File No.: 38036

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

BETWEEN:

ABDULLAH YOUSSEF

Appellant
(Appellant)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent)

FACTUM OF THE RESPONDENT
ATTORNEY GENERAL OF ONTARIO

Rule 42 of the *Rules of the Supreme Court of Canada*

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PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. Overview of Position

1. The appellant was convicted of several offences arising out of an armed bank robbery and sentenced to five and a half years in prison. The Court of Appeal for Ontario (Feldman J.A., dissenting) affirmed the reasonableness of his convictions and dismissed his appeal. The appellant appeals as of right to this court.

2. The Court of Appeal was not divided on a legal issue of general importance, but on the application of *R. v. Villaroman*, 2016 SCC 33, to the facts of this case. The appeal therefore reduces to a single question. Did the totality of the circumstantial evidence – including the unexplained presence of the appellant's DNA on a pocket knife dropped by the robber at the bank and on a black t-shirt found among other clothing and debris in the burned, stolen getaway car – reasonably support the trial judge's finding that the appellant was the robber? The majority of the Court of Appeal for Ontario (Laskin and Blair JJ.A.) correctly concluded that it did. The trial judge applied the correct standard for a conviction based on circumstantial evidence of identity. He considered all the evidence and the effect of gaps in the evidence. It was not open to the dissenting judge to reweigh the evidence by substituting her own view of it.

3. The appeal should be dismissed.

B. Statement of Facts

4. Five years ago, on a May afternoon in 2013, a branch of the Bank of Montreal in London, Ontario was robbed. Eye-witnesses and a surveillance video indicated that the robber was a young man, who wore sunglasses, gloves, a bandana, and a hat. He also wore "maroon and black upper clothing" and "dark jeans".

Majority Reasons of Laskin and Blair JJ.A., A.R. Vol. 1, Tab 1A at para. 1
Evidence of K. Ruggi, A.R. Vol. 1, Tab 2 at p. 224
Evidence of A. Zeledon, A.R. Vol. 2, Tab 2 at p. 19

5. These stills from the bank's surveillance video show the robber:

Bank Surveillance Video (Exhibit 1), A.R. Vol. 2, Tab 3A at p. 158
Still Photos of Bank Robber (Exhibit 2), A.R. Vol. 2, Tab 3B at pp. 159-160

6. It was undisputed that the appellant's DNA was not only found on a pocket knife dropped by the robber at the bank, but also on a black t-shirt in the burned, stolen getaway car. The t-shirt was in a "lump of debris" on the front passenger seat that also included:

- Part of a shoe with a pattern similar to a shoe-print left by the robber at the bank;
- A pair of blue jeans;
- "Something purple that is likely of a cotton material";
- "What appears to be a portion of the band to a pair of sunglasses which has objects melted to it"; and
- A balaclava that likely had the DNA of the appellant's sister on it.

Majority Reasons of Laskin and Blair JJ.A., A.R. Vol. 1, Tab 1A at para. 5
Dissenting Reasons of Feldman J.A., A.R. Vol. 1, Tab 1A at para. 12
Evidence of G. Coon, A.R. Vol. 1, Tab 2 at pp. 61-72
Defence Submissions, A.R. Vol. 2, Tab 2 at pp. 126-127
Crown Reply Submissions, A.R. Vol. 2, Tab 2 at p. 135
Reasons for Judgment, A.R. Vol. 2, Tab 2 at pp. 145, 148-149, 151

7. These photos show the "lump of debris" within which the t-shirt with the appellant's DNA was found in the front passenger seat of the burned, stolen getaway car:

Evidence of G. Coon, A.R. Vol. 1, Tab 2 at pp. 61-72

Photos by G. Coon (Exhibit 4), A.R. Vol. 2, Tab 3C at pp. 209, 221

8. The appellant was charged with several offences arising out of the bank robbery and tried in the Ontario Court of Justice. The main issue at trial was identity: was the appellant the person who robbed the bank? The evidence of identity was circumstantial as the robber could not be identified because his face was covered. The appellant did not move for a directed verdict of acquittal at the close of the Crown's case. Nor did he testify or call any defence evidence.

