

CANADA / JUDGMENT

R. v. Pi

2023 BCCA 105

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 105 R. v. Pi

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Pi,

2023 BCCA 105

Date: 20230307

Docket: CA47842

Between:

Rex

Respondent

And

Pee Lee Pi

Appellant

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Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia,
dated February 18, 2021 (R. v. Pi, 2021 BCSC 105,
New Westminster Docket X082069).

Counsel for the Appellant:

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Place and Date of Hearing:

Vancouver, British Columbia

December 15, 2022

Place and Date of Judgment:

Vancouver, British Columbia

March 7, 2023

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Willcock

Summary:

Following a judge alone trial, the appellant was convicted of second degree murder. He appeals his conviction and asks the Court to order a new trial, or, alternatively, to enter a conviction for the lesser included offence of manslaughter. The appellant alleges the trial judge misapprehended his evidence and that of two experts as to whether he could foresee the consequence of his actions, failed to consider evidence of heavy and chronic use of methamphetamine on his mental state, and applied a lower standard of culpability than that required for murder. Held: Appeal dismissed. The judge did not misapprehend evidence, nor did the judge fail to consider the toxicology evidence on the effects of methamphetamine. It was for the judge to determine the ultimate factual issue as to whether the appellant knew death was likely when he inflicted the injuries on the victim. The judge applied the correct test for murder.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. Overview

- [1] In a trial before a judge alone, Pee Lee Pi was convicted of second degree murder in the death of Tee Bor in his home on Sunday, 17 February 2019: 2021 BCSC 105.
- [2] Mr. Pi appeals from that conviction. He alleges that the judge misapprehended Mr. Pi's evidence at trial and that of two experts who also testified. Mr. Pi suggests that his heavy and chronic use of methamphetamine prevented him from forming the specific intent to commit murder. He also argues that the judge applied a lower standard of culpability than the requisite specific intent.
- [3] Mr. Pi asks the Court to overturn the conviction and order a new trial or, alternatively, enter a conviction for the lesser-included offence of manslaughter.
- [4] There is no dispute that Mr. Pi stabbed Tee Bor and that he inflicted four wounds to the deceased's torso. The only issue before the court below was that of intent - was it murder at law, or manslaughter?
- [5] I have concluded that the judge made no reviewable error in reaching his conclusion and entering the impugned conviction. I would dismiss the appeal.

II. Background

- [6] Mr. Pi is part of the Karen community, as was the victim, Mr. Bor. The Karen are a people from Myanmar. A number of witnesses as well as the accused are Karen speakers and testified at trial through an interpreter.
- [7] Mr. Pi was 28 years old at trial. He was born in a refugee camp in Thailand and came to Canada with his parents and four siblings in 2010. Mr. Bor was 68 years old at the time of his death. He lived in Unit 55 of a townhouse complex in Surrey with his wife, Nya Wah. Mr. Bor and Ms. Wah had two sons. The elder son, Bah So Gay, is an adult with a mental disability who lived in an upstairs bedroom of his parents' home.
- [8] The younger son is Tu Lu Ku. At the time of the offence he and his family lived in a nearby townhouse in the same complex as his parents; prior to moving in September 2018, Mr. Ku and his family had been living with his parents in Unit 55. Mr. Pi and Mr. Ku were acquaintances who had worked together as roofers. From time to time, they used methamphetamine together. During the visits when they used methamphetamine, Mr. Ku was living with his parents and Mr. Pi would visit him there. During those visits, Mr. Bor was sometimes present and would exchange pleasantries with Mr. Pi.
- [9] At the time of the incident in question, Mr. Pi was separated from his wife and their children. He was living as a short-term sub-tenant in a basement suite in Surrey with a Karen woman named Ou Ou and six other people. Over the weekend of 15-18 February 2019, however, Mr. Pi was staying with his sister, Salah Paw, and her husband and children, who also live in Surrey.

- [10] Mr. Bor's death occurred the afternoon of Sunday, 17 February 2019. The findings of fact made by Justice Williams at trial are based upon physical evidence at the scene, video surveillance recordings obtained from the area outside the victim's residence and along portions of Mr. Pi's route, Mr. Pi's testimony, and a statement, accepted as evidence at trial, of Mr. Bor's granddaughter (Mr. Ku's daughter), referred to as M1. M1 and her younger brother, M2, were visiting their grandfather at the time of his death. M1 was an eyewitness to the events. She was seven years old at the time.
- [11] That Sunday afternoon, Mr. Bor was home with M1 and M2 in the living room, and his elder son was upstairs. There is no basis to believe the elder son had any involvement in the events.
- [12] According to the video surveillance evidence, Mr. Pi arrived at the townhouse complex at 1:34 p.m., approached the door of Unit 55, was out of view for just over a minute. He then moved away from the entrance and walked away. He returned at 1:37 p.m., again approached the door and was out of view for just under a minute. He then moved away from the entrance and walked away. He approached the door a final time, at 1:51 p.m. Mr. Pi was out of view for 16 minutes and left at 2:07 p.m.
- [13] A summary of M1's statement by the trial judge discloses that her grandfather let a man with dark skin into the home, and they spoke in the Karen language. The man asked her grandfather for something and he did not have it, and the man stabbed her grandfather with a black folding knife, and then left. Other than the stabbing, M1's statement discloses that the men did not touch each other.
- [14] After the stabbing, M1 ran to her own nearby townhouse with M2 and told Mr. Ku to call 911. Mr. Ku ran to his father's house where Mr. Bor was lying and called 911 at 2:12 p.m. Officers and paramedics arrived quickly and attempted to resuscitate Mr. Bor. He was transported to hospital and pronounced dead shortly afterwards.
- [15] Mr. Bor's autopsy revealed four injuries that the autopsy physician deemed to have caused Mr. Bor's death and to have been inflicted by a knife. They were a wound in the upper right chest and three wounds in the abdomen. Mr. Bor also had what were deemed to be defensive injuries to his hands.
- [16] After Mr. Pi left the scene, video evidence showed him moving at a normal walking pace to his usual residence, wearing the black jacket he had been wearing at Unit 55. When he walked away from his residence shortly afterwards, he was wearing a black and white hoodie that he had previously been wearing under the jacket. Around 6:30 p.m. he arrived at his sister's residence and spent the evening there.
- [17] On 27 February 2019, Mr. Pi was committed under the Mental Health Act, R.S.B.C. 1996, c. 288, and held until 7 March 2019, at the Surrey Memorial Hospital psychiatric ward. The triage diagnosis was psychosis.

