File Number: 35804

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

BETWEEN:

BRANDON WILLS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

APPELLANT'S FACTUM
Brandon Wills, Appellant
Pursuant to Section 42(2) of the *Rules of the Supreme Court of Canada*

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The appellant was found guilty by a jury in Newmarket on two counts of robbery with a firearm, one count of unlawful confinement, one count of disguise with intent to commit an indictable offence, and two counts of possession of a weapon for the purpose of committing an indictable offence. He appealed his conviction and sentence to the Ontario Court of Appeal. The Court allowed his sentence appeal,[1] but was divided on the conviction appeal, specifically, on the issue of whether the verdict was unreasonable. Doherty and Benotto JJ.A. said it was a "close call", but they upheld the verdict. Pepall J.A. would have acquitted the appellant, given the frailties of the circumstantial evidence.

[1] The appellant received a net sentence of five years and four months.

2. The charges arose out of a harrowing home invasion. Two masked men forced their way into the residence of Eufrasia and Domenico Sacchetti, an elderly couple in Woodbridge. The first robber viciously assaulted Mr. Sacchetti with an unidentified weapon. The second robber forced Mrs. Sacchetti to the floor, put a gun to her head, and demanded money. The robbers fled the scene with some cash.

3. The appellant was tried alone. Identity was the sole issue for the jury to decide. The Crown alleged that the appellant was the first robber. The Crown's case rested on three pillars:

i. The appellant's DNA was found on two bandanas used in the robbery. However, on one of the bandanas, there was DNA from at least three individuals, one more than the number of robbers;

ii. About two months after the robbery, a baton was found in the appellant's apartment. Mr. Sacchetti examined it and testified that it was not the weapon used in the robbery. His testimony was not contradicted. There was no evidence connecting the apartment baton to the robbery; and

iii. Mr. Sacchetti gave a generic description of the first robber that was not inconsistent with the appellant's appearance.

4. The appellant did not testify.

5. The appeal to this Court raises a single issue: whether the verdict was unreasonable. The Court of Appeal was unanimous that the DNA evidence and Mr. Sacchetti's generic description of the first robber could not support an inference of guilt. Doherty and Benotto JJ.A. found that the evidence of the apartment baton provided the necessary added evidence connecting the appellant to the robbery. Pepall J.A. disagreed that it could support an inference of guilt.

6. For the reasons given by Pepall J.A. and the additional reasons developed below, the appellant submits that the majority erred in upholding the verdict. The appellant's position is that:

i. The jury's rejection of Mr. Sacchetti's uncontradicted testimony that the apartment baton was not the weapon used in the robbery cannot be supported on any reasonable view of the evidence;

ii. Alternatively, even if it was reasonable for the jury to reject Mr. Sacchetti's testimony that the apartment baton was not the weapon used in the robbery, the jury could not then infer from that rejection of Mr. Sacchetti's testimony that the apartment baton was the weapon used in the robbery. It had no evidentiary weight.

B. The Trial Evidence

i. The Robbery

7. Mr. and Mrs. Sacchetti lived in a house in Woodbridge. He was 78 years old; she was 75. On February 26, 2010, at 7:33 p.m., Mr. Sacchetti heard the doorbell ring, followed by loud knocking on the front door. As Mr. Sacchetti opened the front door, one robber entered the house and pushed Mr. Sacchetti into the front closet, breaking the glass closet doors (the "first robber"). A second robber ran past Mr. Sacchetti into the house (the "second robber"). Both robbers were masked and their heads were covered.[2]

8. Mr. Sacchetti grabbed the first robber and pushed him out the front door. Mr. Sacchetti fell backward on a pile of snow near the bottom of the steps leading to the front porch. It was very well lit outside. The first robber bent over Mr. Sacchetti and began beating his head and torso with a weapon. Mr. Sacchetti tried to protect himself with his hands. During the struggle, Mr. Sacchetti pulled a white bandana off the first robber's face. It was found later that night on the bottom step.[3]

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[2] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 160/8-166/3, 189/11-23; Evidence of E. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 129/30-133/31, 141/25-142/1. (Please note that the page references in the footnotes are to the original page numbering.)

[3] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 166/4-168/30, 173/31-176/8, 180/27-180/20, 182/31-183/22; Exhibit 3, Photograph: Front Stairs Leading to Porch – Slipper (Marked by Witness Officer MacRae and Witness Mr. Sacchetti), Excerpts from Appeal Book, Appellant's Record, p. 22.

9. Inside the house, the second robber came toward Mrs. Sacchetti in the kitchen. He ordered her to get down on the floor. When she had difficulty getting down because of her scoliosis, he put his foot on her back. He pointed a gun at her neck area and told her not to shout before leaving momentarily. When he came back, he pointed the gun at her cheek. He said, "Mrs., you see this?...Where is the money?" She directed him to a drawer in the buffet containing cash. She did not see him again.[4]

10. The second robber came outside and joined the first robber, who was continuing his assault on Mr. Sacchetti. Mr. Sacchetti was screaming for help. The second robber threw snow in Mr. Sacchetti's face to keep him quiet. The assault lasted five to ten minutes. When a neighbour approached, the two robbers fled to a nearby ravine, where a blue bandana was found later that night. The neighbour called 911. An officer was dispatched to attend the scene at 7:56 p.m., 23 minutes after the robbery started.[5]

11. Both the Sacchettis were terrified and thought they were going to die. Mr. Sacchetti was taken to the hospital. He suffered a broken nose and multiple cuts and bruises to his face, head, and torso.[6]

ii. The Descriptions of the Robbers

12. The Sacchettis could not identify the robbers and were able to provide only generic descriptions of them.

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[4] Evidence of E. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 133/32-140/25, 142/26-147/10.

[5] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 168/31-169/6, 173/23-30, 177/22-179/26, 189/24-191/3; Evidence of D. MacRae, Transcript of Proceedings at Trial, Appellant's Record, p. 4/12-18.

[6] Evidence of E. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 139/30-140/4; Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 162/17, 167/8-168/30, 178/4-8, 180/21-181/26; Evidence of J. Kolarsky, Transcript of Proceedings at Trial, Appellant's Record, 152/3-158/25; Exhibit 33, Photograph: Mr. Sacchetti Sitting on a Chair – Showing Injuries, Excerpts from Appeal Book, Appellant's Record, p. 78.

13. Mr. Sacchetti testified that the first robber was wearing a white mask and had a hood on, so he could only see the first robber's eyes and forehead. Mr. Sacchetti could not say what colour the first robber's eyes were. He described the first robber as "black" but "not dark, dark…not an African black, just maybe one step down." The first robber's face was "slim", not "bulky". He was a little taller than Mr. Sacchetti, possibly five feet, seven inches or five feet, eight inches. His build was "normal"; he was "not [a] big guy." He was wearing dark clothes and running shoes. He was "in [his] 20s, 21, 22…something like that."[7] Mr. Sacchetti was not asked to identify the appellant in court or in a photograph.[8]

14. Mrs. Sacchetti testified that the second robber was wearing "a hat with a piece covering his face." She could not see his face, but the area under his eyes was red. She did not know if he was white or black. He was tall, possibly six feet, and "wasn't skinny nor fat" but "regular." His clothing was "all black." He wore running shoes and gloves. His voice was heavy and loud and he had a strong accent. He said one word in Italian, "signora".[9]

iii. The DNA Evidence on the Bandanas

15. Two bandanas or handkerchiefs were seized on the night of the robbery. A white and brown bandana was found on the bottom step leading to the front porch of the Sacchettis' house (the "porch bandana").[10] A blue bandana was found in the nearby ravine along the path taken by

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[7] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 174/16-177/20, 185/6-27; Exhibit 38, Photograph: Mr. Wills and a Male Person, Excerpts from Appeal Book, Appellant's Record, p. 88.
[8] Evidence of F. Abreu, Transcript of Proceedings at Trial, Appellant's Record, pp. 192/27-194/5; Exhibit 38, Photograph: Mr. Wills and a Male Person, Excerpts from Appeal Book, Appellant's Record, p. 88.
[9] Evidence of E. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 140/25-142/25, 147/15-32, 148/25-149/28.
[10] Evidence of D. MacRae, Transcript of Proceedings at Trial, Appellant's Record, pp. 10/8-13/12; Exhibit 3, Photograph: Front Stairs Leading to Porch – Slipper (Marked by Witness Officer MacRae and Witness Mr. Sacchetti), Excerpts from Appeal Book, Appellant's Record, p. 22.

the robbers (the "ravine bandana").[11] The appellant's DNA was detected on both bandanas, but so was the DNA of three or more individuals – one more than the number of robbers.