Colloquy, A.R. Vol. 2, Tab 2 at p. 106
Reasons for Judgment, A.R. Vol. 2, Tab 2 at pp. 141-142

9. In oral reasons, the trial judge found the appellant guilty. He found that the combination of the appellant's DNA on the knife left at the bank in an area accessed only by bank employees and the robber, and his DNA on the t-shirt found in the getaway car, was "fatal to the defence position." In his view: "there is no other reasonable innocent explanation for the presence of [the appellant's] DNA."

Reasons for Judgment, A.R. Vol. 2, Tab 2 at pp. 152-154

10. The appellant appealed his convictions, submitting that the verdicts were unreasonable. A majority of the Court of Appeal for Ontario rejected his submission and dismissed his appeal. The dissenting judge would have allowed the appeal and found the verdicts unreasonable because, in her view, there was a reasonable inference other than the appellant's guilt available on the evidence. The appellant appeals as of right pursuant to section 691(1)(a) of the *Criminal Code*.

Majority Reasons of Laskin and Blair JJ.A., A.R. Vol. 1, Tab 1A at paras. 3-7
Dissenting Reasons of Feldman J.A., A.R. Vol. 1, Tab 1A at paras. 18-19

PART II – STATEMENT OF ISSUES

11. The sole issue on appeal is whether the majority of the Court of Appeal for Ontario erred in concluding that the trial judge's verdicts were reasonable. It did not. The trial judge considered the evidence and the effect of gaps in the evidence, applied the correct legal standard, and reasonably concluded that the appellant's guilt was the only reasonable conclusion available on the totality of the evidence.

PART III – STATEMENT OF ARGUMENT

A. Introduction

12. The majority of the Court of Appeal for Ontario correctly applied *R. v. Villaroman*, 2016 SCC 33, and concluded that the trial judge's verdicts were reasonable.

13. At bottom, the appellant submits that three judges – the trial judge and two judges of the Court of Appeal – all reached an unreasonable conclusion on his guilt. In *R. v. François*, [1994] 2 S.C.R. 827, at pp. 842-843, McLachlin J. noted the difficulty with this submission:

> I note the practical problem of a second appellate court saying a verdict is "unreasonable", after the court of appeal below has concluded the verdict is "not unreasonable". The very existence of such divergence may suggest that the verdict is not so much clearly unreasonable, as one upon which different reasonable views may be held.

B. The Reasonableness of the Verdicts

14. Relying on the dissent in the Court of Appeal, the appellant says that the verdicts were unreasonable because there were reasonable inferences other than his guilt available on the evidence. But that is not the standard of review on appeal.

See *Dissenting Reasons of Feldman J.A.*, A.R. Vol. 1, Tab 1A at para. 18

15. On appeal, an appellate court does not ask whether the appellant's guilt was the only reasonable conclusion available on the totality of the evidence, but whether the trier of fact "could reasonably be satisfied" that it was. As Cromwell J. emphasized in *Villaroman*: "it is fundamentally for the trier of fact to draw the line [...] that separates reasonable doubt from speculation." In other words, an appellate court may only interfere if the trier of fact's conclusion that the evidence excluded any reasonable alternative to guilt was itself unreasonable.

R. v. Villaroman, 2016 SCC 33 at paras. 55-56, 71

See *R. v. Biniaris*, 2000 SCC 15 at para. 49

> ("Even though it might have been reasonable for the jury to conclude otherwise, it was perfectly reasonable for the jury to be satisfied beyond a reasonable doubt that Biniaris had acted with the requisite intent for murder.")

16. Applying that standard, the trial judge's verdicts were – as the majority of the Court of Appeal found – reasonable.

17. The trial judge understood the standard for a conviction based on circumstantial evidence of identity. He cited three leading Ontario cases on DNA and fingerprint evidence in his reasons. Indeed, the appellant relies on two of those cases – *R. v. Wills*, 2014 ONCA 178, aff'd 2014 SCC 73, and *R. v. Mars*, 2006 CanLII 3460 (ONCA) – in support of his unreasonable verdict argument.