[18] In July 2019, Mr. Pi was arrested for the murder of Mr. Bor.

III. Judgment

[19] During a 14-day trial before a judge alone, the defence did not dispute that Mr. Pi stabbed Mr. Bor and inflicted the wounds that caused his death, satisfying the actus reus of the charged offence. The issue was whether the Crown had proven that Mr. Pi had the requisite intent for murder.

[20] The judge set out the test under s. 229(a)(ii) of the Criminal Code: the Crown must prove beyond a reasonable doubt that, at the time Mr. Pi acted to cause the victim's death, he meant to cause the victim bodily harm that he knew was likely to cause death, and was reckless as to whether or not death ensued.

Positions of the Parties

[21] The Crown's theory was that Mr. Pi came to Unit 55 determined to confront Mr. Ku. When Mr. Bor was unable to assist him in locating Mr. Ku, Mr. Pi, in frustration and anger, intentionally stabbed Mr. Bor in the torso. The Crown says that the circumstances, including the weapon used, the location of the injuries, and Mr. Pi's testimony about his understanding of the harm that stabbing a person in their torso can do, established beyond a reasonable doubt that Mr. Pi knew that his action was likely to cause Mr. Bor's death.

[22] Mr. Pi agreed that he came to Unit 55 determined to confront Mr. Ku. However, he argued that he did not have the requisite intent for murder due to his mental state at the time, specifically psychosis and paranoia induced by methamphetamine use. He raised the defences of 1) disturbance of the mind; and 2) cumulative or rolled up effect including his perception of provocation or the need for self-defence, psychosis, drug use, alcohol or rage.

[23] Mr. Pi submitted that the Court should find him not guilty of second-degree murder, and that a conviction for the lesser included offence of manslaughter was warranted in the circumstances.

[24] The Crown argued that there was no air of reality to the defences of self-defence and provocation.

[25] The Crown called 14 witnesses, including psychiatrist Dr. Rakesh Lambda. The defence called four witnesses, including Mr. Pi and psychiatrist Dr. Andrew Kolchak. Two toxicologists' reports were admitted on the effects of crystal methamphetamine use.

Mr. Pi's Evidence

- [26] Mr. Pi gave evidence of his drug use at the material time, testifying that his use of methamphetamine had grown from using small amounts to being heavy and pervasive, that he was "high all the time", and would spend from \$20-\$50 per day on the drug. He said that Mr. Ku had told others that Mr. Pi was a drug user and an addict. That information was a factor in Mr. Pi's separation from his wife.
- [27] Mr. Pi also gave evidence of an event that he said had affected his mental state. In November 2018, Mr. Ku had given Mr. Pi \$20 to purchase methamphetamine. Mr. Ku arranged for Mr. Pi to meet with men who would sell him the drug, drove Mr. Pi to the meeting place, but was not present for the meeting. The men took Mr. Pi's money but did not give him drugs, and asked about Mr. Ku. There were no weapons and no violence or threats of violence during this encounter.
- [28] Mr. Pi testified that he became fixated on the idea that he was in danger from these men, causing him to be paranoid and fearful of going out in public. He said that he purchased a switchblade knife, the knife that caused Mr. Bor's injuries, for his protection. Mr. Pi also said that he wanted to discuss the matter with Mr. Ku, but that his attempts to contact Mr. Ku by phone and text message were unsuccessful.
- [29] Around the time of the offence, Mr. Pi said he was unable to sleep, was experiencing fear and distress, and was hearing voices from his television telling him what to do (although the judge concluded this was not a factor in Mr. Bor's death, but rather evidence of his mental state at the time). Mr. Pi was still going to work during this period.
- [30] Mr. Pi testified that on the day of Mr. Bor's death, he first went to Unit 55 and stepped just inside the front door. He asked Mr. Bor to have his son text or call him. The encounter was pleasant. Mr. Pi said he then left for a half hour and went back to his residence, consumed methamphetamine and drank two cans of beer. He then decided to go back to Unit 55 and wait for Mr. Ku there. He believed that Mr. Ku still lived there.
- [31] When Mr. Bor answered the door the second time, Mr. Bor had a knife in his hand, but Mr. Pi said he knew it was for food preparation. Mr. Pi stepped inside and told Mr. Bor to call his son, to which Mr. Bor responded by asking him if he was looking for Mr. Ku because he was going to kill him. Mr. Pi testified that this alarmed him, and he took out his knife and pointed it at Mr. Bor. Mr. Pi said he knew Mr. Bor to be a kind man but he was overwhelmed with fear and confusion. He told Mr. Bor to drop the knife, and Mr. Bor did so. Mr. Pi told Mr. Bor to go get his son, upon which the two men went upstairs. Mr. Pi saw the elder son alone in his room and told Mr. Bor to call his son, presumably Mr. Ku. The two came back down into the living room, Mr. Pi still holding the knife.

