

CANADA / JUDGMENT

R. v. Damin

2012 BCCA 504

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 504 R. v. Damin

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Damin,

2012 BCCA 504

Date: 20121213

Docket: CA039167

Between:

Regina

Respondent

And

Sebastiano Damin

Appellant

Before:

The Honourable Madam Justice Levine

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, June 2, 2011

(R. v. Damin, 2011 BCSC 723, New Westminster Docket No. X74245)

Counsel for the Appellant:

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Counsel for the Respondent:

M. Brundrett

Place and Date of Hearing:

Vancouver, British Columbia

October 2, 2012

Place and Date of Judgment:

Vancouver, British Columbia

December 13, 2012

Written Reasons by:

The Honourable Madam Justice D. Smith

Concurred in by:

The Honourable Madam Justice Levine

The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Madam Justice D. Smith:

Introduction

- [1] The appellant, Sebastiano Damin, was charged with the second degree murder of his wife. Before Mr. Justice Josephson, sitting as a judge without a jury, Mr. Damin admitted his guilt to manslaughter, but pleaded not guilty to murder. He contended that the evidence of his mental condition at the time of the offence should raise a reasonable doubt that he had the specific intent for murder. He invited the court to find him guilty of the lesser included offence of manslaughter.
- [2] The trial judge found that the evidence of Mr. Damin's mental state at the material time did not negate or raise a reasonable doubt that he had the specific intent to murder the deceased. He convicted Mr. Damin of the offence.
- [3] It is common ground that Mr. Damin was depressed when he killed his wife. His counsel briefly referred to the defence of "not criminally responsible" (NCR) in closing submissions, but did not otherwise advance it at trial. Nor, as the trial judge found, did the evidence support a NCR finding.

- [4] The focus of the submissions by both the Crown and the defence at trial was on the opinion evidence of a forensic psychiatrist, Dr. Smith, who was called as an expert witness on behalf of the defence.
- [5] Dr. Smith interviewed Mr. Damin about six months after the offence. It was her opinion that "at the time of the alleged offence, Mr. Damin was suffering from a major depressive episode that was moderate to severe in nature, with prominent agitation and anxiety". In her opinion, Mr. Damin's depression "played a significant role in determining his emotional responses, his judgment, his thought processes, his decision-making and his behaviour at the material time." Dr. Smith was also of the view that the offence was illogical because it created what Mr. Damin feared most - separation from his wife. She was unable to say if Mr. Damin's mental condition prevented him from foreseeing that the consequences of his repeatedly stabbing the deceased would be her death.
- [6] While the trial judge accepted that Mr. Damin's cognitive abilities were significantly diminished by his depression, he found that: (i) Mr. Damin "knew what he did and why he did it"; (ii) his actions before and after the event were deliberate, focused, and responsive; (iii) his loss of memory after the first two stabs (he stabbed the deceased 126 times) was "not uncommon in such emotional and stressful situations"; and (iv) there was a "morbid logic" to his actions in that he was "motivated by anger" and believed that he could not prevent his wife from forcing him to leave his home. After a careful review of all of the evidence, including the opinion evidence of Dr. Smith, the trial judge concluded:
- [44] The evidence as a whole satisfies me beyond a reasonable doubt the accused possessed the requisite intent for the offence [of] second degree murder; though I accept he possessed a diminished capacity to form that intent.
- [7] Mr. Damin submits that the verdict is unreasonable, that it was based on a misapprehension of the evidence as to the foundation of Dr. Smith's opinion, and that the trial judge erred in law by drawing impermissible inferences from the proven facts and by failing to give sufficient weight or consider evidence that should have raised a reasonable doubt as to his intent.
- [8] For the reasons that follow, I am not persuaded the trial judge erred as alleged. I am also of the view there was sufficient evidence that, when cumulatively weighed, rationally supported the guilty verdict.

