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

FACTUM OF THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

[*Rules of the Supreme Court of Canada,* Rules 37 and 42]

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B E T W E E N

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PART I: STATEMENT OF FACTS

1. The Criminal Lawyers Association ("CLA") accepts the parties' summaries of the facts.

PART II: THE CLA'S POSITION ON THE QUESTIONS IN ISSUE

2. This appeal raises the challenging issue of when it is appropriate for an appellate court to consider the accused's silence at trial in assessing the reasonableness of a verdict. This Court in *R. v. Noble* [1997] 1 S.C.R. 874 held that a trier of fact may only consider the accused's silence to note a lack of evidentiary support for speculative arguments relied on by the defence. This Court considered but left open the question of whether appellate courts were equally constrained. Many appellate courts since *Noble* have cited it in support of the proposition that the accused's silence is relevant to the reasonableness of a conviction but none have articulated a clear principled rule governing the appropriate use of the accused's silence. The judgments in the Court below appear to reflect different understandings on the issue, with the majority holding that the accused's failure to testify "negated" any exculpatory explanation for the evidence called by the Crown, while the dissenting judge held that reasonable inferences consistent with innocence were available whether the Appellant testified or not.

3. The CLA takes no position on the reasonableness of the Appellant's conviction in this case, but intervenes to invite this Court to squarely resolve the issue left open in *Noble* of what use an appellate court may make of the accused's testimonial silence. The CLA submits that the rule on appeal should be the same as at trial: while it is not an error in

itself to advert to the accused's failure to testify and offer an affirmative defence in the face of a compelling Crown case, the accused's silence cannot be a "make-weight" for an otherwise insufficient Crown case, and cannot serve to negate inferences consistent with innocence that are otherwise reasonably available on the evidence or lack of evidence at trial. The CLA submits that this Court should provide a clear rule for appellate courts rather than maintaining the ambiguity left by *Noble*.

PART III: ARGUMENT

A. *Noble* and subsequent jurisprudence on the accused's silence at trial

4. The leading case on the appropriate use of the accused's silence at trial is this Court's decision in *R. v. Noble* [1997] 1 S.C.R. 874. For the majority, Sopinka J. considered three possible uses of the accused's silence at trial:

> (1) Once the Crown has proffered a case to meet, the silence of the accused can be used in determining whether an accused is guilty beyond a reasonable doubt.
>
> (2) Inferences of guilt may be drawn from the accused's silence "only where a case to meet has been put forth and the accused is enveloped in a 'cogent network of inculpatory facts'".
>
> (3) The silence of the accused means that the evidence of the Crown is uncontradicted and therefore must be evaluated on this basis without regard for any explanation of those facts that does not arise from the facts themselves.

5. He rejected the first two uses as inconsistent with the right to silence and burden of proof but endorsed the third use as permissible:

> As set out above, silence is not inculpatory evidence, but nor is it exculpatory evidence. Thus, as in *Lepage*, if the trier of fact reaches a belief in guilt beyond

> a reasonable doubt, silence may be treated by the trier of fact as confirmatory of guilt. Silence may indicate, for example, that there is no evidence to support speculative explanations of the Crown's evidence offered by defence counsel, or it may indicate that the accused has not put forward any evidence that would require that the Crown negative an affirmative defence. In this limited sense, silence may be used by the trier of fact. If, however, there is a rational explanation which is consistent with innocence and which may raise a reasonable doubt, the silence of the accused cannot be used to remove that doubt.