16. Blood was detected on the porch bandana, but not the ravine bandana.[12]

17. To test for DNA, three cutouts were taken from the porch bandana (2-2, 2-3, and 2-4) and one cutout was taken from the ravine bandana (1-2). The cutouts ranged in size from four millimetres by five millimetres to one centimetre by one centimetre.[13]

18. On cutouts 2-4 from the porch bandana and 1-2 from the ravine bandana, a major DNA profile was found. The appellant could not be excluded as the source of that DNA:

> A major male DNA profile (Profile #1), that is suitable for comparison, has been determined at 9 STR loci from the following:
>
> - the white and brown bandana (2-4) from 5 Filomena Court.
> - the blue bandana (1-2) from the Ravine.
>
> ...
>
> Brandon Wills (11-1) cannot be excluded, at 9 STR loci, as the source of the previously reported major DNA profile (Profile #1) from the white and brown bandana (2-4) from 5 Filomena Court and the blue bandana (1-2) from the Ravine.
>
> The probability that a randomly selected individual unrelated to Brandon Wills would coincidentally share the observed major DNA profile from item 2-4 is estimated to be 1 in 48 billion.
>
> The probability that a randomly selected individual unrelated to Brandon Wills would coincidentally share the observed major DNA profile from item 1-2 is estimated to be 1 in 9.2 billion.[14]

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[11] Evidence of M. Price, Transcript of Proceedings at Trial, Appellant's Record, pp. 62/23-70/2.

[12] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 278/28-281/7; Exhibit 73, Report Prepared by Randy Still Dated March 22, 2010, Excerpts from Appeal Book, Appellant's Record, p. 162.

[13] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 281/8-284/19; Exhibit 70, Photograph: Bandana, Excerpts from Appeal Book, Appellant's Record, p. 156.

[14] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 285/5-286/24, 294/11-298/12, 305/6-28, 306/20-307/15; Exhibit 73, Report Prepared by Randy Still Dated March 22, 2010, Excerpts from Appeal Book, Appellant's Record, p. 163; Exhibit 72, Conclusions in Report Dated September 7, 2010 by Randy Still, Excerpts from Appeal Book, Appellant's Record, p. 160.

19. However, minor amounts of DNA from an unlimited number of contributors (other than the appellant) were also detected on cutouts 2-4 and 1-2. They were not suitable for comparison:

> An additional minor amount of DNA was detected in 2-4 and 1-2 that, due to uncertainty with respect to the total number of contributors and the low amount of DNA detected, is not suitable for comparison.[15]

20. On cutout 2-3 from the porch bandana, there was a mixture of DNA from at least three individuals. It was not suitable for comparison:

> The DNA profile from the white and brown bandana (2-3) is a mixture of DNA from at least 3 individuals. Due to uncertainty with respect to the total number of contributors and their relative proportions, this DNA profile is not suitable for comparison.

The DNA expert explained his findings:

> Q. So when you take 2-3 and 2-2 together, you have at least three people, but it could be four or more?
>
> A. Correct. Even just looking at item 2-3, I say at least three, but there could be – we say at least three because we don't know how many individuals are in that mixture. **There could be four, there could be five, we don't know, but there's at least three.**
>
> Q. Is there any limit to how many people could be in that "at least three" category?
>
> A. No, there's not. Again, they could be in varying amounts. Again, typically I wouldn't limit. I wouldn't suggest there'd be 200, to use a large number, but there's more than three individuals and that's all I can really say.[16]

21. On cutout 2-2 from the porch bandana, there was DNA from at least one individual. The total number of contributors is unknown. It was not suitable for comparison:

> The DNA profile from the white and brown bandana (2-2) was determined at 1 STR locus only and, due to the uncertainty with respect to the total number of contributors and the small amount of DNA detected, is not suitable for comparison.[17]

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[15] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 286/25-292/27, 305/29-306/14, 307/16-308/5, 315/27-316/19; Exhibit 73, Report Prepared by Randy Still Dated March 22, Excerpts from Appeal Book, Appellant's Record, 2010, p. 163.

[16] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 300/5-301/3, 308/24-309/10, 314/24-29, 315/13-26 [emphasis added]; Exhibit 73, Report Prepared by Randy Still Dated March 22, 2010, Excerpts from Appeal Book, Appellant's Record, p. 164.

[17] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 301/4-29, 308/6-23, 314/30-315/12; Exhibit 73, Report Prepared by Randy Still Dated March 22, 2010, Excerpts from Appeal Book, Appellant's Record, p. 164.

22. The DNA expert outlined the numerous limitations of the DNA evidence:

i. It is impossible to determine when the appellant's DNA was placed on the bandanas;[18]

ii. It is impossible to determine how long the appellant's DNA has been on the bandanas;[19]

iii. The source of the appellant's DNA on the bandanas is unknown;[20]

iv. There is no fixed time required to deposit DNA and there is variance in whether a person leaves his or her DNA on an item;[21]

v. DNA can be transferred from one item of clothing to another item of clothing. DNA can survive washing in a washing machine with soap and water;[22]

vi. It is impossible to determine whether the appellant had direct contact with the bandanas or whether his DNA was transferred onto the bandanas from another item that already had his DNA on it. In other words, it is possible that the appellant never handled the bandanas, wore them, or otherwise came in contact with them;[23]

vii. It is possible that the robbers may have worn the bandanas and not left their DNA on them;[24] and

viii. The DNA results relate only to the cutouts that were tested. There could be DNA from more individuals on the rest of the bandanas that were untested.[25]

iv. The Apartment Baton

23. The robbery occurred on February 26, 2010. On April 20, 2010, the police executed a search warrant at the appellant's apartment on Jane Street in Toronto. There was evidence that other people shared the one-bedroom apartment with the appellant. Tanisha Lewis, Jaylen

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[18] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 292/28-30, 311/20-22, 311/30-312/4.
[19] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 292/31-293/1, 303/21-23, 311/27-29.
[20] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 293/7-294/10, 311/23-26, 312/5-21, 316/20-317/14.
[21] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 302/15-303/20, 313/32-314/13.
[22] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 303/23-305/5.
[23] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 312/22-313/31.
[24] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, p. 314/14-23.
[25] Evidence of R. Still, Transcript of Proceedings at Trial, Appellant's Record, pp. 310/31-311/18, 317/20-318/18; Exhibit 70, Photograph: Bandana, Excerpts from Appeal Book, Appellant's Record, p. 156.

