

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Kish, 2014 ONCA 181

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Goudge, Cronk and MacFarland JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Nicole Yvonne Kish

Appellant

and

Philip Campbell and Zachary Kerbel, for the appellant

Susan Reid, for the respondent

Heard: October 29, 2013

On appeal from the conviction entered by Justice Ian Nordheimer of the Superior Court of Justice, sitting without a jury, dated March 1, 2011, with reasons reported at 2011 ONSC 1303.

MacFarland J.A.:

[1] The appellant appeals her conviction on a charge of second degree murder. The appellant, with the consent of the Attorney General, was tried by judge alone. She was sentenced to life imprisonment with parole ineligibility set

at 12 years. The appellant had also initiated an appeal of her sentence, but the court was informed by her counsel that the sentence appeal should be dismissed as abandoned.

OVERVIEW

[2] In the early morning hours of August 9, 2007, Ross Hammond, a 32 year old married man, was stabbed on the north side of Queen Street West in the City of Toronto. He received multiple stab wounds to his chest and back as well as defensive wounds to his hands and arms. The most serious of his injuries were five stab wounds to his chest, two pierced his heart and one of those entered the chamber of his heart and ultimately proved fatal. Hammond died as the result of those stab wounds two days after he was attacked.

[3] Hammond was stabbed during a fight with a number of “street kids”. No one saw Hammond stabbed, and there was no direct evidence of who stabbed him. The identity of the person who stabbed him was the principal issue at trial.

[4] This case involved the following types of circumstantial evidence: testimony from 17 civilian eyewitnesses, who saw the events of the evening from various vantage points; photographic aids and diagrams to establish sight-lines and illustrate the relevant locations; surveillance videotape recording portions of the events; forensic blood spatter and DNA evidence; a dying declaration; autopsy results; audio recordings of 911 calls and City TV video recordings which

captured the immediate aftermath of the events and importantly, the appearance of the principal participants at the time.

[5] The events of the evening can be roughly organized into three categories:

1. The initial confrontation at the TD Bank ATM, located at the northwest corner of Euclid Avenue and Queen Street West, where a female street kid approached Hammond and his friend and co-worker, George Dranichak, and asked for \$20.
2. The fight at the stopped streetcar on the south side of Queen Street West that involved Hammond, a male street kid (Douglas Fresh) and two female street kids (the appellant and Faith Watts).
3. The final fight on the north side of Queen Street West that involved Hammond and three street kids (Jeremy Wooley, an unidentified male and the appellant).

DEFENCE CONCESSIONS

[6] The appellant does not dispute:

1. that whoever stabbed Ross Hammond is guilty of second degree murder;

2. that if she brought the knife to the fight and passed it to one of her friends with the intent that it be used on Hammond, she is guilty of second degree murder as an aider;
3. the trial judge's finding that the appellant and Faith Watts were involved in the south side altercation;
4. that it was Faith Watts who stayed on the south side of Queen Street to tend to Fresh after he had been beaten by Hammond; and
5. that the appellant was involved in the fight on the north side.

THE FACTS

(1) The Initial Confrontation at the TD Bank ATM

[7] Ross Hammond and his friend and co-worker George Dranichak had been out for the evening with other co-workers. They parted company with the others and went to a club together at Queen and Bathurst Streets. On leaving the club they proceeded along Queen Street West looking for a place to have something to eat. The trial judge found they were both under the influence of alcohol. Dranichak decided he needed cash and they headed to the ATM machine located at the northwest corner of Queen Street West and Euclid Avenue. Either before or after he used the machine, he and Hammond were approached by a female who asked them for \$20. They responded to her request with rude,

offensive remarks. The female responded loudly and with anger. The trial judge found that she began to yell at the two men “using equally obscene language” – and that her response was also fueled by the alcohol she had consumed that day with her friends Faith Watts, Douglas Fresh and Jeremy Wooley.

[8] The trial judge found that this female street kid who had asked for the \$20 was the appellant, and that she was soon joined by her friend and fellow street kid, Douglas Fresh.

[9] The dispute between Hammond and Dranichak on the one hand and the appellant and Fresh on the other moved westward along the north side of Queen Street West. The female was loud and angry. At one point either Dranichak or Hammond threw Fresh into a storefront window and knocked the appellant to the ground. She and Fresh pursued Dranichak and Hammond, yelling at them and throwing bags of garbage at them.

[10] There was a stopped eastbound streetcar just west of the intersection of Queen and Niagara Streets. Dranichak and Hammond crossed diagonally from the north to the south side of Queen Street West in the direction of that streetcar.

(2) The Fight at Stopped Streetcar on the South Side of Queen Street

[11] By now, Faith Watts, Douglas Fresh’s girlfriend, had joined Fresh and the appellant. It was at this point that Fresh attacked Hammond. The trial judge reasonably concluded that it was more likely Hammond who had thrown Fresh

into the window because it was Hammond who Fresh attacked. Dranichak left the scene when the fight on the south side of the streetcar began. As the trial judge concluded, no other witnesses observed Dranichak's presence after this fight started. The trial judge noted that "while [Fresh] may have intended to even the score, he failed in that objective as Mr. Hammond quickly got the better of Mr. Fresh in the fight." Hammond beat Fresh to the point where he was no longer defending himself and appeared to some to be unconscious.

[12] While Hammond was beating on Fresh, two female street kids, the appellant and Watts¹, were trying to get him off their friend, Fresh. They were described as pulling and punching Hammond on the back. Their efforts did not seem to be having much of an effect on Hammond, he tried to push them away, seemed to swat at them, but did not stop.

[13] These findings of the trial judge were supported by the evidence of Cam Bordignon, who observed the fight from the southwest corner of Queen Street West and Niagara Street, and the evidence of Molly Stopford and Jonathan Paget, who observed the fight from within the streetcar that had stopped on Queen Street West at Niagara Street.