Reasons for Judgment, A.R. Vol. 2, Tab 2 at pp. 151-153

18. The trial judge also considered the gaps in the circumstantial evidence and the appellant's position that those gaps precluded a finding that he was the robber. In summarizing the appellant's position, the trial judge said:

> What is compelling in the defence argument is the idea that given the items found, where they are found, the number of DNA profiles on the knife, and the fact the items which are linked to [the appellant] weren't items used in the commission of the offence, should lead me to conclude that guilt hasn't been established beyond a reasonable doubt because any number of people could've been in that stolen car, having regard to the date the vehicle was stolen, which I believe was March 23rd, approximately a month and a half before the robbery.

Reasons for Judgment, A.R. Vol. 2, Tab 2 at pp. 152-153

19. The trial judge went so far as to say that he would have acquitted the appellant had his DNA only been found on the knife dropped by the robber at the bank or on the t-shirt in the "lump of debris" in the burned, stolen getaway car. But the evidence had to be considered as a whole, not in isolation. And as a whole, the trial judge found the evidence "compelling". He was satisfied beyond a reasonable doubt that the appellant was the robber and had "no difficulty concluding there is no other reasonable innocent explanation for the presence of [the appellant's] DNA."

R. v. Wu, 2017 ONCA 620 at para. 15

Evidence of G. Coon, A.R. Vol. 1, Tab 2 at p. 65

Reasons for Judgment, A.R. Vol. 2, Tab 2 at pp. 153-154

20. The trial judge reasonably concluded that no reasonable inference other than guilt was available on the evidence. He also properly rejected, in the passages of his reasons quoted above, the possibility that the appellant happened to innocently deposit his DNA on *both* the knife dropped by the robber at the bank and the shirt in the burned, stolen getaway car. That possibility was nothing more than mere speculation or conjecture.

21. The majority of the Court of Appeal found that the following pieces of circumstantial evidence, taken together, support the reasonableness of the verdicts:

- A younger male, acting alone, robbed the bank;
- The robber left a pocket knife at the scene of the robbery, in an area accessed only by the robber and bank employees;
- The appellant's DNA was one of three DNA profiles on the pocket knife, and was the major profile;
- Thirty minutes after the robbery, a stolen car was found in flames;
- The stolen car was used by the robber as the getaway car;
- The appellant's DNA was on a black t-shirt found in the stolen car; and
- The DNA on a balaclava found in the stolen car was likely that of the appellant's sister.

Majority Reasons of Laskin and Blair JJ.A., A.R. Vol. 1, Tab 1A at para. 5

22. As the majority of the Court of Appeal said:

> Cumulatively, these pieces of circumstantial evidence exclude any reasonable alternative to [the appellant's] guilt. We add that as [the appellant] did not testify, the trial judge was not required to speculate about possible defences [the appellant] might have offered had he chosen to give evidence: see *R. v. Noble*, [1997] 1 S.C.R. 874, at para. 77.

Majority Reasons of Laskin and Blair JJ.A., A.R. Vol. 1, Tab 1A at para. 6

23. The trial judge was not required to speculate. But that is what the dissenting judge did in the Court of Appeal. She speculated about possible defences the appellant might have offered had he chosen to give evidence. The dissenting judge would have acquitted the appellant because "based on the circumstantial evidence, it is *equally possible* that someone working with or socializing with the appellant in the stolen car took the pocket knife with him when he robbed the bank and returned to the car where the appellant had left his black t-shirt."

> *Dissenting Reasons of Feldman J.A.*, A.R. Vol. 1, Tab 1A at para. 18 [Emphasis added]
>
> Compare *R. v. Ibrahim*, 2014 ONCA 157 at para. 51
>
> > ("[T]here were no reasonable inferences available on the evidence that were inconsistent with the appellant's guilt. For example, the suggestion that the appellant may have worn the recovered balaclava and handled the toy gun at some other time and on another occasion is entirely speculative.")

