NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Lee*, 2020 NSCA 16

Date: 20200306
Docket: CAC 491103
Registry: Halifax

Between:

Malcolm Edward Lee

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice J.E. (Ted) Scanlan
Appeal Heard:	January 28, 2020, in Halifax, Nova Scotia
Subject:	**Criminal Law. Appeal of Conviction.**
Summary:	The appellant's DNA was on a cigarette butt located on the floor inside a residence that had been broken into. The house was clean when the victim left for work and neither she nor anybody who had been in the house smoked in the residence. She did not know the appellant.
Issues:	Was the trial judge's conviction, based entirely on circumstantial evidence, reasonable?
Result:	Appeal dismissed. Mr. Lee's guilt was the only reasonable conclusion to be drawn from the whole of the evidence at trial.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 8 pages.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Lee*, 2020 NSCA 16

Date: 20200306
Docket: CAC 491103
Registry: Halifax

Between:

Malcolm Edward Lee

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Bourgeois, Hamilton and Scanlan, JJ.A.
Appeal Heard:	January 28, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Scanlan, J.A.; Bourgeois and Hamilton, JJ.A. concurring.
Counsel:	Lee V. Seshagiri, for the appellant Mark A. Scott, Q.C., for the respondent

Reasons for judgment:

[1] This is an appeal against conviction on a charge of break, enter and theft at a private dwelling house in Dartmouth, Nova Scotia and a second count which alleged an associated breach of probation for failure to keep the peace and be of good behaviour.

[2] The main issue on appeal relates to DNA analysis which matched the appellant's DNA to a cigarette butt found on the floor inside the subject dwelling house. The appellant, Malcolm Edward Lee, argues the fact that his DNA on the cigarette butt cannot be proof he committed the break and enter and that there may be some other explanation as to how the butt with his DNA came to be in the house. He argues that the trial judge, Provincial Court Judge Jean Whalen, erred in concluding otherwise.

[3] At trial, the victim, Ms. Nancy Downey, testified she returned to her house and found that her home had been broken into and ransacked, with approximately $27,000 worth of items being stolen. Her evidence was that her house was normally clean and in good order. Everything was neat, cleaned, washed and put away before she left for work that day. After the break-in, her cupboards were opened, food had been removed from the refrigerator and strewn everywhere.

[4] Ms. Downey had been packing in anticipation of a pending move. The packed boxes had been opened and the contents were strewn everywhere so "[t]here wasn't much bare floor surface when I got home". In the dining room area there was one item which stood out: a cigarette butt. Ms. Downey testified:

> … I'm not a smoker. I don't have anybody in my immediate circle that smokes. No one would be smoking in my house. It was in the dining room in between the transition of the fridge and the kitchen into the dining room and it was right by my dining room table on the ground.

[5] She indicated as well that she doesn't wear shoes in the house, she leaves them by the door.

[6] Ms. Downey also testified that because of her training in relation to her work as a paramedic she immediately called the authorities once she discovered the break-in. She said she did not disturb the crime scene prior to the police arriving.

[7] At trial an Agreed Statement of Facts was tendered. Mr. Lee agreed that the cigarette butt was seized for later analysis; that there were DNA results obtained from the cigarette butt; and the only DNA on the cigarette butt matched his DNA profile.

Issues

[8] The Notice of Appeal sets out two grounds of appeal:

1. That the learned trial judge erred in law in her application of *R. v. Villaroman*, 2016 SCC 33; and
2. That the conviction is unreasonable.

[9] I agree with the respondent that the two grounds of appeal can be collapsed into a single issue:

> Was the trial judge's conviction, based entirely on circumstantial evidence, reasonable?

Standard of Review

[10] The parties are in agreement with the standard of review as set out in the respondent's factum as follows:

> 24. The standard of review for an unreasonable verdict in cases of circumstantial evidence is well known: the verdict will only be set aside on the ground that it is unreasonable or cannot be supported by the evidence where such a verdict is precluded by any view of the evidence. The appellate court must recognize and give effect to the advantage of the trier of fact in assessing and weighing the evidence at trial. It cannot act as a thirteenth juror. In the case of circumstantial evidence, the reasonableness of the verdict will be assessed in light of the requirement that it be consistent with guilt and inconsistent with innocence.

(See *R. v. H.(W.)*, 2013 SCC 22 at ¶2; and *R. v. O'Brien*, 2010 NSCA 61 at ¶33)

Analysis

[11] In *R. v. Villaroman*, *supra*, Cromwell, J., at para. 20 referenced Charron, J., in *R. v. Griffin*, 2009 SCC 28 citing with approval *R. v. Fleet*, (1997) 120 C.C.C. (3d) 457 at para. 20. In a circumstantial case, the question for a jury will be whether it is satisfied beyond a reasonable doubt that the guilt of the accused is the

only rational inference to be drawn from the proven facts. He was careful not to shift the burden to an accused in circumstantial evidence cases saying:

> [35] … [I]n assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, at para. 58. … Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[12] Mr. Lee's DNA on the cigarette butt was sufficient to link him to the break and enter. The issue for the trial judge was whether, based on the totality of the evidence, it was enough to prove beyond a reasonable doubt that he committed the offence. She noted there was no direct evidence that Mr. Lee broke into Ms. Downey's home. She correctly acknowledged that in order to obtain conviction the inferences drawn from the circumstantial evidence must satisfy her the only reasonable conclusion was that Mr. Lee broke into Ms. Downey's home on the date in question.

