SCC File No.: 38036

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

ABDULLAH YOUSSEF

APPELLANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT
(ABDULLAH YOUSSEF, APPELLANT)

(Pursuant to Rule 42 of the Rules of the *Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

A. Background and Overview of Appellant's Position

1. On May 9, 2013, someone robbed a branch of the Bank of Montreal in London, Ontario. The only issue at trial was the identity of the robber. The case against the Appellant was entirely circumstantial. The main evidence against the Appellant was that his DNA was found on a knife left at the scene of the robbery, and on a black T-shirt found in a stolen car used by the robber to leave the bank. The robber wore gloves, so the DNA on the knife could not have been deposited during the robbery. There was no evidence that the robber was wearing a black T-shirt during the robbery. The getaway car in which the T-shirt was found, was reported stolen a month and a half before the robbery. Justice George of the Ontario Court of Justice found the Appellant guilty of robbery, use imitation firearm, possession of stolen property, disguise with intent to commit an indictable offence, and drive disqualified, reasoning that the combination of the Appellant's DNA on the knife and on the T-shirt in the car, compelled the conclusion that the Appellant was the robber.

2. The Appellant submitted on appeal that the trial judge erred in finding that the only reasonable inference from the evidence in this circumstantial case, was that the Appellant was the robber. In so doing, he drew inferences that were not available on the evidentiary record, and failed to apply the principles from the now leading case of *R. v. Villaroman*, 2016 SCC 33. In the end, the Appellant submitted that the trial judge's approach resulted in unreasonable verdicts.

3. A majority of the Court of Appeal for Ontario, (Justices Laskin and Blair), in a brief set of reasons, dismissed the appeal, concluding that cumulatively, the circumstantial evidence excluded any reasonable alternative other than the Appellant's guilt.

4. By contrast, Justice Feldman, in dissent, would have acquitted the Appellant. She held that, at its highest, the evidence of the Appellant's DNA on a knife and a T-shirt connected the Appellant to those items at some point in time, but the circumstantial evidence could not support a temporal connection between the Appellant's DNA found on the items and the robbery.

5. The Appellant's position is that the dissenting judgment of Justice Feldman correctly applies the approach set out by this Court, to adjudicating a case based on circumstantial evidence, and that therefore, the appeal must be allowed and acquittals entered.

B. The Description of the Robber and Items Found

6. As noted above, the key issue at the trial was the identity of the person who robbed a branch of the Bank of Montreal around midday on May 9, 2013 in London, Ontario. Shelby Sernaglia, an employee of the Bank of Montreal, retrieved and introduced into evidence a surveillance video of a branch at 1315 Commissioners Road East. The video depicted various vantage points, including the front entrance, the greeting area, and all of the teller stations. The video depicts some of the movements of the witnesses inside the bank and of the robber. The robber was a man who was wearing sunglasses, gloves, a bandana, and a hat. He was nimble enough to climb over a teller station in the course of the robbery. He was waving a gun and demanded that the staff open their drop boxes and remove money from their tills. After the robbery, the robber fled in a stolen VW that was located shortly thereafter, a few blocks from the bank, engulfed in flames. The car was reported stolen by its owner Catherine Donald on March 23, 2013, about a month and a half before the robbery.[1]

7. Police investigation at the scene of the robbery revealed the following: a footwear impression from the sit-down kiosk area of the bank, and a folded black pocketknife behind the counter area, which was attended by bank employees, tellers, and the robber. In the getaway car, the police found remnants of a shoe whose impression was similar to that found in the bank. Also found in the car were a pair of blue jeans, a black nylon balaclava type toque, an armband to a set of glasses, and a black T-shirt (double extra large with a "TAG" label).[2]

8. DNA analysis revealed the following: (i) there were 3 DNA profiles on the knife, one of which was that of the Appellant; (ii) the T-shirt had the Appellant's DNA on it; and (iii) the

[1] Testimony of Sernaglia, Trial Transcript, at pp. 9-17; 61-64; 289-294, Record of the Appellant, Tab 2.
[2] Testimony of Coon, Trial Transcript at pp. 22-54, Record of the Appellant, Tab 2.

balaclava found in the car had 2 profiles, one male and one female, but with no further specific identifying features.[3]

