Court File Nº 38217

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

B E T W E E N :

DEVANTE GEORGE-NURSE

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

- and -

CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

Intervener

RESPONDENT'S REPLY TO THE INTERVENER'S FACTUM

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PART I – RESPONSE TO INTERVENER'S ISSUES

A. Introduction

1. In *Regina v. Noble*, this Court held that an accused's silence cannot be used as a "make-weight" for the Crown's case. While it was unnecessary for the Court in *Noble* to definitively decide whether appellate courts are permitted to go further than triers of fact and use an accused's silence as a make-weight, the decisions of both Sopinka J. and Lamer C.J.C. strongly suggest that they cannot. As put by Lamer C.J.C., "I…cannot understand how a verdict that would ordinarily be considered unreasonable can magically become reasonable pursuant to s. 686(1)(a)(i) simply because the case has progressed from one level of court to another".

- *R. v. Noble*, [1997] 1 S.C.R. 874 at paras. 103-109 (per Sopinka J.) & 19-21 (per Lamer C.J.C., dissenting but not on this point)
- *R. v. Prokofiew*, 2012 SCC 49 at paras. 4 (per Moldaver J.) & 64 (per Fish J., dissenting but not on this point)

2. The Respondent accepts that an appellate court may not use an accused's silence as a "make-weight" to transform an otherwise unreasonable verdict into a reasonable one. The Respondent also accepts that an appellate court's use of an accused's silence must be consistent with the trier of fact's use of it. This does not, however, mean that an appellate court's use of the accused's silence is identical to that of the trier of fact. An appellate court's primary function is to review for error, and it approaches this task from a fundamentally different perspective than the trier of fact.

3. In assessing the reasonableness of a verdict, an appellate court is entitled to take into account the appellant's failure to testify, not because it adds weight to the Crown's case, but because it is relevant in assessing whether the inferences drawn by the trier of fact were reasonable. Further, in certain cases, considering the appellant's failure to testify is inherent to the reviewing exercise, as outlined in *R. v. Biniaris*, that an appellate court must perform. In these cases, the appellant's failure to testify must be examined through the lens of judicial experience.

PART II - ARGUMENT

B. The Use of the Accused's Silence on Appeal in Unreasonable Verdict Cases

4. *Noble* affirmed that an appellate court is not precluded from considering the accused's failure to testify when assessing the reasonableness of a verdict. Rather, Sopinka J. identified at least three permissible uses of trial silence: 1) it may be treated as confirmatory of guilt; 2) it may indicate that there is no evidence to support speculative explanations put forward by the defence; and 3) it may indicate that the accused has not put forward evidence that would require the Crown to negative an affirmative defence.

- *R. v. Noble*, [1997] 1 S.C.R. 874 at paras. 103-105

5. The Respondent suggests a further, related, use of trial silence on appeal: that an appellate court may consider the silence of the accused when considering whether the verdict is consistent with the weight of judicial experience. As Arbour J. explained for a unanimous court in *R. v. Biniaris*, appellate review of the reasonableness of a verdict is not limited to assessing the sufficiency of the evidence. Rather, an appellate court is required "to review, analyse and, within the limits of appellate disadvantage, weigh the evidence" to determine whether "judicial fact-finding precludes the conclusion reached by the jury." Thus, in deciding whether the trier of fact could reasonably be satisfied that guilt was the only reasonable conclusion, an appellate court must consider the case through the "lens of judicial experience" and ask not only whether the evidence supports the verdict, but also whether the trier of fact's conclusion conflicts with the bulk of judicial experience. The "lens of judicial experience" includes not only an appreciation and consideration of factors that lead to wrongful convictions, but also factors that enhance the soundness of a conviction. In certain cases, the failure of the accused to testify will be such a factor.

- *R. v. Biniaris*, 2000 SCC 15 at paras. 36, 39, 40

6. It has long been recognized that there are cases in which the accused will bear a strategic or tactical, as distinct from legal, burden to call evidence. This may be particularly so in cases where the accused seeks to rely on exculpatory defences or alternative inferences that are within the knowledge of the accused. *Noble* did not change this. In *R. v. P. (M.B.)*, Lamer C.J.C. explained:

> Once...the Crown discharges its obligation to present a *prima facie* case, such that it cannot be non-suited by a motion for a directed verdict of acquittal, the accused can

> legitimately be expected to respond, whether by testifying him or herself or calling other evidence, and failure to do so may serve as the basis for drawing adverse inferences....In other words, once there is a "case to meet" which, if believed, would result in conviction, the accused can no longer remain a passive participant in the prosecutorial process and becomes -- in a broad sense -- compellable. That is, the accused must answer the case against him or her, or face the possibility of conviction.

This passage was considered by Sopinka J. in *Noble* and, while he cautioned against the use of the phrase "adverse inference" as being potentially confusing, he found that it was "not inconsistent with the conclusion that silence may not be placed on the evidentiary scales". In this regard Sopinka J. stated:

> If a case against the accused has been adduced that is capable of supporting an inference of guilt, it may be a wise strategy for the accused to testify in order to refute the case to meet; this does not involve a shift in the legal burden of proof to the accused, but rather involves a shift of a strategic burden.