Lewis-Wills, a two year old boy, and Tafari Robinson were present when the search warrant was executed. Tafari Robinson's resume and a pay stub were in the hallway closet. There were two sofas in the living room and a queen or double bed and child's bed in the bedroom. One of the sofas was a pull-out or futon and there was a pillow on one of them.[26]

24. Det. Pat Walsh searched the bedroom closet. He testified that on the left side of the closet, he found a gym bag. It was not visible when the closet doors were open. Inside the bag, a baton (the "apartment baton") was found amongst various items of clothing: a black and orange vest, a blue spring jacket, a pair of black jeans, a red and blue Purolator jacket, a black T-shirt, and a black windbreaker. Det. Walsh could not remember if the bag was open or closed, where the apartment baton was in the bag, and whether the top part of the apartment baton was extended.[27]

25. The apartment baton was described by the police witnesses as follows:

- It has three sections: the handle, the middle section, and the end section;
- It is retractable;
- The handle is rubber and the parts that retract into the handle are metal;
- It stays firm when extended; and
- It is similar to the metal batons police carry on their belts, but it is shorter. The end section of the apartment baton was jammed. One officer said an extended police baton is twice as long and another officer said it is about two and a half feet long. A police baton has a small lead ball at the end of it.[28]

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[26] Evidence of F. Abreu, Transcript of Proceedings at Trial, Appellant's Record, pp. 194/6-202/6; Evidence of P. Walsh, Transcript of Proceedings at Trial, Appellant's Record, pp. 204/25-206/18, 216/11-217/28, 218/11-220/13; Exhibit 42, Photograph: Dining Room Table, Couch, Red Walls of Apartment, Excerpts from Appeal Book, Appellant's Record, p. 96.

[27] Evidence of P. Walsh, Transcript of Proceedings at Trial, Appellant's Record, pp.206/18-213/26, 215/22-31, 220/13-17, 226/15-21; Exhibit 44, Photograph: Single Bedroom of Apartment # 509, Excerpts from Appeal Book, Appellant's Record, p. 45, p. 102; Exhibit 48, Photograph: Black Baton (Asp), Excerpts from Appeal Book, Appellant's Record, p. 108.

[28] Evidence of D. Cardwell, Transcript of Proceedings at Trial, Appellant's Record, pp. 46/25-47/13, 47/28-48/32; Evidence of F. Abreu, Transcript of Proceedings at Trial, Appellant's Record, p. 202/13-29; Evidence of P. Walsh, Transcript of Proceedings at Trial, Appellant's Record, pp. 206/32-207/16, 213/27-216/10.

26. As for the colour, a forensic identification officer, upon examining the actual apartment baton in court, described it simply as black.[29] Det. Walsh's evidence regarding the colour of the apartment baton was less clear. First, he was asked to describe its colour based on a photograph. He testified that it was "[b]lack, white, black":

> Q. Okay. I just want to make sure I've put all the – I'm showing you now Exhibit 48. You've already identified that photo as the baton you seized in the grey bag.
>
> A. Yes.
>
> Q. I want you to look at not the handle part. I see the handle part again. If you need me to bring this picture up?
>
> A. If you don't mind, please.
>
> Q. Yeah, okay. I'm just going to show everybody what I'm going to ask you to do while everybody can see the photo. The handle part, and you correct me if I'm wrong when you look at the photos, from about here to here, okay? So I want to ask you what colours you see from the handle part up where the metal part is when you look at that photo.
>
> A. Black, white, black.

After examining the apartment baton itself, Det. Walsh described it as "[p]redominantly black." He agreed that he previously said the baton was black:

> THE COURT: Fifty-six. If you could just show that to the witness, please. If you could just describe the colouring that you see.
>
> A. Predominantly black.
>
> THE COURT: All right, thank you. Any questions arising out of that question?
>
> MS. McCALLUM: What do you mean by "predominantly black", if you don't mind, Your Honour?
>
> A. I just – in different lighting it appears a bit different, that's all.
>
> MS. McCALLUM: And how does it appear in different lighting?

[29] Evidence of K. Bryan, Transcript of Proceedings at Trial, Appellant's Record, p. 126/22-26.

A. It appears lighter in certain sections of it. If you were to hold it, and I'm sure at different distances, not that I'm an expert on it, but my personal view on what it looks like, you see what looks like almost like things of white that go through it.

MS. McCALLUM: Okay, thank you.

THE COURT: Mr. Aubin, any questions arising out of the question I put to the witness?

MR. AUBIN: Officer, you've given evidence about the colour of that baton on a previous occasion. Do you recall that?

A. Yes.

MR. AUBIN: And you said the baton was black, right?

A. Yes.[30]

27. There was no forensic evidence connecting the apartment baton to the robbery.

28. Batons can be purchased online and in self-defence stores. Det. Walsh identified nine photographs from the internet of different types of batons. The batons varied in colour, shape, and size, including:

i. A silver baton with a black handle (Exhibits 59);

ii. A grey baton with a black handle (Exhibit 61);

iii. A silver or white baton with a black handle (Exhibit 66);[31]

iv. A baton that bends (Exhibit 64); and

v. A baton with what looks like a spring (Exhibit 65).

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[30] Evidence of P. Walsh, Transcript of Proceedings at Trial, Appellant's Record, pp. 231/12-233/11.

[31] Evidence of P. Walsh, Transcript of Proceedings at Trial, Appellant's Record, pp. 220/18-231/11; Exhibit 59, Photograph: Baton – Silver with Black Handle, Excerpts from Appeal Book, Appellant's Record, p. 131; Exhibit 60, Photographs: Two Batons, Excerpts from Appeal Book, Appellant's Record, p. 133; Exhibit 61, Photograph: Baton – Grey with Solid Black Handle, Excerpts from Appeal Book, Appellant's Record, p. 135; Exhibit 62, Photograph: Baton – Black, White in the Middle, Excerpts from Appeal Book, Appellant's Record, p. 137; Exhibit 63, Photograph: Baton – Solid Silver in Colour, Black with Grooves/Springs, Excerpts from Appeal Book, Appellant's Record, p. 139; Exhibit 64, Photograph: Flexible Baton (Black and White), Excerpts from Appeal Book, Appellant's Record, p. 141; Exhibit 65, Photograph: Baton – Handle with Spring (Black and White), Excerpts from Appeal Book, Appellant's Record, p. 143; Exhibit 66, Photograph: Baton – Silver/White with Black Handle, Excerpts from Appeal Book, Appellant's Record, p. 145; Exhibit 67, Photograph: Multiple Batons – Different Sizes, Excerpts from Appeal Book, Appellant's Record, p. 147.

29. Four officers were asked whether they had ever seen a baton when executing a search warrant. Det. Don Cardwell testified that he had not seen one. Det. Kevin Bryan said "there may have been one, but I do not recall one." Det. Frank Abreu testified that he had seen one "maybe once or twice". Det. Walsh said "maybe once" from a residence and once or twice from a vehicle, but he could not give exact numbers.[32]

v. The Weapon Used in the Robbery

30. Mr. Sacchetti testified that it was "fully bright" outside when he observed the weapon used in the robbery:

> Q. And was there – what was the lighting like outside when this was happening?
>
> A. Well, the light, you know – after the snow it was pretty white. Even though I didn't turn the light on, but it was fully bright. The night was pretty bright, after the snow was bright.[33]

31. Mr. Sacchetti's evidence regarding the lighting was confirmed by the first officer who arrived at the scene. Cst. Douglas MacRae recalled the exterior of the house being "very well lit" when he arrived. He could not confirm if the porch light was on, but he testified that "it was well lit enough that I could see where I was going and see what was around me."[34]

32. Mr. Sacchetti observed the weapon during the assault, which he estimated lasted between five and ten minutes:

> Q. One of the things you said, Mr. Sacchetti, and it's important that if you are able, if you are able, to give us an idea of how long this attack on you was taking place – let me just finish.
>
> A. Well, maybe five minutes, six minutes. I don't know. Ten minute? I don't know the time because I had no time on me, and after the beating I wasn't – I didn't know what the

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[32] Evidence of D. Cardwell, Transcript of Proceedings at Trial, Appellant's Record, pp. 45/22-47/27; Evidence of K. Bryan, Transcript of Proceedings at Trial, Appellant's Record, pp. 126/4-127/9; Evidence of F. Abreu, Transcript of Proceedings at Trial, Appellant's Record, pp. 202/7-203/3; Evidence of P. Walsh, Transcript of Proceedings at Trial, Appellant's Record, pp. 217/29-218/9.

[33] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, p. 174/10-15.