10

6. He then turned to a consideration of cases holding that an appellate court can rely on the accused's silence in considering the application of the curative proviso or the reasonableness of a conviction. He interpreted those cases as applying a similar analysis to the one he endorsed as permissible for the trier of fact: the accused's silence can be referred to as showing an absence of evidence to support speculative exculpatory explanations for the Crown's case. He further noted in the alternative that the right to silence and presumption of innocence may operate differently on appeal, but declined to make a final determination about whether an appellate court could use the accused's silence in a way that would be improper at trial:

20 > I conclude that the presumption of innocence under s. 7 in the context of an appeal of a conviction, if it applies at all, does not operate with the same force as it does in the setting of a trial. Moreover, the right to silence does not have the same meaning on appeal. At the appellate stage, a conviction has previously been entered. Regardless of the use of silence by the appellate court in exercising its discretion to confirm the conviction or order a new trial, the conviction will not be reached on the basis of the silence of the accused, rather the presumption of guilt established by the guilty verdict will not be dislodged. Thus, even if the appellate review cases go farther than suggesting that silence may be accounted for by the court of
30 > appeal only in the limited sense of confirming the absence of innocent explanations, the principles applying to appellate review are not <u>necessarily</u> those that apply to a trial. At trial, which is the context with

> which the present appeal is concerned, not appellate review, the presumption of innocence and the right to silence are of paramount importance. Moreover, recent case law, particularly *François* and *Lepage*, is clear that, at trial, silence cannot be used as a piece of inculpatory evidence. Consequently, even if cases have held that courts of appeal may refer to silence as a factor in assessing the reasonableness of the verdict or in deciding whether to apply the curative provision, this does not alter the conclusion that at trial silence cannot be used as a piece of inculpatory evidence. I leave for another day any final conclusion as to whether the appellate review cases were correct insofar as they implied that silence may be treated as a make-weight by an appellate court.

In dissent, Chief Justice Lamer endorsed the drawing of inferences from an accused's silence, but also rejected the idea of having differing standards at trial and on appeal:

> I simply cannot conceive how a trial verdict that is a miscarriage of justice can be cured by an appellate court pursuant to s. 686(1)(*b*)(iii) because we say that certain Charter rights no longer apply on appeal. I similarly 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. If the role of a trier of fact is to have any meaning, appellate courts must undertake their statutory responsibility to review the fitness of verdicts and to cure trial errors on the same understanding of the silence of an accused. I cannot endorse a criminal justice system in which an accused's silence may be used to a greater extent by appellate judges than by triers of fact at the trial level. Otherwise the Court is effectively sanctioning what it says is prohibited -- inviting both judges and juries to use silence as evidence, but asking them to keep it quiet.

7. In Following *Noble*, many appellate courts have cited the accused's failure to testify in support of a finding that a conviction was reasonable: see for example : *R. v. Tremble* 2017 ONCA 671; *R. v. Lazzro* 2016 ABCA 353; *R. v. Ward* 2011 NSCA 78; *R. v. Oddleifson* 2010 MBCA 44; *R. v. Li* 2009 BCCA 21; *R. v. Dell* (2005) 194 C.C.C. (3d) 321 (Ont. C.A.); *R. v. R.(E.)* 2002 BCCA 361; *R. v. Roach* 2011 NSCA 95; *R. v. Lennie* 2013 NWTCA 7; and *R. v. Clayton* 2001 NSCA 72. Some courts have explicitly held that a broader use of the

accused's silence is permissible on appeal than at trial. For instance, in *Oddleifson*, *supra*, adopted also in *Lazzro, supra*, the court held:

> On appeal, the accused's failure to testify can also be used to assess the claim of an unreasonable verdict (see *R. v. Noble*, [1997] 1 SCR 874 at 103; *R. v. Dell* (2005), 194 CCC (3d) 321 (ONA)at 35; *R. v. Klyne* (C.L.G.), 2007 MBCA 100; *and R. v. Munif*, 2009 BCCA 451. That use must be considered in the context of appellate review, which reviews for error. Unlike at trial, where the burden rests on the Crown to prove guilt, on appeal the accused is guilty and will remain so unless the accused demonstrates an error at the trial level (see *Noble* at 108-9). As a result, although the accused's failure to testify cannot be considered as a factor to infer or confirm guilt at the trial level, this failure, 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.(Emphasis added).

8. In *R. v. Villaroman* 2016 SCC 33, this Court held that in a circumstantial case, the Crown was required to disprove "reasonable possibilities" or "plausible theories" based on logic and experience, not on speculation. The Court rejected the position that inferences consistent with innocence needed to be based on proven facts, Cromwell J. holding:

> 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.