- *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555 at p. 579 [emphasis in original]
- *R. v. Noble*, [1997] 1 S.C.R. 874 at paras. 88-92
- See also: *R. v. Cook*, [1997] S.C.R. 1113 at para. 39 (note that *Cook* was a unanimous decision of this Court released concurrently with *Noble*)

7. Thus, when engaged in an assessment of the reasonableness of a verdict, in accordance with this Court's decision in *R. v. Biniaris*, an appellate court has an obligation to consider the significance of any strategic burdens that were borne by the defence, including whether they were discharged. As stated by Arbour J. in *Biniaris*:

> I wish to stress the importance of explicitness in the articulation of the reasons that support a finding that a verdict is unreasonable or cannot be supported by the evidence. Particularly since this amounts to a question of law that may give rise to an appeal, either as of right or by leave, the judicial process requires clarity and transparency as well as accessibility to the legal reasoning of the court of appeal. When there is a dissent in the court of appeal on the issue of the reasonableness of the verdict, both the spirit and the letter of s. 677 of the *Criminal Code* should be complied with. This Court should be supplied with the grounds upon which the verdict was found to be, *or not to be*, unreasonable.

- *R. v. Biniaris*, 2000 SCC 15 at para. 42 [emphasis added]

C. Appellate courts have heeded *Noble* when assessing verdicts for reasonableness

8. Contrary to what is suggested at paragraphs 7 and 17 of the *Factum of the Intervener*, the Respondent submits that the use appellate courts have made of an accused's silence is consistent with the principles established in *Noble*. In none of the cases cited by the Intervener has the reviewing court used the accused's silence to transform an otherwise unreasonable verdict into a reasonable one. Rather, when read in context, the discussions in the appellate authorities show that appellate courts consider trial silence only when they have otherwise concluded that the trier of fact could reasonably be satisfied that guilt was the only reasonable conclusion. This is exactly what *Noble* contemplated, and what is required by *Biniaris*.

- *R. v. Noble,* [1997] 1 S.C.R. 874 at para. 103
- *R. v. Biniaris,* 2000 SCC 15 at paras. 36, 49
- *R. v. W.H.*, 2013 SCC 22 at paras. 2, 26-28

9. This includes the Manitoba Court of Appeal's decision in *R. v. Oddleifson*. There, the Court only considered the appellant's failure to testify *after* determining that the Crown had met its burden of showing that the only reasonable inference that could be drawn from the evidence was that the accused had knowledge and control over the cocaine. While the Court was mindful that "the accused's failure to testify cannot be used as a sword", in its view, the Crown's case "cried out for an explanation". The Court stated that "although the accused had the right not to testify, that decision carried the risk of not providing the trial judge with the necessary evidentiary foundation which, if accepted, could have precluded the inference of possession from being drawn." Significantly, it was only after this discussion that the Court noted that "the accused's failure to testify [could] also be used to assess the claim of an unreasonable verdict", and cited *Noble*. The Court's statement that the accused's "failure [to testify], or more specifically, the absence of an innocent explanation, can be considered at the appellate level as a factor in assessing the reasonableness of the guilty verdict" is nothing more than an observation that the accused had failed to discharge its strategic burden in the face of a compelling Crown case. This Court appropriately refused leave to appeal.

- *R. v. Oddleifson,* 2010 MBCA 44 at paras. 25-27, leave to appeal refused, [2010] S.C.C.A. No. 244

10. Conversely, in cases where appellate review has revealed that the trier of fact could not have been satisfied that guilt was the only reasonable conclusion, as in *R. v. Luu*, appellate courts have instructed themselves to not consider the appellant's failure to testify, and have deemed the verdict unreasonable. Appellate courts are well aware that the failure to testify does not "transform or strengthen" a weak Crown case.

- *R. v. Luu*, 2010 ONCA 807 at paras. 32-33
- *R. v. Klyne*, 2007 MBCA 100 at paras. 31-33

D. The Case on Appeal

11. In the case on appeal, the majority's use of the appellant's failure to testify is consistent with *Noble*. The appellant urged the jury to accept an exculpatory inference which did not arise reasonably or logically from the evidence, or any gap in the evidence. Only the appellant could have provided evidence to support the inference he asked the jury to draw, and he chose not to testify. In the result, the jury appropriately inferred that the only reasonable inference was that the appellant had urged the driver to shoot in the direction of Mr. Foster. On appeal, the majority carefully considered the evidence and concluded that it was not unreasonable for the jury to have done so. It was only *after* coming to this conclusion that the majority commented that the appellant's failure to provide an innocent explanation at trial undermined the alternative inference he advanced on appeal, and that any suggestion the driver was acting alone was mere speculation.

- *Majority Reasons of MacPherson and Miller J.J.A.*, Appellant's Record, Tab 1A at paras. 33-35

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21ST DAY OF JANUARY, 2019

BY:

FS Leslie Paine, Counsel for the Respondent

PART III: TABLE OF AUTHORITIES

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