COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Mufuta, 2015 ONCA 50
DATE: 20150128
DOCKET: C54811

Strathy C.J.O., Cronk and Hourigan JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Muamba Mufuta

Appellant

Ian Carter, for the appellant

Kevin Rawluk, for the respondent

Heard: October 24, 2014

On appeal from the conviction entered on September 22, 2011 by Justice Bruce W. Duncan of the Ontario Court of Justice, sitting without a jury.

Cronk J.A.:

[1] Following a trial by judge alone, the appellant was convicted of one count of voyeurism arising from an incident in a women's washroom at a restaurant. He appeals from his conviction on the sole ground that the verdict is unreasonable.

Background in Brief

[2] As a female employee of a restaurant was preparing to leave one of two stalls in the women's washroom at the restaurant, she noticed a man peering down at her from the adjoining stall. The woman ran from the washroom, screaming.

[3] Identity was the only issue at trial. The Crown's case against the appellant was mainly circumstantial.

[4] The complainant was unable to identify the perpetrator. She provided a generic description of the suspect, describing him as a black man with a shaved head. Three other restaurant employees also furnished only general descriptions of the perpetrator.

[5] Shortly before the incident, three black men entered the restaurant, ordered food and drinks, and sat together to eat. Each of the men fit the general description of the voyeur, as did the appellant.

[6] A restaurant surveillance tape captured the image of a black man entering the washroom area at about 2:45 p.m. on the afternoon in question. The tape showed the complainant entering the area two minutes later, and the same black man exiting at 2:48 p.m. A police officer viewed the tape shortly after the incident. He could not identify or exclude the appellant as the black man depicted in the tape. The contents of the tape were recorded over before the

police sought to retrieve the tape, some three weeks after the incident. As a result, the tape was unavailable at trial to assist in the identification of the perpetrator.

[7] After the incident, the police seized a partially full bottle of pop from the top of the toilet tank in the washroom stall where the victim saw the perpetrator. On subsequent testing, the appellant's DNA was identified on and around the mouth of the pop bottle. Apart from the DNA evidence, there was no evidence at trial that the appellant had ever been in the restaurant or that he was one of the black men dining in the restaurant at the time of the offence. However, a DNA expert testified at trial that forensic examination of the pop bottle yielded only a single source DNA profile. She also said that the testing established that the appellant was the last person to drink from the pop bottle.

[8] The restaurant surveillance tape did not show anyone entering the washroom area with a pop bottle. However, as the washrooms were cleaned daily, the pop bottle had to have been placed in the washroom sometime on the day in question.

[9] The appellant was arrested approximately three months after the incident. He did not testify at his trial.

Trial Judge's Decision

[10] The trial judge concluded that, apart from the evidence of the appellant's DNA on the pop bottle, the remaining identification evidence was "completely neutral". In his view, the non-DNA evidence merely established that, in addition to the appellant, there were at least two black men in the restaurant and "possibly one other in the washroom area" who fit the general description of the perpetrator.

[11] The trial judge was satisfied that the appellant's DNA was on the pop bottle, the appellant was the last person to drink from the bottle, and the bottle was left in the relevant stall of the women's washroom sometime on the day in question.

[12] In these circumstances, the trial judge concluded that only three possible scenarios arose: 1) the appellant was the perpetrator; 2) the appellant left the pop bottle in the washroom earlier in the day, before the incident occurred; or 3) another man, of similar appearance to that of the appellant, carried the pop bottle into the women's washroom and committed the offence.

[13] In the trial judge's view, the last two scenarios were fanciful or "speculative, unlikely and totally lacking in evidentiary support". He therefore rejected them as, in effect, irrational conclusions that did not give rise to a reasonable doubt regarding the appellant's culpability. He concluded, to the requisite criminal

standard of proof, that the only rational conclusion on the whole of the evidence was that the appellant was guilty of the offence charged.

Grounds of Appeal

[14] The appellant argues that his guilt was not the only reasonable inference available on the totality of the evidence and that, as a result, the verdict is unreasonable. In support of this argument, he contends that the trial judge erred by examining whether the evidence established that someone other than the appellant brought the pop bottle into the washroom. The appellant says that the correct approach was to determine whether there was evidence that established beyond a reasonable doubt that the appellant was the person who brought the pop bottle into the washroom.

Discussion

(1) Test for an Unreasonable Verdict

[15] The test for finding an unreasonable verdict is well-settled. In *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, Arbour J. said:

> The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebes* as follows:
>
> > [C]urial review is invited whenever a jury goes beyond a reasonable standard… . [T]he test is "whether the verdict is one that

> a properly instructed jury acting judicially, could reasonably have rendered".