B. The judgment in the court below

9. The judgments in the court below took different views on this court's decision in *Noble*, supra, and its application to the facts of this case. Hourigan J.A., dissenting, found

that the accused's failure to testify was of no assistance given the existence of reasonable exculpatory explanations for the evidence relid upon by the Crown.

> [17] The fact that the appellant did not testify to offer a plausible alternative version of events is of no assistance to the Crown in this case. Appellate courts may refer to an accused's silence as indicative of an absence of an exculpatory explanation when considering an unreasonable verdict argument on appeal. However, the accused's failure to testify is generally relevant only in cases where the Crown has adduced a compelling body of evidence: *R. v. Noble* [1997] 1 S.C.R. 874, at para. 103.
>
> [18] In *R. v. LePage*, [1995] 1 S.C.R. 654, at paras. 29-30, a majority of the Supreme Court of Canada endorsed the following statement from R. v. Johnson (1993), 12 O.R. (3d) 340 (C.A.): "No adverse inference can be drawn if there is no case to answer. A weak prosecution's case cannot be strengthened by the failure of the accused to testify." See also *R. v. Hay*, 2009 ONCA 398, 249 O.A.C. 24, at para. 37; and *R. v. Tremble*, 2017 ONCA 671, 354 C.C.C. (3d) 27, at para. 98.
>
> [19] Thus, while the jurisprudence makes clear that the accused's failure to testify may be taken into account in assessing whether there is an innocent inference available, it would make little sense to factor in that failure when reasonable innocent explanations are already apparent by looking at the gaps in the Crown's case.

10. MacPherson J.A. for the majority held that the accused's failure to testify in this case "negated" the alternative explanations cited by Hourigan J.A. in finding the verdict to be unreasonable:

> [31] My colleague emphasizes that since the case against the appellant was based entirely on circumstantial evidence, an inference of guilt must have been the only reasonable available inference: see *R. v. Villaroman*, [2016] 1 S.C.R. 1000, at para. 30. He determines that there was another reasonable inference available in this case: that the driver intended to shoot at Foster without any counselling from the appellant.
>
> [32] However, I note that the appellant did not testify at trial. In my view, his failure to testify negates the alternative inference my colleague identifies.

> [33] As recognized by my colleague, appellate courts may refer to an accused's silence as indicative of an absence of an exculpatory explanation when considering an unreasonable verdict argument on appeal*: R. v. Noble*, [1997] 1 S.C.R. 874, at para. 103. However, relying on *R. v. Lepage*, [1995] 1 S.C.R. 654, at paras. 29-30, my colleague concludes that no adverse inference can be drawn from the appellant not testifying in this case because there was "no case to answer."
>
> [34] With respect, I disagree. The facts I set out above established a strong case to answer. . .
>
> [35] This court is therefore entitled to consider the appellant's failure to testify in assessing whether an innocent inference was available: *Noble*, at para. 103.

C. The CLA's proposed approach

11. The CLA submits that both principle and policy support a consistent rule between trial and appeal on the issue of the relevance of the accused's failure to testify. Where the defence suggests innocent inferences that are speculative or implausible, it may be appropriate to note the accused's failure to give evidence in support of those suggestions. However, where plausible innocent explanations exist, then the Crown's case fails irrespective of the accused's failure to testify. The failure of the accused to testify has no positive evidentiary value; indeed it is not evidence at all and cannot be properly held to counter, answer or "negate" a factual inference.

12. While the accused no longer benefits from the presumption of innocence on appeal, an appellate court cannot ignore the fact that this presumption existed at the time of trial. The trier of fact is not entitled to use the accused's silence to infer guilt or enhance the Crown's case. It would be unfair and incoherent for appellate courts to employ reasoning prohibited to triers of fact in assessing the reasonableness of conclusions

reached by those triers of fact. Were it otherwise, an accused person could be left without a remedy for a clear legal error, if a conviction that is legally unsupportable applying the *Noble* standard at trial becomes reasonable on appeal with the appellate court using the accused's failure to testify against him or her.

