1) defence, namely a defence of Mental Disorder. I believe Mr. Hassan Ali would thus meet criteria for being found Not Criminally Responsible based on that mental disorder for the Index Offences.

C. Discussion

I. The Interpretation of s. 83.2

[48] Each of the nine counts with which the defendant is charged alleges an offence contrary to s. 83.2 of the *Criminal Code*. Section 83.2 provides that a person "who commits an indictable offence...for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life." The indictable offences underlying the charges in this case are attempted murder (counts 1, 2 and 3), assault causing bodily harm (counts 4 and 5), assault with a weapon (counts 6, 7 and 8), and carrying a weapon for the purpose of committing an offence (count 9).

[49] It is common ground that the agreed facts establish the *actus reus* of each of the underlying offences. What is in issue is whether the facts also establish the additional elements required to make the underlying offences contraventions of s. 83.2. Specifically, the issue is whether the agreed facts establish that the defendant committed the underlying offences "for the benefit of, at the direction of or in association with a terrorist group".

[50] The position of the defence is that s. 83.2 does not apply to individuals acting alone, solely for their own purposes. The defence submits that the terrorist group for or with whom a defendant commits an underlying offence must have an identity that extends beyond or is apart from the identity of the defendant. As there is no evidence of any connection between the defendant and any other person or group, and as the Crown does not allege that the defendant committed any of the underlying offences for the benefit of, at the direction of or in association with anyone but himself, the Crown has failed to establish an essential element of the *actus reus* of the s. 83.2 offences. Thus, the defence submits, the defendant is entitled to an acquittal on the 83.2 offences and the issue of criminal responsibility should be addressed only in relation to the underlying offences.

[51] The position of the Crown is that there is no reason to interpret s. 83.2 as requiring that the terrorist group for or with whom a defendant commits the underlying offence have an identity that is separate from that of the defendant. The Crown submits that a self-radicalized lone-wolf who chooses to act on his own initiative can be captured by s. 83.2.

[52] The Crown's argument proceeds almost entirely on the wording of s. 83.2, read in light of the definitions set forth in s. 83.01. The latter section provides that for the purposes of Part 11.1, "terrorist group" includes "an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity." "Entity" is defined as "a person, group, trust, partnership or fund or an unincorporated association or organization". Thus, a terrorist group can consist of one person. Stated slightly differently, a single person can be a terrorist group if one of the person's purposes or activities is the carrying out of terrorist activity.

[53] Terrorist activity is also a term defined in s. 83.01. It is not disputed that the attendance of the defendant at the Recruiting Centre was for the purpose of engaging in conduct that comes

within that definition. Accordingly, the Crown submits that at the time the defendant went to the Recruiting Centre *he* was a terrorist group, and even if he was acting alone and for his own purposes he committed the underlying offences "for the benefit of, at the direction of or in association with a terrorist group" within the meaning of s. 83.2.

[54] In support of its position, the Crown relies on the jury instructions provided by Justice Code in *R. v. Esseghaier and Jaser.*[6] In that case, the underlying offences relied on by the Crown in relation to the two s. 83.2 counts before the court were conspiracies between Esseghaier and Jaser. Justice Code instructed the jury that if they were satisfied that the conspiracies were committed, they must then determine whether they were committed for the benefit of, at the direction of or in association with a terrorist group. He told the jury that the terrorist group alleged by the Crown was *either* Esseghaier and Jaser *or* Esseghaier alone. That is, he left it open to the jury to convict Esseghaier of the s. 83.2 offences even if he was the only member of the terrorist group for whose benefit the underlying offences were committed.

[55] Justice Code's jury instructions merit careful consideration, but they cannot be taken to have authoritatively resolved the issue raised in the case at bar. Jury instructions do not constitute a judgment or a ruling and they do not engage the principle of *stare decisis* or the doctrine of judicial comity. Indeed, it appears that because of the particular context within which the s. 83.2 instructions were crafted Justice Code was never called upon to make a ruling in that regard. Whether or not Esseghaier could be the sole member of the alleged terrorist group was of no significance to Jaser. As Justice Code reminded the jury, Jaser's counsel conceded that if they were satisfied that the commission of the underlying conspiracies had been proved, they should also be satisfied that they were committed for the benefit of a terrorist group.[7] The question of whether Esseghaier could constitute a one-person terrorist group was only material in relation to Esseghaier, but he not only was not represented by counsel, he refused to participate in the proceedings. In the circumstances, Justice Code did not have the advantage of full argument in relation to the question with which the case at bar is concerned.[8]

[56] I have not been referred to any other case in which the question raised here in relation to the proper interpretation of s. 83.2 has been addressed. It comes before me as a matter of first impression.

