COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Chu, 2023 ONCA 183
DATE: 20230320
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Simmons, Lauwers and Copeland JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Dung D. Chu

Respondent

James D. Sutton and Maryse Nassar, for the appellant

Naomi Lutes, for the respondent

Heard: March 10, 2023

On appeal from the acquittals entered on May 27, 2021, by Justice Robyn M. Ryan Bell of the Superior Court of Justice, with reasons reported at 2021 ONSC 3825.

REASONS FOR DECISION

[1] This is a Crown appeal from the respondent's acquittals on charges of possession for the purpose of trafficking of cocaine, cannabis marihuana, cannabis resin, MDMA, and crack cocaine; possession of psilocybin and cocaine; and possession of property obtained by crime. The Crown's case was circumstantial. The grounds of appeal raised relate to the manner in which the trial judge assessed

the circumstantial evidence as it related to proof of the elements of possession for all of the offences charged.

[2] The appellant raises three grounds of appeal. After hearing the appellant's submissions, we called on the respondent only in relation to the first ground of appeal. For the reasons that follow, we would dismiss the appeal.

[3] The appellant first argues that the trial judge considered the circumstantial evidence in a piecemeal fashion, rather than considering its cumulative effect, contrary to the principles established in cases such as *R. v. Morin*, [1988] 2 S.C.R. 345, at pp. 354-55, 358; *R. v. B.(G.)*, [1990] 2 S.C.R. 57, at pp. 75-77; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 31; *R. v. Uhrig*, 2012 ONCA 470, 102, at para. 13. In particular, the appellant argues that the trial judge considered individual pieces of evidence, such as the surveillance evidence, and then removed them from consideration – "cast them aside", in the words of counsel for the appellant – before she considered the evidence of the seizures.

[4] We are not persuaded that the trial judge committed the legal error of considering the evidence in a piecemeal manner.

[5] The trial judge was alive to the obligation to consider the circumstantial evidence as a whole and its cumulative effect. She expressly instructed herself on the following inter-related legal principles: (1) that it is the cumulative effect of circumstantial evidence that must be considered against the reasonable doubt

standard; (2) that circumstantial evidence is not to be assessed on a piecemeal basis; and (3) that the burden of proof beyond a reasonable doubt does not apply to individual pieces of evidence. In giving this self-instruction, the trial judge referred to the decisions of this court in *Uhrig*, at para. 13, and *R. v. Wu*, 2017 ONCA 620, 141 W.C.B. (2d) 43, at para. 15.

[6] The trial judge's correct self-instruction on the law is relevant context in considering whether she applied the legal principles correctly. Having said this, the trial judge was required not only to state the legal principles correctly, but also to apply them correctly. We conclude that she did so.

[7] In describing the Crown's theory of its case, the trial judge repeatedly referred to the Crown's reliance on the cumulative effect of the different bodies of circumstantial evidence. Thus, her reasons demonstrate that she was aware of the need to consider the circumstantial evidence cumulatively as it related to the evidence before her.

[8] Near the outset of her reasons, the trial judge described the Crown's position as follows:

> The case against Mr. Chu rests entirely on circumstantial evidence. Eleven witnesses testified at trial, all of whom were members of the Ottawa Police Service. <u>These witnesses testified about their surveillance observations and the seizures; Sergeant Trevor Dunlop provided expert opinion evidence.</u>
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> …

> The Crown's position is that, based on the circumstantial evidence, the only reasonable inference is Mr. Chu was a high-level drug trafficker who was supplying drug traffickers in Ottawa with marihuana and cocaine at the pound and kilogram level. The Crown submits that the totality of the circumstantial evidence is overwhelming and establishes each of the thirteen counts against Mr. Chu beyond a reasonable doubt. [Emphasis added.]

Later in the reasons, after summarizing all of the evidence and the applicable legal principles, the trial judge began her analysis by stating:

> The Crown's theory is that Mr. Chu kept his more valuable drugs at his residence at [Meadowlands address] and used [the Malibu address] as a "stash house." The Crown submits that Mr. Chu had knowledge and control of the prohibited substances and relies on the surveillance evidence to provide context and to "bolster" the seizure evidence. [Emphasis added.]

[9] Read in the context of the reasons as a whole, these passages make clear that the trial judge understood her obligation to consider the surveillance evidence, the opinion evidence, and the evidence of the seizures cumulatively in assessing whether the Crown had met its burden.

[10] Finally, the trial judge's analysis of whether the evidence satisfied her that the Crown had proven possession beyond a reasonable doubt shows that she considered the cumulative effect of the circumstantial evidence and did not assess individual pieces of circumstantial evidence, in isolation, against the reasonable doubt standard.

[11] After providing a detailed summary of all of the trial evidence and instructing herself on the applicable law, the trial judge began her analysis of the evidence by discussing a number of aspects of the evidence which she described as "limitations" of the surveillance evidence and the expert evidence. In substance, in this portion of the reasons, the trial judge identified gaps in the evidence. The fact that the trial judge addressed the weaknesses of particular areas of evidence does not indicate that the sum total of her analysis was looking at individual pieces of evidence in isolation. As this court recognized in *R. v. Ceballo*, 2021 ONCA 791, 408 C.C.C. (3d) 70, at para. 32, it is often necessary to consider the significance of individual pieces of evidence before their cumulative effect can be considered.