- [32] Mr. Pi testified that Mr. Bor picked up the telephone and hit Mr. Pi on the neck with it, and then tried to grab the knife from him by the blade. They wrestled, and Mr. Pi says he does not remember how many times he stabbed Mr. Bor or where he stabbed him, but that he was trying not to stab him. He agreed that he maintained control of the knife the entire time.
- [33] Mr. Pi stated he had no intention to kill Mr. Bor and "had nothing in mind to hurt him". He agreed in cross-examination that he knew the knife had the capacity to cause serious injury if it was used to stab someone in the chest or stomach, that vital organs are in the torso, and that if he stabbed someone in the torso, he "ran the risk" of causing an injury that was going to kill them.

The Psychiatric Evidence

- [34] The judge summarized the evidence of the two psychiatrists who testified as to Mr. Pi's mental state.
- [35] Dr. Kolchak was retained by the defence, and interviewed Mr. Pi on two separate occasions. His opinion was that, on 17 February 2019, Mr. Pi was intoxicated with methamphetamine, was experiencing a substance-induced psychotic disorder, and was experiencing psychotic symptoms, such as paranoia. Dr. Kolchak opined that in the context of Mr. Pi's paranoia, he interpreted Mr. Bor's holding a knife as a threat, and that was a factor in their ensuing struggle. He stated, however, that he did not think that the intoxication and paranoia had affected Mr. Pi's understanding of "the nature and quality of his actions", or his ability "to foresee the consequences of his actions, that his stabbing will cause harm to the person". Dr. Kolchak also stated that he considered it less likely that Mr. Pi intended to kill the victim, and that the death was "accidental".
- [36] Dr. Lamba was retained by the Crown. He did not interview Mr. Pi, but was fully acquainted with the trial testimony of key witnesses. Dr. Lamba accepted that Mr. Pi was a methamphetamine user at the time leading up to the event. He did not believe, however, that Mr. Pi's condition rose to the level of a psychotic disorder, and was more in the nature of a "delusional atmosphere" or "paranoid ideas". He opined that Mr. Pi's mental state "was not disturbed to the extent that he would not understand the consequences of his actions".
- [37] The doctors also gave opinions on the circumstances of Mr. Pi's 27 February detainment under the Mental Health Act, discussed in the next section. Dr. Lamba was of the opinion that those events were consistent with a substance-induced psychosis that appeared to be new. Dr. Kolchak viewed the events as supportive of his conclusion that Mr. Pi had a psychotic disorder and that the symptoms were worsening.

Other Evidence

- [38] Mr. Pi's older sister Salah Paw testified that over the weekend of 17 February there was nothing unusual about her brother's mood or behaviour. Ms. Paw and Ou Ou, as well as Ou Ou's daughter who also lived at Mr. Pi's residence, said they did not see Mr. Pi using drugs, they would not permit drug use in their homes, and they did not observe anything that caused them to suspect he was involved in the use of illicit substances.
- [39] Ou Ou and her daughter also gave evidence of Mr. Pi's behaviour on 26 February 2019, in which he was acting strangely as if having a seizure, appeared to be intoxicated, said strange and frightening things to them, and when police were called, said to the attending officer that he saw a Buddha who told him to kill himself and others around him. On 27 February, the officers apprehended him under the Mental Health Act and took him to Surrey Memorial Hospital, where the records indicate bizarre conduct and threatening behaviour. As mentioned, the triage diagnosis was psychosis. He was prescribed anti-psychotic medication. Within three days at the psychiatric unit, Mr. Pi was calm, settled and stable.
- [40] In addition, there was evidence from Mr. Pi's arrest for an unrelated charge on 20 February 2019, in which the arresting, searching and interviewing officers observed no indication of impairment or mental illness.

Findings

- [41] The judge concluded that the evidence clearly constituted proof of the specific intent necessary for second degree murder. He found that when Mr. Pi inflicted the wounds, he knew that if he stabbed someone in the torso he ran the risk of causing an injury that would kill them. The judge stated he did not consider it necessary to rely upon the "common sense inference" that a sane and sober person intends the natural and probable consequences of their actions, but added that the evidence had not established Mr. Pi's state of mind was sufficiently mentally disrupted as to render this inference unsafe or inappropriate: at para. 165.
- [42] The judge accepted that Mr. Pi was a regular user of methamphetamine to an extent that caused significant disruption in his life, but not to an extent that had caused him to lose control of his thoughts and actions. The judge therefore did not accept that, at the relevant time, Mr. Pi was in a drug-induced mental state that was either an active psychosis or significant intoxication so as to raise a doubt that he was aware of his actions and their consequences: at paras. 173, 178.
- [43] In making this finding, the judge relied on the observations of Ms. Paw, Ou Ou and her daughter, as well as the evidence of the two psychiatrists, preferring that of Dr. Lamba. The judge adopted Dr. Lamba's interpretation of the circumstances surrounding Mr. Pi's 27 February committal, stating that he was unable to conclude that Mr. Pi was in psychosis at the time of Mr. Bor's death, ten days before.