Factual background

- [9] At the time of offence, Mr. Damin was age 75 and living with the deceased, his second wife, in her townhome. His health had deteriorated over the previous few years and he was clinically depressed. He had become very dependent on the deceased and was irrationally fearful that harm would come to her if she left their residence. She in turn had threatened to have him removed from the home and placed elsewhere, which led Mr. Damin to be fearful of being alone.
- [10] On November 24, 2009, at approximately 3 a.m., Mr. Damin woke up, and went into the kitchen where he grabbed a steak knife. He then walked into his wife's bedroom, where she was sleeping, and viciously stabbed her to death. He inflicted 126 stab wounds over most of her body. She died quickly of excessive bleeding. Based on the pathologist's description of the defensive wounds to the deceased, the trial judge found that she had "attempted to protect herself to some degree ... [t]he attack continued as the victim went to the floor beside the bed ... [a]ll stab wounds occurred prior to the death of the victim" and were mostly to her torso, head, neck and face (para. 12).
- [11] After the event, Mr. Damin left the deceased's bedroom and in an apparent suicide attempt he cut himself three times in the neck and once in the abdomen. He then opened the front door, which set off the security alarm. At 3:17 a.m., he called 911, provided the dispatcher with his home address, and stated twice, "I killed my wife". He also said, "I tried to kill myself, but I can't" and "I just got mad. She tried to ruin my life".
- [12] The security alarm woke a neighbour who came over to the residence and found Mr. Damin covered in blood. She asked him where Mrs. Damin was to which Mr. Damin replied, "she's dead".
- [13] Police and ambulance arrived shortly thereafter. The trial judge found that Mr. Damin "was able to respond appropriately to their questions and react to their directions" (para. 17).
- [14] Mr. Damin was taken to the hospital where he was questioned by the police. Initially he appeared reluctant to communicate with them and so they left. Later, however, they returned when a nurse informed them that Mr. Damin wished to speak with them. Mr. Damin advised the police that "I did it ... because I thought she was going to ... make me leave ... I guess I kind of snapped". He also stated that he and his wife had had an argument that night before they went to bed after which "I got to thinking and thinking and thinking and ... and then I guess I went crazy" (paras. 19-20).
- [15] The following day Mr. Damin was interviewed by Dr. Joshi, a hospital psychiatrist. The trial judge, taking from the Crown's written submissions, summarized the interview (at para. 21):

- a. Initially, his marriage to Maria Catroppa was good. They did not argue too much and enjoyed being with each other. However, when he started to become depressed, the relationship deteriorated, precipitated by his increasing need to have his wife at home all the time due to anxiety and worry and her wanting to maintain her freedom. As a result, they argued more. Maria would get mad and threaten [the accused] to move out of the house. This worried him even more, as he did not feel that he could cope on his own.
- b. On the day of the stabbing, he and his wife had an argument "as usual" before she went out for the day. She ran some errands and had a dentist appointment. She returned from the dentist and they had supper.
- c. They argued again after supper over the same issues of him not wanting to be left alone, and Maria wanting to have more freedom.
- d. They watched TV and then went to bed. He and his wife slept separately, and had done so for some time. He denied any thoughts of wanting to harm his wife that day. He denied ever having had thoughts of wanting to harm his wife in the past. He denied feeling angry towards her when he went to sleep.
- e. His medications provided 4 - 5 hours of continuous sleep. He then wakes up, often feeling anxious and worried.
- f. He woke after four hours of sleep feeling thirsty. He went to the kitchen to grab a glass of water.
- g. His wife apparently was still asleep.
- h. Then "something snapped in his head" and he grabbed a knife from the kitchen and went to her bedroom and stabbed her to death.
- i. He denied repeatedly that this was something that he had been thinking about doing for some time.
- j. He said that it was a thought that happened in the moment.
- k. He said that after the first few strikes, he did not remember what happened after that.
- l. He next recalled attempting to stab himself to kill himself.
- m. After a few stabs to his neck and abdomen area, he could not go through with the act of killing himself and then he called 9-1-1.
- n. He told the operator that he had killed his wife and tried to kill himself, but he could not and needed medical help.
- o. He called his neighbours, told them the same thing, and lay on the carpet waiting for EMS and police to arrive.
- p. He stated that he was extremely sorry and remorseful for what had happened.