[57] I agree with Crown counsel that Parliament has determined that a solo actor can be a terrorist "group" for the purposes of Part 11.1 of the *Code*. I also agree that an indictable offence committed for the benefit of a single person can come within s. 83.2 if the single person otherwise meets the definition of a terrorist group. That is not the issue here, however. The issue is not whether the entity for whose benefit the underlying offence is committed can be a single person but rather whether a single person can be *both* the person committing the underlying offence *and* the entity for whose benefit it was committed.

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[6] The relevant portions of the instructions were provided to the court by counsel

[7] At pages 89 and 107 of the printed copy of the instructions

[8] It may be noted, as well, that the offences underlying the s. 83.2 allegations were conspiracies between the two accused. If the jury were satisfied that the conspiracies had been proved, it is hard to see how whether both of the conspirators were also both members of the terrorist group was a live issue.

[58] The Crown's focus on the wording of s. 83.01 and 83.2 falls short of what the interpretative process requires. In *Rizzo and Rizzo Shoes Ltd. (Re)*, Iacobucci J. stated that statutory interpretation cannot be founded on the wording of legislation alone. He stated that "today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[9] This approach has been described as "the cardinal rule of statutory interpretation".[10]

[59] Thus, an analysis of the scope of s. 83.2 cannot end with the observation that a single person can be a terrorist group. The matters that I will now discuss must also be taken into account.

(a) the 'associated words' rule

[60] The requirement that the underlying offence be committed "for the benefit of, at the direction of or in association with" a terrorist group supports an inference that Parliament did not intend that the person who committed the underlying offence in s. 83.2 and the entity for or with whom the offence was committed could be the same person.

[61] In *Opitz v. Wrzesnewski*, the majority of the Supreme Court of Canada referred to "the well-known 'associated words' or '*noscitur a sociis*' rule of interpretation."[11] The rule states that "a term or an expression should not be interpreted without taking the surrounding terms into account. The meaning of a term is revealed by its association with other terms: it is known by its associates."[12] The majority adopted Professor Sullivan's articulation of the reasoning process contemplated by the rule:

> The associated words rule is properly invoked when two or more terms linked by "and" or "or" serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature among the terms. This feature is then relied on to resolve ambiguity or limit the scope of the terms. Often the terms are restricted to the scope of their broadest common denominator.[13]

[62] The associated words rule serves a purpose, but it remains subservient to the cardinal rule articulated in *Rizzo*, and at times it must yield to looking at the meaning of individual words in a list in a broader context.[14]

[63] In *R. v. Venneri,*[15] the Supreme Court was called upon to interpret s. 467.12 of the *Criminal Code*, which makes it an offence to commit an indictable offence "for the benefit of, at the direction of, or in association with a criminal organization". The context within which the interpretation issues arose in *Venneri* was different from the context of s. 83.2. While a terrorist group can be

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[9] [1998] 1 S.C.R. 27, at paragraph 21
[10] see, e.g, *R. v. Grant,* [2006] O.J. No. 2179 (C.A.); reversed on other grounds 2009 SCC 32
[11] 2012 SCC 55
[12] At paragraph 40
[13] At paragraph 41
[14] *Grant, supra*, at paragraph 75
[15] 2012 SCC 33

comprised of one person, a criminal organization requires at least three, and thus the particular question with which the case at bar is concerned cannot arise in relation to s. 467.12. What is helpful, though, is that in interpreting the words "in association with a criminal organization" Justice Fish applied the associated words rule:

> The phrase "in association with" should be interpreted in accordance with its plain meaning and statutory context. It is accompanied here by the terms "at the direction of" and "for the benefit of". These phrases are not mutually exclusive. On the contrary, they have a shared purpose and will often overlap in their application. Their common objective is to suppress organized crime. To this end, they especially target offences that are connected to the activities of criminal organizations and advance their interests.[16]

[64] With respect to the plain meaning of "in association with", the trial judge in *Venneri* turned to *The Oxford English Dictionary*, where the phrase "associate oneself with" is defined as to "allow oneself to be connected with or seen to be supportive of". That definition implies the existence of more than one person. Other dictionary definitions are to the same effect. For example, *The Concise Oxford Dictionary* (11th ed.) defines "association" as "a group of people organized for a joint purpose, a connection or cooperative link between people or organizations." The *New Shorter Oxford Dictionary* defines "association" as including "the action of joining or uniting for a common purpose…; a body of people organized for a common purpose…; the conjoining or uniting of things or persons with another or others…" In short, the plain meaning of "association" generally carries with it the concept of a link between different entities. Except perhaps in a colloquial sense, one does not speak of a person associating with himself or as acting in association with himself.

