



SUPREME COURT OF CANADA

CITATION: R. v. Metzger, 2023
SCC 5

**APPEAL HEARD AND JUDGMENT
RENDERED:** February 14, 2023
REASONS FOR JUDGMENT:
March 3, 2023
DOCKET: 40285

BETWEEN:

Shawn Metzger
Appellant

and

His Majesty The King
Respondent

CORAM: Côté, Rowe, Martin, Kasirer and O’Bonsawin JJ.

**REASONS FOR
JUDGMENT:** Rowe J. (Martin and Kasirer JJ. concurring)
(paras. 1 to 9)

**DISSENTING
REASONS:** Côté J. (O’Bonsawin J. concurring)
(paras. 10 to 16)

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Shawn Metzger

Appellant

v.

His Majesty The King

Respondent

Indexed as: R. v. Metzger

2023 SCC 5

File No.: 40285.

Hearing and judgment: February 14, 2023.

Reasons delivered: March 3, 2023.

Present: Côté, Rowe, Martin, Kasirer and O’Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Criminal law — Appeals — Unreasonable verdict — Evidence — Circumstantial evidence — Accused convicted of offences arising from home invasion on basis of circumstantial evidence of identity — Convictions affirmed by majority of Court of Appeal — Dissenting judge finding that verdicts unreasonable — Whether verdicts unreasonable.

The accused was convicted at trial of a number of offences arising from a home invasion robbery. Neither of the two victims of the robbery clearly saw the perpetrators, who were masked. The Crown's case to identify the accused as a participant in the robbery relied entirely on two pieces of circumstantial evidence: (1) the accused's DNA found on a cigarette butt in the vehicle of one of the victims, which was stolen from the scene and found abandoned after the robbery; and (2) the testimony of that same victim that he may have heard the accused's last name spoken by one of the perpetrators during the robbery. A majority of the Court of Appeal dismissed the accused's conviction appeal. The dissenting judge would have allowed the appeal and substituted acquittals on the basis that the verdicts of guilt were unreasonable.

Held (Côté and O'Bonsawin JJ. dissenting): The appeal should be allowed.

Per Rowe, Martin and Kasirer JJ.: The convictions should be set aside and verdicts of acquittal substituted. The verdicts were unreasonable and cannot be supported by the evidence.

The DNA evidence alone was not sufficient to establish guilt beyond a reasonable doubt. At best, it permitted an inference that the accused was in the vehicle at some point in time prior to its recovery, but there was no evidence indicating when and why he may have been in the vehicle.

The victim's testimony that he heard the accused's last name during the robbery was fraught with frailties. The trial judge's acceptance of the reliability of the victim's evidence cannot be supported on any reasonable view of the evidence. The trial judge misapprehended an aspect of the victim's testimony and failed to meaningfully address many of the concerns surrounding the victim's physical or mental state.

Considering the totality of the evidence, no trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available. In light of the evidentiary weaknesses, this is not an instance in which the accused's decision not to testify at trial can be raised against him.

Per Côté and O'Bonsawin JJ. (dissenting): The appeal should be dismissed and the accused's convictions upheld. The trial judge could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence.

First, it was open to the trial judge to consider the total absence of any reasonable explanation for the presence of the accused's DNA in the stolen vehicle. The trial judge did not consider the DNA evidence in a vacuum but relied on additional evidence to eliminate the possibility that the cigarette butt could have gotten into the stolen vehicle before or outside of the robbery. This evidence cried out for an explanation that only the accused's testimony could have provided, such that he must accept the consequences of having remained silent.

Second, the trial judge was in a privileged position to assess the identification evidence. His finding that the victim was a credible and reliable witness is entitled to deference. Whether a different trier of fact may have reached a different conclusion does not justify appellate interference. The combined effect of the identification evidence and strong DNA evidence, viewed logically and in light of human experience, allowed the judge to infer guilt on the underlying robbery.

Cases Cited

By Rowe J.

Referred to: *R. v. Brunelle*, 2022 SCC 5; *R. v. Burke*, [1996] 1 S.C.R. 474; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000; *R. v. Phillips*, 2018 ONCA 651, 364 C.C.C. (3d) 220.

