Landmark Case

OJEN ROEJ
ONTARIO JUSTICE EDUCATION NETWORK
RÉSEAU ONTARIEN D'ÉDUCATION JURIDIQUE

RACIAL PROFILING & REASONABLE APPREHENSION OF BIAS: *R.* V. *BROWN*

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R. v. Brown (2003)

Facts

On November 1, 1999, Constable Olson of the Metro Toronto Police stopped Decovan (Dee) Brown, a man of African-American descent and a professional basketball player, while he was driving on the Don Valley Parkway in Toronto. Police Officers have discretionary powers to stop motorists on roadways. This discretionary power is authorized by s.216 (1) of the *Highway Traffic Act.*

> *Highway Traffic Act*
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> 216. (1) A police officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop.

Mr. Brown testified that the Officer pulled up alongside him on the road to look into the car before slowing down and moving behind Mr. Brown, in order to follow him. After a couple of kilometres, the Officer pulled Mr. Brown over. Officer Olson stated that he stopped Mr. Brown because he was driving over the 90 km speed limit, and twice, his car had crossed in and out of the lane in which he was driving.

The Officer said that he had smelled alcohol while talking to Mr. Brown. Mr. Brown was given a roadside screening device test, which he failed. As a result, he was taken to the police station and given a breath test. The legal limit for blood alcohol content is 80 mg of alcohol in 100 ml of blood. Mr. Brown's blood-alcohol concentration showed 140 mg per 100 ml of blood. He was charged under s. 253 (b) of the *Criminal Code of Canada* with driving over the legal limit.

Mr. Brown argued that his s.9 *Charter* right had been infringed. He argued that Officer Olson had arbitrarily (without proper cause) detained Mr. Brown because he was a black man driving an expensive car. As a result of this infringement, his counsel applied under s.24 (2) of the *Charter* to have the evidence of the breath tests excluded.

Canadian Charter of Rights and Freedoms

9. Everyone has the right not to be arbitrarily detained or imprisoned.

24. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

A two-day trial occurred at the Ontario Court of Justice. Mr. Brown was convicted of the "driving over 80" charge and was fined $2,000. He appealed his sentence to the Superior Court of Justice. Mr. Brown was successful on his appeal and a new trial was ordered. The Crown appealed this result to the Ontario Court of Appeal. The Crown's appeal was heard by that Court and dismissed.

Ontario Court of Justice

A charge under section 253 (b) of the Criminal Code is a summary conviction offence, which is considered less serious than indictable offences. A judge, without a jury, conducted Mr. Brown's trial.

The major issue at trial was why Officer Olson had initially stopped Mr. Brown. Mr. Brown's counsel argued that the only reason Officer Olson stopped Mr. Brown was because he was a black man driving an expensive car. The defence counsel suggested that the officer had racially profiled Mr. Brown, infringing his s. 9 *Charter* right. As a result of this infringement, counsel wanted the evidence collected after the improper detention to be excluded under s. 24 (2) of the *Charter*. Without this evidence, Mr. Brown could not be convicted.

Mr. Brown's counsel had to prove that the initial detention was arbitrary and that Officer Olson did not have articulable cause for stopping Mr. Brown. Articulable cause means that an Officer has reasonable grounds, and can clearly explain why the motorist was stopped. The defence put forward several pieces of evidence to show that Officer Olson had been motivated by subconscious racial stereotypes in his decision to initially stop Mr. Brown.

The trial judge did not accept the evidence presented by Mr. Brown's counsel that racial profiling was the reason Mr. Brown was stopped. In refusing to accept this evidence, the trial judge commented that the suggestion of racial profiling was "...really quite nasty, malicious...accusations based on, it seems to me, nothing..."

The trial judge convicted Mr. Brown of "driving over 80" and fined him $2000. During the sentencing, the judge suggested that Mr. Brown apologize to Officer Olson for the allegation of racial profiling.

Mr. Brown appealed his summary conviction to the Superior Court of Justice.

Superior Court of Justice

Mr. Brown appealed the conviction on the ground that the trial judge's conduct gave rise to a reasonable apprehension of bias on the issue of racial profiling. The issue with reasonable apprehension of bias is two-fold: whether there was actual presence of bias, or whether there is a perception that bias was present. The fairness of the trial, as well as confidence in the justice system, will be jeopardized if either type of bias is shown to be present. The appeal judge had to determine whether there was evidence that the trial judge had been biased – not impartial – or, just as important, had appeared to biased, in his handling of the trial.