[16] Justice Arbour elaborated, at para. 37:

> The *Yebes* test is expressed in terms of a verdict reached by a jury. It is, however, equally applicable to the judgment of a judge sitting at trial without a jury. The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal.

See also *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3; *R. v. D.D.T.*, 2009 ONCA 918, 257 O.A.C. 258.

[17] In *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, Fish J., at para. 98, dissenting in the result but not on this point, added this important caveat regarding an appeal from a decision of a judge alone based on an unreasonable verdict claim:

> But where reasons do exist, a verdict cannot be reasonable within the meaning of s. 686(1)(a)(i) [of the *Criminal Code*] if it is made to rest on findings of fact that are demonstrably incompatible, as in this case, with evidence that is neither contradicted by other evidence nor rejected by the judge.

See also *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, at para. 9 *per* Deschamps J.

(2) Application of the Test in this Case

[18] I am not persuaded that the appellant has met the exacting test for the demonstration of an unreasonable verdict.

[19] As I have said, the trial judge described the non-DNA identification evidence – the eyewitnesses' descriptions of the perpetrator and the police officer's account of what he had seen on the surveillance video – as "completely neutral" on the key issue of identification.

[20] This is a fair characterization of the non-DNA identification evidence. The witnesses' generic descriptions of the man they saw in the vicinity of the restaurant washroom and the police officer's observations of the images on the surveillance tape did not strengthen the Crown's case on identification. That said, the footage from the restaurant surveillance tape did establish that a black man entered the washroom area around the time of the crime, followed immediately thereafter by the complainant.

[21] Relying on this court's decision in *R. v. Mars* (2006), 206 O.A.C. 387, 205 C.C.C. (3d) 376 and *R. v. Wills*, 2014 ONCA 178, 308 C.C.C. (3d) 109, the appellant argues that the DNA evidence, standing alone, was not capable of supporting the inference that he was the man who brought the pop bottle into the washroom area and was seen by the complainant. He submits there had to be other evidence that, combined with the DNA evidence, would permit a finding

that he was the perpetrator because the DNA evidence alone failed to establish when his DNA was placed on the pop bottle and when the bottle was left in the washroom and by whom.

[22] The appellant further submits that the trial judge erred by presuming that the mere presence of the appellant's DNA on the pop bottle was highly inculpatory, requiring the appellant to demonstrate that there was some other rational explanation – other than his guilt – for the presence of his DNA on the pop bottle found in the washroom.

[23] I would reject these submissions for several reasons.

[24] First, in my opinion, the appellant understates the significance of the DNA evidence. The appellant's DNA on the pop bottle found in the washroom stall occupied by the perpetrator was a powerful piece of evidence linking the appellant to the scene of the crime. Before this court, the appellant accepts that the presence of his DNA on the pop bottle, coupled with the expert evidence regarding the single DNA profile on the bottle, supported the inferences that he drank from the pop bottle and that he was the last person to do so.

[25] Second, as the Crown points out, while the DNA evidence was the centrepiece of the Crown's case on identification, it did not stand alone. The totality of the evidentiary record establishes that:

- a black man who was physically similar to the appellant was caught on the restaurant surveillance footage entering the washroom area two minutes before the complainant. The same black male exited the washroom approximately one minute after the complainant entered the washroom;

- the police secured the women's washroom so that nobody entered after the incident;

- the partially consumed pop bottle was found on the toilet tank in the same washroom stall where the complainant observed the perpetrator;

- the washrooms were cleaned every night. It followed that the pop bottle had to have been left in the women's washroom on the day of the incident;

- only the appellant's DNA was found on the pop bottle, even though the entire mouth area of the bottle was swabbed for testing. There were also no identifiable fingerprints found on the pop bottle.

- three black men, each of whom matched the general description of the perpetrator, were dining together in the restaurant on the day of the incident;

- the three black men fled the restaurant after the complainant emerged from the washroom;

- there was no evidence that anyone other than the appellant had actually handled the pop bottle or drank from it;

- the appellant was the last person to drink from the pop bottle;

- there was no evidence linking anyone other than the appellant to the washroom stall in which the perpetrator was observed; and

- the appellant fit the generic description of the perpetrator provided by eyewitnesses.

[26] In my view, based on these undisputed facts, a reasonable trier of fact could have concluded that the appellant was the voyeur. There was no evidence at trial to support any other explanation for the presence of a pop bottle, bearing only the appellant's DNA, in the stall of the women's washroom occupied by the perpetrator. In these circumstances, in my opinion, it would stretch coincidence beyond the realm of reasonableness to speculate that the appellant innocently deposited the pop bottle earlier the same day into the same stall in the women's washroom or that someone other than the appellant deposited the pop bottle used by the appellant in the washroom stall while committing the offence.