[65] In the course of argument, Crown counsel conceded that the words "in association with", in s. 83.2, imply the existence of a separate entity. She submitted, however, that the same cannot be said about "for the benefit of" and "at the direction of".

[66] It does no violence to the language to describe a person as doing an act for the benefit of himself. However, to describe the person as doing something at the *direction* of himself is more of a figurative than a literal usage. The *Concise Oxford Dictionary* definition of "direct", when used as a verb, includes "control the operations of…; aim in a particular direction or at a particular person…; give an order to." It defines "direction" as "the action of directing or managing". The *New Shorter Oxford English Dictionary* defines "direction" as including "the action or function of directing; guidance; instruction; management…: an instruction of what to do, how to proceed, or where to go…" The *Mirriam Webster Online Dictionary* defines "direction" as "guidance or supervision of action or conduct." What those definitions show is that in its usual sense, to do an act "at the direction of" implies that the source of the direction is external to the actor.

[67] In my view, Parliament's use of the words "at the direction of or in association with a terrorist group" suggests that the terrorist group must be an entity apart from the person who commits the underlying offence. The associated words rule invites a harmonious reading of the

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[16] at paragraph 53

words "for the benefit of", limiting its scope to situations where the person for whose benefit the underlying act is done is someone other than the actor.

(b) Parliament's focus on associative activity

[68] In *R. v. Khawaja*,[17] Chief Justice McLachlin stated:

> The *Anti-Terrorism Act*, S.C. 2001, c. 41, part of which now forms Part II.1 of the *Criminal Code*, was passed in 2001, in the aftermath of the Al Qaeda attacks in the United States and Resolution 1373 of the United Nations Security Council, which called on member states to take steps to prevent and suppress terrorist activity... The purpose of the legislation is to provide a means by which terrorism may be prosecuted and prevented...[18] [emphasis added]

[69] At the time the *Anti-Terrorism Act* was passed, there were already many provisions in the *Criminal Code* pursuant to which terrorist activity could be prosecuted. Indeed, some commentators referred to much of the *Anti-Terrorism Act* as unnecessary and "mere window-dressing".[19] In his essay *Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act*[20], however, David Paciocco explained why the Government would have regarded the existing criminal law provisions to be inadequate:

> First, our criminal law institutions developed primarily on the assumption that crime would be committed by individuals or small domestic, non-political groups. Terrorism, by contrast, is a highly political, organized activity. The *Anti-Terrorism Act* attempts to adapt the criminal law to deal with this reality in a more comprehensive way than the anti-gang legislation did, by creating a broad range of what are, in truth, association-based offences. [emphasis added]

[70] I agree with the characterization of the offences created by the *Anti-Terrorism Act* as association-based offences. A reading of the *Act* as a whole demonstrates that Parliament decided to expand the arsenal of proscriptive measures already available to law enforcement by focusing on *associative* activity. In essence, what Parliament chose to proscribe in the *Act* was not the commission of terrorist acts, at least not directly, but rather conduct that contributes to or facilitates the commission of terrorist acts. The common feature of all or almost all of the offences now found in Part 11.1 of the *Criminal Code* is a relationship or association between the person whose conduct is proscribed and some other entity. Indeed, seven of the new offences make the existence of one particular entity – a terrorist group – an essential element that the Crown must prove beyond a reasonable doubt. And four of those seven offences, including s. 83.2, specifically require proof that the accused acted "for the benefit of, at the direction of or in association with a terrorist group."

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[17] 2012 SCC 69

[18] at paragraph 21

[19] Gary Trotter, "*The Anti-Terrorism Bill and Preventive Restraints on Liberty*", in R. Daniels, P. Macklem & Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill C-36* (Toronto, University of Toronto Press, 2001), at page 247; Don Stuart, "*The Anti-terrorism Bill C-36: An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System*" (2002-2003), 14 National Journal of Constitutional Law. 153.