C. The Eyewitness Testimony

9. Larry Smith and his son Ken Smith were having lunch at the Asian Wok restaurant in the same plaza as the Bank of Montreal branch where the robbery occurred. Larry Smith saw a car pull up and stop in a laneway adjacent to the bank branch. The driver got out and left the door open. He saw the person run down the sidewalk and into the bank. Smith sensed "something's wrong". The person came out of the bank shortly thereafter, got into the car and left. He described this person as black, with a dark coat, a hat, and a bandana. His son, Ken, saw the same person leave the bank. He described the person as about 5'9" to 6'0", wearing a bandana or a scarf, and a hat.[4]

10. A number of bank employees and customers testified about their observations of the robbery and of the robber. The witnesses gave various accounts and descriptions of the events. Maria Loureiro, a financial services coordinator, was working as a "sit-down" teller on the day of the robbery. She described how the robber jumped on her desk in a "very energetic" manner. He told her to "stay back". He was wearing dark clothing and something covering his face. She said he had "dark skin" around his eyes. She saw him with a gun in his left hand that he waved around. He told her to "open it" (the cash drawer). He took some money and put it into a bag. He then moved on to the other tellers, all the while saying "stay back". She said that the robber's voice seemed to familiar to her, but she could not say from where she recalled it.[5]

11. Sarah Parney, another bank teller, saw the robber hop over the "sit-down" teller's counter and say "get down on the floor". She described the robber as 5'5" with a slender build, and likely in his 20's or 30's. He moved swiftly and seemed agile. He was wearing a baseball cap, glasses, and a bandana over his face. He had a gun that he pointed at various people. She told the police that the gun looked like an "air pistol" to her, like a BB gun available at a Canadian

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[3] Testimony of Popovic, Trial Transcript at pp. 73-97, Record of the Appellant, Tab 2.
[4] Testimony of L. Smith, Trial Transcript at pp. 265-272, Record of the Appellant, Tab 2; Testimony of K. Smith, Trial Transcript, at 255-260, Record of the Appellant, Tab 2.
[5] Testimony of Loureiro, Trial Transcript at pp. 139-169, record of the Appellant, Tab 2.

Tire store. He heard him tell another teller, Kathy Ruggi, to get on the floor and to open the cash drawer. He then left the bank.[6]

12. Kathleen Ruggi was the "head teller" at the bank. She supervised "the line" of tellers, but that day she was also working as a teller at the counter. She heard a large bang and saw a person jump over the counter at the "sit-down" teller's station. The robber wore a black baseball cap, a black or maroon jacket, ski goggles, a black and white patterned bandana up to his nose, and he had a gun. She thought the gun might have been an imitation. He appeared to be a younger man, based on her observations of his "ease of movement". She saw and heard the robber tell the other tellers to open their cash drawers. Then, he left the bank.[7]

13. The assistant bank manager, Mary Lokhorst, testified that she was on the phone when she saw someone behind the counter where the tellers worked. She saw a person with a gun, waving it in the air. She only saw the robber for few seconds and only from the waist up. She could not remember what words the robber spoke, although she told the police that she thought the robber had a Spanish or Portuguese accent. She later saw a knife behind the counter and alerted the police to its location.[8]

14. A bank customer, Maria Weese, testified that she saw a person jump on the teller's counter. She heard him say, "open it", "open it". The robber had a beige gun in his left hand, which he pointed at the teller. He seemed younger based on her observations of his "attire and agility". He then jumped back over the counter and looked like he wanted to leave the bank. He went to the front door and left.[9]

15. Another customer, Ara Zeledon, was at the bank with his son. He saw the robber jump in front of a teller he had known for a number of years, "Maria" (Loureiro). He heard him say "give me the money", three times after he had jumped over the desk. The robber had a deep voice and seemed young based on how he moved. He told the police the robber was 5'3"'. He wore dark glasses, a black hat, and had a bandana over his face. He carried what looked like a

[6] Testimony of Parney, Trial Transcript at pp. 173-193, Record of the Appellant, Tab 2.
[7] Testimony of Ruggi, Trial Transcript at pp. 196-227, Record of the Appellant, Tab 2.
[8] Testimony of Lokhorst, Trial Transcript at pp. 99-121, Record of the Appellant, Tab 2.
[9] Testimony of Weese, Trial Transcript at pp. 127-135, Record of the Appellant, Tab 2.