[14] Molly Stopford was sitting on the passenger side of the stopped streetcar and Jonathan Paget was beside her, she had the window seat, he the aisle. The

¹ The trial judge concluded that the two females who were attempting to assist Fresh were the appellant and Watts. The appellant does not dispute this finding.

fight was ongoing immediately below where they were sitting. Stopford said that although both females were engaged in the effort to stop Hammond, one was more involved than the other. She said she assumed the two women were friends of Fresh because they were similarly attired, wearing baggy clothes and “seemed to be yelling at the jock, trying to get him to stop fighting with their friend.”

[15] Stopford said that these women were similar in appearance. Both white, of medium height, slim build, light brown hair – and importantly, said: “I didn’t really differentiate between the two of them too much in my mind in terms of looks”. Stopford distinguished the women by the roles they played – “there was one woman that was more involved than the other one” were her words.

[16] Stopford observed the more involved female to have a knife. The handle was in her mouth, only the blade of the knife was exposed. She made this observation from only about four feet away through the open window of the streetcar. It is significant that within a few days of the stabbing, Stopford drew a diagram of the blade of the knife that she had observed in this woman’s mouth, including a round circle that marks a distinguishing feature of the knife that was used to fatally wound Hammond. In my view, it adds a certain weight to Stopford’s evidence that she was able to accurately draw the knife that she said she saw, and that it very closely resembled the murder weapon.

[17] In any event, when she saw the knife Stopford became upset and at that point she closed the window of the streetcar and deliberately turned her attention away from the fight.

[18] When she next looked out to the south, she did not see the woman who had had the knife; she saw Fresh with blood on his face and noted that someone had helped him to the sidewalk. By the time Stopford's attention was turned back to the north side of Queen Street West, the fight on that side was clearly over. She noticed that one woman appeared to have suffered an injury to her arm and that she was being tended to by another woman.

[19] Specifically, Stopford said that she saw the woman whom she had seen with the knife now on the north side of the street, and noted that another female had taken off her shirt and was wrapping it around the arm of the woman who had had the knife. Stopford thought these two females were the same two she had seen earlier, in the first fight. She also believed that the woman who was helping the woman who had had the knife was the other woman who had been the less involved female in the efforts to get Hammond off Fresh.

[20] Stopford conceded on cross-examination that there was nothing in the descriptions of the two women that she could point to in order to distinguish between the two of them. It was by the roles they played in the first fight that she distinguished them.

[21] Stopford next saw Hammond on the hood of a taxi cab on the north side of Queen Street West and at that point he was holding a knife in his right hand. She thought it was the same knife she had previously seen in the mouth of the more involved female. As it turned out, she was right about that. The weapon had obviously been used by Hammond on the appellant. Both Hammond's blood and the appellant's blood were found on the area of the knife where the blade joins the handle.

[22] Jonathan Paget was seated beside Stopford, and his evidence largely supported hers. The two were friends. They had been out together for the evening and were on their way home.

[23] Paget observed two females in close proximity to where the fight between Hammond and Fresh was taking place. He said one of the women "approached the fight and ended the fight" and as she approached he very clearly recalled her yelling at the parties who were fighting in an effort to get them to stop. He described her as being dressed in "street fashion".

[24] He said that this female approached the fight "with intent", moving toward the two male fighters very briskly with her arms out ready to help stop the fight. And she was able to stop the fight and got the short-haired male (Hammond) off the street kid (Fresh). Paget said that at some point during these events he noticed this female was holding a knife in her right hand. He only saw the blade

of the knife, which he estimated to be about three inches long, the handle was concealed by the woman's hand and fingers.

[25] Paget saw the knife twice during the events of that evening. The first time was when he saw it in the female's hand. He could not say if it was before or after the fight between Hammond and Fresh, but he recalled the knife in her hand as she walked from the front of the streetcar toward where he (Paget) was sitting.

[26] The second time he saw that knife was when it was in Ross Hammond's hand as he lay on the hood of a taxi on the north side of Queen Street West. Paget also noted that when the female with the knife first approached, she was with a second female. At the end of the altercation, he noticed this second female tending to the first female's cut arm. The woman who had been cut, who we know to be the appellant, was very upset about having been cut on the arm. Paget believed the woman who was tending to the appellant after the fight was the same female who accompanied her at the beginning of the fight on the south side of the street.

[27] Paget was clear in his evidence that the woman who brought the knife to the fight on the south side of the streetcar was the same woman who ended up with the cut arm on the north side of the street.

[28] He said it stuck in his memory because he had heard many times you should not bring a knife or a weapon into a fight because you may end up the one injured by it. He was reminded of that saying at the time because the woman whom he had seen bringing the knife to the fight was the one who ended up with a cut arm.

[29] He was fairly certain in his evidence that it was the same girl. Neither Stopford or Paget could assist further in terms of descriptions of the two women.

[30] The evidence is clear that the appellant was the person who ended up with the cut arm on the north side, that it was Faith Watts who was assisting her, and that this was at the very end of the events that took place on the north side of the street.

[31] The trial judge accepted the evidence of Stopford and Paget. He concluded that the appellant had the knife on the south side and used it to get Hammond off Fresh by inflicting superficial wounds to his back.

[32] The trial judge concluded that Watts stayed behind with Fresh after he was pulled, unconscious, to the south sidewalk, while the appellant went around the front of the streetcar in pursuit of Hammond.

[33] Hammond was caught on video surveillance from the One of a Kind Pasta Shop between the south and north side altercations. He does not appear in that

video to have suffered any debilitating injury and he does not have a knife in his hands.