[34] Evidence of D. MacRae, Transcript of Proceedings at Trial, Appellant's Record, pp. 21/1-23/4.

hell I was doing. So you know, I had no clock, no time, so I couldn't say. If I say it could be five minutes, could be ten. Between five and ten minutes, no more than that. It was fast.[35]

33. Mr. Sacchetti testified that when the second robber started throwing snow in his face, he closed his eyes, but only for "a minute or so":

> Q. Okay. You've told us that you had your eyes closed at times during this beating. Are you able to tell us, like, how much of the time of the beating your eyes were closed?
>
> A. Not long. Not too long because when the guy come out then when they start throw snow in my face, in my eyes, then I close my eyes. It would have been short, a minute or so. Because it was me and him outside, only was one beating me, but I had my eyes open.[36]

34. Mr. Sacchetti provided a detailed description of the weapon used in the robbery. He was shown the apartment baton and testified that it was not the weapon. His evidence was uncontradicted.

35. Mr. Sacchetti's description of the weapon can be summarized as follows:

- It consisted of two parts: the bottom or the handle, and the top.
- The bottom was eight inches long and an inch and a half around. It was black or brown. It did not move. Mr. Sacchetti believed it was made of wood, but he was unsure.
- The top was metal. It was 12 inches long and five-eighths or three-quarters of an inch around. It was silver in colour. The top was flexible, like a whip or BX wire. It goes into a point.

36. Mr. Sacchetti first mentioned the weapon near the outset of his examination-in-chief. He was not cross-examined. He described the bottom part as wood and the top part as "a piece of metal that swivels":

> A. …He's on the top of me and not really on the top of me like a real position, and he was whacking me and beating me with this piece of metal. Well, **the bottom I guess was wood**…

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[35] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 178/27-179/4.
[36] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, p. 179/10-17.

Q. I'm going to ask you to slow down a little, okay?

A. ...and **the top was a piece of metal that swivels**. It's not straight. Like, when you hit, it moves around.[37]

37. Mr. Sacchetti described the wooden bottom as about eight inches long and vividly demonstrated how the top part swiveled around using the microphone in the witness box:

Q. And you were using a motion with your arm that he was whacking you?

A. He was, yeah, whacking me with this piece of – **the bottom was wood and it was about eight inch**, about like this, and then **the top was something that you move it around**, you know? Like, for example, like this, you know. You whack 'em around and it moves.

Q. I'm going to ask you some more detail about that item in a minute, okay?

MR. AUBIN: Your Honour, I just wonder if maybe we should put on the record what the witness just did with the microphone so it's on the record.

MS. McCALLUM: He was **swiveling around the top of the microphone** when he was [talking] about it moving around.

THE COURT: Is that agreed, Mr. Aubin?

MR. AUBIN: Yes.[38]

38. Mr. Sacchetti did not know the name of the weapon:

A. ...I guess he must use his fist with that because that metal piece, it wouldn't – it's a slim – I don't know what I can say.

Q. All right. I'm sorry, what did you say? "I don't know...", and I didn't hear what you said?

A. I don't know if he hit me with the fist here or with this – with this thing that he had. I don't know the name or what would you call it.[39]

39. Mr. Sacchetti provided a detailed description of the bottom and top parts of the weapon – their composition, function, shape, size, and colour. Twice, he likened the bottom part of the

[37] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, p. 161/22-29 [emphasis added].
[38] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 166/18-167/2 [emphasis added].
[39] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, p. 167/13-21.

weapon to a police baton, but proceeded to distinguish it on the basis that the top part of the weapon was flexible, "like [a] whip that swivels" or "like BX wire":

> Q. Now, I want to ask you, I'm going to ask you some questions about the item that you were being hit with that this person had, okay? So I want you to describe – you've told us a little bit about it already. You've used the word "bottom" and "top", okay?
>
> A. Yeah.
>
> Q. Can you tell us in terms of what do you mean by the **bottom**?
>
> A. Like, you know **like the policeman has that wood piece that they used to carry on the side their legs, the Canadian policemen? But then this thing, he had a piece of metal on the top of that**...
>
> Q. Okay. Just you're going to have to slow down. Just a second. He had a piece of metal on the top of what?
>
> A. On the top of the **wood handle**.
>
> Q. Okay.
>
> A. And this piece of metal is **like whip that swivels**, you know, moves around when you – like, you know, it's not like a piece of wood that it doesn't move. He had me and he moves this piece of metal. It's something like that, swivels.
>
> Q. Okay. So you're just waving your hand and your arm and finger back and forth?
>
> A. Like, you know the whip, like when they had the horse? The whip, except this thing was like – for example, **like BX wire**. You know, like wire that the electrician used to use, is a metal that moves, you twist it the way you want it.
>
> Q. No, I have no idea. I have no idea what that is.
>
> A. Well, this thing, you **could twist it** the way you want, this piece that they had on the top of this wood. It's like a piece of metal that it's **not stiff**. You know, it's not one piece, it moves around.
>
> Q. Let's slow down and back up, please, okay, Mr. Sacchetti? So you started to talk about – you started to compare it to a whip that you used with a horse. Is it like that or is it – I didn't understand you. Is it like that or not like that?
>
> A. Well, I give you an example. Like, this was a metal, but it was like a whip, you know. Used to have when you whip the horse. This thing's **not straight**, it moves, you know.

Q. In which direction did it move?

A. Well, you move it the way you want it. You know, you either here or you can have it there.

Q. Okay. So I just want to show, you're flicking your hand when you're talking about moving it.

A. Yeah. Well, the metal piece that was on the top of this brown handle is a piece that it moves, you know. It's not straight, you move. You know, it's **flexible**. That's the word, flexible.

Q. Let me ask you about the **bottom**, the **handle** part, okay? Do you recall what colour it was?

A. I think it was **black or brown**, something like that.

Q. And about how long was the handle?

A. Well, it would be about **eight inch**. I figure would be about eight inch long.

Q. Okay, and how about the part that you've described as **metal**? About how – did you see how long…

A. The metal – the metal…

Q. Let me finish. Mr. Sacchetti, it's really important that we not talk at the same time, okay? Just the metal part that you've talked about, about how long was that?

A. The metal part would be I figure about **12 inch or so**.

Q. Did the bottom handle part move at all? Could it move?

A. No.

Q. Were you able to tell how many parts there were to this item?

A. Well, the only part there were of this item was the **two**, was the handle, the **wood handle** at the bottom and this **flexible tube** on the top.

Q. Are you able to tell us, please, how large the handle portion was around?

A. The handle, the bottom, would be about **an inch and a half**.

Q. And how about the metal part?

A. And the metal part…

Q. Around. How large around?

A. The metal part would be, well, **five eight or three quarter**. Like a finger.

Q. Okay. So give us an idea. Was it the same or a different size around as the handle?

A. From the bottom to the top?

Q. Yeah.

A. No, **way smaller on the top**.

Q. Okay. Which was the smaller part, the top or the handle?

A. The top because the bottom was an inch and a half.

Q. Okay. What colour was the top part?

A. The top part was a **silver colour**. Like silver, yeah. Silver colour. Like, a metal silver. Like, for example the part here.

Q. Okay. What are you pointing to? You're pointing to something when you're describing the colour. Lift it up.

A. You want me to raise this thing?

Q. Yeah. Okay.

A. Silver, yeah.

Q. You're pointing to the silver metal part of the microphone in front of you?

A. Well, I call this silver. It might not be the right word, but…

Q. How did it feel when it hit you? How did it feel when it hit you?

A. How did it feel? You don't want me to remember how it feel. It feel – you feel like you've been whacked, beaten. I mean, you ever get beat? Anybody here got beat with this thing like that? Then you know how it feels.

Q. Mr. Sacchetti, one of the things you said when I asked you to describe this item, you said it was like the policeman has, that wood…

A. Well…

Q. Let me finish. You said it was **like what the policeman has, that wood piece they carry at the side of their legs**. I want you to tell us, what was the same or what was different about this item than what the police carry? What are you thinking about in terms of what the police carry?