plastic gun in his right hand. The robber seemed upset because little money was forthcoming. The robber said "nobody move", as he left the bank. The entire event lasted about 2 minutes.[10]

D. After the Robbery

16. Shortly after the robbery, Alexander Khosin, who was outside cleaning his car, heard a vehicle drive by near his home and later saw and smelled smoke. He saw what looked to him to be a VW burning. Meanwhile, Officer John Dance, had information that the robbery suspect had fled the scene in a silver VW. During a patrol of the area, he heard about a car fire over the police radio. He attended the area of 590 Millbank Drive, which was south of the bank. In between some townhouses, he saw a car fully engulfed in flames. The distance from the bank to the car fire was about 4 kilometers. As noted above, the VW was reported stolen about a month and half before the robbery.[11]

E. The DNA Evidence

17. Various items were seized from the bank and from the burning car. Three items were sent to the Center of Forensic Sciences for analysis: (i) the black folding knife found at the bank; (ii) the black T-shirt found in the car; and (iii) the black balaclava found in the car. Dr. Mary Popovic testified about the results of the analysis. The knife had DNA from 3 different people on it. One profile was that of the Appellant. It was impossible to date when any of the DNA was deposited on the knife. The testing of the T-shirt revealed one profile that was the same profile of the major male contributor of the DNA on the knife, namely the Appellant. There were two sources of DNA on the balaclava, one male and one female, but there was insufficient data available to do any further specific identification of the DNA.[12]

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[10] Testimony of Zeledon, Trial Transcript at pp. 233-252, Record of the Appellant, Tab 2.
[11] Testimony of Khosin, Trial Transcript at pp. 274-279, Record of the Appellant, Tab 2; Testimony of Dance, Trial Transcript, Record of the Appellant, at pp. 289-294, Tab 2; Testimony of Willmore, Trial Transcript, Record of the Appellant, at p. 303, Tab 2.
[12] Testimony of Popovic, Trial Transcript at pp. 73-97, Record of the Appellant, Tab 2.

F. Submissions of Counsel

18. The Crown stated that "this case really…turns on the DNA evidence". The Crown acknowledged that the eyewitness descriptions of the robber were "very poor", but the Court had the benefit of a video and still photographs. The Crown submitted that the robber was a younger man, who wore a hat, glasses, and a bandana. He acknowledged that the robber was not wearing a balaclava during the robbery. The Crown suggested that the descriptions by Larry Smith and Maria Loureiro that the robber was black, were unreliable.[13]

19. The Crown submitted that the only logical inference was that the robber dropped the knife behind the counter during the robbery. The Appellant was the major contributor of DNA on the knife. The Crown acknowledged, "I cannot prove that that DNA was placed the knife [sic] at the time of the robbery. If anything, the fact that the accused is wearing gloves, or the robber's wearing gloves, would suggest that that DNA was placed on it prior to the robbery". The Crown's case, was buttressed, however, by the Appellant's DNA on the T-shirt found in the burning car, and the similarity of the footwear impression from the car and that found at the bank.[14]

20. By contrast, the defence submitted that the evidence did not satisfy the test that the only reasonable inference to be drawn from the evidence was guilt. The defence acknowledged that the trial judge could find the following: (i) the VW was stolen on March 23, 6 weeks before the robbery; (ii) the knife was dropped by the robber at the bank; (iii) there was DNA from 3 people on the knife; (iv) it was impossible for the DNA to be placed on the knife during the robbery, since the robber wore gloves throughout; (v) the burning car found near the bank was driven by the robber after the robbery; (vi) the Appellant's DNA is on the T-shirt found in the burning car; and (vii) the balaclava found in the burning car had 2 sets of DNA, one male and one female.[15]

21. The defence submitted that, unlike many other cases resting on DNA evidence, none of the DNA evidence in this case could be shown to have been deposited at the time of the offence, as opposed to some former time. There was no evidence that the robber wore the T-shirt. The

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[13] Submissions of Crown, Trial Transcript at pp. 324-331, Record of the Appellant, Tab 2.
[14] Submissions of Crown, Trial Transcript at pp. 331-334; 340, Record of the Appellant, Tab 2.
[15] Submissions of Defence, Trial Transcript at pp. 341-344, Record of the Appellant, Tab 2.

