

Her Majesty the Queen v. Brown
[Indexed as: R. v. Brown]

64 O.R. (3d) 161

[2003] O.J. No. 1251

Docket No. C37818

Court of Appeal for Ontario

Morden, Laskin and Feldman JJ.A.

April 16, 2003

Criminal law -- Bias -- Reasonable apprehension of bias -- Defence counsel bringing application at trial to exclude evidence on basis that accused was arbitrarily detained because of racial profiling -- Evidence in support of application being capable of supporting finding of racial profiling -- Trial judge expressing displeasure at bringing of application based on racial profiling and making comments which suggested that he failed to understand nature of racial profiling and that his primary concern was with impact of application on officer -- Trial judge suggesting during sentencing that accused apologize to officer for allegations made by defence counsel -- Trial judge's conduct giving rise to reasonable apprehension of bias.

The accused was a young black man and a professional basketball player. He was stopped by a police officer while driving an expensive motor vehicle. The officer claimed that he stopped the accused because the accused was speeding, but there was evidence that called this claim into question. The accused was ultimately charged with driving over 80. Defence counsel brought an application at trial to exclude evidence on the basis that the accused was arbitrarily detained contrary to s. 9 of the Canadian Charter of Rights and Freedoms because the detention was based on racial profiling. The application was dismissed and the accused was convicted. His appeal was allowed. The summary conviction appeal judge held that the trial judge's conduct of the trial gave rise to a reasonable apprehension of bias. In reaching that conclusion, the summary conviction appeal judge relied on: remarks by the trial judge during the cross-examination of the officer, suggesting that he found defence counsel's allegations "troubling"; attempts made by the trial judge to assist the officer; remarks by the trial judge during cross-examination of the officer, which demonstrated a failure to understand the nature of the application and a tendency to confuse racial profiling with conscious racism and to view the allegations as a personal attack on the officer; statements by the trial judge during defence counsel's submissions that the allegations were "really quite nasty, malicious, . . . based on, it seems to me, nothing"; statements made during defence counsel's submissions which,

again, demonstrated a failure to understand the nature of racial profiling; and the trial judge's suggestion to the accused during sentencing that the accused apologize to the officer for the allegations. The Crown appealed.

Held, the appeal should be dismissed.

There was evidence before the trial judge that was capable of supporting a finding of racial profiling. A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven, it must be done by inference drawn from circumstantial evidence. Where the evidence shows that the circumstances relating to a detention correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention, the record is then capable of supporting a finding that the stop was based on racial profiling. [page162]

As a general rule, a failure to understand the importance of evidence at the time it is given does not, by itself, afford a foundation for a finding of reasonable apprehension of bias. If, however, there is a reasonable basis for concluding that the trial judge's failure to understand the evidence is the result of the judge having a closed mind on the issue to which the evidence is addressed, then the misunderstanding is a factor that should be taken into account. The crucial time to assess the effect of a failure to understand the importance of the evidence is at the end of a case, after the judge has heard all of the evidence and counsel's submissions on it.

If the argument supporting reasonable apprehension of bias were based solely on what happened during the cross-examination of the officer, it would fail. Although the trial judge's expression of concern respecting the "serious" allegation was troubling, the record showed that the trial judge, generally, conducted the trial in a businesslike and even-handed manner. Defence counsel was denied no line of inquiry. This part of the record, on its own, fell short of showing the convincing and cogent evidence required to support a finding of reasonable apprehension of bias.

Comments made by the trial judge during defence counsel's submissions demonstrated a failure to appreciate the evidence based on a resistance to the application. He asked what motive the officer could possibly have had for stopping the accused on a major highway and stated that the case would be different if it arose in an area of the city with a large black population and involved a "pattern of abusive detentions of people who just happened to be using the street". Defence counsel should not have been expected to advance a motivation for the racial profiling in this case beyond the motive inherent in the practice itself. There was no evidence supporting the trial judge's assumption that racial profiling is more likely to occur in an area where the population includes a large proportion of the targeted racial group. The trial judge's reference to a "pattern of abusive detention" set the test higher than any individual litigant would practically be able to satisfy. It was difficult to see why he would have thought the accused should be required to show a particular instance of police conduct that fit a wider pattern. A reasonable observer might have thought that these statements by the trial judge indicated a resistance to the actual defence before him: that a police officer had made assumptions about a black man driving an expensive car before stopping him and then lied about his reasons for the stop. Moreover, a reasonable observer could infer from the trial judge's statement that the defence had made serious, nasty and malicious accusations based on nothing that the trial judge was strongly disposed against the application and that the most important factor for him was the impact of the application on the officer.