(3) The Final Fight on the North Side of Queen Street

[34] After the fight with Fresh, Hammond moved around the streetcar to the north side of Queen Street West and became involved in a second fight. This time he was outnumbered – two men and a woman set upon him and he was put to the ground. He suffered stab wounds to his chest that would cause his death two days later.

[35] The trial judge concluded that Jeremy Wooley, an unknown male and the appellant were engaged in that second fight with Hammond.

[36] Melissa Gallately had a bird's eye view of the fight on the north side. She lived in an apartment over the Select Mart, on the south side of Queen Street. The apartment consisted of the second and third floors above the store. On the evening in question, Gallately was in bed on the third floor with her infant son, trying to settle him, when her attention was drawn to the street by screaming and yelling. She went out onto the balcony for a closer look and saw three people – two males and a female – on top of one person. The taller of the two men wore a shirt that was totally unbuttoned and he wore nothing underneath it. The other male was shorter, with shorter hair and he wore shorts. The female was wearing

a longer black skirt and a black tank top. Her hair was either in dreadlocks or it was matted and half-pulled up. Her hair was dark.

[37] There was no one else around the group when Gallately first looked out, other than the man on the ground, who she described as being in almost a fetal position. He was trying to cover himself and protect his head from the beating that was being inflicted on him. She described the three attackers, the two men and the woman in the black skirt, as looking like street kids in dirty, disheveled clothing. The male on the ground who was receiving the beating looked older than the street kids and more conservative.

[38] She observed both men punch, stomp and kick Hammond, but said that the man with the open shirt was being the more aggressive of the two men. The woman was hunched over the man on the ground facing his stomach and chest area. She described the woman as kind of flailing toward his body – her arms were moving constantly and she was very angry. Gallately estimated that about thirty seconds into the fight, this same woman began to scream about being bloody and being stabbed. She saw nothing in the hands of either of the two men or the woman. Although the woman had screamed about being stabbed, it did not slow her down, Gallately described her as very aggressive. Although Hammond was making an effort to get up, the blows kept coming and knocked him to the ground. He tried several times and eventually got up and stumbled away. Gallately went on to describe Hammond's effort to stop a cab for

assistance, but her attention was more focused on the girl who had been involved in the fight. She remained screaming on the sidewalk with the two men – calling for an ambulance and yelling that she was bleeding. All three were soon approached by a police officer.

[39] The CTV video taken in the immediate aftermath of the events clearly show the main characters, the appellant, Faith Watts, Jeremy Wooley and Douglas Fresh. How they were attired and how they looked that night is captured on film.

[40] The appellant, distinctly, is the only one wearing a long black skirt and black halter top and her hair is in dreadlocks. Faith Watts on the other hand, is wearing gray shorts and Doc Marten style calf length boots.

ISSUES

[41] The appellant raises two grounds of appeal:

1. The trial judge accepted and relied on manifestly unreliable evidence in concluding that the appellant was the female armed with a knife on the south side of the street and was the person who took that knife to the north side of the street where she used it to fatally stab Hammond. This resulted in an unreasonable verdict.
2. The trial judge misapprehended, or failed to confront, items of exculpatory evidence that could have contributed to the existence of a

reasonable doubt. Most significantly, he did not consider the possibility that Faith Watts, Jeremy Wooley or the unknown third man involved in the final fight on the north side of Queen Street could have been the stabber.

(1) First Ground of Appeal – Unreasonable Verdict

[42] The appellant argues that the verdict is an unreasonable one. She says the evidence upon which the trial judge relied to conclude that the woman bleeding on the north side was the woman with the knife on the south side did not meet the criminal standard of proof and was insufficient to satisfy a reasonable trier of fact beyond a reasonable doubt. The critical and key issue on this ground of appeal is: who was the woman on the south side with the knife? The appellant or Faith Watts? In short, the appellant submits that the trial judge erred when he concluded that the female at the ATM machine in the initial confrontation was the appellant rather than Faith Watts; that the trial judge erred in accepting Stopford and Paget's identification of the appellant as the female armed with a knife on the south side of the street because it was manifestly unreliable; and that the trial judge erred in accepting the evidence of Melissa Gallately in relation to the appellant's observed actions during the north side fight. The appellant argues that the trial judge's reliance on the above-listed evidence resulted in an unreasonable verdict.

[43] The test for finding an unreasonable verdict is well-settled. In *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, Arbour J. said:

The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebe* as follows:

[C]urial review is invited whenever a jury goes beyond a reasonable standard ...[T]he test is 'whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered'.

...

and at para. 37:

The *Yebe* test is expressed in terms of a verdict reached by a jury. It is however, equally applicable to the judgment of a judge sitting at trial without a jury.

The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal.

[44] The application of the test was explained by Watt J.A. in *R. v. Roks*, 2011 ONCA 526, stating, at para. 122:

Under s. 686(1)(a)(i), an appeal court is entitled to review the evidence adduced at trial, to re-examine that evidence and to reweigh it, but only for the purpose of determining whether the evidence, as a whole, is

reasonably capable of supporting the trial judge's conclusion: *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 663. We must bring to bear on the exercise of evidentiary review, re-examination and reweighing, our assessment, informed by judicial training and experience, not simply our own personal experience and insight: *Biniaris*, at para. 42.

[45] The appellant concedes that the test is a high one. She argues firstly that the trial judge erred in finding that it was the appellant who asked Dranichak and Hammond for \$20 at the ATM machine. She submits that Dranichak identified the female at the ATM as Faith Watts rather than the appellant. He did so within a few days of August 9, 2007 and from police photographs shown to him. The trial judge rejected his evidence as unreliable.