- [44] The judge interpreted Dr. Kolchuk's opinion that the death was "accidental" as meaning that Mr. Pi did not go to Mr. Bor's residence with the objective of killing him and that the death of Mr. Bor was not an intended outcome. The judge stated that this explanation was not "legally correct": at para. 161. Most significantly, in the judge's view, there was no substantial difference in the opinions of the two doctors on the critical point that Mr. Pi understood the nature and quality of his actions and was able to foresee the consequences of them.
- [45] Further, the judge disbelieved Mr. Pi that he had returned to his residence and consumed alcohol and methamphetamine right before confronting Mr. Bor, based on the short time (13 minutes) between his final two visits to Unit 55. The judge rejected the defence's argument that this was memory loss consistent with methamphetamine use and paranoia, based on his observation that Mr. Pi's testimony did not leave any impression of faulty or deficient memory.
- [46] In light of Mr. Pi's concession in cross-examination that he had not consumed any other drugs that weekend, since Friday, the judge concluded that Mr. Pi was not under the influence of drugs or alcohol when he stabbed Mr. Bor and found his assertion that he was "always high" to be less credible: at para. 177; TS, p. 257, ll. 12-14.
- [47] The judge questioned the reliability of Dr. Kolchak's opinions because they were based in part on his acceptance of Mr. Pi's assertion that he had used methamphetamine the day and night prior to the event and the day of the event.
- [48] The judge otherwise accepted Mr. Pi's version of events at the residence. However, he concluded that self-defence had not been made out because the act committed by Mr. Pi was not reasonable in the circumstances, basing this on factors such as the discrepancy in age, health and physical ability between Mr. Pi and Mr. Bor and the fact that Mr. Pi retained control of the knife at all times. The judge further considered that a lesser response from Mr. Pi than repeated thrusts with the knife, such as stepping back while keeping the knife in his control, would have been viable.
- [49] The judge further concluded that the defence of provocation had no application. He found that the conduct of Mr. Bor would not constitute an offence of the kind set out in s. 232(2) of the Code, and that Mr. Bor was obviously acting in self-defence.
- [50] Finally, the judge considered whether the combined evidence of mental distress, intoxication, and perceived need to act in self-defence had cumulatively raised a reasonable doubt, and concluded it had not.
- [51] The judge found Mr. Pi guilty of second-degree murder.

IV. Issues

- [52] The issues before the Court are:
1. Did the trial judge misapprehend:

- i. the expert evidence; or
- ii. the evidence of the defence

as to whether Mr. Pi could foresee the consequences of his actions?

- 2. Did the judge fail to consider the impact of high dose or chronic use of crystal methamphetamine on Mr. Pi's mental state?
- 3. Did the judge apply an incorrect standard of culpability than the requisite specific intent for murder, for example, on the basis that Mr. Pi "ran the risk" of causing death?

V. Appeal

- [53] With regard to the evidentiary issues, Mr. Pi submits that in light of the trial judge's misapprehensions and failures to consider evidence, the Crown has not discharged its burden to show beyond a reasonable doubt that he was able to formulate the specific mens rea required for murder. He says that, viewing the record as a whole, the misapprehensions and failures go to the substance of the essential part of the reasoning process: *R. v. Lohrer*, 2004 SCC 80 at paras. 6, 8.
- [54] Mr. Pi submits that the gravamen of the offence is manslaughter, for which the mens rea is "objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, in the context of a dangerous act": *R. v. Creighton*, [1993] 3 SCR 3 at 44-45, 1993 CanLII 61.
- [55] The respondent Crown submits that Mr. Pi's submissions on these points essentially ask this Court to retry the case and substitute findings the appellant would have preferred. It says that Mr. Pi does not identify any actual mistake of the judge on the substance of the evidence, nor any failure to give effect to evidence or to consider evidence relevant to a material issue, as would be required to establish a misapprehension under s. 686(1)(a)(iii) of the Criminal Code.
- [56] The Crown says the reasons for judgment of the trial judge are responsive to the evidence and live issues at trial and that this Court should not interfere with the judge's factual findings as to the appellant's mental state. It says that a judge's findings of fact, including inferences and evaluations of expert and lay evidence, are owed deference on appeal absent palpable and overriding error.

Issue #1: Did the judge misapprehend the expert evidence or the evidence of the defendant as to whether Mr. Pi could foresee the consequences of his actions?

Positions of the Parties

The Expert Evidence

[57] The heart of Mr. Pi's submission is that the judge wrongly concluded that each of the doctors had opined that Mr. Pi had subjective foresight of Mr. Bor's death. Mr. Pi submits that neither expert provided such evidence. In particular, Mr. Pi submits that Dr. Kolchak's evidence is that Mr. Pi foresaw the harm of stabbing but not the fatal outcome.

[58] The judge at paras. 125 and 129 said:

To my understanding, the difference in the opinions of Dr. Kolchak and Dr. Lamba, with respect to Mr. Pi's mental state at the time of the infliction of the fatal injuries, is not a large one. More importantly, whatever difference there is, it seems to me, is not of critical importance in that Dr. Lamba, like Dr. Kolchak, concludes that, at the relevant time, Mr. Pi's mental condition was not disturbed to the extent that he would not understand the consequences of his actions, and he concludes that Mr. Pi was able to foresee those consequences.

All that said, the critical conclusion, as I have indicated, is that each of the doctors are ad idem in their view that Mr. Pi, at the time he inflicted the fatal injuries upon Mr. Bor, understood the nature and quality of his actions and was able to foresee and appreciate the consequences of his actions.

[Emphasis the appellant's.]

[59] Dr. Kolchak's testimony is reproduced by Mr. Pi:

I, again, believe that Mr. Pi was generally led by his paranoia, which was related to danger he perceived from the world around him. He did not perceive the danger from the victim until he interpreting [sic] holding the knife while cooking as related to -- to potential danger to him. He made decisions on the fly and although I cannot say for sure that he didn't intend to kill him, it seems that the actions were accidental or incidental to what he experienced at the time. And it is my opinion that if he [indiscernible/videoconference] the truth, he didn't intend to kill the victim, that the death was - death itself as accidental.

[TS, p. 294.]

[60] Mr. Pi also stresses Dr. Kolchak's report, entered as an exhibit at trial:

It is my clinical opinion, based on his report to me, that Mr. Pee Lee Pi understood [the] nature and quality of his actions at the time of the offense. It is less likely that he intended to kill the victim, and therefore, death was accidental. However, I cannot opine on his intent with certainty as Mr. Pi could not recall the details of the offense. He likely acted in panic hoping to defend self while interpreting the world around him and actions of other people as threatening in the paranoid context brought about by psychosis stemming from chronic stimulant use.

