COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Chang, 2024 ONCA 498
DATE: 20240620
DOCKET: C70694

Lauwers, Roberts and Monahan JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Joseph Chang

Appellant

Andrew Furgiuele and Rebecca Silver, for the appellant

Andrew Hotke, for the respondent

Heard: June 12, 2024

On appeal from the conviction entered on September 28, 2021, and the sentence imposed on December 10, 2021 by Justice Jennifer Woollcombe of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant challenges his conviction for second-degree murder of his intimate partner, Alicia Lewandowski. At the conclusion of the appellant's submissions, we dismissed the appeal for reasons to follow. These are our reasons.

Background

[2] The trial took place before a judge alone without a jury. There was no dispute that the appellant shot and killed Ms. Lewandowski at close range, while she sat in the driver's side of his car, in the early hours of March 5, 2018. He claimed that he could not form the requisite intent for first- or second-degree murder because he was in a cocaine-induced psychosis at the time of the shooting. He told the defence psychiatric expert, Dr. Collins, that he thought he was shooting at menacing figures he had imagined in his psychotic state.

[3] The appellant did not testify at trial. He relied on the defence expert evidence of Dr. Collins to whom he relayed his recollections. He also relied on the evidence of his cousin, his lawyer, and his friend who testified that that the appellant made preposterous statements to them, and relied on the statements that Ms. Lewandowski made to others before her death. The appellant argued that this evidence demonstrated that he was in a cocaine-induced psychosis at the time of the shooting and incapable of forming the requisite intent for murder. His position at trial was that he should be found guilty only of manslaughter. There was no suggestion that he was not criminally responsible as a result of a mental disorder.

[4] The trial judge found that there was no admissible evidence that the appellant was in a cocaine-induced psychotic state at the time of the shooting and that, even if he exhibited psychotic behaviour, the appellant was capable of forming

and did form the requisite intent to kill Ms. Lewandowski at the time of the shooting. As she was not persuaded beyond a reasonable doubt that the appellant had premeditated the killing, she convicted him of second-degree murder.

Issues

[5] The appellant submits that the trial judge misapprehended the evidence supporting his claim of psychosis, including the appellant's preposterous utterances, and she erred in finding that the defence expert psychiatrist was not an objective expert. He asks that this court substitute a verdict of manslaughter.

Analysis

[6] We are not persuaded that the trial judge made any reversible error.

[7] In her very detailed and careful reasons, the trial judge thoroughly reviewed and did not misapprehend the evidence concerning the appellant's state of mind before, during and after the shooting.

[8] There was no error in the trial judge's exercise of her role as gatekeeper. She was required to critically examine the defence expert evidence and entitled to accept some, all, or none of it. It was open to the trial judge to question the defence expert's objectivity respecting his core opinion that the appellant lacked the capacity to form the requisite intent for murder at the time of the shooting.

[9] Summarized in paragraphs 447 to 453 of her reasons are the trial judge's detailed and numerous findings explaining why she rejected the core defence

expert opinion evidence that the appellant lacked the capacity to intend to kill Ms. Lewandowski.

[10] Notably, the trial judge observed that Dr. Collins remained "rigid and intransigent" in the face of new, significant information that he conceded he would have liked to explore with the appellant, and in the face of explanations inconsistent with his opinion, claiming that they nonetheless would not have affected his opinion. For example, although Dr. Collins conceded that memory loss could result from a "red-out" during which a person could act intentionally, he seemed, as the trial judge found, "unwilling to entertain or consider" that the appellant could have had a red-out during the shooting, notwithstanding he had not explored the appellant's memory loss with him.