[13] Mr. Lee concedes the trial judge reviewed the relevant case law:

> 37. The appellant concedes that the Trial Judge correctly apprehended the substance of the law on this issue. She explained:
>
> > The DNA evidence clearly establishes that [the Appellant] touched that cigarette butt at some point in time, however, the probative value of the DNA evidence on the charge depends upon whether the entirety of that evidence reasonably permits the inference that [the Appellant] touched the cigarette butt in connection with the break and enter and not at other some place in time. And the DNA evidence alone doesn't permit any inference as to when [the Appellant's] DNA was put on that cigarette butt.
> >
> > The reasonableness of such an inference or conclusion turns on whether the inference that [the Appellant] touched the cigarette butt in connection with that break and enter could reasonably be drawn from the evidence other than the DNA evidence itself.

[14] As noted in *R. v. O'Brien*, 2010 NSCA 61:

> [18] It is well established that DNA evidence is simply a piece of circumstantial evidence. Like fingerprint evidence, it merely indicates that a person's DNA

> somehow got where it was found, not that a person committed the crime. (See *R. v. Terciera* (1998), 123 C.C.C. (3d) 1,[1998] O.J. No. 428 (C.A.), aff'd [1999] 3 S.C.R. 866). The Crown acknowledged that the DNA evidence in this case was the equivalent to that of a fingerprint. That is, of accepted, it established that at some point in time, the appellant had handled, or even worn the mask. It did not without more, establish that the appellant had committed the robbery.

Although this Court overturned Mr. O'Brien's conviction based on the trial judge having erred in permitting extensive bad character evidence, the conviction was reinstated by the Supreme Court of Canada (*R. v. O'Brien*, 2011 SCC 29) based on the DNA in the mask proving identity.

[15] I am satisfied the trial judge understood the limitations of DNA evidence. She also correctly stated and applied the law in relation to circumstantial evidence.

[16] A review of the trial judge's decision makes it clear that she understood the burden of proof and the presumption of innocence. She noted that the Crown bears the burden of proof at all times. She referenced the level certainty required to establish proof beyond a reasonable doubt. She found that the DNA evidence clearly established that Mr. Lee touched the cigarette butt at some point in time. She noted the probative value of the DNA evidence depended on whether the entirety of the evidence reasonably supported an inference that he touched the cigarette butt in connection with the break and enter and not at some other place and time. She asked herself whether the evidence as a whole was capable of permitting a reasonable inference that the DNA on the cigarette butt was put there while the appellant was committing the break and enter.

[17] The trial judge referenced the evidence noting:

- The break and enter occurred after Ms. Downey left for work and before she returned home.
- Ms. Downey does not know Mr. Lee and there was no evidence that she was acquainted with any of Mr. Lee's friends.
- Nobody resided with Ms. Downey.
- No one smokes in her home nor are any persons in her circle of friends smokers.
- Her home was neat and tidy when she left for work that day and she cleans her floors twice a week.

- There was no cigarette butt on the floor when she left for work.
- Only Mr. Lee's DNA was found on the cigarette butt.

[18] Mr. Lee, through counsel, proffered many speculative theories as to how the cigarette butt with his DNA may have came to be in the house. He suggested that people pick up cigarette butts all the time and on this day someone picked it up and dropped it on purpose, or by accident, when they were in Ms. Downey's home. The trial judge found the alternative suggestions were not reasonable inferences. In *Villaroman* Cromwell, J. said:

> [36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
>
> [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
>
> [38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.
>
> [39] I have found two particularly useful statements of this principle.
>
> [40] The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:
>
> > In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the

> occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis added.]
>
> [41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage — that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative — a helpful way of describing the line between plausible theories and speculation.
>
> [42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.
>
> [43] Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

[19] I have already noted, as in *O'Brien*, DNA can be relied upon to support an inference that an accused participated in an offence. Identification is an issue of fact that depends on the totality of the evidence and it varies from case to case. The evidence in this case is more compelling than in *O'Brien.* There, the mask was found in a public space the day after a robbery had been committed. There was no DNA from other persons on the mask. Here only Mr. Lee's DNA was on the butt but it was found inside a locked house with no public access.

[20] The trial judge correctly considered the evidence of Ms. Downey, as to the limited access to her residence and the fact her home was neat and clean and the cigarette butt was not there when she left for work. The suggestion by Mr. Lee that somebody else may have picked up a cigarette butt with his DNA on it and placed it in the home was appropriately relegated to mere speculation. As noted in *Villaroman*, para. 71, the Crown is not required to negative every possible conjecture. The line between inference and speculation is for the trial judge to draw.

[21] Mr. Lee did not testify at trial. The Crown's case rose to a level of *prima facie* proof. The totality of the evidence enabled the trial judge to infer guilt beyond a reasonable doubt. In the absence of any explanation from Mr. Lee there was no basis to conclude otherwise (see *R. v. Lepage*, [1995] 1 S.C.R. 654, para. 26). In saying that, I note that a failure of an accused to testify at trial does not result in a shift of the burden of proof. The burden remains on the Crown. The

trial judge decided that "based on all of the evidence before me I conclude it was Mr. Lee who broke into Ms. Downey's home on the date in question and stole all of the items that she has listed that were taken and, therefore, I find Mr. Lee guilty of break and enter.". Clearly she was satisfied as to the identity of the offender.

[22] For Mr. Lee to succeed he must satisfy this Court that the verdict is unreasonable. As I noted above, this Court is entitled to consider the failure of the accused to call evidence or to testify.

[23] I am satisfied the trial judge got it right. Mr. Lee's guilt was the only reasonable conclusion to be drawn from the whole of the circumstantial evidence at trial.

[24] I am satisfied the appeal should be dismissed.

Scanlan, J.A.

Concurred:

Bourgeois, J. A.

Hamilton, J.A.