[61] Mr. Pi also points out that Crown counsel did not question Dr. Kolchak on whether the appellant had any subjective foresight that the stabbing could likely lead to the death of Mr. Bor.

[62] Further, Mr. Pi submits that the judge misapprehended Dr. Kolchak's evidence on his use of the word "accidental", interpreting this in a legal sense as the defence of accident. The judge at para. 161 states:

The evidence of Dr. Kolchak included an opinion that it was "less likely that Mr. Pi intended to kill the victim, and therefore the death was accidental". By this, I understand him to mean that Mr. Pi did not go to Mr. Bor's residence that day with the objective of killing him, and thus the death of Mr. Bor was not an intended outcome. With due respect to Dr. Kolchak, that explanation is not legally correct. There is no defence of accident raised by Mr. Pi, nor would such a result be tenable on the evidence. Accordingly, the concept of accident will not form any part of this Court's analysis.

[63] Mr. Pi argues that Dr. Kolchak was using the common meaning of the words "accident" and "accidental" to emphasize the unintended consequence of the encounter between Mr. Pi and Mr. Bor, not in a legal sense to suggest that Mr. Pi did not intend to inflict any harm whatsoever. Mr. Pi says this evidence suggests that he did not comprehend that stabbing was likely to cause death nor was he reckless as to whether death would ensue.

[64] With regard to Dr. Lamba's evidence, Mr. Pi emphasizes that Dr. Lamba did not interview the appellant, but relied on police reports, transcripts of testimony, and collateral medical information.

[65] Mr. Pi submits that Dr. Lamba initially opined that the appellant was not suffering from stimulant-induced psychosis at the time of the offence and was able to foresee the consequences of his actions, but during cross-examination backed away from that position, conceding that Mr. Pi may have been suffering from paranoia at the time of the offence:

Q: Well, are you - are you expecting Mr. Pi to have been consistently psychotic showing - for this not to be a new symptom, is it that this presents consistently psychotic over a number of days?

A: So what I'm saying is that on those previous episodes, or on those previous occasions, 23rd, 20th, and even 17th, I cannot rule out that he didn't have some underlying mild paranoia symptoms, but the presentation on 26th was different.

[TS, p. 422.]

[66] Mr. Pi submits that neither expert, directly or by implication, opines on whether the appellant knew he was likely to kill the victim by stabbing him. Both agree, rather, that the appellant knew that his actions "could" cause bodily harm.

[67] The Crown argues that the judge consistently and correctly describes the experts' opinions as being that Mr. Pi "understood the nature and quality of his actions" and was "able to foresee the consequences of his actions". It says this was Dr. Kolchak's view despite his opinion that the appellant was intoxicated and experiencing a mental disturbance at the relevant time.

- [68] The Crown argues that the judge never suggests that the experts testified about what the appellant actually foresaw, as a matter of fact. Rather, the judge understood that their opinions were limited to psychiatric matters such as whether intoxication or mental disturbance had affected the appellant's ability to know the likely consequences of his actions. It was the judge's role to determine the ultimate factual issue: whether Mr. Pi knew death was likely when he stabbed Mr. Bor.
- [69] With regard to Dr. Kolchak's use of the word "accidental", the Crown argues that the judge's interpretation (that "the death of Mr. Bor was not an intended outcome") better accords with Dr. Kolchak's own explanation of this aspect of his report -- Dr. Kolchak specified in his testimony that "[t]he reason why I came to the conclusion is because there was no known animosity between him and the victim ": TS, p. 294.
- [70] In any event, the Crown submits that the interpretation of this word could not have impacted the verdict. It says the judge accorded much of Dr. Kolchak's report no weight because, as mentioned, the judge found that "aspects of his opinion are based upon propositions not in the evidence": at para. 117.

Mr. Pi's Evidence

- [71] Mr. Pi submits that the judge similarly misapprehended his evidence in concluding that he foresaw the likely consequence of death from his actions. Mr. Pi says he only gave evidence that he knew the general harm that can result from stabbing in the torso, not that he had actual foresight of Mr. Bor's death in this specific instance.
- [72] He states that when questioned on this during cross-examination, he only referred to the general proposition of the harm a knife can cause and the potential consequences. It was not put to him that when he stabbed Mr. Bor, he had the foresight to kill or cause bodily harm that was likely to kill him. Mr. Pi further submits that it is uncertain whether his evidence was influenced by having the benefit of looking at the situation in retrospect rather than the requisite foresight at the time.

[73] Mr. Pi testified as follows in cross-examination:

Q But you know that inside your torso there are various vital organs that we all need to function properly to keep ourselves alive?

A Yes.

Q And you'd agree that, with this knife, you knew if you stabbed someone in their torso that you run the risk of causing them an injury that was going to kill them?

A Yes, and then when I first bought this knife also I had no intention to kill other people or to hurt other people. In case that somebody would come and attack me, then I will use it to protect myself or to retaliate back

Q Right. But you knew that that knife you purchased was a potentially lethal weapon if you were to stab someone with it in their torso?

A Yes.

Q And you know that people who get stabbed in their torso, they can bleed to death?

A I don't know about that.

Q You're saying you -- all right. You -- you're aware that if you stab someone with a knife that they'll bleed?

A Yes.

[TS, p. 249.]

Q And, again, as a general proposition, you're aware that causing serious injury to someone's chest or stomach area can cause life-threatening wounds? A I did not know exactly, but I had a sense of the possibility.

[TS, p. 250.]

[74] Mr. Pi submits that in *R. v. Vaillancourt*, [1987] 2 SCR 636, 1987 CanLII 2, the Supreme Court of Canada made it clear that the accused must have actual subjective foresight of the likelihood of death. Mr. Pi says that there was no evidence before the judge that he knew at the time of the stabbing that Mr. Bor's death was likely to ensue.