24. Respectfully, the dissenting judge was "theorizing in the absence of evidentiary support."

> *R. v. Chanmany*, 2016 ONCA 576 at para. 45

25. Like the Court of Appeal in *Villaroman*, the dissenting judge "erred by focusing on hypothetical alternative theories and, at times, engaging in speculation rather than on the question of whether the inferences drawn by the trial judge, having regard to the standard of proof, were reasonably open to him." Her analysis "overlooks the important point [...] that it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation. The trier of fact's assessment can be set aside only where it is unreasonable." In this case, two judges of the Court of Appeal concluded it was not.

> *R. v. Villaroman*, 2016 SCC 33 at paras. 66-72
>
> *Majority Reasons of Laskin and Blair JJ.A.*, A.R. Vol. 1, Tab 1A at paras. 3-7

26. Further, the appellant decided not to testify in the face of *prima facie* proof that he was the robber. There was no directed verdict application at trial; the trial judge convicted the appellant; and the convictions were affirmed on appeal by a majority of the court. This was the paradigm of a case to meet.

> See *R. v. Lepage*, [1995] 1 S.C.R. 654 at para. 29

27. The appellant's decision not to testify in the face of *prima facie* proof that he was the robber undermines the alternative inference advanced by the dissenting judge. As the High Court of Australia said, in a passage cited by the Court of Appeal of Alberta post-*Villaroman*:

> In a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused.

R. v. George-Nurse, 2018 ONCA 515 at paras. 31-36

R. v. Sidhu, 2016 ABCA 321 at para. 31, citing *R. v. Baden-Clay*, [2016] HCA 35

R. v. An, 2015 ONCA 799 at paras. 15-16

28. The facts relevant to the dissenting judge's alternative inference would have been within the knowledge of the appellant. Yet, the appellant did not provide the dissenting judge's or any other explanation for the "compelling" combination of his DNA at the scene of the crime and in the stolen getaway car. In assessing the reasonableness of the verdicts, this court is entitled to take into account the appellant's failure to testify, not because it adds weight to the Crown's case, but because it is relevant in determining whether the inferences drawn by the trial judge were reasonable.

R. v. Noble, [1997] 1 S.C.R. 874 at paras. 103, 109

R. v. George-Nurse, 2018 ONCA 515 at paras. 31-36

R. v. Wu, 2017 ONCA 620 at para. 16

R. v. Wills, 2014 ONCA 178 at para. 44, aff'd 2014 SCC 73

See e.g. *R. v. Singh*, 2018 BCCA 206 at para. 15

> ("If Mr. Singh had an explanation for such matters as why he wanted a specific police-type of vehicle or why he searched the Internet for police-type emergency lighting, then he could have presented evidence in that regard.")

R. v. Eastgaard, 2011 ABCA 152 at para. 22, aff'd 2012 SCC 11

> ("Given the appellant's failure to testify, any suggestion that the driver gave the appellant the firearm and instructed him to hide it is mere speculation. The appellant could have testified to this effect if this indeed happened but he chose not to.")

Reasons for Judgment, A.R. Vol. 2, Tab 2 at pp. 153-154

29. This court's comments in *R. v. A.G.*, 2000 SCC 17, at para. 29, apply here:

> [W]here a judge gives detailed reasons for judgment and when, as in this case, the reasons reveal that he or she was alive to the recurrent problems in this field of adjudication, the court of appeal brings no special insight to the assessment of the evidence. As this Court's s. 686(1)(a)(i) jurisprudence makes very clear, the fact that an appeal court judge would have had a doubt when the trial judge did not is insufficient to justify the conclusion that the trial judgment was unreasonable.

C. Conclusion

30. Applying *Villaroman*, the majority of the Court of Appeal for Ontario correctly concluded that the trial judge's verdicts were reasonable. The trial judge applied the correct standard for a conviction based on circumstantial evidence of identity. He considered the evidence and the effect of gaps in the evidence. And he reached a reasonable conclusion. The trial judge's verdicts should be affirmed.

PART IV – SUBMISSIONS ON COSTS

31. Neither party seeks costs.

PART V – ORDER SOUGHT

32. The respondent requests that the appeal be dismissed.

ALL OF WHICH is respectfully submitted by

Date: July 16, 2018

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Kevin Rawluk
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PART VI – TABLE OF AUTHORITIES

Authorities **Paragraph(s)**