A. Now, what I know, I never been involved with the police that they gonna use at me, but **I see the police walk with this thing on their thing, but I don't know how far it goes into the pants**. But that was the – but this thing, **I don't know if policeman Canadian have the same metal piece on the top**. I didn't see this. All I know, I see when they walk and I see this thing on their legs and **it's the same, about the same colour. I figure it's wood, but I don't know at the end the way it is**.

Q. You've been referring to the handle or the end as wood.

A. Yes.

Q. Why are you calling it wood? What is it about the object that makes you think it's wood?

A. Well, as far as I understand, as far as my knowledge, **I think it's made out of wood. I don't know**.

Q. Did you ever actually touch this item yourself?

A. No.

Q. Other than it being hit on your body, did you touch it at all, the handle or…

A. No.[40]

40. Mr. Sacchetti was given the apartment baton and asked to examine and extend it. He testified that it was not the weapon used in the robbery. He noted five differences between the weapon and the apartment baton:

i. The top of the weapon was flexible, whereas the top of the apartment baton was "straight" and "doesn't flex";

ii. the top of the weapon was "a little longer" than the top of the apartment baton;

iii. the top of the weapon was silver in colour, whereas the top of the apartment baton was black;

[40] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 169/13-173/22 [emphasis added].

iv. the top of the weapon "go[es] into a point", whereas the top of the apartment baton "has a little head like a mushroom"; and

v. the bottom of the weapon was thicker than the bottom of the apartment baton.

As Mr. Sacchetti testified:

> Q. Okay. Mr. Sacchetti, I'm going to show you an object, okay, and then I'm going to ask you some questions about the object. Don't say anything until I ask my question, okay?
>
> A. Okay.
>
> Q. I want you to look at that object and you can see if it moves at all, but I want to ask you, how does that object I've given you compare to what you saw that night when you were being whacked?
>
> A. Well, the handle was about the same length, the bottom was about the same length, but **top, it's long**, about this long.
>
> Q. The item that was used?
>
> A. Yeah, the thing was on the top of his hand, but was **flexible**, you know. See, this thing, it's **straight**. It **doesn't move, doesn't flex**.
>
> Q. So I'm going to say for the record, while you were demonstrating you were using it – I don't want to not describe his actions with his arm, I want to describe it properly, but you were essentially doing a motion with your arm and the end of that item was moving as you were doing that.
>
> A. You want me to repeat?
>
> Q. No, it's okay. Mr. Sacchetti, while you were doing that did you see part of that item come out of the bottom…
>
> A. No.
>
> Q. …while you were just demonstrating it for us?
>
> A. No.
>
> Q. Are you able to hold onto the handle? Do you see part…
>
> A. No.
>
> Q. You can't do that?

A. No. It was going so fast. I was try and protect me.

...

Q. Now I'm going to ask you some questions about the object I've given you, okay? I'd like you to pick it up. Are you able to move the end at all? I don't want you to hurt yourself.

A. You want me to pull it out?

Q. Yeah. Can you pull it out? So I want to ask you some questions while it looks like that, okay? Are you able to tell whether or not you folded it out as far as you can? Have you pulled it out as far as you can right now?

A. Well, that thing was as **little longer** than this thing, but the difference is that this thing is **solid**, it **doesn't move**, and that thing, you **could move** it.

Q. And how does the colour compare to the item that was used?

A. Well, this is **black**. That was a **silver** colour.

Q. And what part was the silver colour that you saw?

A. This is the – the top part was the silver colour.

Q. So just for the record, you're showing the part that is – the top part is not the handle, the thinner part.

A. The metal, the thin part, yeah.

Q. Okay.

A. This about the size, the five/eight or a finger, but...

Q. Okay. Now I want to ask you about the size around. How does the size around of the item you are holding which is Exhibit A, how does the handle size around compare to what you saw that night?

A. The **bottom was thicker** than this.

Q. And how about the top portion?

A. The top was about...

Q. How does – let me finish my question. How does it compare around to what you recall of that night?

A. About the same as this and **go into a point**.

Q. What do you mean it went into a point?

A. It doesn't have like, this had, like this one has. For example, the finger goes from here to a point.

Q. Okay. So let's make sure we're talking about the same thing. You've said that the item you're holding which is Exhibit A has a point at the end.

A. This one has a **little head like a mushroom**, that one wasn't.

Q. And so that night it did not have like the mushroom shape?

A. No.[41]

C. The Closing Addresses to the Jury

41. The Crown told the jury that they could infer the appellant was one of the robbers from the DNA evidence:

> The identity of Brandon Wills as one of those perpetrators and one of the assailants is readily and clearly a known to you as a matter of a reasonable inference, common sense and overwhelming evidence and that lies squarely with the simple reality of the DNA evidence on both bandanas. You know and can conclude Brandon Wills is one of those assailants, most logically the one beating Mr. Sacchetti, as a result of the bandana being torn from the face and the baton, but I'm going to go through this in more detail, but nevertheless it is known to you because a piece of his very identity, his DNA, is torn right off the face. Right – the bandana is torn right from Mr. Sacchetti's assailant and left on the ground to be picked up. So that – therein lies clearly the identity of the perpetrator. That DNA is on that bandana and there's no way to get around it and that is his DNA. It is his identity. He is the perpetrator, one of the perpetrators of that house.
>
> ...
>
> So what are the reasonable inferences, the possibilities that do not defy common sense and that is quite simply that Brandon Wills committed the robbery. You know it because of his DNA and you know it because of the bandana being ripped off of the face of the perpetrator by Mr. Sacchetti, and you know it because of the second bandana along the flight path that also had his DNA on it. That is identity of the perpetrator. It is solid. It

[41] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 181/27-185/4.

is simple. It is compelling. It's undisputed. It's common sense. It's overwhelming. That is identity.[42]

42. The Crown told the jury that the baton evidence was "compelling evidence deserving a significant weight in your deliberations about who was the perpetrator". She suggested that Mr. Sacchetti was an "honest but mistaken witness." She asserted that it would be "wholly unreasonable" to expect Mr. Sacchetti to have described the weapon used in the robbery "with precision in its minutia and its detail" or positively identified it, given the context in which he made his observations. She stated that it was dark outside and referred to Mr. Sacchetti's testimony, but not Cst. MacRae's. Regarding the differences Mr. Sacchetti identified between the weapon and the apartment baton, the Crown told the jury that his evidence was that both moved. In fact, Mr. Sacchetti twice stated that the apartment baton did not move, unlike the weapon. The Crown also mistakenly said that Det. Cardwell testified in cross-examination that "metal changes with lighting in terms of the colour."[43]

43. In addition to the DNA and baton evidence, the Crown told the jury to give weight to Mr. Sacchetti's generic description of the first robber because it is consistent with the appellant's appearance.[44]

44. In his closing address to the jury, defence counsel disputed that the DNA evidence could identify the appellant as one of the robbers. He said that "one way to think about reasonable doubt is are there other rational explanations other than the accused person is involved in the offence". He stressed that "there's more people on [the bandanas] than there are perpetrators". He reviewed the limitations of the DNA evidence and did his best to caution the jury that it was

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[42] Closing Address to the Jury by Ms. McCallum, Transcript of Closing Addresses, Appellant's Record, pp. 10/24-11/13, 13/9-21.
[43] Closing Address to the Jury by Ms. McCallum, Transcript of Closing Addresses, Appellant's Record, pp. 17/4-26/3.
[44] Closing Address to the Jury by Ms. McCallum, Transcript of Closing Addresses, Appellant's Record, pp. 26/3-27/22.