- q. He stated that he could not believe that he had killed his wife.
- r. He denied harbouring any homicidal ideation toward his wife prior to stabbing her last night.
- 53. Dr. Joshi questioned [the accused] about his illness. He told her that he suffers from a lifelong problem of significant symptoms of excessive worry and anxiety that had worsened with the onset of his depression. He further stated that he currently worries excessively about his relationship with his wife, fearing that she will make him leave and he will be all alone. He also worries about not being able to talk to his children and other family members about the relationship difficulty. In the past, he worried about his children, his job and finances.

Dr. Smith's evidence at trial

[16] At trial, Dr. Smith testified for the defence on the issue of Mr. Damin's state of mind at the material time. She formed her opinion based on an interview with Mr. Damin about six months after the event, and her review of the witness statements, the police narrative, and Mr. Damin's medical records. In direct evidence she testified:

Q. Is your opinion limited to the notion that he was simply unable to control his emotional responses?

A. That's part of my opinion, but that's only part of it. As I said earlier, that once significantly depressed, an individual copes badly with negative events and negative news, engages in this catastrophic thinking and more readily becomes emotionally distressed than the average individual. But my opinion goes beyond that to the effect that the emotional distress in combination with the already compromised cognitive function of a depressed, anxious individual with limited reserves, the impact that would have on his ability to think clearly, to judge situations, to problem solve, to foresee the consequences of his actions.

[17] On cross-examination, Dr. Smith clarified her evidence on the critical issue of whether Mr. Damin's depressive state may have impacted his ability to form the requisite intent for murder:

Q. So is it your opinion then that when he was killing her he knew what he was doing?

A. We don't know. We don't know.

Q. There's nothing to suggest he didn't know what he was doing?

A. I would imagine if we'd stopped him in, you know, mid-thrust he would've known that he had a knife in his hand.

Q. Well, he knew he was stabbing her -

A. Yes.

Q. --right?

A. Yeah. Yeah. Yeah.

Q. So -

A. But -

Q. -- it is your opinion that he knew that when he took the knife and he plunged it into Maria he knew that he was stabbing Maria, right?

A. We don't know. We just don't know--

Q. Well, he said he did it?

A. -- whether he was thinking or not, but we know that he remembers two stabs. We don't know if by being aware of that he was considering the consequences of what he was doing. Thinking through the consequences.

[18] The trial judge summarized Dr. Smith's evidence at para. 23:

1. At the time of the alleged offence, the accused was suffering from a major depressive episode that was moderate to severe in nature, with prominent agitation and anxiety.
2. For the accused, the depression was severely disabling, affecting all aspects of his life. In addition to withdrawing from social interactions, the accused likely suffered from anxiety symptoms such as nervousness, excessive worrying, irritability, restlessness and agitation. He was also moody and had only tenuous control over his emotional responses. His mood can fluctuate throughout the day, usually being worst early in the morning. It can also be affected by stress and agitation.
3. Severe depression can have a profound effect on thought content and everything is viewed through a "grey or black filter." The accused appears to have become very pessimistic, with feelings of despair, hopelessness, helplessness, inappropriate guilt and worthlessness. He experienced irrational and catastrophic thinking focused on his wife.
4. Major depression is often associated with cognitive difficulties such as poor concentration, memory, decision making and thinking. Exacerbated by his elderly age, symptoms resembled those of dementia, including confusion, significantly comprising his cognitive function.
5. A reduction in the dosage of an anti-psychotic medication Seroquel "could easily have led to a worsening of his symptoms and in particular to an increase in his level of agitation and anxiety."