Four aspects of the trial judge's conduct were considered:

1. Remarks made by the trial judge during the sentencing of Mr. Brown.
2. Remarks made by the trial judge during Mr. Brown's counsel's arguments after the evidence had been given.
3. Remarks made by the trial judge during Officer Olson's cross-examination (when Mr. Brown's counsel was questioning the Officer).
4. Remarks made by the trial judge reprimanding the defence counsel for his tone of voice during cross-examination of the Officer and references to the amount of time being taken for counsel to present his case.

The appeal judge found that these four issues in the context of the trial as a whole gave rise to a reasonable apprehension of bias.

> The legal test to determine whether there is a reasonable apprehension of bias is as follows:
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> Whether a reasonable person, fully informed of the facts of the case, would conclude that the decision-maker, whether consciously or subconsciously, was biased during the decision-making process.

On this issue, the judge reasoned that the reasonable person in this case would be aware of the presence of racism in our society.

The appeal judge did not conclude that the trial judge was biased. Rather, he found that this is a case where reasonable people, aware of the problem of racism in our society and the role of the judge as an impartial trier of facts, would reasonably detect a bias on the part of the trial judge. The appeal judge made no conclusion about the trial judge's actual opinions about racial profiling. He only decided that someone might interpret those comments to suggest bias.

As a result, Mr. Brown's conviction was set aside and a new trial was ordered.

Ontario Court of Appeal

The Crown appealed to the Court of Appeal for Ontario. The Court found that the evidence, taken as a whole, did support a conclusion that racial profiling had influenced Officer Olson in his decision to stop Mr. Brown.

The Court agreed that a finding of a reasonable apprehension of bias should be supported by proper evidence. In this case, the evidence of the trial judge's conduct throughout the trial, taken as whole, did support a finding of a reasonable apprehension of bias. The Crown's appeal was dismissed.

Legal Issues

Racial Profiling

In deciding the appeal, the Court of Appeal considered how a person could prove that racial profiling had occurred. The Court of Appeal addressed this issue by saying that racial profiling will rarely be proven by direct evidence (e.g. an Officer admitting that he or she was influenced by race in his or her discretionary decision to stop a motorist).

The Court explained that if racial profiling is to be proven, it must be proven by circumstantial evidence. This type of evidence is based on an inference – or assumption – that can be drawn from other established facts or evidence.

Where the evidence shows that the circumstances relating to the detention correspond with racial profiling, the court can infer that the Officer may have been motivated by racial profiling, at least in part. In this specific case, the Court of Appeal accepted the evidence presented during the trial that indicated Officer Olson was motivated by subconscious racial stereotypes.

The evidence that supported this finding included:

- Mr. Brown's was wearing a baseball cap and jogging suit while driving an expensive car;
- Officer Olson looked into Mr. Brown's car while driving alongside him on the road;
- Officer Olson ran a vehicle report on the car before stopping Mr. Brown;
- There was evidence of a second set of notes that had been prepared;
- There were differences in the time reported in Officer Olson's notebook and the times that he gave the breath analyser technician.

The Court also stated that racial profiling in criminal investigations is based on "a belief by a police officer that a person's colour, combined with other circumstances, makes him or her more likely to be involved in criminal activity." The Court acknowledged the studies on racial profiling that suggest that when a person looks out of place, racial profiling is more likely to occur, than in an area where his or her skin colour is prominent.

The Court accepted that this evidence was sufficient to raise the issue of racial profiling at the trial.

Reasonable Apprehension of Bias

To protect trial fairness and confidence in the justice system, the Supreme Court of Canada established a test for reasonable apprehension of bias. The test for reasonable apprehension of bias was set out in the case, *Committee for Justice and Liberty v. Canada (National Energy Board)* [1978] 1 S.C.R. 369. The test asks whether an informed, practical person would be more likely than not to think that the decision-maker, whether consciously or unconsciously, decided the issue fairly. The presence of actual bias, or the perception that bias exists, must be avoided. In cases such as this, the reasonable person is assumed to be aware of the history of discrimination faced by

disadvantaged groups and the s. 15 equality guarantees in the *Charter of Rights and Freedoms*. Reasonable apprehension of bias protects against procedural unfairness by allowing a court to review the words and conduct of the decision-maker. The role of the judge or decision-maker as the impartial, objective party is an important value of the Canadian justice system. Trials must be fair *and* must also appear to be fair.

The Decision

The Court of Appeal found that the test for reasonable apprehension of bias had been correctly applied. Based on the evidence, the trial judge had a reasonable apprehension of bias when he did not consider the arguments about racial profiling. The Court of Appeal dismissed the Crown's appeal.

Importance of this Case

This case is important because it sets out how a person would argue that an action was based on racial profiling rather than the discretionary powers of police. This case also reaffirms the importance of procedural fairness, the need for trials to be fair *and* appear to be fair, and the role of the decision-maker as the impartial party.