[27] Third, in my view, the appellant's reliance on the decisions of this court in *Mars* and *Wills* is misplaced. Both *Mars* and *Wills* are distinguishable from this case.

[28] *Mars* and *Wills* both involved accuseds charged with criminal offences arising from home invasions. In *Mars*, the victim heard a knock at his door and observed an unmasked man holding a pizza box. When the victim opened the door to inform the man that he had not ordered any pizza, three men swarmed into the house.

[29] As in this case, identity was the sole issue at trial. The victim was unable to identify the man carrying the pizza box. However, a neighbour observed three

men running away from the victim's house. He described the men as "three black youths".

[30] In addition, the pizza box contained three fingerprints, one of which matched the appellant's fingerprints. At trial, expert evidence established that it was not possible to date the appellant's fingerprint or determine when it was placed on the pizza box. Indeed, the Crown's expert acknowledged that fingerprints could remain on a pizza box for several years.

[31] On appeal by the accused from his conviction, this court set aside the conviction because the circumstantial evidence did not reasonably support the inference that the appellant's fingerprint was left on the pizza box at the time of the robbery. To the contrary, it was just as reasonable to infer that his fingerprint was left on the pizza box at some time before the robbery. In addition, several other factors worked against a finding of guilt: 1) although the accused's appearance was consistent with the victim's description of one of the three robbers, the victim's description of that robber was so general that it could not inculpate the accused; and 2) because the accused was a white man, the neighbour's evidence of his sighting of "three black youths" effectively excluded the accused as one of the robbers.

[32] These facts set this case apart from *Mars*. Unlike the fingerprint evidence in *Mars*, in this case, the only DNA found on the pop bottle was that of the

appellant and other evidence at trial established that the pop bottle must have been left in the washroom on the same day as the day of the offence. Further, unlike this case, the expert evidence in *Mars* established that the accused's fingerprint could have been deposited on the pizza box on another occasion. For example, the robbers could have found the pizza box in the trash and used it to commit the offence. Finally, in contrast to the neighbour's testimony in *Mars*, there was no affirmative evidence at the appellant's trial excluding him as the perpetrator.

[33] For similar reasons, *Wills* does not assist the appellant. In *Wills*, two men, both wearing bandannas to mask their faces, forcibly entered a home occupied by two individuals. One of the invaders viciously attacked one of the occupants with a baton. During the attack, the victim pulled a white bandanna from the assailant's face. The police later found the white bandanna. They also discovered a second, blue bandanna in a ravine used as the escape route by the assailants. A footprint discovered near the second bandanna matched a footprint found at the victims' home.

[34] On testing of the white bandanna, the DNA of at least three people was detected. One of the DNA samples matched the accused's DNA. The blue bandanna was also subjected to DNA testing, revealing the DNA of at least two individuals. Again, one of the DNA samples matched the accused's DNA.

[35] However, at trial, a DNA expert was unable to estimate how long the DNA may have been on the bandannas. He also noted that the robbers may not have left any DNA on the bandannas.

[36] Further, neither homeowner could identify the assailant who wielded the baton. The victim of the assault simply described his assailant as a black man, 5 feet 7 inches or 5 feet 8 inches tall, with a “slim” face and small frame. The second homeowner was held at gunpoint by the other intruder. She provided only a general description of the man with the gun, describing him as a tall man of average build who spoke Italian.

[37] After the incident, the police seized a metal baton from the accused’s home. The victim of the assault described the baton as “similar” to the one used in the attack but also said that he believed the attacker had used a weapon with a wooden handle. He also identified three other slight differences between the weapons.

[38] The trial judge convicted the accused of a series of offences arising out of the home invasion. On appeal, the *Wills* court was not satisfied that the DNA evidence alone could support the inference that the accused was one of the perpetrators or that either bandanna belonged to the accused. Because the Crown’s expert evidence did not establish when the accused’s DNA was deposited on the bandannas, the Crown’s own evidence precluded those

inferences based exclusively on the DNA evidence. As a result, as with the fingerprint evidence in *Mars*, there had to be other evidence which, combined with the DNA evidence, would permit a finding that the accused was the perpetrator: *Wills* at para. 36.

[39] The *Wills* court went on to conclude that the inference of the accused's guilt was otherwise supportable on the facts. In particular, there was evidence that the accused had a baton at his house – an uncommon household item – that resembled the baton used in the attack. Further, unlike *Mars*, where the neighbour's exculpatory description of the assailants diminished the potential force of the circumstantial evidence linking the accused to the home invasion, the non-DNA identification evidence in *Wills* was neutral. Finally, the accused's DNA was found on both of the bandannas, further supporting the finding that he was involved in the attack.