"extremely dangerous" and "can be misused very, very easily". Regarding the apartment baton, defence counsel argued that it did not prove the appellant's guilt because Mr. Sacchetti was clear that it was not the weapon used in the robbery, and there was evidence that it did not belong to the appellant. He noted that Mr. Sacchetti gave a very detailed description of the weapon and did not testify that he had any trouble seeing it, and the Crown never suggested to him that he was mistaken. It was also suggested that batons are widely accessible. As for the description of the first robber, defence counsel pointed out that Mr. Sacchetti did not testify that the appellant was the first robber or resembled him.[45]

D. The Jury Charge

45. The trial judge's instructions to the jury generally conformed to the standard jury charge. The trial judge gave the standard instruction that the jury could believe some, none, or all of the evidence. He said that "the evidence in this case really does not come down to issues of credibility as it relates particularly to the evidence of the Sacchettis." He explained the difference between direct and circumstantial evidence. He reviewed the DNA evidence, specifically repeating the random match probabilities of 1 in 48 billion and 1 in 9.2 billion. He gave the standard instructions on expert evidence and eyewitness testimony. He effectively told the jury that some of the Sacchettis' evidence was likely inaccurate:

> Both Mr. and Mrs. Sacchetti gave some evidence of the physical characteristics of the perpetrators who were assaulting them, as well as the weapons used. The accuracy of their evidence must be looked at in the context of the lighting conditions and the fact that both were placed in extremely stressful situations. It would not be overly surprising if there were some inaccuracies in their evidence concerning the description of the individuals involved and the weapons used.[46]

[45] Closing Address to the Jury by Mr. Aubin, Transcript of Closing Addresses, Appellant's Record, pp. 30/28-50/8.
[46] Transcript of Jury Charge, Appellant's Record, pp. 28/5-68/27, 76/2-100/10.

46. In reviewing the Crown's theory, the trial judge reiterated the Crown's position that "the most cogent and compelling evidence that Mr. Wills committed the robbery lies with the DNA evidence." He said that the apartment baton, which was "strikingly similar" to the weapon Mr. Sacchetti described, was "important evidence that links Mr. Wills directly to this robbery." He repeated that "[i]t was dark outside, with artificial lighting from the snow", and that "it would be wholly unreasonable to expect Mr. Sacchetti, in these circumstances, to recount with precision the details of the baton or to be able to positively identify the actual baton that was used on him that night." The trial judge told the jury that Mr. Sacchetti's description of the first robber was not insignificant because it fit the appellant.[47]

47. The trial judge summarized the defence position that "there is no evidence that Mr. Wills committed this crime." The trial judge said that "Mr. and Mrs. Sacchetti cannot identify the perpetrators, the DNA evidence cannot identify the perpetrators, and the baton found in the apartment where Mr. Wills lived was not used in the crime." The review of the defence theory, which was half as long as the review of the Crown's position, focused on the DNA evidence.[48]

48. The jury retired to consider its verdict at 10:34 a.m. on October 19, 2011. By 2:06 p.m., the jury had reached its verdict – guilty on all counts.[49]

E. The Appeal to the Ontario Court of Appeal

49. The Court of Appeal was unanimous that the main pillar of the Crown's case – the DNA evidence – was important, but inconclusive on the issue of identity. As Doherty J.A. thoroughly and cogently explained:

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[47] Transcript of Jury Charge, Appellant's Record, pp. 55/29-64/17.
[48] Transcript of Jury Charge, Appellant's Record, pp. 64/21-68/7.
[49] Transcript of Jury Charge, Appellant's Record, pp. 100/15-19, 108/29-110/31.

> The DNA evidence was obviously important evidence. The jury could readily infer that one or both of the robbers had worn the bandanas during the robbery. The DNA evidence also established, almost to an absolute certainty, that the appellant, among others, had direct or indirect contact with both bandanas at some point in time before the police found the bandanas at the robbery scene.
>
> The finding of the appellant's DNA on both, as opposed to just one, of the bandanas was also suggestive of some connection between the appellant and the robbery. The DNA evidence went some way toward identifying the appellant as one of the perpetrators.
>
> However, the DNA evidence alone could not support the inference that the appellant was one of the perpetrators or that either bandana belonged to the appellant. The expert evidence called by the Crown precluded those inferences based exclusively on the DNA evidence. Like the fingerprint evidence in *R. v. Mars*, (2006), 205 C.C.C. (3d) 376, at paras. 20-21 (Ont. C.A.) and *R. v. D.D.T.*, 2009 ONCA 918, at para. 26, the DNA evidence alone could not say when that DNA was placed on the bandanas 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, e.g. see *R. v. Samuels*, 2009 ONCA 719; and *R. v. Wong*, 2011 ONCA 815.[50]

50. The Court was also in agreement that the Sacchettis' very general descriptions of the robbers added no force to the Crown's case.[51]

51. However, the Court parted ways on whether the apartment baton provided the necessary added evidence to permit the inference that the appellant was one of the robbers. Doherty J.A., writing for himself and Benotto J.A., found that it did, although it was "a close call." He held that a reasonable jury could conclude that Mr. Sacchetti's general description of the weapon used in the robbery as similar to a police baton was accurate, but he got the details wrong because of the circumstances in which he observed the weapon. Thus, a reasonable jury could conclude that Mr. Sacchetti was struck with a police baton that was similar to the police baton in the appellant's apartment. Doherty J.A. considered that the "somewhat uncommon nature" of a

[50] *R. v. Wills*, 2014 ONCA 178, at paras. 34-38, 68-69, 85.
[51] *Wills, supra*, at para. 43.

police baton adds probative value to the evidence. He also took into account the appellant's failure to testify in concluding that the verdict was reasonable.[52]

52. Pepall J.A. found that "the verdict in this case is beyond the limits of reasonableness." She noted four points:

i. The apartment baton was not identified as the weapon used in the robbery;

ii. Mr. Sacchetti identified how dissimilar it was to the weapon used in the robbery;

iii. There is no evidence connecting the apartment baton to the crime; and

iv. Batons are not "complete rarities."[53]

53. Pepall J.A. carefully reviewed Mr. Sacchetti's testimony. She disagreed with Doherty J.A. that Mr. Sacchetti likened the weapon used in the robbery to a police baton generally. Rather, Mr. Sacchetti was comparing only the bottom of the weapon. He went on to say that the top of the weapon was different from a police baton. Pepall J.A. noted that both Mr. Sacchetti and Cst. MacRae testified that the lighting was good. She concluded that the inconclusive DNA evidence coupled with the baton evidence could not reasonably permit the inference that the appellant was one of the robbers.[54]

PART II: QUESTION IN ISSUE

54. There is one question in issue: Is the verdict unreasonable?

[52] *Wills, supra*, at paras. 39-44.
[53] *Wills, supra*, at paras. 65, 71-74.
[54] *Wills, supra*, at paras. 75-85.

PART III: STATEMENT OF ARGUMENT

A. The Law on Unreasonable Verdicts

55. The power of an appellate court to set aside an unreasonable verdict is set out in s. 686(1)(a)(i):

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

56. This power, available only in appeals by the accused, serves as "an additional and salutary safeguard against the conviction of the innocent."[55] As Doherty J.A. wrote in this case: "Jury verdicts are regarded as the gold standard in criminal law. However, as with any human institution, juries can make mistakes. Where the mistake is a wrongful conviction, the cost to the accused can be measured in years of his or her life."[56]

57. A verdict is unreasonable or cannot be supported by the evidence if it is one that a properly instructed jury acting judicially could not have reasonably rendered.[57] In a case such as this where the evidence was purely circumstantial, the test is whether a properly instructed jury acting judicially could not have reasonably concluded that the only rational conclusion to be reached from the whole of the evidence was that the appellant was guilty.[58]

58. In *W.H.*, Cromwell J. for this Court identified two boundaries within which appellate review under s. 686(1)(a)(i) must be conducted. One is that "due weight" must be given to the

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[55] *R. v. Burke*, [1996] 1 S.C.R. 474, at para. 6.
[56] *Wills, supra*, at para. 27.
[57] *R. v. W.H.*, 2013 SCC 22, at para. 26; *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 185; *R. v. Biniaris*, 2000 SCC 15, at para. 36.
[58] *Wills, supra*, at paras. 33, 66; *Yebes, supra*, at p. 185; *R. v. Barrett*, 2004 NSCA 38, at para. 19; *R. v. Griffin*, 2009 SCC 28, at para. 33.

