

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Isley, 2020 ONCA 90

DATE: 20200205

DOCKET: C62703

Miller, Fairburn and Thorburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Donald William Norman Isley

Appellant

Richard Litkowski, for the appellant

Bradley Reitz, for the respondent

Heard and released orally: January 31, 2020

On appeal from the conviction entered on October 8, 2015, and the sentence imposed on December 18, 2015, by Justice C.N. Herold of the Superior Court of Justice, sitting with a jury.

REASONS FOR DECISION

[1] The appellant argues that the trial judge failed to adequately address the jury's questions about: a) why they were not presented with evidence as to whether a swab of the appellant's clothing was tested; and b) whether a footprint found outside of the appellant's residence where the fire was set was identified.

[2] The appellant maintains that the trial judge's answer failed to grapple with what he describes as the jury's fundamental concern that the trial judge did not link the importance of the absence of evidence on those points – things that may otherwise link the appellant forensically to the fire – to the fact that the absence of evidence could raise a reasonable doubt.

[3] We do not agree.

[4] Read contextually, the answer was complete and legally accurate. In particular, it carefully reminded the jury that a reasonable doubt can arise from an absence of evidence. There is no objection taken to the charge to the jury as it relates to this legal point. Read contextually, the answer to the jury's question reinforced this legal principle and specifically conveyed to the jury that the things they were concerned with were not evidence before them and could raise a reasonable doubt, consistent with *R. v. Lifchus*, [1997] 3 S.C.R. 320.

[5] The conviction appeal is dismissed. The sentence appeal is dismissed as abandoned.

“B.W. Miller J.A.”

“Fairburn J.A.”

“Thorburn J.A.”