[46] Dranichak's iteration of events was at odds with the evidence of many other witnesses whose evidence the trial judge accepted. Dranichak testified that he and Hammond moved to the south side of Queen Street almost immediately after they left the ATM. At this point he testified that he, Dranichak, was attacked by a male and a female on a bike. He was able to fight them off and make his escape in a taxi. Dranichak said he didn't know where Hammond was when he left and he was certain that they never got as far west as Niagara Street.

[47] Contrary to Dranichak's evidence, the argument between he and Hammond and the male and female street kids who were following them moved westward along the north side of Queen Street – a fact witnessed by a number of

witnesses. No other witness saw anyone on a bike who was actively involved in the initial dispute.

[48] Mystica Cooper and Laura Quigley both described the angry, loud female street kid, who along with a male street kid was pursuing Dranichak and Hammond along the north side of Queen Street West, as wearing a long skirt with her hair in dreadlocks. The appellant was the only one wearing a long skirt with her hair in dreadlocks. The trial judge concluded that Cooper and Quigley could not both be mistaken. He was aware that they both had described the appellant's hair colour as blondish when it was in fact brown. He noted that a number of witnesses had described many of the persons involved as being blond. The trial judge did not consider the misdescription as being significant. As he explained, the artificial lighting in the area distorted colour as some of the surveillance video evidence clearly demonstrated. The trial judge's finding is supported by the evidence of Cooper, Quigley and Shawn Park. Their descriptions of the appellant match her appearance in fact, as captured on the CTV video as well as the police booking video.

[49] The identification of the female street kid in the ATM confrontation as the appellant was a finding the trial judge was entitled to make on the evidence before him. Dranichak's evidence was at odds with that of many other witnesses. It was open to the trial judge to reject his evidence as unreliable.

[50] Next, the appellant submits that the evidence of both Molly Stopford and Jonathan Paget was manifestly unreliable and the trial judge erred in relying on that evidence to identify the appellant as the woman with the knife on the south side.

[51] The appellant places particular reliance on the following exchange between defence counsel and Molly Stopford:

Q. So the woman that you thought was cut and the woman who was tending to the injury may or may not have been the same two that you had seen in the fight.

A. Yes. I thought they were but it's possible that I was wrong.

Q. I gather your first instinct was that the girl who was cut was also the girl who'd had the knife in the fight, is that right?

A. Yes.

Q. And I also understand that you've examined that idea closely, is that right?

A. Mm, yeah, I guess so.

Q. It's possible you're interchanging the two women that are in the fight in your mind?

A. Yes, it's possible.

and further on:

Q. Between the two girls, you're not even 100 percent sure which one took the shirt off, which one was cut.

A. That's right.

Q. Do you recall being asked by the police, Do you think you can tell them apart, and answering, Honestly, I don't know. I have no idea.

A. Yes.

Q. You agree with that again today?

A. Yes.

Q. You're not 100 percent positive that the girl who was cut was the girl with the knife?

A. That's right.

Q. You're not 100 percent positive that the girl who took her shirt off was the second girl?

A. That's right.

[52] In re-examination by the Crown, Stopford was questioned about what influence the media coverage of the event may have had on her evidence. She responded:

A. I specifically tried to not let the media influence any of my memory. But I suppose that – I hope that it didn't but I guess it's possible that it created – it filled in some of the blanks, but I very strongly believe that I am only saying exactly what I saw.

[53] I start by noting that it is unhelpful generally in cross-examination to repeat a witnesses' statement to them that had been made in chief and ask if they are "100 percent certain" of that statement. First, it is not necessary for a witness to be "100 percent certain" – that is not the criminal standard. Secondly, most

reasonable persons would usually agree to a possibility they could be wrong or as the saying goes “anything is possible”. The trial judge was alive to this, stating in his reasons:

Our reliance on the evidence of any eyewitness also recognizes that an eyewitness does not have to be certain in his or her identification. To the contrary, it is well-recognized that there is a weak link between the certainty of an eyewitness and the accuracy of that witness’ evidence: *R. v. Hibbert*, [2002] 2 S.C.R. 445 at para. 52. ...

Rather than detracting from their evidence, in my view, their willingness to acknowledge the reality that they might be wrong only serves to enhance the genuineness with which they gave their evidence. Ultimately, it is the trier of fact who must assess the evidence and decide what evidence to act on.

[54] I would also note that the trial judge was clear in his reasons that he was very much aware of the frailties of eyewitness evidence, and explained that trial judges “caution jurors very strongly about these frailties and the need to take special caution in approaching such evidence”. The trial judge elaborated:

[E]very witness will see events from their own perspectives. They will remember some aspects of the events better than others. In my view, those inconsistencies are minor in nature and, rather than detracting from the honesty of the witness’ evidence, they enhance it because they are precisely the type of inconsistencies that one would expect to see when asking multiple people to recall the same event. It does, however, further explain why we exercise the caution that we do when we approach the evidence of eyewitnesses and why we look for corroboration in other evidence.

[55] There is no doubt the trial judge was aware that Stopford conceded in cross-examination that she may have been interchanging the two females and that her recollection may have been influenced by the media. The trial judge said “[s]he also admits that she might be interchanging the two females in terms of which one had the cut arm”, and “Ms. Stopford does acknowledge that her recollection of the events may have been influenced by media coverage that she saw of the story.”

[56] As for Paget, on cross-examination he maintained that he was “fairly certain” the woman he’d seen with the knife in her hand on the south side was the same woman he saw with the cut arm on the north side of the street. He was vague on any details which could help to identify the appellant. He said that a saying had stuck in his mind at the time, that you should never bring a knife or a weapon to a fight because it may end up being used on you. He was struck by the irony that the appellant took the knife to the fight and ended up being cut by it.