[75] The Crown submits that the reasons do not suggest that the judge was under any such misapprehension, as the judge never states that Mr. Pi admitted to having the requisite foresight at the moment he stabbed Mr. Bor. In the Crown's submission, the judge considered Mr. Pi's admitted prior knowledge of the consequences of stabbing someone in the torso relevant to determining what Mr. Pi knew when he stabbed Mr. Bor in the torso. This, along with all the evidence, persuaded the judge that Mr. Pi knew death was likely at the critical time.

Analysis

[76] The Supreme Court of Canada in *Lohrer* said the following with respect to misapprehension of evidence (at para. 1, quoting *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 1995 CanLII 3498 (C.A.) at 221):

If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

- [77] For a conviction to be overturned on this basis, an appellate court must determine, first, whether the trial judge did in fact misapprehend evidence. A misapprehension of the evidence may refer to a mistake as to the substance of the evidence, a failure to consider evidence relevant to a material issue, or a failure to give proper effect to evidence: *R. v. Osinde*, 2021 BCCA 124 at para. 17, quoting *Morrissey* at 218.
- [78] The misapprehension must go to the substance rather than the detail, and be material rather than peripheral to the reasoning of the trial judge. Further, the errors must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction": *Lohrer* at para. 2.
- [79] With regard to the expert evidence, the judge does appear to have misapprehended Dr. Kolchak's use of the word "accidental". I agree that this word was not intended in a legal sense -- Dr. Kolchak was not inviting the court to consider the defence of accident -- but in the common sense of the word, that Mr. Pi did not intend to kill Mr. Bor when he stabbed him. This is supported by the context of the use of the word, such as Dr. Kolchak saying that his "actions were accidental or incidental to what he experienced at the time", that he "acted in a panic" and that he was "led by paranoia", all related to what in Dr. Kolchak's opinion were paranoid symptoms of a methamphetamine-induced psychosis.
- [80] While Dr. Kolchak did opine that, despite the symptoms of psychosis, Mr. Pi could understand the nature and quality of his actions and "foresee the consequences of his actions, that his stabbing will cause harm to the person", in light of his use of the term "accident", in my view the substance of Dr. Kolchak's opinion is that Mr. Pi foresaw the likelihood of bodily harm but did not necessarily foresee that the harm was likely to cause Mr. Bor's death.
- [81] However, I am of the view that even if this did constitute a misapprehension, it does not play an essential role in the reasoning process leading to the conviction. The judge does not suggest that the experts opined Mr. Pi specifically foresaw Mr. Bor's death. Rather, the judge understood both experts to have said that Mr. Pi in general could foresee the consequences of his actions at the time. This on its own would not be enough for a conviction, but as the Crown states, "it was the judge's role to determine the ultimate factual issue: whether Mr. Pi knew death was likely when he stabbed Mr. Bor". The conviction rests on the judge considering Mr. Pi's testimony about his general knowledge of the harm stabbing someone in the torso can do and his testimony about his drug use alongside the testimony of the experts.
- [82] Similarly, with regard to the alleged misapprehension of Mr. Pi's evidence, I find that the judge was not under the false impression that Mr. Pi had testified he had actual foresight. Rather, the judge used Mr. Pi's admitted prior knowledge of the potential harm of stabbing, in light of all of the evidence, to infer that Mr. Pi had the requisite foresight at the time.

Issue #2: Did the judge fail to consider the impact of high dose or chronic methamphetamine use on Mr. Pi's mental state?

Positions of the Parties

[83] Mr. Pi submits that the judge erred by failing to properly consider the toxicology reports tendered into evidence as to the impact of high dose methamphetamine use, and that he further erred in concluding that Mr. Pi was not intoxicated or in a state of active mental disruption at the material time.

[84] At para. 196 of his reasons, the judge stated:

With respect to the defendant's state of mind at the time, as described earlier, I am satisfied that he was aware of what he was doing and understood the effect of his actions. I find no reason to conclude that he was in a state of any appreciable intoxication or active mental disruption. With respect to his mental state more generally, my view is informed by his testimony and that of the psychiatrists, as explained earlier.

[Emphasis added.]

[85] Mr. Pi submits this is contrary to the evidence of toxicologist Wayne Jeffrey, whose report stated that "high dose use of methamphetamine can produce suspiciousness and paranoid thinking, severe agitation, repetitious behaviour, and in some cases prolonged psychosis". Mr. Pi reiterates his testimony that he used approximately \$20 - \$50 of the drug per day, which in accordance with Mr. Jeffrey's report would be 0.5 grams - 1 gram. Mr. Pi points out that this amount falls above the threshold for heavy usage, classified as 0.2 - 0.3 grams per day.

[86] In particular, Mr. Pi argues the trial judge fails to consider what impact this usage may have had on his psychosis in light of the fact that, as the judge summarized from the toxicology reports, methamphetamine drug psychosis can last "days or weeks": at para. 158.

[87] The Crown's brief submission on this matter is that the judge did consider the toxicologists' reports and the appellant's evidence regarding the frequency and intensity of his drug use, at paras. 75-77, 84, 158, and 173. The judge was unable to conclude from this evidence that Mr. Pi was "in a state of any appreciable intoxication or active mental disruption".

[88] The Crown reiterates that Mr. Pi is inviting this Court to re-try the case in his favour, re-arguing matters that fall within the trial judge's domain.

Analysis

[89] As acknowledged by the appellant, the judge did at para. 158 make brief mention of the evidence of the two toxicologists. The final point in his summary of this evidence states:

· With high doses and chronic use, methamphetamine may cause drug induced psychosis. Users may experience confusion, delusions, paranoia, hallucinations, extreme agitation /hyperactivity, hypervigilance, unpredictable and inappropriate, aggressive behavior, non-goal oriented, non-purposeful behaviour and stereotype compulsive behavior. When a person reaches the stage of drug psychosis, reality testing is absent. This stage of psychosis is not an "on and off" phenomenon, but can last for days or weeks.