6. The accused is unable or unwilling to describe his thoughts and feelings immediately leading up to, and during, the attack on the victim. This is not uncommon for even a person with normal cognition in the midst of extreme levels of emotion. It is more common when suffering from a major depression and anxiety, and is exacerbated by age.
7. There is nothing to suggest the accused was suffering from a psychotic illness and experiencing delusional beliefs or hallucinations at the time of the alleged offence.
8. With no prior history of significant aggression, his depression caused irrational behaviour that was highly out of character for the accused. Dr. Smith concludes as follows:

Furthermore the alleged offence itself had no logic to it. I have considered the possibility that the killing of his wife was motivated entirely by anger and a desire for revenge on a wife who was threatening to leave him. However, this would make little sense, as the main focus of his worrying was that he would be abandoned by his wife and unable to cope on his own, but by killing his wife he was essentially bringing about the situation that he most feared. Until he killed his wife there would still have been hope that the relationship could work. However I believe that his ability to control his emotional responses, and once emotionally distressed, to think clearly, to consider the consequences of his actions, to make decisions and to judge situations would have been significantly compromised and coloured by the effects of the depressive illness. His attempt to end his own life after killing his wife is further evidence of his depressed state of mind at the time. It is therefore my opinion that the depressive illness from which [the accused] was suffering at the time of the alleged offence played a significant role in determining his emotional responses, his judgment, his thought processes, his decision-making and his behaviour at the material time.

[Emphasis in judgment.]

[19] The trial judge (at para. 24) also referred to a question asked of Dr. Smith in direct examination, which he described as "central to the issue at trial":

Q. The accused said he got mad. Why isn't it that simple? He believes she was going to leave. He got made and killed her. Why isn't it that simple?

A. Quite simply, that would be bringing about the thing he dreaded most- losing his wife. It has no logic to it.

[20] On cross-examination, Dr. Smith was asked to clarify her opinion how Mr. Damin appeared to understand that he had killed his wife when he called 911, but reported that he could only remember inflicting the first two stabs. The trial judge summarized Dr. Smith's evidence on this issue (at paras. 25-27):

[25] When asked in cross-examination if the accused's reporting having killed his wife shortly after the attack was inconsistent with his having reported later he recalled only the first two or three stabs, Dr. Smith replied to the effect that it would not have taken much for the accused to have turned around and seen his wife on leaving the bedroom, and that though

he was obviously aware his wife was dead, this was very different from thinking clearly or seeing the consequences of his actions. It is also possible he remembered the result of his attack for a short period of time as an immediate memory which did not then transfer into his long term memory.

- [26] Dr. Smith explained the accused's apparent rational thinking shortly after the attack, such as opening the screen door to set off the alarm and calling 911, as mood improvement and thinking more rationally after the time of the alleged offence.
- [27] Dr. Smith agreed that anger would have been a factor in the killing, but only one of several.
- [21] An NCR defence was not pursued by Mr. Damin at trial. However, during cross-examination the trial judge asked Dr. Smith how Mr. Damin's mental state, as she had found it, was distinguishable from an NCR state. Dr. Smith replied:

Well, as I said earlier, the -- there's no clear evidence of psychotic symptoms. We have the suspiciousness and the unreasonable fears. He may have been delusional, but I haven't got enough information (indiscernible) with my opinion with respect to delusions. But for him to be found not criminally responsible he would not -- he would either have to not know what he was doing or have delusional beliefs that essentially justified what he was doing legally or morally. And I don't think we have any evidence of that.