[20] (2002), 16 S.C.L.R. (2d) 185, at 186-187

[71] Even where the existence of a terrorist group has not been made an element of a Part 11.1 offence, Parliament's concern with associative activity is clear. For example, s. 83.02 is aimed at a person who "provides or collects property" intending or knowing that it will be used for terrorist activity. Section 83.03(a) targets a person who "collects property, provides or invites a person to provide, or makes available property or financial or other related services intending that they be used, or knowing that they will be used… for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity." Pursuant to s. 83.04, a person commits an offence who "uses property… for the purpose of facilitating or carrying out a terrorist activity, or possesses property intending that it be used or knowing that it will be used… for the purpose of facilitating or carrying out a terrorist activity". Section 83.19 makes it an offence to facilitate a terrorist activity, and s. 83.191 makes it an offence to leave Canada to facilitate terrorist activity. Sections 83.22, 83.221 and 83.23, respectively, create offences of instructing a person to carry out terrorist activity, communicating terrorist propaganda, and harboring a terrorist.

[72] The seven offences that make the existence of a terrorist group an essential element to be proved beyond a reasonable doubt are:

> (i) s. 83.03(b) – collecting property, providing or inviting a person to provide, or making available property or financial or other related services, "knowing that… they will be used by or will benefit a terrorist group";
>
> (ii) s. 83.08 – dealing in property "owned or controlled by or on behalf of a terrorist group";
>
> (iii) s. 83.18 – knowingly participating in or contributing to "any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity";
>
> (iv) s. 83.181 – leaving Canada to participate in or contribute to the activity of a terrorist group;
>
> (v) s. 83.2 – committing an indictable offence for or with a terrorist group;
>
> (vi) s. 83.201 – leaving Canada to commit a 83.2 offence;
>
> (vii) s. 83.21 – instructing a person to carry out an activity for a terrorist group.

[73] The particular requirement that the person act "for the benefit of, at the direction of or in association with a terrorist group" is found in four of those sections:

> (i) 83.18(3) provides that participating in or contributing to an activity of a terrorist group includes "providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group" and "entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group";
>
> (ii) 83.2 provides that everyone who commits an indictable offence "for the benefit of, at the direction of or in association with a terrorist group" is guilty of an indictable offence;
>
> (iii) 83.201 provides that everyone who leaves Canada for the purpose of committing an act or omission that, if committed in Canada, would be an indictable

> offence "for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence";
>
> (iv) 83.21(1) provides that every person who knowingly instructs any person "to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity, is guilty of an indictable offence."

[74] As David Paciocco observed in the passage quoted earlier,[21] "terrorism…is a highly political, organized activity." The seven offences that make the existence of a terrorist group an element that must be proved beyond a reasonable doubt, and the four of those seven that require that the proscribed conduct be "for the benefit of, at the direction of or in association with a terrorist group", reflect a recognition of that reality. They demonstrate Parliament's concern with *associative* activity in support of terrorism, and with one particular form of that activity, namely activity involving an actual terrorist group. A reading of s. 83.2 that captures the lone-wolf derives no support from a consideration of Parliament's concerns in passing the *Anti-Terrorism Act*, nor from an analysis of the method by which Parliament chose to address those concerns. On the other hand, a reading of s. 83.2 that excludes the lone-wolf is consistent with a recognition by Parliament that the *Criminal Code* already provides ample means for dealing with such a person.

(c) Parliament could have captured the lone wolf had it intended to do so

[75] The defence submits that if Parliament had intended to create an offence of committing an offence for a terrorist purpose, it could easily have made that intention clear.[22] For example, it had available to it the template it employed in s. 83.03, which provides:

> Every one who… collects property, provides or invites a person to provide, or makes available property or financial or other related services
>
> (a) intending that they be used, or knowing that they will be used… for the purpose of facilitating or carrying out any terrorist activity… or
>
> (b) knowing that, in whole or part, they will be used by or will benefit a terrorist group is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

[76] Based on that template, Parliament could have made it an offence to commit an indictable offence "(a) for the purpose of carrying out any terrorist activity, or (b) for the benefit of, at the direction of or in association with a terrorist group". The fact that Parliament only used the language of the latter part of that example in s. 83.2 tends to support an inference that it did not intend s. 83.2 to apply to the lone-wolf.