[57] Paget thought this at the time the events occurred, and while it is not identification *per se*, it is an indication of the impression made on his memory at the time – that the woman with the knife on the south side was the same woman who got stabbed on the north side. It is unlikely his memory would have been jogged that way if it had been someone other than the woman he had seen with the knife on the south side who ended up wounded on the north side.

[58] In my view it was open to the trial judge to accept the evidence of Stopford and Paget. While their evidence was not identical, each was corroborative of the other's on the material points. Both said the woman they had seen with the knife on the south side was the same woman who ended up with the cut arm on the north side – and there is no doubt the woman with the cut arm was the appellant.

[59] The trial judge found, and his finding is not challenged, that the two women involved in the south side fight were Faith Watts and the appellant. Faith Watts admitted in her video evidence that the knife, ultimately found to be the murder weapon, was her knife. She said she pulled it out during the south side fight and was almost immediately disarmed by – she thought “Richard” Hammond. She described the knife as one she had stolen in Montreal. Her boyfriend Fresh had also stolen an identical knife at the same time. Fresh's matching knife was found among his belongings when he was searched following these events.

[60] The evidence is clear, however, that Watts remained on the south side and did not go to the north side until the fight on the north side was over. At that time, she went over to assist her friend, the appellant, who was bleeding.

[61] There were only four people involved in the fight on the south side of the streetcar – Watts, the appellant, Fresh and Hammond. The knife is seen by both Paget and Stopford on the south side. Watts and Fresh stay on the south side, which leaves only the appellant or Hammond to take the knife to the fight on the

north side. Hammond, as indicated earlier, is captured on video between the two fights – he does not have a knife in either hand and does not appear to be seriously injured at that point. By process of elimination, that leaves only the appellant who could have taken the knife to the north side. This fact, coupled with the evidence of Stopford and Paget, is strongly persuasive that it was the appellant who had the knife on the south side and the only one who could have taken it to the north side.

[62] That this was the knife, identified by both Stopford and Paget, that was used to stab Hammond fatally and wound the appellant cannot be doubted on this record.

[63] The nature of this evidence is not identification evidence in the strict sense. Neither Stopford or Paget were able to identify the appellant by a description of her features or what she was wearing at the time, other than in general terms – her clothing was “baggy” – her hair “messy”.

[64] In dealing with Stopford’s evidence, the trial judge specifically noted that she admitted she might be interchanging the two females. He did not specifically refer to the entire cross-examination about whether, for example, she was one hundred percent sure. It was not necessary for him to do so here. The point that he did mention was the common theme of the cross-examination and the trial judge was aware of it. But, as he was entitled to do, he accepted her evidence

and that of Paget. As indicated earlier, their evidence was mutually corroborative and when considered with the rest of the evidence was powerfully persuasive overall.

[65] The appellant submits that no one saw Watts transfer the knife to her. She suggests that it is equally plausible that Watts could have passed the knife to Jeremy Wooley or the unidentified third man who participated in the fight on the north side. The difficulty with this argument is that there was no reliable evidence that either of those men were ever on the south side of Queen Street at the material time. The only shred of evidence is that of Cam Bordignon, who gave a vague description of one of the onlookers to the south side fight, which might describe Wooley. It defies logic, however, to suggest that Wooley would simply stand by and witness his friend Fresh being pummelled into unconsciousness by Hammond, while doing nothing to help.

[66] Finally, the appellant submits that the trial judge did not adequately deal with the inconsistencies in the evidence of Melissa Gallately. Had he done so, he would have rejected her evidence in relation to her observations of the appellant, who while engaged in the north side fight, was flailing her arms and hand toward the victim's stomach and chest area.

[67] Gallately gave a statement to the police the morning after the stabbing, and was cross-examined on that statement by defence counsel. She did not use

the word “flail” in her statement to the police and did not specifically state that the female was beating the gentleman on the ground. She said that what she meant when she described the female as “being on him” was that she was crouched over him and that “they were clearly landing blows, she was on top of him moving and flailing”.

[68] At the preliminary inquiry, Gallately also gave evidence and was cross-examined in relation to that. She again had explained that the two men were kicking and punching Hammond and that the female was on top of him. She explained, when asked if she had seen the girl punch or kick:

Well, it was kind of a scuffle and I know she was on him.
She wasn't helping him.

[69] She agreed that she had not mentioned the flailing of arms by the woman in either her statement to the police or in her evidence at the preliminary inquiry.

When asked if she had any doubt about the arm flailing, she said:

No, I have a recollection to it. Just since I didn't say it before. Her motions and arm movements towards him were very aggressive.

[70] Defence counsel took Gallately to both her statement to the police, which she gave the morning after the stabbing, and to the evidence she gave at the preliminary inquiry. In relation to her statement to the police, Gallately testified at trial that at the time she thought it had just been another bar fight, a common

occurrence in the neighbourhood. She said if she had known that someone had died she may have, as she put it, been “a little more, you know, diligent about coming up with extreme details.”

[71] In relation to her evidence at the preliminary inquiry, Gallately agreed that she had said the female assailant was “on him” and “on top of him” and that she had not said, then, that the female was flailing and moving her arms.

[72] Defence counsel tried to have Gallately agree that the female was the least aggressive of the three who were attacking Hammond. She responded:

A. No. Maybe physically but not verbally.

Q. So physically she’s –

(counsel interjects)

A. She was quite angry, quite aggressive verbally and her mannerisms towards him were very aggressive.

and the cross-examination continued:

Q. Okay. So from a verbal point of view, she was not the least aggressive.

A. No.

Q. But from a physical point of view she was the least aggressive.

A. Yes. Yes. If you’re taking the arm flailing out, yes.

Q. If we’re taking the arm flailing out. Well, are we taking the arm flailing out?

A. I don't know.

Q. Do you have some doubt about the arm flailing?

A. No, I have a recollection to it. Just since I didn't say it before. Her motions and arm movements towards him were very aggressive.