The reasons of the trial judge

- [22] In his reasons for judgment, the trial judge referred to the NCR defence, which counsel for Mr. Damin raised for the first time in submissions, and concluded that the defence was not made out on the evidence (para. 30). (In his factum, counsel for Mr. Damin listed this as a ground of appeal, but during oral submissions acknowledged that the defence was not advanced at trial and conceded that the evidence did not support a finding of NCR. I agree and propose to say nothing further on this issue.)
- [23] In considering the relevant law, the trial judge referred (at para. 33) to *R. v. Robinson*, 2010 BCSC 368, where after reviewing the authorities, Mr. Justice Joyce concluded:
- [110] Where there is evidence of a mental condition relevant to intent, this evidence must be considered along with all the other evidence in determining whether the accused had the intent requisite for murder. Such consideration does not create the notion of diminished responsibility, which does not exist in our law. Rather is simply recognizes that if the accused was suffering from some sort of mental condition at the time of the offence, that mental condition is a circumstance that might affect whether or not he formed the necessary specific intent (see *R. v. Bailey* (1996), 111 C.C.C. (3d) 122 (B.C.C.A.)).
- [24] The trial judge adopted the conclusion in *Robinson* that "the defence of diminished responsibility is not known to Canadian law. It is the impact of the characteristics of the specific offender as they relate to the commission of the alleged offence that are considered (at para. 34)". He distinguished *Robinson*, however, on its facts. In *Robinson*, the court found

that the accused's frontal lobe injury from an earlier motorcycle accident, combined with his polysubstance abuse, led to impulsive thinking which he could not control. This affected his ability to foresee the consequences of his actions in stabbing the victim to death. The accused in that case was found guilty of manslaughter.

- [25] The trial judge found that, based on Mr. Damin's self-described mental state before he killed the deceased as "thinking and thinking and thinking"; the clear purpose of his actions before he went into his wife's bedroom; his deliberate and focused actions after the event; and his meaningful responses to his neighbour, police and ambulance attendants, Mr. Damin's "depression did not interfere with his ability to form the requisite intent, as did the accused's injuries in Robinson" (para. 35).
- [26] After a careful review of the evidence, the trial judge rejected Dr. Smith's premise that Mr. Damin's cognitive functioning was "significantly compromised and coloured" at the time of the offence because of his depressive illness. He found that Dr. Smith's evidence simply did not go far enough to support the defence theory that Mr. Damin's depression negated the requisite intent for murder "even accepting the evidence of Dr. Smith in its entirety" (para. 42).
- [27] Instead, the trial judge found that Mr. Damin had acted out of anger toward the deceased, that he "did not have difficulty appreciating the consequences of his actions, and that while it may not have made sense to Dr. Smith, there was a morbid logic to the accused's actions insofar as he was angry, and believed there was nothing he could do to prevent his wife from forcing him to leave" (para. 36). In particular, he found that while Mr. Damin's recall of the event appeared to have ended after the second strike of the knife, and did not return until he left the bedroom after the attack, the judge was satisfied, based on Dr. Smith's evidence, that this type of memory loss "is not uncommon in such emotional and stressful situations, even for people of normal cognitive ability" (para. 40).
- [28] He concluded:
- [41] Though the accused recalled nothing of the attack after the first two or three stabs, his behaviour from the time of retrieving the knife from the kitchen and the commencement of the attack is consistent only with the requisite intent for second degree murder. His conduct immediately thereafter is also consistent with the knowledge of what he did and why he did it. The defence theory that he drifted into such a severe depressive state after the first couple of stab wounds so as to not have the requisite intent, improving almost immediately after the final blow, drifts solidly into the realm of speculation.
- [42] This would be my conclusion even accepting the evidence of Dr. Smith in its entirety. However, the foundation of her opinion is her perception that committing the alleged offence is illogical as it would create what the accused feared most - separation from his wife. From the perception of the accused however, it was not so illogical. He believed his wife was going to cause that much-feared separation in any event. This made him very angry, and that anger motivated the knife attack on the victim. Unfortunately, it is not

uncommon in situations of domestic violence to see physical attacks on a spouse motivated by anger at an unwanted separation. Neither is remorse nor disbelief thereafter uncommon.

- [43] The actions of the accused before, during and after his period of memory loss were goal oriented, though misguided. As well, his actions were sufficiently determined that he did not cease the attack until inflicting 126 stab wounds on his defenceless victim. This was not a single blow in a heated moment. The accused entered the bedroom of the sleeping victim with the intent to attack her with a knife and did not stop until death was a certain outcome.
- [29] In sum, the trial judge found that Mr. Damin was driven by anger when he stabbed the deceased and his actions immediately before the event were "goal- oriented" and demonstrated a clear intention to stab the deceased. Further, his actions immediately after the event were also deliberate and demonstrated an understanding of the ramifications of his actions - his attempted suicide, his triggering of the security alarm, his explanation to the 911 dispatcher that he had killed his wife because he was "mad" over her attempt "to ruin [his] life", and his meaningful responses to inquiries from a neighbour, police and ambulance.