advantages of the jury as the trier of fact who was present at the trial and saw and heard the evidence.[59] At the same time, this Court has also acknowledged that "the deference owed to a trial court's findings of fact must not become a pretext for an appellate court to evade its responsibility to set aside an unreasonable verdict."[60]

59. The other boundary is that the appellate court must consider not only whether there is sufficient evidence to support the conviction, but also whether the jury's conclusion conflicts with the "bulk of judicial experience." The appellate court must "review, analyze and, within the limits of appellate disadvantage, weigh the evidence" and decide whether "judicial fact-finding precludes the conclusion reached by the jury" through the "lens of judicial experience"[61] Doherty J.A. defined the "lens of judicial experience" as follows:

> The "lens of judicial experience" refers to the appellate court's examination of the cogency of the evidence as informed by the court's awareness of the risk of wrongful convictions associated with certain kinds of cases and certain kinds of evidence. The court, as an institutional participant in the criminal justice system, has an appreciation of those risks that a jury in a specific case cannot have.[62]

60. In *W.H.*, Cromwell J. offered examples of "the sorts of cases in which accumulated judicial experience may suggest that a jury's verdict is unreasonable":

> Circumstances in which a special caution to the jury is necessary about a certain witness or a certain type of evidence are reflective of accumulated judicial experience and may well factor into an appellate court's review for reasonableness. Some examples include the evidence of jailhouse informants and accomplices, and eyewitness identification evidence. Other circumstances that generally do not require, as a matter of law, any particular warning to the jury may nonetheless, in light of accumulated judicial experience, contribute to a conclusion of an unreasonable verdict, for example the risks of accepting bizarre allegations of a sexual nature and the risk of prejudice in relation to psychiatric defences…What all of these examples have in common is that accumulated judicial experience has demonstrated that they constitute an explicit and precise circumstance that creates a risk of an unjust conviction.[63]

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[59] *W.H., supra*, at para. 27.
[60] *R. v. Beaudry*, 2007 SCC 5, at para. 62; *Burke, supra*, at para. 6.
[61] *W.H., supra*, at para. 28; *Biniaris, supra*, at paras. 6, 39-40.
[62] *Wills, supra*, at para. 30.
[63] *W.H., supra*, at para. 29 [citation omitted].

61. In this case, Doherty J.A. recognized that the reprehensible nature of the crime and the nature of the evidence, which was purely circumstantial and included inconclusive DNA evidence, were circumstances that "create[d] a risk of an unjust conviction":

> This was a terrible crime committed against innocent and particularly vulnerable members of the community. Law-abiding members of the community could easily see themselves as the victims of this kind of random violent crime. A jury's understandable concern that criminal activity of this kind does not go unpunished could subconsciously influence the jury's assessment of whether the circumstances—which no doubt pointed the finger of suspicion at the appellant—were sufficiently compelling to justify a finding of guilt beyond a reasonable doubt.
>
> Not only is this the kind of case where jury objectivity is tested, but also the evidence relied on by the Crown was purely circumstantial. The reasonableness of the verdicts must be assessed with regard both to the inferences reasonably available from the totality of the evidence and to the Crown's ultimate burden to demonstrate that guilt is the only reasonable inference to be drawn from the totality of that evidence…There is a risk that a jury could use the DNA evidence, which provided incontrovertible evidence connecting the appellant to the bandanas, to draw the further, but much weaker, inference connecting the appellant to the robbery.[64]

62. Where a verdict is based on the jury's assessment of a witness' credibility, the question is whether it "cannot be supported on any reasonable view of the evidence".[65] In *R. v. François*, McLachlin J. (as she then was) discussed challenges to credibility based on a witness' lack of reliability:

> Review for credibility may involve consideration of the basis for conclusions which the witness has drawn. For example, a witness may say, "That is the man who hit me". If other evidence indicates that the witness was unable to see the person who hit him at the time of the assault, the witness's identification might be considered unreasonable and a verdict dependent solely upon it overturned under s. 686(1)(a)(i). This sort of challenge for credibility is not much different in practice than the challenge on other grounds in *Corbett* and *Yebes*.

[64] *Wills, supra*, at paras. 32-33 [citations omitted].
[65] *W.H., supra*, at paras. 30-34, *Burke, supra*, at para. 7.

McLachlin J. explained that challenges to credibility based on lack of truthfulness are more problematic because they involve factors that are not "susceptible of reasoned review by a court of appeal".[66]

63. Where the Crown's case is weak and incapable of supporting an inference of guilt, the accused's failure to testify cannot strengthen the Crown's case so as to justify drawing an otherwise unreasonable finding of guilt. Only where the Crown's case, standing alone, is capable of supporting a conviction can the accused's failure to testify have legal significance as confirmation of the trial judge's finding that no reasonable doubt could exist on the evidence.[67]

64. The Court must put itself in the place of the appellate court, consider the matter anew, and if an error is found, make the order the appellate court should have made.[68]

B. Application to the Facts

65. The appellant submits that the majority of the Court of Appeal committed several errors in applying the law to the facts of this case. For the reasons given by Pepall J.A. and the additional reasons developed below, the verdict was unreasonable. The appellant takes the position that:

i. The jury's rejection of Mr. Sacchetti's evidence that the apartment baton was not the weapon used in the robbery cannot be supported on any reasonable view of the evidence;

ii. Alternatively, even if it was reasonable for the jury to reject Mr. Sacchetti's evidence that the apartment baton was the weapon used in the robbery, the jury could not then infer from that rejection that the apartment baton was the weapon used in the robbery. The rejection of Mr. Sacchetti's evidence had no evidentiary value and could not strengthen the Crown's case.

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[66] *R. v. François*, [1994] 2 S.C.R. 827, at pp. 835-836.
[67] *R. v. D.D.T.*, 2009 ONCA 918, at para. 38; *R. v. Mars*, [2006] O.J. No. 472 (C.A.), at para. 23; *R. v. Lepage*, [1995] 1 S.C.R. 654, at para. 29.
[68] *Yebes, supra*, at p. 186.

Without any added evidence, the jury was left with the inconclusive DNA evidence, which could not support the inference that the appellant was one of the robbers. The appellant must be acquitted.

66. The majority gave the following reasons for its decision:

> ...A reasonable jury could conclude that Mr. Sacchetti's general description of the weapon used against him as like the "wood piece" that police "carry on the side of their legs" was accurate and reliable but that his description of the details of the weapon was not reliable because of the circumstances in which he observed the weapon. For example, a reasonable jury might well take Mr. Sacchetti's reference to the weapon as being "like a whip" as explained by the manner in which his assailant swung the weapon in a downward motion at Mr. Sacchetti who was lying on the ground. Similarly, Mr. Sacchetti's description of the end of the weapon used to strike him as silver could be explained by the exposure of the metal surface of the weapon where the paint had been scratched off. The lighting conditions where Mr. Sacchetti was attacked could well have affected his perception of the colour of the object being used to bludgeon him.
>
> Allowing for the clearly advantageous position of the jury who saw and heard Mr. Sacchetti testify and who had an opportunity to examine the baton seized from the appellant's closet, I think a reasonable jury could conclude that Mr. Sacchetti was struck with a police baton that was similar in appearance to the police baton seized from the appellant's bedroom closet.
>
> The reasonableness of the finding that the appellant was one of the perpetrators ultimately depends on the probative value of evidence that the appellant had in his bedroom closet some two months after the robbery a police baton that was similar to the weapon used in the robbery. In considering the probative value of the evidence, one must bear in mind that a police baton is not the kind of object that is commonly found in a household or in the possession of persons other than police officers. The somewhat uncommon nature of the weapon adds some probative force to the evidence from the Crown's perspective.
>
> ...
>
> This is a close call. I am, however, satisfied that the DNA evidence linking the appellant to the two bandanas used in the robbery, combined with evidence permitting the inference that some two months after the robbery the appellant had a police baton like the police baton used in the robbery, is sufficient to render the jury's finding that the Crown had proved that the appellant was one of the perpetrators a reasonable one. In holding that the verdicts survive the reasonableness analysis I have taken into account the appellant's failure to testify.[69]

[69] *Wills, supra*, at paras. 40-44 [citation omitted].