[40] In this case, as I have emphasized, only the appellant's DNA was found on the pop bottle discovered in the restaurant washroom. This fact increases the probative force of the DNA evidence, connects the appellant to the scene of the crime, and supports the inference that he left the pop bottle in the washroom. It also renders less reasonable any inference that someone other than the appellant used the pop bottle.

[41] In addition, in contrast to *Mars* and *Wills*, there was evidence in this case supporting the inference that the appellant's DNA was deposited on the pop bottle at or around the time of the offence: 1) the appellant was the last person to drink from the bottle; 2) the bottle was part-full, suggesting that the appellant's DNA had been recently deposited on the bottle; 3) given the washroom cleaning schedule, the pop bottle had to have been left in the washroom on the day of the incident; 4) the pop bottle was found in the women's washroom at the restaurant – a place the appellant had no right to be; and 5) the pop bottle was discovered in the exact stall used by the voyeur.

[42] I would therefore reject the appellant's contention that, on the authority of *Mars* and *Wills*, the verdict in this case is unreasonable.

[43] Fourth, I regard this case as analogous to the decisions in *R. v. Dewar*, 2003 CanLII 48229 (Ont. C.A.) and *R. v. Gauthier*, 2009 BCCA 24, 264 B.C.A.C. 298. In *Dewar*, a restaurant was burglarized during a series of break-ins at a shopping mall. The police discovered a pop bottle in the restaurant manager's office that, on testing, was found to contain the accused's DNA, together with that of a co-accused, on the mouth of the bottle. The co-accused pled guilty to the offence with which he was charged arising out of the break-ins, and his admission was an agreed fact at the accused's trial. The employees of the restaurant were not permitted to drink canned pop in the restaurant, and there

was no innocent explanation for the presence of the pop bottle, bearing the accused's DNA, in the manager's office.

[44] The trial judge found that it was illogical that someone other than the accused would bring the pop bottle into the shopping mall and carry it from establishment to establishment when several of the burglarized shops had pop readily available. Further, in the trial judge's view, since little of the pop had been consumed, the pop bottle was not brought into the mall to be consumed while the perpetrators hid. The trial judge therefore concluded that the pop was consumed by the accused and his co-accused during the break-in. In other words, the accused was present at the break-in as one of the perpetrators. On appeal, this court concluded that the trial judge's reasoning was not speculative and the verdict was not unreasonable.

[45] A similar result obtained in *Gauthier*. In that case, a residence was broken into and a beer bottle bearing the accused's fingerprint was found on the victim's bed, together with various other assorted items that had been strewn about. The accused argued that the beer bottle could have been brought into the residence by a friend of the victim with whom the accused associated. Alternatively, an intruder could have brought the bottle into the residence after the accused had handled it.

[46] The British Columbia Court of Appeal rejected the accused's claim that his conviction was unreasonable, holding, at paras. 11-12, that his exculpatory hypotheses were speculative. The court noted that there was no evidence that the accused might have innocently handled the beer bottle at some other time and place. Nor was there any non-speculative explanation on the evidence for the presence of the beer bottle bearing the accused's fingerprint. The only reasonable explanation was that the accused was the intruder who broke into the residence and relocated many items in it, including the beer bottle.

[47] This reasoning is apt here. On the totality of the evidence in this case, there is no evidentiary foundation for any explanation of the presence of a partially-consumed pop bottle, bearing the appellant's DNA, in the exact washroom stall used by the perpetrator, other than that the appellant was the voyeur. In particular, there is simply no evidence that anyone other than the appellant ever handled the pop bottle or drank from it. Nor is there any evidence linking anyone other than the appellant to the washroom stall occupied by the perpetrator.

[48] Finally, I am mindful of the appellant's argument that the trial judge erred, in effect, by placing the onus on the appellant to demonstrate that there was some other rational conclusion, apart from the appellant's guilt, for the presence of the pop bottle bearing the appellant's DNA found in the washroom.

[49] I would reject this argument. The reasons confirm that the trial judge was alert to the applicable test for assessing guilt or innocence in a circumstantial case. He expressly considered, as he was obliged to do, whether the appellant's guilt was the only reasonable inference to be drawn from the facts established on the whole of the evidence: see *R. v. Cooper*, [1978] 1 S.C.R. 860. In so doing, in my view, he did not reverse the burden of proof. To the contrary, he expressly instructed himself that, "The Crown must prove guilt beyond a reasonable doubt, which burden carries with it, in a circumstantial case, the duty of excluding all rational conclusions alternative to guilt." I see no basis for appellate interference with the trial judge's conclusion that the Crown met this burden in this case.

Disposition

[50] For these reasons, I would dismiss the appeal.

Released:
"GRS"
"JAN 28 2015"

"E.A. Cronk J.A."
"I agree G.R. Strathy C.J.O.
"I agree C.W. Hourigan J.A."