Issues on appeal

[30] Mr. Damin raises the following grounds of appeal:

1. Did the trial judge misapprehend the evidence of Dr. Smith?
2. Did the trial judge draw impermissible inferences, give "undue reliance" to some evidence, and fail to account for other evidence?
3. Is the verdict unreasonable or unsupported by the evidence?

Discussion

1. Did the trial judge misapprehend the evidence of Dr. Smith?
- [31] Counsel for Mr. Damin submits that the trial judge's verdict was based on a misapprehension of the foundation of Dr. Smith's opinion. He submits that the trial judge erred in finding that Dr. Smith's opinion was based on the premise that it was illogical for Mr. Damin to have intended to have killed his wife and thereby bring about the situation he feared most - separation from his wife. Counsel contends that this misapprehension of Dr. Smith's opinion was material and went to the core of the judge's reasoning in finding that Mr. Damin had the specific intent for murder. Counsel submits that this amounts to reversible error: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 97 C.C.C. (3d) 193 (O.N.C.A.) at para. 93; *R. v. Bader*, 2012 BCCA 25, 315 B.C.A.C. 158 at para. 27 citing *R. v. Peters*, 2008 BCCA 446 at para. 14.
- [32] With respect, I cannot agree. The trial judge reviewed Dr. Smith's opinion on the issue of Mr. Damin's mental state in considerable detail. In finding that Mr. Damin possessed a diminished capacity to form the intent to kill, the judge accepted part of Dr. Smith's opinion that Mr. Damin was experiencing a major depressive disorder at the material time, which

featured symptoms of prominent agitation and anxiety, and that Mr. Damin's depressive state determined his emotional responses, impaired his decision-making ability, and compromised his cognitive functioning. The ultimate question, however, was whether this depressive state negated or raised a reasonable doubt that Mr. Damin had the requisite intent for murder in the circumstances of a prolonged and overwhelming violent attack upon the deceased. He concluded that, based on all of the evidence, Mr. Damin subjectively foresaw the consequences of his actions and therefore meant to kill the deceased or knew the deceased would likely die in these circumstances.

- [33] I am not persuaded the trial judge's rejection of Dr. Smith's opinion (that Mr. Damin's killing of his wife whom he did not want to be separated from was illogical, irrational and significantly compromised by his depressive illness) formed the core of his reasoning for finding that Mr. Damin had the requisite intent for murder. In my view, his comment that such illogical or irrational acts occur in many domestic violence cases was a mere observation that often, in such cases, the object of a violent attack is the very person whom the perpetrator professes to love.
- [34] As I understand his analysis, the core of the trial judge's reasoning was that Mr. Damin's focussed, "goal-oriented", and deliberate actions, before and after the event, in addition to his meaningful responses to neighbours, police and ambulance attendants, did not indicate a sufficiently compromised mental state to negate the specific intent for murder.
- [35] I would not accede to this ground of appeal.
2. Did the trial judge draw impermissible inferences, give "undue reliance" to some evidence, and fail to account for other evidence?
- [36] The trial judge concluded from the totality of the evidence that Mr. Damin's actions, immediately before, during the first two stabs to the deceased that he recalled, and immediately after the event, were focussed, goal-oriented, and meaningfully responsive. Counsel for Mr. Damin submits that these findings were in error because they were coloured by the trial judge's misapprehension of Dr. Smith's evidence.
- [37] In particular, counsel contends that the trial judge's finding that Mr. Damin had a functioning mind and that his actions before the event demonstrated a "rational deliberative process" based on Mr. Damin's statement to the police that he was "thinking, thinking, and thinking" when he awoke, and went into the kitchen to grab a knife, was an erroneous inference. Counsel argues that based on Dr. Smith's evidence, simple goal-directed activities do not always reflect the ability to think clearly and foresee the consequences of one's actions. Counsel further submits the trial judge erred in inferring that Mr. Damin's actions before the event reflected a "clear purpose" and were "goal-oriented" because that was not the only inference that could be drawn from those actions. Counsel also disputes the trial judge's inference (at para. 43) that the number of stab wounds inflicted was "sufficiently determined" to evidence an intent to kill. He submits that the overwhelming violence was also consistent with a "frenzied impulsive attack during which the accused was not aware of