[73] The trial judge accepted the evidence of Melissa Gallately. In his reasons, he referred only to the statement she had given to the police and her evidence to the effect that she may have been more forthcoming and provided greater detail, had she known that someone had died. The trial judge accepted that explanation as "honest and forthright." He did not specifically reference the preliminary inquiry evidence and appellant's counsel argues that by then, Gallately knew that someone had died and the trial judge should have dealt with this inconsistency.

[74] I do not agree. This experienced trial judge was well aware that on another occasion this witness had said something different from the evidence she provided at trial. She specifically had not mentioned the flailing of the female assailant's hands and arms on the either of the earlier occasions. The trial judge only referred to the police statement, and he accepted her explanation. The appellant's complaint is with respect to Gallately's failure to mention the flailing on a second occasion. However, Gallately was not asked at trial why she had failed to mention the flailing arms at the preliminary inquiry as she had been asked about the statement to the police. Instead, defence counsel reviewed with

her the evidence she had given at the preliminary inquiry and Gallately explained what she had meant when she said the female was “on top of him”. She agreed she had not mentioned the flailing of arms but had no doubt, at trial, about what she had observed.

[75] There was no blatant contradiction of her evidence on an earlier occasion, in the strict sense. She merely elaborated at trial. The trial judge was fully aware of and appreciated that, although having had the opportunity to do so, this witness had not mentioned the flailing arms on at least one of those earlier occasions.

[76] In my view, the trial judge’s failure to mention the fact that Gallately had also failed to mention the flailing of arms at the preliminary inquiry is of no consequence. The shortcoming of her evidence was the same failure to mention the same conduct. He accepted her evidence despite her failure on the one occasion he referenced in his reasons, as he was entitled to do. As the trial judge, it was his call; I would not interfere with his finding.

[77] I would also note that the testimony of Nataja DeSilvia and Saad Mir generally supports the evidence of Gallately.

[78] DeSilvia, who worked at a restaurant on the north side of Queen Street West, witnessed the fight on the north side of the street. She described the female involved in the fight as younger, wearing a tank top, and with dreadlocked

hair. She saw punches being thrown by all involved in the fight. When the fight ended, DeSilvia saw the man who had been beaten hook his arm into a taxi, and saw the taxi carry him west on Queen Street. She heard the female yell that he had stabbed her, and she said that the female who had been involved in the fight was bleeding and calling for an ambulance. DeSilvia saw another female come to help, and then DeSilvia called 911.

[79] Saad Mir was driving a taxi on the night of the stabbing. He witnessed the fight on the north side of Queen Street, and testified that he saw a male being attacked by a female and two other males. Mir testified that the male being attacked was on top of the female, while the other two males were kicking at him. Mir said that the male and the female were struggling, and that the female was making punching motions, although Mir could not testify as to the force of the blows. After about ten seconds, Mir said that the male who was being attacked got up and tried to get into another taxi, but could not get in. That male then approached Mir's taxi. Mir saw that he had a knife in his hands, and locked his doors. However, the windows were open, and the male locked his arm around the centre post of the car on the passenger side. Mir drove slowly, as there was traffic, and the male fell from the car as they passed by the church. Mir testified that he made a U-turn and drove back towards Niagara Street and alerted a police officer to Hammond's condition. He then made another U-turn and drove west along Queen Street. At that time, he saw the female who had been involved

in the fight. He said she was holding her left wrist and saying that she had been stabbed.

[80] Based on all of the above, I would not give effect to this ground of appeal. In my view, the verdict is a reasonable one and is amply supported by the evidence.

(2) Second Ground of Appeal - Failure to Apprehend and Address

Exculpatory Evidence

[81] The appellant argues that the trial judge misapprehended the evidence in that he did not consider exculpatory evidence which may have raised a reasonable doubt about the appellant's guilt.

[82] In *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at p. 217, Doherty J.A. noted:

Submissions premised on an alleged misapprehension of evidence are commonplace in cases tried by a judge sitting without a jury. A misapprehension of the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence.

[83] Both *Morrissey* and the recent decision of this court in *R. v. Alboukhari*, 2013 ONCA 581 are examples of cases where trial judges have misstated what the evidence in fact was. In both *Morrissey* and *Alboukhari*, this court quashed

the convictions and ordered a new trial, as the misstatements were found to have played an important role in the trial judges' reasoning.

[84] This case is different in that the principal misapprehension alleged here is the trial judge's failure to consider that Faith Watts, Jeremy Wooley or the unidentified third man could have been the killer.

[85] Counsel for the appellant argues that this case is, on its facts, more like the case that was the subject of this court's decision in *R. v. Clouthier*, 2012 ONCA 636. In *Clouthier* the appellant was convicted of robbery and disguise with intent to commit an indictable offence. The offences arose from the robbery of a Mac's Milk Store in Arnprior by a man wearing a balaclava. As the court put it, at para. 1:

The sole issue at trial was identity. The appellant's principal ground of appeal is that in his reasons for conviction, the trial judge failed to give any consideration to evidence that the appellant's DNA did not match that detected on a balaclava that was found near the scene of the robbery.

[86] Sharpe J.A. writing for the court noted, at paras. 12-16:

In the circumstances of this case, the failure of the trial judge to address the significance of the DNA evidence is highly problematic. The Crown offered some evidence pointing to the appellant as the robber, but the Crown's evidence was far from compelling. While the evidence of the DNA on the balaclava did not conclusively demonstrate the appellant's innocence, it was a significant piece of evidence that potentially exculpated

the appellant and it therefore deserved some consideration by the trial judge.