(d) the Crown's interpretation of s. 83.2 makes s. 83.202 redundant

[77] The Crown's submission that Parliament intended s. 83.2 to be engaged where a lone-wolf carries out a terror attack for his own purposes is belied by the two provisions that immediately follow – ss. 83.201 and 83.202.

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[21] *supra*, footnote 17

[22] Defence factum, paragraph 33

[78] Section 83.201 provides:

> Everyone who leaves ... Canada ... for the purpose of committing an act or omission ... that, if committed in Canada, would be an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

[79] This provision makes it an offence to leave Canada for the purpose of doing something that, if done in Canada, would amount to an offence under s. 83.2. If the Crown's submission as to the scope of s. 83.2 were correct, s. 83.201 would capture the situation where a lone-wolf leaves Canada for the purpose of committing an offence that constitutes terrorist activity. Parliament, however, also enacted s. 83.202, which specifically addresses that situation:

> Everyone who leaves ... Canada...for the purpose of committing an act or omission ... that, if committed in Canada, would be an indictable offence under this or any other Act of Parliament if the act or omission constituting the offence also constitutes a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

[80] On the Crown's interpretation of s. 83.2, s. 83.202 is redundant. In interpreting a statute it ought not to be assumed that Parliament has enacted provisions that are redundant or have no practical effect. Rather, "it must be assumed that each term, each sentence and each paragraph have been deliberately drafted with a specific result in mind. Parliament chooses its words carefully: it does not speak gratuitously": *Hills v. Canada (Attorney General)*, [1998] 1 S.C.R. 513, at paragraph 106. Parliament must have considered that s. 83.202 captured conduct that s. 83.201 did not.

[81] The way that s. 83.202 is worded also sheds light on Parliament's intention in relation to s. 83.2. Section 83.202 is one of four "leaving" offences in Part 11.1. Section 83.181 makes it an offence to leave Canada to commit what would be an offence under s. 83.18; s. 83.191 makes it an offence to leave to commit what would be an offence under s. 83.19; and s. 83.201 makes it an offence to leave to commit what would be an offence under s. 83.2. All three of those provisions relate back to a specific offence created by Part 11.1. In contrast, s. 83.202 does not. It simply refers to the commission of what would be an offence under the *Criminal Code* or another federal statute. The difference between s. 83.202 and the other three leaving offences suggests that Parliament considered the underlying conduct in s. 83.202 – an act or omission that constitutes terrorist activity – to have been proscribed not by Part 11.1 but elsewhere in the law.

(e) the Crown's interpretation of s. 83.2 makes s. 83.27 redundant

[82] In its factum, the Crown submits that "it would be antithetical to the purpose of the terrorism legislation that an individual carrying out a solo attack would not be captured by the terrorism provisions of the *Criminal Code*."[23]

[83] That submission overlooks s. 83.27, which provides:

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[23] Crown's Factum, paragraphs 36 and 49

> Notwithstanding anything in this *Act*, a person convicted of an indictable offence, other than an offence for which a sentence of imprisonment for life is imposed as a minimum punishment, where the act or omission constituting the offence also constitutes a terrorist activity, is liable to imprisonment for life."

[84] Section 83.27 anticipates the very situation that the Crown submits would not be captured if its interpretation of 83.2 were rejected. I acknowledge that s. 83.26 – which mandates consecutive sentences for terrorism offences – would not apply to a person sentenced under s. 83.27, but the fact remains that Parliament has provided in Part 11.1 for the situation where a person commits an offence in the course of a solo terrorist attack. Pursuant to s. 83.27, such an offender is subject to a sentence of life imprisonment regardless of what the maximum period of imprisonment would have been absent a terrorism component. In other words, s. 83.27 makes the lone wolf who commits an indictable offence for his own terrorist goals liable to the same punishment as a person whose conduct is captured under s. 83.2. Rejecting the Crown's interpretation of s. 83.2 does not leave a gap in the scheme enacted by Parliament in Part 11.1.