robber was wearing gloves during the robbery. Therefore, the Appellant's DNA on the knife and T-shirt had to have been deposited at a time before the robbery. At most, the Crown's evidence established that the Appellant had some prior connection with the car, which had been reported stolen 6 weeks before the robbery.[16]

22. The defence noted that the footprint impression testimony was not supported by any expert evidence, and was, therefore, tenuous at best. Further, the defence pointed out that other items used by the robber were not found in the car, despite the short time period between the robbery and the finding of the burning car, namely, the hat, the jacket and the gloves. Ultimately, the defence submitted that the Crown's case at its highest amounted to a "guess", and was not based on reasonable inferences.[17]

G. The Reasons for Judgment

23. The trial judge noted that he viewed the video of the robbery and determined from it the following: (i) the robber was a man who wore sunglasses, a bandana, and a hat; (ii) the robber was not wearing a balaclava during the robbery; (iii) the robber was younger and "nimble"[18]. The trial judge noted that there were significant discrepancies and conflicts in the eyewitness testimony of the robbery, including related to the robber's voice and accent, and the robber's skin colour.[19]

24. The trial judge held that the most important evidence was the DNA. After summarizing the evidence and the positions of the parties, the trial judge concluded as follows:

> If there was simply DNA evidence at the scene, or just DNA evidence in the car, or DNA located on just one item, I would agree with the defence position. I cannot. The combination of this evidence is compelling. The location of the knife

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[16] Submissions of Defence, Trial Transcript at pp. 344-347; 349, Record of the Appellant, Tab 2.
[17] Submissions of Defence, Trial Transcript at pp. 349- 350, record of the Appellant, Tab 2.
[18] In this respect, the trial judge observed that the Appellant's "age and date of birth are a matter of record, apparent on the information itself, and simple commons sense in-court observations lead me to conclude that [the Appellant] is a male who is neither a senior, or middle-aged."
[19] Reasons for Judgment, Trial Transcript at pp. 359-360; 362-363, Record of the Appellant, Tab 2.

> and the presence of Mr. Youssef's DNA as the primary contributor on that knife is fatal to the defence position.

The trial judge concluded that there was no other reasonable or innocent explanation for the presence of the Appellant's DNA on the items. In the absence of an exculpatory explanation, the trial judge could not search for explanations or speculate about possible defences.[20]

H. The Court of Appeal for Ontario

25. Justice Laskin and Justice Blair at the Court of Appeal for Ontario concluded that cumulatively, the circumstantial evidence excluded any reasonable alternative other than the Appellant's guilt. In contrast, Justice Feldman found that, based on circumstantial evidence, it was equally possible that someone working with, or socializing with, the Appellant in the stolen car took the pocketknife with him when he robbed the bank and returned to the car where the Appellant had left his black t-shirt. Further, there was no obligation on the Appellant to testify in order to raise this possibility.[21]

26. Further, Justice Feldman found that the evidence relating to the knife could not create a temporal connection between the Appellant and the robbery, because neither he nor the other two DNA contributors to the knife could have deposited their DNA during the robbery, as the perpetrator was seen wearing gloves. Therefore, according to Justice Feldman, the knife was an object brought to the robbery by the robber with the DNA of three others already on it. The same thing can be said about the T-shirt with the Appellant's DNA found in the getaway car: there is no connection between the DNA on the T-shirt and the robbery because the robber was not seen wearing a black T-shirt. The black T-shirt was just an object connected to the Appellant, but not the robbery. Ultimately, Justice Feldman found that the circumstantial evidence linked the Appellant to objects found at the robbery, but not to the robbery itself.[22]

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[20] Reasons for Judgment, Trial Transcript at pp. 363-370, Record of the Appellant, Tab 2.
[21] Reasons for Decision, Court of Appeal for Ontario, Paragraphs 1-6; 18, Record of the Appellant at Tab 1A.
[22] Reasons for Decision, Court of Appeal for Ontario, Paragraphs 11-16, Record of the Appellant, Tab 1A.

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PART II – ISSUES

27. This appeal, as of right, raises the following question of law: whether the trial judge erred in finding that the evidence in this case met the test required when the Crown's case is based on circumstantial evidence, as stated by this Court in *R. v. Villaroman*, 2016 SCC 33.