The robbery took place on an October evening when one would not expect to see or find a balaclava. This made it more probable that the balaclava found near the scene was the same one worn by the robber. The balaclava covered part of the robber's mouth making it possible that the robber would have deposited DNA on the balaclava.

In my view the trial judge erred in law by failing to explain why the DNA and balaclava evidence did not raise a reasonable doubt as to the appellant's guilt.

Another element in the evidence not dealt with by the trial judge was the store clerk's evidence as to the height of the robber. She testified that she is five feet five inches tall and that she was standing on a six inch platform behind the counter. From that perspective, she was face to face with the robber and she estimated that he would have appeared an inch or less than an inch taller than her while she stood on the six-inch platform. This suggests that the robber could have been approximately six feet tall. The appellant is five feet seven or eight inches tall. The point was not emphasized by defence counsel in his closing submissions but it was mentioned and was clearly raised in the evidence.

While trial judges are not required to make reference to every piece of evidence, there is a duty to consider the evidence in its entirety, not simply the evidence that inculpates the accused. In my view, the failure to deal with two items that tended to exculpate the appellant – the balaclava and the evidence as to the height of the robber – amounts to an error of law sufficient to justify setting aside these convictions.

[87] The question raised here is whether there was a duty on the part of the trial judge to consider the alternate theories of liability raised by the appellant on this appeal – namely, the possibility that Faith Watts, Jeremy Wooley or the unidentified third man involved in the north side fight was the stabber – two of which were never raised in argument before the trial judge.

(a) Faith Watts as the possible stabber

[88] The appellant argues that the trial judge did not give the evidence that suggested Faith Watts was the actual killer the attention it deserved. She argues that the case against Watts was as strong as the case against her, and that the trial judge's failure to deal with that evidence is a misapprehension of evidence amounting to an error in law. The misapprehension is the trial judge's failure to consider what would amount to exculpatory evidence vis-à-vis the appellant.

[89] This same argument was advanced at trial and rejected by the trial judge.

[90] In this court, we begin with two important defence concessions:

1. The appellant does not dispute the trial judge's finding that it was the appellant and Faith Watts who were involved in the south side altercation; and
2. The appellant does not dispute that it was Faith Watts on the south side tending to Fresh after he was beaten by Hammond.

[91] The appellant points to the following evidence in support of her assertion that it is as likely that Faith Watts was the stabber as it is that she was:

1. Watts owned the knife;
2. Watts testified that she introduced the knife into the fight;
3. All of the stabbing could have been performed on the south side;
4. Dranichak identified Watts as the enraged female at the bank machine;
5. Fresh, who was beaten, was Watts' boyfriend; and
6. DNA evidence strongly implicates Watts.

Watts Owned the Knife

[92] As the trial judge noted in his reasons, that fact did not preclude his finding that the appellant had the knife in both the south side and north side fights. He rejected most of Watts' evidence as unreliable given that, as she said, she had been drinking most of the day and at one point injected oxycontin. The mere fact that she was likely the owner of the weapon does not necessarily lead to the conclusion that she was the one who used it.

Watts Testified She Introduced the Knife into the Fight

[93] The trial judge inferentially rejected the evidence of Watts that she introduced the knife into the fight by concluding, as he did, that the appellant

either borrowed the knife earlier in the day or took it at the time Hammond beat Fresh.

[94] Faith Watts had testified that she had her knife in her hand and almost immediately after opening the knife she was disarmed by, she thought, Hammond.

[95] First, the only fight Watts was involved in was the fight on the south side and no issue is taken with the trial judge's finding that after that fight Watts remained on the south side to tend to Fresh.

[96] Second, Hammond is caught on the video from the One of a Kind Pasta Shop, after the south side fight and before the north side fight, and he is unarmed and apparently uninjured.

[97] Third, if Hammond had taken the knife during the fight on the south side, it is unlikely events would have turned as they did.

[98] Fourth, the suggestion contradicts the evidence of Stopford and Paget, which was evidence the trial judge accepted, that it was the appellant who had the knife in the south side fight.

Watts Could Have Performed all of the Stabbing on the South Side

[99] Again, the video evidence from the One of a Kind Pasta Shop would suggest that Hammond was uninjured between the south side and north side fights.

[100] The blood spatter from Hammond, and indeed the appellant, is all on the north side of the street. The only blood spatter on the south side belongs to Fresh.

[101] Finally, Hammond comes into possession of the knife only after the north side fight – at which point he is obviously seriously wounded and the appellant has been stabbed.

Dranichak Identified Watts as the Enraged Female at the ATM

[102] I have dealt with this evidence. The trial judge was entitled to reject Dranichak's evidence as unreliable for the reasons he gave.

[103] There was a preponderance of evidence identifying the appellant as the woman with Fresh on the north side of the street in pursuit of Hammond and Dranichak before the fight on the south side of the street began.

[104] I note that in his closing submissions to the trial judge, defence counsel (not Mr. Campbell) pointed to the lies and fabrications in Dranichak's evidence, and said:

I submit this court must be very cautious in using any of the evidence of Mr. Dranichak in your findings of fact.

Fresh, the man who was beaten by Hammond, was Watts' Boyfriend

[105] While this may have provided Watts with a motive, the fact remains and the evidence is undisputed that she remained on the south side with Fresh after

he was beaten by Hammond. There is no evidence that places Watts on the north side while the fight there is ongoing.

DNA Strongly Implicates Watts

[106] The trial judge dealt with this point as follows:

It is at this point that I will again refer to the DNA evidence. It established that there was more of Mr. Hammond's blood found on the footwear of Ms. Watts than was found on the footwear of Ms. Kish. The defence relies on this evidence to direct attention to Ms. Watts as the more likely perpetrator of Mr. Hammond's murder than Ms. Kish. The fact is that the amount of blood found on the footwear and clothing of many of the persons involved, including these two, is miniscule. It does not provide a solid foundation for making the type of distinction urged by the defence especially given that there was blood on the street that all of these people could have stepped in or collected on their footwear after the stabbing of Mr. Hammond. This again shows some of the limitations of physical evidence.