By Côté J. (dissenting)

R. v. Villaroman, 2016 SCC 33, [2016] 1 S.C.R. 1000; *R. v. Phillips*, 2018 ONCA 651, 364 C.C.C. (3d) 220; *R. v. George-Nurse*, 2019 SCC 12, [2019] 1 S.C.R. 570; *R. v. Kowlyk*, [1988] 2 S.C.R. 59; *R. v. Noble*, [1997] 1 S.C.R. 874; *R. v. Brunelle*, 2022 SCC 5; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Mars* (2006), 206 O.A.C. 387; *R. v. Nicholl* (2004), 190 C.C.C. (3d) 549; *R. v. Grayston*, 2016 ONCA 784; *R. v. Ahmed*, 2015 ONCA 848; *R. v. Stjepanovic*, 2006 BCCA 169, 223 B.C.A.C. 226; *R. v. O'Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485.

APPEAL from a judgment of the Alberta Court of Appeal (Veldhuis, Schutz and Crighton JJ.A.), 2022 ABCA 16, [2022] A.J. No. 79 (QL), 2022 CarswellAlta 187 (WL), affirming the convictions of the accused. Appeal allowed, Côté and O’Bonsawin JJ. dissenting.

Jennifer Ruttan and Danielle Gregoire, for the appellant.

Tom Spark, for the respondent.

The reasons for judgment of Rowe, Martin and Kasirer JJ. were delivered by

ROWE J. —

[1] The appellant, Shawn Metzger, appeals as of right from a decision of the Court of Appeal of Alberta dismissing his appeal from convictions by a judge sitting alone for a number of offences arising from a home invasion robbery: 2022 ABCA 16. Identity was the sole issue at trial. Neither of the two victims of the robbery clearly saw the perpetrators, who numbered three or four, as the perpetrators were masked. The Crown’s case to identify the appellant as a participant in the robbery relied entirely on two pieces of circumstantial evidence: (1) the appellant’s DNA found on a cigarette butt in the vehicle of one of the victims, Mr. Iten, which was stolen from the scene and found abandoned approximately 11 hours after the robbery; and (2) the testimony of Mr. Iten that he may have heard the name “Metzger” spoken by one of the intruders during the robbery. On this evidence, the trial judge was satisfied beyond a reasonable

doubt that the appellant participated in the robbery. A majority of the Court of Appeal dismissed the appellant's conviction appeal. Veldhuis J.A., dissenting, would have allowed the appeal and substituted acquittals on the basis that the verdicts of guilt were unreasonable.

[2] I am of the view that the verdicts were unreasonable and that the appeal should be allowed. Even accounting for the privileged position of the trial judge, I am satisfied that the guilty verdicts cannot be supported by the evidence: *R. v. Brunelle*, 2022 SCC 5, at para. 7.

[3] The trial judge acknowledged that the DNA evidence, standing alone, would not be sufficient to establish guilt beyond a reasonable doubt. I agree with that conclusion. The DNA evidence at best permitted an inference that the appellant was in the vehicle at some point in time prior to its recovery by the police. There was no evidence indicating *when* and *why* the appellant may have been in the vehicle, which was unaccounted for during the 11 hours between the robbery and its recovery. Mr. Iten also routinely left the keys in the vehicle prior to the robbery. As the dissenting judge of the Court of Appeal noted, there were also pieces of clothing and other items in the vehicle that the forensic identification officer acknowledged were not sent for DNA analysis. In these circumstances, the DNA evidence alone could not have established a case to meet against the appellant with respect to participation in the robbery.