[85] If the Crown's interpretation of s. 83.2 were correct, and if Parliament intended s. 83.2 to apply to a person who engages in terrorist activity as a lone-wolf, s. 83.27 would be redundant. As indicated above, it ought not to be assumed that Parliament has enacted provisions that are redundant or have no practical effect. The practical effect that s. 83.27 has is an expansion of the sentencing options for non-Part 11.1 offences that involve terrorist activity. The enactment of s. 83.27 supports an inference that Parliament anticipated that persons who commit solo attacks would be caught not by the offences created in Part 11.1 but by provisions found elsewhere in the *Criminal Code.*

Conclusions on the Statutory Interpretation Issue

[86] The Crown's approach to the interpretation of s. 83.2 focuses almost entirely on the wording of the provision. The wording is obviously important but statutory interpretation cannot be founded on the wording alone. Rather, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[24]

[87] When the interpretation of s. 83.2 is approached in that manner, and when the objective of Part 11.1 of the *Code*, the method by which Parliament has sought to achieve that objective, the wording of s. 83.2, the role that s. 83.2 plays in the anti-terrorism scheme, and the relationship that s. 83.2 has with other provisions of Part 11.1 are considered together and as a whole, the inexorable conclusion is that the intention of Parliament in enacting. 83.2 was to proscribe the kinds of *associative* conduct that support, facilitate and contribute to terrorist activity. The kind of lone-wolf criminal conduct engaged in by the defendant was not intended to be captured by s. 83.2. Parliament understood that such conduct was subject to prosecution under the existing provisions of the *Criminal Code* and was content to simply bolster the sentencing options available for that conduct by enacting s. 83.27. There was no need to do more.

[88] Accordingly, the Crown has failed to prove that the defendant's attack on the military personnel at the Recruiting Centre was for the benefit of, at the direction of or in association with

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[24] *Rizzo and Rizzo Shoes Ltd, supra, footnote 4*

a terrorist group and he is found not guilty on each of the nine counts under s. 83.2. However, he is not entitled to be found not guilty of the included offences of attempted murder, assault causing bodily harm, assault with a weapon and carrying a weapon. The agreed facts establish that he committed the *actus reus* of each of those offences and that he did so with the requisite intent. Whether he should be found guilty of those offences depends on whether at the time of the attack he was suffering from a mental disorder so as to be exempt from criminal responsibility. It is to that issue that I now turn.

II. Criminal Responsibility

[89] Section 16 of the *Criminal Code* provides that no person is criminally responsible for an act committed while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or of knowing that the act was wrong. Section 16 further provides that everyone is presumed *not* to suffer from a mental disorder so as to be exempt from criminal responsibility unless the contrary is proven on a balance of probabilities.

[90] To displace the presumption of criminal responsibility in this case two things must be established:

> (i) at the time of the attack at the Recruiting Centre the defendant had a mental disorder; and
>
> (ii) the mental disorder rendered the defendant incapable of appreciating the nature and quality of the acts underlying the offences with which he is charged, or rendered him incapable of knowing that those acts were wrong.

[91] The Crown and the defence jointly submit that both of those things have been established and that the defendant should be found not criminally responsible. In support of their joint submission, the parties rely on the evidence of Dr. Chaimowitz and Dr. Klassen.

[92] Both Dr. Chaimowitz and Dr. Klassen are of the opinion that the defendant was suffering from a mental disorder at the time of the material events. A "mental disorder" is defined in s. 2 of the *Criminal Code* as "a disease of the mind". A "disease of the mind" is a legal term, not a medical term, but it contains a substantial medical component.[25] It includes any illness, disorder or abnormal condition that impairs a person's mind and its functioning. It does not include states that an accused has created, for example, by voluntarily drinking alcohol or taking drugs. It does not include temporary mental states, such as hysteria or concussion.

[93] Generally speaking, where criminal responsibility is in issue, a psychiatrist will describe an accused's mental condition and how that condition is considered from a medical perspective. Then, "[the] trial judge decides, as a matter of law, whether the condition the psychiatrist describes is 'a mental disorder'. An affirmative finding on this issue leaves it to the trier of fact, whether a judge or jury, to decide whether, on the facts, the accused was suffering from a mental disorder at the time she or he committed the offence".[26] Having said that, "Canadian courts have at least

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[25] *R. v. Dobson*, 2015 ONSC 2865, at para. 68

[26] *ibid*, at para. 72

implicitly recognized that the major mental illnesses, the psychoses, are diseases of the mind and, thus, mental disorders..."[27]

[94] The opinion of both psychiatrists in this case is that the mental disorder from which the defendant was suffering was a major mental illness, namely schizophrenia with auditory hallucinations. I am satisfied that as a matter of law that illness qualifies as a mental disorder for the purposes of s. 16 of the *Criminal Code*. Further, in light of the evidence in relation to the defendant's behaviour leading up to, at the time of and immediately after the incident, I am satisfied that the defendant was suffering from that disorder at the material time.