[11] Importantly and relatedly, the trial judge found troubling his unqualified and unquestioning acceptance of all of the appellant's statements to him. She noted as particularly troubling that Dr. Collins did not question the appellant on what she was correct to describe as some of the most problematic aspects of his statements or on the most important details about what happened in the days and hours leading up to and including the shooting. Specifically, Dr. Collins did not grapple with the inconsistencies in the appellant's account about the shooting and his behaviour that the trial judge found was inconsistent with the hallucinations that he claimed he was experiencing. This included, as the trial judge noted, the implausibility of the appellant purporting to remember everything up to and

following the shooting but nothing about the shooting itself. Further, Dr. Collins simply accepted the appellant's claim that he was shooting at approaching strangers at the fence line, without considering how this could have been possible in light of the fact that all three shots were fired at Ms. Lewandowski, who was seated in the driver's seat of the car. As Dr. Collins conceded during cross-examination, this entirely improbable scenario should have raised a concern that the appellant was malingering, a possibility Dr. Collins failed to seriously consider.

[12] The trial judge did not fail to consider or reject all the evidence that the appellant says supported Dr. Collins' opinion of drug-induced psychosis. She concluded that the appellant's statements that he feared being followed and killed by others were not preposterous for a drug dealer like the appellant to make, as he was involved in an inherently dangerous activity. The trial judge did accept that some of the statements, as well as instances of the appellant's bizarre behaviour (such as, for example, dismantling and damaging part of his apartment, which resulted in police and firefighters attending, and his conduct at the McDonald's restaurant following the shooting), demonstrated that the appellant experienced paranoia and delusional thinking, as well as hallucinations, around the time of and following the shooting.

[13] However, the trial judge was not persuaded and did not accept the defence expert opinion that the appellant's drug-induced psychosis continued at the time of the shooting.

[14] First, the trial judge found, correctly in our view, that there was no admissible evidence "on the crucial issue of ongoing drug consumption" by the appellant in the days leading up to the shooting. Nor was there any evidence about what the appellant did in the 24 hours prior to visiting his friend's house to take the gun used in the shooting a few hours later. Dr. Collins agreed that the appellant had the requisite intent at that point to take and possess a loaded firearm.

[15] Moreover, while acknowledging that there were instances of troubling behaviour by the appellant, the trial judge set out in meticulous detail the overwhelming evidence demonstrating that at the same time, the appellant engaged in purposeful activity, inconsistent with incapacity to form intent, in the days and hours immediately before, during, and after the shooting. These instances included: having the presence of mind to dispose of a gun and drugs off the balcony of his apartment before the arrival of police and firefighters; packaging the gun safely in a pillow so that he could retrieve it later; visiting his lawyer to obtain advice when he could not regain access to his apartment after it was sealed by the police; obtaining another gun from his friend when he could not retrieve the gun he disposed of off his balcony; calling Ms. Lewandowski on a cellphone that he had never used before; shooting Ms. Lewandowski three times at close range,

notwithstanding her pleas to stop as recorded on her call to the 911 operator, and attempting to hide the gun from her; pulling her from the driver's side of the car and leaving her to die on the road; and failing to try to communicate with her following the shooting.

[16] The appellant relies on *R. v. Molodowic*, [2000] 1 S.C.R. 420 to argue that the trial judge erred by rejecting the defence expert evidence without any rational basis. We are not persuaded that *Molodowic* assists the appellant's position. It is entirely distinguishable on its facts. Notably, the psychiatric opinion in *Molodowic* about the accused's incapacity to form the requisite intent to murder did not suffer from the problems noted by the trial judge in the present case. Moreover, unlike here, the accused's statements and behaviour in *Molodowic* were not inconsistent with the psychiatric opinion that he lacked the capacity to appreciate that his actions were morally wrong at the relevant time. For the reasons we have already explained, the trial judge in the present case had a rational basis for rejecting the defence expert opinion.

[17] In sum, the trial judge rejected that the appellant could not form the requisite intent for murder because of drug-induced psychosis and found that he had the requisite intent for murder. All her findings were thoroughly explained, rooted firmly in the record, and support her conviction of the appellant for second-degree murder. Effectively, the appellant's submissions amount to an invitation for this court to retry this case. That is not our function. There is no basis to intervene.

Disposition

[18] For these reasons, the appeal from conviction is dismissed. The sentence appeal was not pursued and is dismissed as abandoned.

"P. Lauwers J.A."
"L.B. Roberts J.A."
"P.J. Monahan J.A."