67. The majority erred in its interpretation of Mr. Sacchetti's evidence, as Pepall J.A. pointed out in her dissenting reasons. The lengthy excerpt at para. 39 from Mr. Sacchetti's testimony makes clear that when he compared the weapon used in the robbery to a police baton, it was specifically in relation to the bottom part of the weapon. He went on to contrast the top of the weapon on the basis that it was flexible and swiveled like a whip.[70] Mr. Sacchetti was unequivocal that the apartment baton was not the weapon used in the robbery.

68. The majority suggested that a reasonable jury could conclude that Mr. Sacchetti was mistaken in describing the details of the weapon used in the robbery because of the circumstances in which he observed it. Such a conclusion would be incompatible with the following undisputed evidence:

i. Mr. Sacchetti testified that it was "fully bright" outside. Cst. MacRae confirmed Mr. Sacchetti's evidence. He recalled that the exterior of the house was "very well lit", such that he could see where he was going and what was around him;

ii. Mr. Sacchetti did not have a fleeting glimpse of the weapon. He observed it during the assault, which lasted between five and ten minutes;

iii. Mr. Sacchetti was in a position to see the weapon. He was on his back while the first robber was bent over him;

iv. Mr. Sacchetti's highly detailed description of the weapon included distinctive features, such as the flexibility of the top part and how it goes into a point;

v. When Mr. Sacchetti was asked to recount what happened on February 26, 2010, he said, "That's one night I cannot forget";[71] and

vi. Mr. Sacchetti was asked to identify the apartment baton in a highly suggestible environment, not unlike in-dock identifications. Yet he steadfastly maintained that the apartment baton was not the weapon used in the robbery.

69. It is also critical to the reasonableness analysis that there was no evidence that Mr. Sacchetti had any difficulty seeing the weapon, remembering how it looked like, or recounting

[70] *Wills, supra*, at para. 79.

[71] Evidence of D. Sacchetti, Transcript of Proceedings at Trial, Appellant's Record, pp. 160/29-161/2.

its appearance in court. There were no prior inconsistent statements, no hints of bias, and no indications of bad character. Rather, it was evident that Mr. Sacchetti was a careful witness.

70. In view of these circumstances, the majority erred in suggesting that a jury could reasonably find that Mr. Sacchetti mistook a straight baton for a flexible one, and a black or mostly black baton for a silver one.

71. The majority referred to the jury's advantageous position over an appellate court, but as this Court observed in *François*, that advantage is less significant in a case like this, which turns on the reliability of a witness. This Court can examine the same exhibits that were before the jury, including the apartment baton.

72. The majority held that a reasonable jury could conclude that Mr. Sacchetti was struck with a police baton that looked similar to the police baton seized from the appellant's apartment. However, as outlined above and noted by Pepall J.A., Mr. Sacchetti identified five differences between the weapon used in the robbery and the apartment baton. While the apartment baton was described as similar to a police baton, several officers testified that a police baton is longer.

73. The majority referred to the uncommon nature of police batons adding probative force to the apartment baton. Yet as Pepall J.A. commented, batons are not "complete rarities." Anyone with internet access can buy one.

74. The majority erred in taking into account the appellant's failure to testify in finding that the verdict was reasonable. As in *D.D.T.*, because the Crown's case was weak and incapable of supporting an inference of guilt, the appellant's failure to testify could not add weight to the Crown's case so as to justify drawing an otherwise unreasonable finding of guilt.

75. The majority failed to address *R. v. Ellis*, which is indistinguishable in an important respect from this case. Mr. Ellis was convicted of robbery. Identification was the central issue at

trial. The salesperson testified that a man entered the store and asked for money. He pulled what looked like a gun from his pocket and put it on the counter for over 30 seconds. It was within two feet of the salesperson and pointed at her. The robber left the store. The salesperson's boss called 911. When the robber returned, the salesperson gave him some money and he left. She was very frightened and thought that she might be killed. She testified that the robber was in the store for about five minutes. The police arrived within five minutes of the 911 call. Mr. Ellis was arrested up the street with an imitation firearm. It did not match the description of the gun given by the salesperson, although there were some similarities. The imitation firearm was shown to the salesperson during her testimony and she could not recognize it. She provided a generic description of the robber. Some of the details were inconsistent with Mr. Ellis' appearance. She gave an in-dock identification of Mr. Ellis. He did not testify.[72]

76. The Ontario Court of Appeal found the verdict unreasonable. The following passage is on point:

> None of the surrounding circumstances offer any support for the identification evidence…Insofar as the appellant's possession of the imitation handgun is concerned, we accept counsel's submission that since the salesperson was unable to recognize the gun and it did not match the description of the gun given by her, the appellant's possession of it cannot reinforce the Crown's case against the appellant.[73]

In this case, because Mr. Sacchetti could not positively identify the apartment baton and it did not match his description of the weapon used in the robbery, the appellant's possession of it contributed nothing to the Crown's case.

77. The appellant submits that this is one of those cases in which accumulated judicial experience suggests that the jury's verdict may have been unreasonable:

i. As Doherty J.A. discussed, the jury may have been influenced by an understandable concern that such a reprehensible crime does not go unpunished.

[72] *R. v. Ellis*, 2008 ONCA 77, at paras. 1-7.
[73] *Ellis, supra*, at paras. 8-9.

It would not have gone unnoticed that there were two robbers but only one accused on trial;

ii. This was a purely circumstantial case, but the jury was not instructed that they had to be satisfied that the appellant's guilt was the only reasonable inference to be drawn from the evidence;

iii. There is a risk that the jury used the inconclusive DNA evidence to connect the appellant to the robbery, especially since they were invited to do so by the Crown in her closing address. She described the inference of identity based on the DNA evidence as "solid", "simple", "compelling", "undisputed", "common sense", and "overwhelming". The jury might have been left with the impression that the DNA evidence was infallible. The trial judge did not caution the jury that the DNA evidence alone could not support the inference that the appellant was one of the robbers.

iv. The Crown told the jury that the baton evidence was "compelling" and deserved "significant weight" in their deliberations. The jury was told multiple times that Mr. Sacchetti's description of the weapon used in the robbery was likely inaccurate. In contrast, the trial judge did not highlight all the circumstances that compelled the conclusion that Mr. Sacchetti's recollection of the weapon was reliable.

Considered in this context, the guilty verdicts are unsafe and must be set aside.

PART IV: SUBMISSIONS ON COSTS

78. The appellant makes no submissions on costs.

PART V: ORDER SOUGHT

79. The appellant requests that the appeal be allowed and that an acquittal be entered on all counts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th DAY OF JUNE, 2014 BY:

Carlos F. Rippell
Counsel for the Appellant

Diana M. Lumba
Counsel for the Appellant

PART VI: TABLE OF AUTHORITIES

Authority	Paragraph Numbers
R. v. Wills, 2014 ONCA 178	49-53, 56-57, 59, 61, 66-67
R. v. Burke, [1996] 1 S.C.R. 474	56, 58, 62
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PART VII: STATUTES

***Criminal Code*, R.S.C., 1985, c. C-46**

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence

***Code criminal*, L.R.C. (1985), ch. C-46**

686. (1) Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict d'inaptitude à subir son procès ou de non-responsabilité criminelle pour cause de troubles mentaux, la cour d'appel :

a) peut admettre l'appel, si elle est d'avis, selon le cas :

(i) que le verdict devrait être rejeté pour le motif qu'il est déraisonnable ou ne peut pas s'appuyer sur la preuve