[90] The judge after this summary goes into the "Analysis and Findings" section of his judgment. The toxicology evidence is not mentioned again. The judge's findings on the effects of methamphetamine on Mr. Pi's mental state occur at paras. 173-178. They can be summarized in three points:

- a) The judge accepted Mr. Pi was "a regular user of methamphetamine, to an extent that caused significant disruption in his life", but did not accept that this dependency was of such a magnitude that "it had taken over his life and caused him to lose control of his thoughts and actions": at para. 173. The judge took into account the observations of Mr. Pi's family and people he lived with who had observed him, as well as police evidence of his conduct on 20 February 2019.
- b) The judge concluded that Mr. Pi's psychotic symptoms leading to his detainment on 27 February 2019 could not be projected backward 10 days to the day of the stabbing. In coming to this conclusion, the judge referred to Dr. Lamba's evidence that Mr. Pi's symptoms stabilized relatively quickly after the detainment and did not recur: at para. 174.
- c) The judge disbelieved Mr. Pi's testimony that he had consumed alcohol and methamphetamine immediately before his confrontation with Mr. Bor: at paras. 175-176.

[91] As stated, this final factor, in combination with the fact that Mr. Pi conceded in cross-examination that he had not consumed drugs since Friday [15 February 2019] led the judge to question the credibility of the assertion that he was "always high and using methamphetamine almost all the time".

[92] I cannot conclude that the judge failed to consider the impact of drug use on Mr. Pi's mental state. He alluded to the expert evidence and provided reasons for his ultimate conclusion. It was for the judge to weigh this evidence and to give effect to it in consideration of the evidence as a whole.

[93] In *R. v. Sundman*, 2021 BCCA 53, this Court again considered intoxication as a defence to murder - that is, as raising a reasonable doubt as to the accused's specific intent.

[94] Justice Fitch summarized the jurisprudence (at para. 103):

As noted in *R. v. Daley*, 2007 SCC 53 at para. 41, intoxication as a defence to murder will arise where there is evidence of "advanced intoxication." In most murder cases, the focus will be on the foreseeability prong of s. 229(a)(ii) and whether the accused knew that the bodily harm he inflicted was likely to cause the victim's death. The degree of intoxication required to advance a

successful intoxication defence may vary depending on the manner in which death was caused. For certain types of homicides, where death is the obvious consequence of the unlawful act, the accused might, as a practical matter, have to establish a particularly advanced degree of intoxication to successfully avail himself of the defence: Daley at paras. 42-43 Evidence that an accused engaged in purposive conduct immediately before and after causing the death of the victim is relevant in determining whether the Crown has proved beyond a reasonable doubt that the accused caused the death with the intent for murder

[Citations omitted.]

[95] The Court in Sundman concluded that the trial judge did not err in his consideration of the evidence and its impact on the mental state of the accused. Justice Fitch continued (at para. 108):

Additionally, the circumstances of the killing presented obvious obstacles to the successful advancement of an intoxication defence. I say this for three reasons. First, the manner in which the killing was committed was such that it would be difficult to argue that anything short of incapacity or, at minimum, a particularly advanced state of intoxication would interfere with Sundman's ability to foresee that "aiming" a "powerful handgun" at the centre mass of McLeod's body and discharging it from fairly close range on at least four occasions would cause bodily harm likely to cause death. Second, there was very little evidence about the quantity of crystal methamphetamine consumed by Sundman prior to the shooting, and no evidence regarding the purity of the drug consumed. Third, there was no evidence that Sundman was, at the relevant time, displaying indicia of impairment by drugs of the kind that might reasonably be considered to impair his ability to foresee the consequences of his actions. His conduct at the time of the shooting, and in its aftermath, was marked by purposive behaviour, including a complex series of actions designed to conceal the commission of the offence and his participation in it. Finally, while Rosland testified that the ingestion of crystal methamphetamine might lead to aggression and impulsivity, he was unable to say whether it would impair an individual's appreciation of the consequences of their actions. As a result, the usual evidentiary foundation upon which the defence of intoxication rests was largely absent in this case.

[96] These observations are apposite here. First, unlike in Sundman, on the finding of the judge here there was no consumption of drugs by Mr. Pi in the lead up to the stabbing. Second, while this is not a case of firing a powerful handgun into the deceased's torso, it is a case of Mr. Pi plunging a knife four times into Mr. Bor's upper body.

[97] Third, as in Sundman, there was no evidence that Mr. Pi was at the relevant time displaying indicia of impairment by drugs of the kind that might reasonably be considered to impair his ability to foresee the consequences of his actions. The evidence was that his conduct at the time of the stabbing and in its immediate aftermath was purposive and according to those around him not in any way out of the normal.

[98] In contrast with Sundman, here there was evidence before the judge of the potential effects of crystal methamphetamine and the experts opined on it in relation to Mr. Pi. While they differed in their assessment of Mr. Pi's symptoms on the date in question and whether these rose to the level of psychosis, both experts agreed at least to this extent: at the relevant time Mr. Pi was capable of understanding the nature and consequences of his actions.

[99] I would not accede to this ground of appeal.

Issue #3: Did the judge apply an incorrect standard of culpability than the requisite specific intent for murder?

Positions of the Parties

[100] In addition to the alleged misapprehensions of and failures to properly consider evidence, Mr. Pi submits that the judge erred in law by applying a lower standard of culpability than that required for murder.