13. Allowing an adverse inference to be drawn on appeal from an accused's silence at trial would ignore the crucial fact that the trial record was created in a forum where such an inference is not permitted, and this would necessarily affect the tactical decisions of the defence. The accused at trial should be entitled to presume that if the Crown's case is insufficient then an acquittal will follow. Where the accused at chooses not to testify in a case where a conviction would be unreasonable on the evidence heard, it does not logically follow that the accused was unable to put forward a credible exculpatory version of events. Defence counsel in such a situation would have every reason to advise the accused not to take the risk of testifying in what should be a winning position.

14. For that reason, a rule granting appellate courts greater latitude than triers of fact to rely on the accused's silence will also create undesirable incentives for accused persons and defence lawyers. Where the Crown has led a case insufficient to prove guilt, from a trial point of view it is a straightforward decision for defence counsel to advise a client not to testify or call evidence. Given that *Noble* establishes that this silence cannot be used against the accused, there is nothing to be gained from calling evidence in support of exculpatory possibilities that are already reasonable on the record that exists at the close

of the Crown's case. Calling evidence unnecessarily is a tactical error and a disservice to the client.

15. If a guilty verdict is returned after the defence has made a sound decision not to call the accused (or any other evidence), because there is not enough evidence to convict, there should be an appellate remedy for a decision that was wrong when it was made. If, however, an appellate court later holds that the accused's silence has the effect of negating those exculpatory possibilities, then the decision becomes much more difficult. The defence will need to weigh the real possibility that the trier of fact may reach an unreasonable verdict and that the accused's silence will be used to prevent the correction of that verdict on appeal. Careful defence lawyers may default to leading defence evidence wherever possible even in response to the weakest of Crown cases. This will have the effect of undermining the right to silence and burden of proof, skewing the advice given to clients and potentially contributing to the increasing length of criminal trials. The CLA submits that accused persons should simply be able to rely on the knowledge that the sufficiency of the Crown's case will be assessed on appeal on the same basis it is at trial and that a verdict which was wrong when it was returned will not be immuce to challenge because of an asymmetrical standard applied on appeal..

16. The CLA submits that the relevance of the accused's trial silence should be extremely limited on appeal, as it is at trial. Given the Court's holding in *Villaroman* that exculpatory inferences need not be based on proven facts, the accused's election not to testify cannot add weight to the Crown's case or meaningfully affect the determination

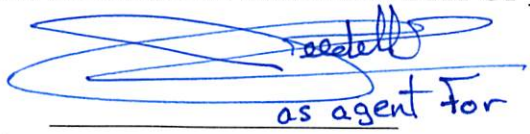
of its sufficiency. It has never been an error for an appellate court or a trier of fact to note the accused's failure to testify when assessing whether a particular proposed exculpatory explanation is speculative or implausible in the absence of supporting evidence. However, the accused's silence cannot make an otherwise plausible exculpatory inference implausible, or "negate" an innocent explanation.

17. The CLA notes that both parties in this case have advanced a similar understanding of the appropriate use of the accused's trial silence in assessing the reasonableness of a verdict. The CLA however disagrees with the Respondent's submission that neither the court below nor other appellate courts since *Noble* have operated on any different basis (Respondent's factum at ¶40). As noted at ¶7 *supra*, some appellate courts have explicitly found that they are entitled to make a broader use of the accused's silence than the trier of fact, and others have relied on the accused's silence in a manner that leaves it unclear whether it is being employed as a "make-weight." The CLA accordingly submits that this Court should take this opportunity to clarify the law and to rule out the suggestion from *Noble* that the accused's failure to testify might be treated differently on appeal than at trial, ensuring that a consistent standard is applied across the country rather than maintaining the present unsettled state of the law.

PARTS IV & V: SUBMISSIONS RE COSTS

18. The CLA does not seek costs and asks that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14TH DAY OF JANUARY, 2019.



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PART VI: LIST OF AUTHORITIES

Paragraphs

Cases