[4] The other piece of circumstantial evidence that supported the DNA evidence was Mr. Iten's testimony that he had heard the name "Metzger" during the

robbery. However, that evidence was fraught with frailties. Mr. Iten was struck on the head with a baseball bat at the outset of the robbery and was fading in and out of consciousness. In his testimony, he actively questioned his own recollection of what he had heard. He did not mention to the police during his initial interviews that he had overheard the name “Metzger”; rather, an investigating officer first mentioned the name to Mr. Iten during a telephone interview, months or possibly years after the robbery. When asked at trial whether he recalled hearing the name before that telephone interview, Mr. Iten said that he did; he indicated this was based on discussions that he had after the robbery with the second victim, Mr. Rivard, who Mr. Iten believed shared the same recollection. However, this was not corroborated by Mr. Rivard in his testimony. Mr. Iten also contemplated that his recollection of hearing the name may have been a false memory due to childhood trauma arising from personal associations with the German word “*metzger*”, meaning “butcher”, which is Mr. Iten’s lifetime vocation.

[5] Although no issue is raised with respect to Mr. Iten’s honesty, in my view, this is one of the rare instances where the trial judge’s acceptance of the reliability of Mr. Iten’s evidence cannot be supported on any reasonable view of the evidence: *R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7; *Brunelle*, at para. 8. The trial judge wrongly concluded that “[n]othing turns” on the inconsistency between Mr. Iten’s and Mr. Rivard’s evidence because they were in different rooms and may have heard different things; the trial judge misapprehended the fact that Mr. Iten testified they had

the *same* recollection. The trial judge also failed to meaningfully address many of the concerns surrounding Mr. Iten's physical or mental state during and after the robbery.

[6] Considering the totality of the evidence — including the frailties in Mr. Iten's evidence and the absence of any other inculpatory evidence except for the presence of the appellant's DNA on the cigarette butt — I am satisfied that no “trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available”: *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 55. The verdicts were therefore unreasonable.

[7] In light of the evidentiary weaknesses of both the DNA evidence and Mr. Iten's recollection, I respectfully disagree with the view that this is an instance in which the appellant's decision not to testify at trial can be raised against him. As the dissenting judge noted, quoting from *R. v. Phillips*, 2018 ONCA 651, 364 C.C.C. (3d) 220, at para. 69,

this was not a case in which the evidence cried out for an explanation that only the appellant's testimony could have provided, such that he must accept the consequences of having remained silent. It was a very weak Crown case built on identification. The failure of the accused to testify does not undermine his argument that the verdict was unreasonable.

(C.A. reasons, at para. 87 (CanLII))

[8] It is not necessary to address the appellant's additional arguments concerning the doctrine of recent possession.

[9] I would allow the appeal, set aside the convictions, and substitute verdicts of acquittal.

The reasons of Côté and O'Bonsawin JJ. were delivered by

CÔTÉ J. —

[10] The appellant, Shawn Metzger, appeals as of right from his convictions for robbery and break and enter arising from a home invasion on June 24, 2017. Identity was the sole issue at trial. Neither of the victims was able to see the three or four intruders, who were masked. After the robbery, the intruders drove away in a truck owned by one of the occupants, Mr. Valentin Iten. The truck was found abandoned and locked roughly 11 hours later. A cigarette butt was found under the driver's seat and sent for DNA analysis, which returned a single profile matching the appellant.

[11] The main issue in this appeal is whether it was unreasonable for the trial judge to convict the appellant based on (1) the presence of his DNA in the stolen truck; and (2) Mr. Iten's testimony that he heard the appellant's last name, "Metzger", used during the robbery. The majority of the court below dismissed the appellant's appeal, finding that the verdicts were not unreasonable (2022 ABCA 16). I agree. In my view, the trial judge could reasonably be satisfied that the appellant's guilt was the only reasonable conclusion available on the totality of the evidence (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 55).