PART III – ARGUMENT

A. Governing Principles

28. In *Villaroman*, *supra*, this Court considered how to assess the burden of proof in cases based on circumstantial evidence. Writing for a unanimous Court, Justice Cromwell first distinguished between direct and circumstantial evidence. He explained that direct evidence is evidence, which if believed, *proves* the conclusion the evidence is intended to prove. Circumstantial evidence, on the other hand, is evidence that, if believed, *supports* the conclusion the evidence is intended to prove.[23]

B. Circumstantial Evidence and Proof Beyond a Reasonable Doubt

29. Justice Cromwell explored the history of the application of the reasonable doubt standard in cases depending on circumstantial evidence, specifically in the context of the rule in *Hodge's Case*. The concern raised in circumstantial evidence cases, is that a trier of fact may be left to "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw. As a result, juries were instructed that they could convict only if the evidence is both consistent with guilt and inconsistent with any other rational conclusion. Justice Cromwell went on to note that, over time, this requirement was relaxed. In subsequent decisions such as *R. v. Cooper* and *R. v. Griffin*, the Court departed from any legal requirement for a special instruction on circumstantial evidence. However, there was, as an essential component of a jury charge, an instruction to the effect that the jury must be persuaded beyond a reasonable doubt that the only rational inference is guilt. Justice Cromwell went further by referring to the subsequent decision of *R. v. Mayuran*, where the Court clarified the role of jury instructions, stating that:

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[23] *R. v. Villaroman*, 2016 SCC 33 at paragraph 23 [*Villaroman*].

> There is therefore no particular form of mandatory instruction. However, where proof of one or more elements of the offence depends solely or largely on circumstantial evidence, it may be helpful for the jury to receive instructions that will assist them to understand the nature of circumstantial evidence and the relationship between proof by circumstantial evidence and the requirement of proof beyond reasonable doubt. I will touch briefly on both of these aspects.[24]

C. Whether the Inference Must be Based on Proven Facts

30. Justice Cromwell also considered the range of reasonable inferences that can be drawn from circumstantial evidence. He concluded that inferences consistent with innocence do not have to arise from proven facts, since this wrongly puts an obligation on an accused to prove facts. He noted that if there are any reasonable inferences other than guilt, "the Crown's evidence does not meet the standard of proof beyond a reasonable doubt." Justice Cromwell also noted that assessing other reasonable inferences inconsistent with guilt requires that the circumstantial evidence be viewed logically and in view of human experience. This ensures that the theory is plausible and not merely speculative. [25]

31. *Villaroman* reasserts the venerable distinction between direct and circumstantial evidence, and how circumstantial evidence must be assessed in criminal trials. A trier of fact must be cautious about "jumping to conclusions" or "filing in the blanks" with circumstantial evidence. A further important aspect of the Court's decision is its recognition that a reasonable doubt need not arise from proven facts. This is a welcome affirmation of an important principle central to the concept of a "reasonable doubt". This Court had earlier noted that a rational inference based on factual findings is not required for an acquittal in a case involving purely circumstantial evidence. As Justice Cromwell previously held in *R. v. H. (J.M.)* at paragraph 25:

> An acquittal (absent some fact or element on which the accused bears the burden of proof) is not a finding of fact but instead a conclusion that the standard of persuasion beyond a reasonable doubt has not been met.

Further, the following passage from Justice Sharpe's judgment (dissenting in the result) in *R. v. Kendall* was cited with approval by Justice Binnie in *R. v. Walker*:

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[24] *Villaroman*, *supra* note 23, at paras 19-22; 26; *R. v. Mayuran*, 2012 SCC 31 at para 22.
[25] *Villaroman*, *supra* note 23, at para 35.

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> A reasonable doubt need not rest upon the same sort of foundation of factual findings that is required to support a conviction. A reasonable doubt arises where an inadequate foundation has been laid.[26]

D. DNA Evidence on its Own is Not Enough In Identification Cases

32. In *R. v. Mars* 2006 CanLII 3460 (ON CA) at paragraph 19, the Court of Appeal for Ontario explained that where there is fingerprint evidence linking an accused with an object connected to a crime or a crime scene, there must also be "other evidence capable of establishing that the accused touched the object at the relevant time and place so as to connect the accused to the crime".[27]