[12] After identifying gaps in the surveillance and opinion evidence, the trial judge considered the evidence from the seizures in the context of the gaps she had identified. The appellant argues that the trial judge did not consider the surveillance evidence in her assessment of the seizure evidence. However, the trial judge's reasons make clear that the appellant is incorrect in this assertion. In her discussion of the seizure evidence, the trial judge intersperses consideration of the surveillance evidence. The following passages make this clear (reference to the surveillance evidence by underlining is added):

> Here, the prohibited substances were not situated in plain view of entering either property. Both residences have multiple room[s]. Mr. Chu's movements once inside the residences are unknown. <u>Other individuals had access to both residences and still others visited both residences.</u>

> There are other reasonable inferences available on the evidence that are consistent with Mr. Chu's innocence and raise a reasonable doubt: that Mr. Chu did not have knowledge of the entire contents of [the Meadowlands address] and [the Malibu address], that he did not have the sole control of who accessed either location, and that Mr. Chu interacted with individuals at both locations for legitimate reasons.
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> …
>
> Mr. Chu was a resident of [the Meadowlands address] and had a key to [the Malibu address]. However, he was not the only resident of the first, and not the only one with a key to the latter. Other unidentified individuals visited both properties. Mr. Chu was not observed at [the Meadowlands address] on October 8, the date of the alleged offences. Mr. Chu was inside [the Malibu address] for 13 minutes on October 8. His movements inside the residence on that date are unknown. The prohibited substances were not situated in plain view. Residency and access do not automatically infer knowledge of the entire contents of a residence, nor do residency and access automatically infer control. The constellation of factors around Mr. Chu's relationship to the properties is simply insufficient to satisfy me beyond a reasonable doubt on the elements of knowledge and control. [Emphasis added.]

[13] Thus, in her assessment of the evidence, the trial judge identified "limitations" or gaps in the surveillance and opinion evidence. She then considered the evidence of the seizures in the context of the other evidence, taking into account the gaps that she had identified. At no point in her assessment of the evidence did the trial judge apply the standard of proof beyond a reasonable doubt to any individual piece or pieces of evidence. Nor did she at any point say, having

considered a particular piece of evidence, that she was removing it from her assessment of the evidence as a whole. Rather, she simply pointed out areas where she found there were “limitations” in the evidence. She then considered those gaps in her assessment of whether the evidence as a whole proved possession beyond a reasonable doubt.

[14] We pause to explain how our comments apply to the trial judge’s reference to Sergeant Dunlop’s evidence “serv[ing] to highlight” the limitations of the surveillance evidence. The trial judge’s observation that Sergeant Dunlop could not say that any one of Mr. Chu’s meetings was in relation to drugs or a drug transaction does not mean she took his evidence concerning a pattern of meetings off the table. Her observation means only what it says: Sergeant Dunlop’s evidence offered context, but without more, could go only so far in bolstering the evidence of the seizures. In general, the surveillance evidence concerning Mr. Chu’s meetings did not provide evidence of a transaction taking place or even reveal the identities of the people with whom he was meeting. Further, we do not read the trial judge’s observation as showing a focus on one meeting and ignoring Sergeant Dunlop’s opinion in relation to a pattern of meetings. The trial judge referred to “meetings” (plural) and to there being evidence of both short and long meetings in the same paragraph of her reasons.

[15] A reasonable doubt may arise from “an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond

a reasonable doubt": *J.M.H.*, at paras. 25-30, 39; see also *R. v. Schuldt*, [1985] 2 S.C.R. 592, at p. 610; *B.(G.)*, at p. 70. Where, as in this case, no legal error is revealed, s. 676(1)(a) does not permit appellate intervention on a Crown appeal.

[16] Our reasons should not be read as suggesting that it would not have been open to a trial judge, on the record before the court in this trial, to find that the circumstantial evidence was sufficient to prove the elements of possession beyond a reasonable doubt. The Crown's circumstantial case had significant force. But absent legal error, it was within the trial judge's role as trier of fact to assess whether it satisfied her beyond a reasonable doubt of the respondent's guilt. We are not persuaded that the appellant has demonstrated that the trial judge committed the legal error of weighing the evidence piecemeal. The findings made by the trial judge were open to her on the record before the court.

[17] As noted above, we did not call on the respondent on the second and third grounds of appeal. The second ground raised by the appellant was an argument that the trial judge misapprehended particular aspects of the evidence. This argument of misapprehension of evidence does not raise a question of law alone; rather, it raises a question of mixed fact and law: *R. v. Minuskin* (2003), 68 O.R. (3d) 577 (C.A.), at para. 6; *J.M.H.*, at paras. 24-39. As such, it is not within the scope of the Crown's right of appeal on questions of law alone, pursuant to s. 676(1)(a) of the *Criminal Code*.

[18] The third ground of appeal raised by the appellant was an argument that the trial judge failed to consider joint possession and, thus, only assessed the case against the respondent by considering whether the Crown had proven sole possession beyond a reasonable doubt. We do not accept this submission. The trial judge correctly instructed herself on the law in relation to both constructive possession and joint possession. We see no error in her application of the law in relation to the elements of constructive and joint possession.

[19] For these reasons, we would dismiss the appeal.

"Janet Simmons J.A."
"P. Lauwers J.A."
"J. Copeland J.A."