[101] He says this is evidenced throughout the judgment by the language used by the judge: for example, saying that Mr. Pi "ran the risk" of causing an injury that was going to kill Mr. Bor (at para. 101):

In cross-examination, Mr. Pi agreed that he knew the knife he had purchased for self-protection had the capacity to cause serious injury if it was used to stab someone in the chest or stomach area; that vital organs are in the torso; and that if he stabbed someone in the torso, he ran the risk of causing an injury that was going to kill them. He agreed he knew all of those things, but said that when he bought the knife he had no intention to kill or hurt other persons; he said that he had the knife for self-protection.

[Emphasis added.]

and at para. 163:

I conclude that when Mr. Pi inflicted the fatal wounds, a volitional act, he knew the knife had the capacity to cause serious injury if it was used to stab someone in the chest or stomach area; that vital organs are in the torso; and that if he stabbed someone in the torso, he ran the risk of causing an injury that was going to kill them. His own evidence and the opinions of both psychiatrists support that conclusion. In the result, I find the evidence quite clearly constitutes the necessary proof of intent required to establish liability for second degree murder, specifically by the second branch of the intent provision.

[Emphasis added.]

[102] Mr. Pi further submits that the judge at para. 113 used the term "stop the person" and "cause harm to the person" similarly as a test that demonstrated a lower standard of culpability:

Nevertheless, Dr. Kolchak was quite clear in expressing his opinion that, although Mr. Pi was likely affected by the consumption of methamphetamine in the context of intoxication and likely the symptoms of paranoia were worsening, that did not affect his ability to foresee the consequences of his actions. While his reactions in the moment may have been based on fear and exaggerated by his methamphetamine use, he did know that he had a knife and that he used the knife to stop the person. He was able to foresee the consequences of his action, which is that his stabbing would cause harm to the person.

[Emphasis added.]

[103] Mr. Pi submits that "causing harm to a person" and "stopping a person" fall short of the proof of specific intent required.

[104] He submits that in *R. v. Brar*, 2009 BCCA 585 at para. 83, this Court found that a jury instruction substituting the word "could" for the word "likely" resulted in conviction on a lower standard of culpability than is required by law. The judge in that case instructed the jury: "[l]ikely to cause death involves a substantial degree of probability, and means could well cause death": *Brar* at para. 76.

[105] Mr. Pi says the lower standards and incorrect articulations of the test run throughout the judgment and it is only at the final paragraph of the decision that the judge correctly cited the test for mens rea, in a manner that is disjointed from the earlier reasoning.

[106] The respondent Crown submits that the substance of Mr. Pi's submission is to excise discrete words from the judgment and ascribe meaning to them that they do not bear in context. It argues that the judge's use of phrases such as "ran the risk", "causing harm to the person" or "stop the person" are summaries of testimony given at trial, and do not purport to set out a legal test.

[107] In the Crown's submission, not only did the judge explicitly state the correct test several times, but the judge's reasons, approached functionally, contextually, and as a whole, show that he applied the correct test. The Crown cites *R. v. Tessier*, 2022 SCC 35, in which the Court stated:

[45] Appellate courts charged with reviewing the work of trial judges should not read single sentences in isolation, however incongruous they might seem standing alone as statements of the law. A court of appeal must consider the law as it is presented in the whole of the judgment under review []. In light of the presumption that a judge knows the law, including the settled principles of law with which they are regularly confronted, this is the right course for appellate review for weighing supposed errors of law as well as those of fact.

[Citations omitted.]

- [108] The Crown further submits that there is nothing wrong with using language such as "run the risk" in the context of a broader consideration of whether the mens rea for second degree murder is established, so long as it does not purport to describe the applicable legal standard comprehensively. It says, rather, that "run the risk" evokes the third component of the fault element in s. 229(a)(ii) of the Code, that of recklessness as to whether death ensues or not.
- [109] With regard to this third branch, the Crown says that, because anyone who causes bodily harm that they know is likely to cause death must have a deliberate disregard for the fatal consequences they know are likely to happen, the recklessness element is "almost an afterthought": *R. v. Moo*, 2009 ONCA 645 at paras. 46-48; *R. v. Weng*, 2022 BCCA 332 at para. 43.
- [110] The Crown agrees that, per *Brar*, the word "likely" in s. 229(a)(ii) equates to "a substantial degree of probability" and that this is not interchangeable with the word "could". It further acknowledges that it is not sufficient for the accused merely to have been aware of the risk of death and to have "tak[en] a chance": *R. v. Balbar*, 2013 BCCA 315 at para. 36. However, it says this is not what happened here. In the Crown's submission, this case is distinguishable from *Brar* in that the last thing the jury in that case was told was that they could substitute the word "could" for the word "likely": *Brar* at para. 83.

Analysis

- [111] To summarize the test, the fault element in s. 229(a)(ii) of the Code has three components: (1) the intention to cause bodily harm, (2) knowledge that the bodily harm will probably be fatal and (3) recklessness as to whether the victim lives or dies: *Weng* at para. 39, citing *Moo* at para. 45.
- [112] I agree that the judge's use of the term "ran the risk" describes what he concluded was Mr. Pi's recklessness as to whether or not Mr. Bor would die, or the third branch of the test. It was a repetition of what Mr. Pi had agreed to in his evidence. It was not meant to be a comprehensive articulation of the legal test. The judge clearly knew the law and articulated the proper standard:
- [222] In the result, I am satisfied that the evidence proves, to the standard of proof beyond a reasonable doubt, that the defendant Pee Lee Pi committed the second degree murder of Tee Bor as alleged. When he caused Mr. Bor's death, he meant to cause the victim bodily harm that he knew was likely to cause death, and was reckless as to whether death ensued or not...
- [113] I further agree that this case is distinguishable from *Brar* and *Balbar*. In both of those cases the misstatement of the test occurred in jury instructions and no other articulation of the legal test was given.
- [114] I would not accede to this ground of appeal.

VI. Disposition

[115] In the result I would dismiss the appeal from conviction.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Willcock"

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