33. Justice Feldman in her dissent in this case rightfully concluded that a similar analysis applies to DNA evidence. In *R. v. Wills*, 2014 ONCA 178, Justice Doherty at paragraph 36 found that DNA evidence alone could not support the inference that the appellant was one of the perpetrators or that either bandana belonged to the appellant. In that case, a bandana was found not far from the scene of the crime with the appellant's DNA. Citing *Mars*, Justice Doherty found that DNA evidence alone could not say when that DNA was placed on the bandanas; there had to be other evidence which, combined with the DNA, would permit a finding that the appellant was the perpetrator. In *R. v. Ahmed*, 2015 ONCA 848, this principle was applied and the Court of Appeal overturned a conviction of robbery that was based solely on DNA evidence. The Court did so because there was "no other evidence capable of linking the appellant to the crime". Finally in *R. v. Grayston*, 2016 ONCA 784, the Court of Appeal again overturned a conviction solely based on evidence of DNA found on a balaclava located at the scene. The Court found that the connection of the accused with the crime depends on the existence of other evidence capable of "establishing that the accused was in contact with the object at the relevant place and time".[28]

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[26] *R. v. H. (J.M.)*, 2011 SCC 45 at paragraph 25 [*JMH*]; *R. v. Walker*, 2008 SCC 34 at paragraphs 22 and 26 [*Walker*].
[27] *R. v. Mars* (2006), 205 C.C.C. (3d) 376 (Ont. C.A.) at para 19 [*Mars*].
[28] *R. v. Wills*, 2014 ONCA 178 at para 36; aff'd 2014 SCC 73 [*Wills*]; *R. v. Ahmed*, 2015 ONCA 848 at para 4; *R. v. Grayston*, 2016 ONCA 784 at paras 5, 14 [*Grayston*].

E. Principles Applied

34. The Appellant submits that the trial judge erred in finding that the location of the knife and the presence of the Appellant's DNA on that knife was "fatal" to the defence position. This ignored the logical inconsistency between that finding and the accepted fact that the robber wore gloves during the robbery. The DNA could not have been deposited on the knife at the time of the robbery. Therefore, the DNA evidence alone could not support the inference that the Appellant was the robber.

35. Further, the expert evidence called by the Crown precluded those inferences based exclusively on the DNA evidence. Like the fingerprint evidence in *Mars*, *supra* and *R. v. D.D.T.*, *infra*, the DNA evidence alone could not say when that DNA was placed on the knife or T-shirt, and therefore could not identify the Appellant as the perpetrator of the robbery. There had to be other evidence which, combined with the DNA evidence, would permit a finding that the Appellant was the perpetrator.[29]

36. In this case, there was no such other evidence to support the Appellant's identification as the robber. The footprint impression evidence was, as the trial judge fairly noted, of "minimal" and limited value. The eyewitness evidence was inconsistent as to many identifying features, and described only very common features consistently (a young, agile man). The evidence could not link the T-shirt found in the car to the commission of the robbery.

37. The Appellant further submits that the trial judge erred when he concluded that there was no other reasonable innocent explanation for the presence of the Appellant's DNA on the items. In the absence of an exculpatory explanation, the trial judge suggested that he could not search for explanations or speculate about possible defences. This reasoning is at odds with Justice Cromwell's reasons in *Villaroman*, *supra*, where he held that assessing other reasonable inferences inconsistent with guilt requires that the circumstantial evidence be viewed logically and in view of human experience.

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[29] *Wills*, *supra* note 28 at paras 34-44; *Mars*, *supra* note 27 at paras 20-21; *R. v. D.D.T.*, 2009 ONCA 918 at para 26 [*DDT*]; *R. v. Samuels*, 2009 ONCA 719; *R. v. Wong*, 2011 ONCA 815; *R. v. Mufuta*, 2015 ONCA 50.

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38. In this case, logic, human experience, and the evidence itself, supports other reasonable inferences, other than the Appellant as the robber. Unlike many of the cases resting on DNA evidence, none of the DNA evidence in this case could be shown to have been deposited at the time of the offence, as opposed to some other, prior time. The balaclava found in the car had DNA on it from both a man and a woman indicating that more than one person had access to the car in the period between the day it was stolen and the robbery. At most, the Crown's evidence established that the Appellant had some prior connection with the car, which had been reported stolen 6 weeks before the robbery.