[95] I turn then to a consideration of the effects that the disorder had on the defendant. To rebut the presumption of criminal responsibility, it would not be sufficient to show merely that mental disorder played a role in his conduct. Nor would it be sufficient that the defendant did not appreciate the nature and quality of his acts or that he did not know that they were wrong. What must be established, rather, is either that the mental disorder left the defendant *incapable* of appreciating the nature and quality of his conduct, or that it left him *incapable* of knowing that his conduct was wrong.

[96] The first branch of that test involves a consideration of the defendant's ability to appreciate the nature and quality of his acts. To appreciate means more than to know. To know means to be aware of something. To appreciate requires not only knowledge but also understanding. The 'nature and quality' of an act refers to the physical character and consequences of the act. A person is incapable of appreciating the nature and quality of an act if he did not have the capacity to understand the character and consequences of what he was doing. "Consequences" refers to the natural physical consequences.

[97] "Wrong", for the purposes of s. 16, means morally wrong, that is, something that a person should not do according to the accepted standards of society. In order to know that the conduct in question is wrong, a person must have more than a general capacity to know right from wrong. It is not sufficient that a person has the ability in general terms to distinguish between acts that are right and acts that are wrong according to the standards of society. A person may well be aware that an act is usually contrary to societal standards and therefore wrong but, by reason of mental disorder, may be incapable of knowing that the act is wrong in the particular circumstances in which the person finds himself. The question on this second branch is not concerned with actual knowledge but with capacity for knowledge. If, notwithstanding a mental disorder, a person has the *capacity* to know that his conduct is morally wrong he is not exempt from criminal responsibility even if he does not *actually* know the conduct is morally wrong.

[98] It is the opinion of both Dr. Chaimowitz and Dr. Klassen that the defendant's mental disorder did not deprive him of the capacity to appreciate the nature and quality of his acts at the time he attacked the personnel at the Recruiting Centre, nor did it deprive him of the capacity to know that his acts were legally wrong. It is their opinion, however, from a medical perspective, that he was incapable of knowing that they were morally wrong.

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[27] *ibid*, at para. 76

[99] I am not bound to accept those opinions: it is for the *court* to determine whether the criteria for a verdict of not criminally responsible have been established and that determination is to be made on the basis of the evidence as a whole. Expert testimony such as that provided by Dr. Chaimowitz and Dr. Klassen is admissible but not determinative. However, both doctors provided a very thorough and persuasive basis for their opinions. They carefully considered the possible alternative hypothesis that, notwithstanding his mental illness, the defendant knew that his conduct was morally wrong but nonetheless engaged in it for religious and ideological purposes. In the end, they rejected that alternative hypothesis. After a consideration of all of the evidence, so do I.

[100] The defendant's attack on the personnel at the Recruiting Centre was terrorist activity within the meaning of Part 11.1 of the *Criminal Code*. It was a deeply disturbing assault on one of the pillars of Canadian peace and security. Pursuant to s. 16 of the *Criminal Code*, however, a person who commits acts that would otherwise constitute a crime, even a grave crime, is exempt from criminal responsibility if it is established on a balance of probabilities that the person was, by reason of mental disorder, incapable of knowing that his acts were morally wrong. That exemption reflects the commitment of the criminal law to the requirement of moral blameworthiness and to the principle that individuals should not be subjected to punishment if, because of a mental disorder, they lacked the capacity to reason right from wrong and thus to choose between right and wrong.[28]

[101] I am satisfied that the defendant has met the onus on establishing that at the time of the attack at the Recruiting Centre he was suffering from a mental disorder that rendered him incapable of knowing that his conduct was morally wrong and thus that he is exempt from criminal responsibility for that conduct.

D. Disposition

[102] For the foregoing reasons, the defendant is found not guilty on all nine counts of committing indictable offences for the benefit of, at the direction of or in association with a terrorist group. He is found not criminally responsible on the counts of attempted murder included in counts 1, 2 and 3, on the counts of assault causing bodily harm included in counts 4 and 5, on the counts of assault with a weapon included in counts 6, 7 and 8, and on the count of carrying a weapon for the purpose of committing an offence included in count 9.

Ian MacDonell, J.

MacDonnell, J.

Released: May 14, 2018

[28] *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at paragraphs 191-195, per McLachlin. J., dissenting in the result