what he was doing". He further contends that the judge's inference that Mr. Damin's actions were motivated by anger was in error based on the evidence of what Mr. Damin said in his 911 call and his statement to the police at the hospital. Counsel contends that those acts were consistent with other rational inferences, based on Dr. Smith's evidence.

- [38] This submission, in my view, fails to appreciate the narrow standard of review to be applied, not only to a trial judge's findings of fact, but equally to his inferences of fact, as was articulated in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. After reiterating that an appeal is not a re-trial of a case, the Court in *Housen* underscored that the standard of review of a trial judge's inferences of fact "is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts" (para. 21, emphasis in original). The Court went on to caution appellate courts from becoming involved in "an unjustified reweighing of the evidence" absent palpable and overriding error, and "that where evidence exists to support [an] inference, an appellate court will be hard pressed to find a palpable and overriding error" (para. 22). The Court further reiterated that "it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence" (para. 23) and directed:
- [23] ... If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. [Emphasis in original.]
- [39] On appeal, Mr. Damin does not allege palpable and overriding error by the trial judge or an absence of evidence to support the trial judge's factual conclusions (i.e., error in the inference-drawing process). Rather, he submits that where there is more than one inference to be drawn from the proven facts, it is an error of law for the trial judge to resolve an issue based on only one rational inference while rejecting the other rational inference. I do not understand this to be a correct statement of the law concerning the determination of intention.
- [40] It is true that a judge may not arbitrarily choose between permissible inferences, and that any reasonable doubt must be resolved in the accused's favour. Equally, however, it is open to a trial judge to weigh the circumstantial evidence of intent to determine which of two or more conceivable inferences ought to be drawn. If, having weighed the evidence, the judge is satisfied that the only reasonable inference is that the accused is guilty, this Court must not interfere with the verdict simply because a different evaluation of the evidence may have led to an alternative reasonable inference.
- [41] This issue was addressed in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, where Madam Justice Arbour, for the Court, wrote:

- [49] I agree with Ryan J.A.'s conclusion that "[a]ll of these facts were for the jury to assess" (p.77). There is nothing in the compendium of accumulated judicial experience that should cause concern that the jury went astray in its review and assessment of the evidence. Even though it might have been reasonable for the jury to conclude otherwise, it was perfectly reasonable for the jury to be satisfied beyond a reasonable doubt that Biniaris had acted with the requisite intent for murder. [Emphasis added.]
- [42] It seems to me that counsel is inviting this Court to undertake on appeal a reweighing of the evidence. This is exactly what the Supreme Court of Canada in *Housen* said that an appeal court should not do, echoing the earlier comments of Arbour J. in *Biniaris*. Such an approach exceeds the scope of appellate review. Provided there is some evidentiary basis upon which the trial judge could reasonably have made the factual findings (including inferences of fact) that he did, there is no basis upon which this Court may interfere.
- [43] Moreover, while it is an error of law for a trial judge not to consider all of the evidence on a critical issue before deciding guilt, a trial judge need not demonstrate the extent of his deliberation on each item of evidence. This principle was reiterated in *R. v. Walle*, 2012 SCC 41, 348 D.L.R. (4th) 375 where Mr. Justice Moldaver, for the Court, explained:
- [46] ... The appellant's chief complaint is that the trial judge failed to consider all the evidence relevant to intent before deciding on that issue. A failure of a judge to consider all the evidence relating to an ultimate issue of guilt or innocence constitutes an error of law: *R. v. Morin*, [1992] 3 S.C.R. 286, at p. 296; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 31-32. However, as Sopinka J. made clear in *Morin*, there is "no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts", and "unless the reasons demonstrate that [a consideration of all the evidence in relation to the ultimate issue] was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect": p. 296. I see no failure to consider all the relevant evidence in this case.
- [44] These comments in my view are apposite in this case. Here, the trial judge carefully reviewed all of the evidence, both expert and lay. After weighing that evidence, he made findings of fact from which he drew inferences of fact in support of his determination that Mr. Damin had the requisite intent for murder. I am unable to find any error in his inference-drawing process that would support this ground of appeal.
3. Is the verdict unreasonable or unsupported by the evidence?
- [45] Counsel for Mr. Damin submits the verdict was unreasonable or cannot be supported by the evidence. Specifically, he contends that the trial judge misapprehended the evidence of Dr. Smith and drew erroneous inferences from the evidence that formed the basis for his finding that the Crown had established beyond a reasonable doubt that Mr. Damin had the requisite intent for murder. He submits that the conviction should be set aside and a verdict of manslaughter be substituted or alternatively a new trial be ordered pursuant to s. 686(1)(a) (i) of the Criminal Code, R.S.C. 1985, c. C-46.

- [46] The Supreme Court of Canada in *R. v. R.P.*, 2012 SCC 22, 344 D.L.R. (4th) 408 reiterated the principles it had earlier espoused in *R. v. Yebes*, [1987] 2 S.C.R. 168 and *Biniaris*. Writing for the Court in *R.P.*, Madam Justice Deschamps summarized:
- [9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).
- [47] The central issue in this case was whether the evidence established beyond a reasonable doubt that Mr. Damin had the subjective foresight (i.e., knew) that stabbing the deceased as he did would cause her death or would cause such grievous bodily harm that her death was likely to result. The trial judge instructed himself on the legal test to found a conviction for murder by adopting the summary of the requisite mens rea from *Robinson*. All agree that the legal test was correctly reviewed by Mr. Justice Joyce in that decision, where he wrote that "evidence of a mental condition that falls short of a mental disorder that renders the accused not criminally responsible, may raise a reasonable doubt as to whether the accused had the necessary specific intent" (para. 107), and further:
- [110] Where there is evidence of a mental condition relevant to intent, this evidence must be considered along with all the other evidence in determining whether the accused had the intent requisite for murder. Such consideration does not create the notion of diminished responsibility, which does not exist in our law. Rather it simply recognizes that if the accused was suffering from some sort of mental condition at the time of the offence, that mental condition is a circumstance that might affect whether or not he formed the necessary specific intent (see *R. v. Bailey* (1996), 111 C.C.C. (3d) 122 (B.C.C.A.)).
- [48] The specific intent for murder is generally established through circumstantial evidence and the application of what has been described as the common sense inference that "if a sane and sober person acts in a way that has predictable consequences that person usually intends, or means to intend, to cause those consequences": *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523 at para. 64. This inference is available even in cases where the accused testifies that he or she is unable to recall what happened or his or her intent at the relevant time: *R. v. Kokotailo*, 2011 BCCA 465, 313 B.C.A.C. 91 at paras. 16-18.

[49] The trial judge found that Mr. Damin's depressive state at the time of the offence did not negate his capacity to form the specific intent for murder. While arguably other inferences could have been drawn from the evidence, it cannot in my view be said that this verdict was unreasonable. In my opinion, the trial judge made reasonable findings based on the totality of the evidence: Walle at para. 46.

[50] In the result, I am satisfied the trial judge made no error of law and that the verdict was one that a properly instructed trier of fact, acting judicially, could reasonably have rendered. I would dismiss the appeal.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Mr. Justice Groberman"

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Prepared on 29 October 2026 · Esheria