39. The trial judge's approach also comes dangerously close to shifting the burden of proof to the Appellant, by implicitly suggesting that in order for the trial judge to have a reasonable doubt there must be some alternate set of facts for the judge to consider. This approach runs afoul of the settled law which is that inferences consistent with innocence do not have to arise from proven facts, since this wrongly puts an obligation on an accused to prove facts.[30]

F. The Verdicts Were Unreasonable

40. The Appellant submits that a proper application of the burden of proof, viewed through the lens of judicial experience, reveals that the trial judge's verdicts were unreasonable.[31]

41. The Appellant submits that reasonable doubt was raised at trial in a number of ways. First, reasonable doubt existed based in part on the frailties of the identification evidence provided by the witnesses, especially with respect to the identifying features of the robber.

42. Further, as noted above, the DNA evidence was not sufficient to "connect the dots" and identify the Appellant as the robber. In *DDT*, *supra*, the Court of Appeal for Ontario suggested a two-stage approach for appellate review of the reasonableness of a verdict in cases where evidence of this nature provides the sole evidence capable of identifying the perpetrator: (i) the first stage involves an examination of the reasonableness of the inference that the DNA was placed on the object with connection to the crime, at the relevant time and place; (ii) the second stage involves an examination of the soundness of the conclusion that the totality of the evidence

[30] *R. v. Noble*, [1997] 1 S.C.R. 874, 1997 CanLII 388; *Villaroman*, *supra* note 23, at para 35; *JMH*, *supra* note 26, at para 25; *Walker*, *supra* note 26, at paras 22 and 26.
[31] *R. v. Biniaris*, 2000 SCC 15 at paras. 36-42 (S.C.C.); *Grayston*, *supra* note 28.

and reasonable inferences available to the trial judge were sufficient to prove the Appellant's guilt beyond a reasonable doubt.[32]

43. In this case, the Crown must have demonstrated first that, based on the evidence, the inference that the Appellant was wearing the T-shirt or deposited the DNA on the knife during the robbery, was a more likely inference than the inference that he was in contact with the knife and T-shirt on an unrelated occasion. Second, the Appellant's guilt must have been the only rational conclusion available on the totality of the evidence.

44. Evidence of the Appellant's DNA on the T-shirt found in the car only demonstrates that he likely wore the shirt, or came into contact with the shirt, at some point after the car was stolen in March of 2013, and falls short of connecting him to the robbery. The discovery of the knife with the Appellant's DNA on it in the bank, equally says nothing about when it was deposited. Indeed, the fact that the robber wore gloves during the robbery makes it more likely that the Appellant's DNA was deposited on the knife at some point before the robbery.[33]

G. Why the Dissent is Correct

45. Justice Feldman's reasons are a correct application of the law on these issues. Justice Feldman found that one could not create a link between the Appellant and the robbery by simply putting together two pieces of evidence linked to one but not the other. She found the Appellant's link to the specified objects problematic, as there was no evidence to indicate when the Appellant's DNA came to be on those objects. This conclusion is completely consistent with the well-established line of jurisprudence in identification cases where both fingerprint and DNA evidence are involved.

46. As Justice Cromwell stated in *Villaroman*, *supra*, at para 55:

> Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the <u>only reasonable conclusion</u> available on the totality of the evidence. [emphasis added]

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[32] *DDT*, *supra* note 29 at para 15; *Grayston*, *supra* note 28 at paras 12-20.
[33] As noted above, the Crown acknowledged this during his submissions: Submissions of Crown, Trial Transcript at pp. 332-333, Record of the Appellant, Tab 2.

As Justice Feldman pointed out, the Appellant's guilt is **not** the only reasonable conclusion. She found that it would have been equally possible that someone working with, or socializing with, the Appellant in the stolen car took the pocketknife with him when he robbed the bank and returned to the car where the Appellant had left his black T-shirt. Without a temporal link connecting the Appellant's DNA on the items found with the commission of the robbery, Justice Feldman correctly found that the test in *Villaroman* was not met and that the verdicts were unreasonable.[34]

PART IV – COSTS

47. The Appellant makes no submissions as to costs.

PART V – ORDERS SOUGHT

48. The Appellant requests that the appeal be granted and acquittals entered; or in the alternative, the Appellant requests that the appeal be granted and that a new trial be ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 22nd day of May, 2018.

Richard Litkowski
Jessica Zita

Counsel for the Appellant

[34] *Villaroman, supra* note 23 at para 55.

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PART VI – TABLE OF AUTHORITIES

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PART VII – STATUTORY PROVISIONS

N/A