[107] In my view, this was a matter for the trial judge. He was there, he saw the amount of blood that was deposited on Watts' boots and the very bottom edge of her shorts – he called the amounts “miniscule”.

[108] There is no doubt that Watts walked the area of the stabbing after it was over while tending to her friend, the appellant, who had been stabbed on the arm. Not only is she observed by a number of witnesses doing so, she is captured on the CTV video. The crime scene was not preserved. Monica Sloan of the Centre of Forensic Sciences rejected defence counsel's suggestion that “the higher you

go up on someone's body the greater the investigative value of the sample, if it turns out to be someone other than the person?" This suggestion, of course, was in relation to the location of the victim's blood found on the shorts worn by Faith Watts.

[109] In my view, the trial judge's conclusion that the DNA evidence was of little assistance in this case in terms of assisting in the identification of the person who stabbed Ross Hammond is well supported in the evidence.

[110] I see no misapprehension by the trial judge. He considered the defence suggestion that "Ms. Watts was the female with the knife in the fights". He did not fail to consider or address this "exculpatory" evidence. To the contrary, he considered it and rejected it for the reasons he gave.

(b) Jeremy Wooley as the possible stabber

[111] I would note that defence counsel did not argue or suggest at trial that Jeremy Wooley may have been the stabber. That being the case, it is hardly surprising that the trial judge did not deal with this theory in his reasons. Such a theory is in my view utter speculation and is without foundation in the evidence.

[112] There is no reliable evidence that places Wooley on the south side at the time that the fight between Hammond and Fresh took place. The trial judge found that it was Fresh, the appellant, and Watts who were in pursuit of Hammond and Dranichak after the initial confrontation at the ATM. Dranichak left the scene,

leaving Fresh, the appellant, Watts and Hammond as the four people involved in the fight on the south side of Queen Street. The only evidence concerning Wooley is a vague suggestion by Cam Bordignon about a “bigger”, “husky” guy being an onlooker as the south side fight took place.

[113] Bordignon was heading to a bar with two of his friends after having had a few drinks at a friend’s place. He said he had a “good buzz” going to the bar.

[114] He said he observed three or four street kids moving in the same direction after the two jocks. One was a male that initially went to fight one of the jock guys – a tall and skinny street kid.

[115] Bordignon also recalled a bigger, husky guy, maybe about 200 pounds. He thought he had a scruffy appearance and was unshaven. He said he remembered these two street kids because of the fights, plural, that he had seen.

[116] Bordignon did not know if any of the street kids he had seen crossing from the north side of the street to the south side were women. He watched the fight between Hammond and Fresh – they were the only two he recalled being in that fight. Bordignon said that the skinnier street kid was tended to after the fight by a female street kid who appeared to be his girlfriend.

[117] Asked where the bigger, huskier street kid went he responded:

Um, I really noticed him when the fight moved across the street north.

[118] On the north side he remembered “two or three street guys beating on the jock guy ... they had the jock on the ground and were punching and kicking him”. He remembered the huskier street kid saying “you die tonight”.

[119] There is no evidence that Wooley was involved in the south side fight. The only fight he was involved in was the north side fight.

[120] If Wooley was the stabber, someone had to get the knife to him, and the only person it could have been logically, was the appellant.

[121] It was Faith Watts’ knife. Stopford and Paget saw the knife in the appellant’s possession on the south side. Watts remained on the south side with Fresh. Only the appellant, who went to the north side in pursuit of Hammond, could have transferred the knife to Wooley.

[122] If she did transfer the knife, the evidence is that the statement by Wooley “you die tonight” is made as the beating of Hammond is underway, and the beating continues for a time after the statement is made.

[123] The evidence is clear and the appellant concedes that she was the woman involved in the north side fight where she herself was stabbed.

[124] The fact is that the appellant was an active participant in the north side fight – where a vicious beating was administered to Hammond – from its start to its finish and she continued her participation after hearing Wooley utter the words “you die tonight.”

[125] If Wooley administered the fatal stab wounds, the appellant would still be guilty of second degree murder as a party.

[126] However, there is no evidence that places Wooley in such close proximity to the south side fight that he could have received the knife from Watts.

[127] To suggest he was the stabber is, on the record, speculative at best.

(c) Third man as possible stabber

[128] There is evidence that a third unidentified male was involved in the north side fight. However, there is simply no evidence to support an inference that he was the stabber other than his involvement in that fight.

[129] There is no evidence he was ever seen on the south side while that altercation was ongoing.

[130] The fact that the unidentified male left the scene after the north side fight does not make it any more likely that he was the stabber.

[131] We know an unknown male was involved and that an unknown male told Shawn Park that he had been stabbed in a fight. That is the extent of the evidence and it is hardly enough to raise any doubt let alone a reasonable one. Further, it was not a ground argued at trial.

[132] In my view, there is no basis to conclude that the trial judge misapprehended the evidence by failing to deal with exculpatory evidence as the appellant has argued.

[133] The trial judge dealt with, and rejected for the reasons he gave, the submission that Faith Watts was the stabber. That is not a misapprehension of evidence.

[134] Further, the suggestion that either Wooley or the unidentified third man were possible stabbers was not argued at trial.

[135] In any event, for the reasons given, in my view there is simply no evidentiary basis on which to make such an argument.

DISPOSITION

[136] I would dismiss the appeal.

Released: March 10, 2014 "STG"

"J. MacFarland J.A."
"I agree S.T. Goudge J.A."
"I agree E.A. Cronk J.A."