[12] In the circumstances, there was no reasonable explanation for why the appellant's DNA was found on a cigarette butt under the driver's seat of the stolen truck, if not for his involvement in the robbery less than 12 hours earlier. The trial judge did not consider the DNA evidence in a vacuum. Rather, he relied on additional evidence to eliminate the possibility that the cigarette butt could have gotten into the stolen truck before or outside of the robbery. It is undisputed that Mr. Iten did not know the appellant. It is important to emphasize that "[n]obody else used the truck" around the time of the robbery (trial reasons, reproduced in A.R., at p. 21). Mr. Iten and his roommate both heard the truck start at the end of the robbery. The truck was found locked and showed no signs of forced entry. The cigarette butt was found under the driver's seat, and the DNA matched only the appellant's profile. Taken together, this evidence "cried out for an explanation that only the appellant's testimony could have provided, such that he must accept the consequences of having remained silent" (*R. v. Phillips*, 2018 ONCA 651, 364 C.C.C. (3d) 220, at para. 69; see also *R. v. George-Nurse*, 2019 SCC 12, [2019] 1 S.C.R. 570, at para. 1). It was open to the judge to consider the "total absence of any kind of reasonable explanation" (*R. v. Kowlyk*, [1988] 2 S.C.R. 59, at p. 73; see also *R. v. Noble*, [1997] 1 S.C.R. 874, at para. 103) for the presence of the appellant's DNA in a stolen truck found mere hours after the robbery and a short distance away from the victims' residence.

[13] While some may view the "Metzger" identification evidence as weaker, the trial judge was in a privileged position to assess the evidence (*R. v. Brunelle*, 2022 SCC 5, at para. 9, citing *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 62).

The question is whether his findings were [TRANSLATION] “sufficiently supported by the evidence and involve[d] no palpable and overriding error” (*Brunelle*, at para. 8). I agree with the majority of the court below that the trial judge’s finding that Mr. Iten was a credible and reliable witness is entitled to deference. Whether a different trier of fact may have reached a different conclusion does not justify appellate interference (C.A. reasons, at paras. 26 and 34 (CanLII)). In any event, it was the combined effect of the identification evidence and the strong DNA evidence that allowed the judge to infer guilt on the underlying robbery.

[14] The authorities referred to by the appellant, in which DNA or fingerprint evidence was found insufficient to infer guilt on the underlying theft or robbery, are distinguishable. In *R. v. Mars* (2006), 206 O.A.C. 387, there was no evidence that assisted in determining *when* the accused’s fingerprint was placed on a pizza box used in committing a robbery (para. 21). Further, evidence given by a neighbour, who described all three robbers as black, “effectively excluded the appellant who . . . is white” (per Doherty J.A., at para. 27). Similarly, in *R. v. Nicholl* (2004), 190 C.C.C. (3d) 549 (Ont. C.A.), where a pop can with the accused’s thumbprint on it was found in a vehicle *two weeks* after it was stolen, and in *R. v. Grayston*, 2016 ONCA 784, where a balaclava with DNA from the accused *and* other individuals was found in a stolen vehicle, this evidence was held to be compatible with explanations other than guilt. In *R. v. Ahmed*, 2015 ONCA 848, the accused’s DNA was found — together with three other DNA matches — on a plastic grocery bag used during a robbery, which bags are “commonplace, portable, disposable and reusable” (para. 7 (CanLII)). Given

the generic nature of the eyewitness descriptions relied on by the Crown, the evidence did not go far enough to support the inference that the accused's DNA had been deposited on the bag during the robbery.

[15] By contrast, there was additional evidence in this case that permitted the trial judge to determine *when* the appellant's cigarette was left in the stolen truck. I also note that DNA evidence, either alone or in combination with "less than strong" identification evidence, has served to ground verdicts of guilt in similar cases (*R. v. Stjepanovic*, 2006 BCCA 169, 223 B.C.A.C. 226, at paras. 10-11; see also *R. v. O'Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485, at paras. 2 and 13-16).

[16] This is not a case where the judge's verdict "cannot be supported by the evidence" (*Brunelle*, at para. 7). Rather, the verdict is one that a properly instructed trier of fact could reasonably have rendered (*Villaroman*, at para. 55). The judge was entitled to conclude that the "circumstantial evidence, viewed logically and in light of human experience", was not reasonably capable of supporting an inference other than that the appellant was guilty (*Villaroman*, at para. 38). I would dismiss the appeal and uphold the appellant's convictions.

Appeal allowed, CÔTÉ and O'BONSAWIN JJ. dissenting.

Solicitors for the appellant: Ruttan Bates, Calgary.

*Solicitor for the respondent: Alberta Crown Prosecution Service —
Appeals and Specialized Prosecutions Office, Calgary.*