The trial judge's suggestion during sentencing that the accused should apologize to the officer related directly to his distaste for the matters that were raised during the course of the trial. The open indication of distaste or aversion during the presentation of a case is utterly inconsistent with the duty of a judge to listen dispassionately with an open mind. It could reasonably have signalled to the accused that the trial judge had a fixed and negative view of the defence raising issues of race. The suggestion of an apology, an act that is not part of the proper judicial function, was consistent with the judge's expression of distaste and reinforced the appearance of the primacy of his concerns for the effect of the application on the officer. It could only be seen as being demeaning to the accused who had given evidence that, if accepted, supported a finding of racial profiling. [page163]

A reasonable apprehension of bias should not be made except on the basis of cogent evidence. While the evidence segment of the trial, standing alone, would not support such a finding, the submission segment gave rise to concerns, and the remarks made during sentencing removed any doubts about the impact of the trial judge's conduct on the mind of a reasonable observer who had been present throughout the trial. This observer would have felt that the trial judge showed such an antipathy and resistance to the application that he was unable to hear and determine it with an open and dispassionate mind.

R. v. S. (R.D.), [1997] 3 S.C.R. 484, 161 N.S.R. (2d) 241, 151 D.L.R. (4th) 193, 218 N.R. 1, 477 A.P.R. 241, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, apld

Other cases referred to

Brown v. Durham Regional Police Force (1998), 43 O.R. (3d) 223, 167 D.L.R. (4th) 672, 59 C.R.R. (2d) 5, 131 C.C.C. (3d) 1, 39 M.V.R. (3d) 133, 21 C.R. (5th) 1 (C.A.) [Leave to appeal to S.C.C. allowed (1999), 252 N.R. 198n], affg (1996), 134 D.L.R. (4th) 177, 36 C.R.R. (2d) D-6, 106 C.C.C. (3d) 302, 19 M.V.R. (3d) 207 (Ont. Gen. Div.), supp. reasons (1996), 134 D.L.R. (4th) 221, 106 C.C.C. (3d) 302 (Ont. Gen. Div.); Housen v. Nikolaisen, 2002 SCC 33, 219 Sask. R. 1, 211 D.L.R. (4th) 577, 286 N.R. 1, 272 W.A.C. 1, [2002] 7 W.W.R. 1, 30 M.P.L.R. (3d) 1, 10 C.C.L.T. (3d) 157; R. v. Araujo, 2000 SCC 65, [2000] 2 S.C.R. 992, 193 D.L.R. (4th) 440, 262 N.R. 346, 79 C.R.R. (2d) 1, 149 C.C.C. (3d) 449, 38 C.R. (5th) 307; R. v. Biniaris, 2000 SCC 15, [2000] 1 S.C.R. 381, 184 D.L.R. (4th) 193, 252 N.R. 204, 143 C.C.C. (3d) 1, 32 C.R. (5th) 1; R. v. Parks (1993), 15 O.R. (3d) 324, 84 C.C.C. (3d) 353, 24 C.R. (4th) 81 (C.A.) [Leave to appeal to S.C.C. refused (1994), 28 C.R. (4th) 403n, 175 N.R. 321n]; R. v. Richards (1999), 42 M.V.R. (3d) 70, 26 C.R. (5th) 286 (Ont. C.A.); R. v. Wilson, [1990] 1 S.C.R. 1291, 74 Alta. L.R. (2d) 1, 108 N.R. 207, [1990] 5 W.W.R. 188, 48 C.R.R. 107, 56 C.C.C. (3d) 142, 77 C.R. (3d) 137

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 9, 24(2) Criminal Code, R.S.C. 1985, c. C-46, ss. 253(b), 839(1)

Authorities referred to

Harris, D., Profiles of Injustice: Why Racial Profiling Cannot Work (New York: New Press, 2002)
 Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer for Ontario, 1995) (Co-Chairs: M. Gittens and D. Cole)
 Murneik, "The Application of Rules: Law or Fact?" (1982) 98 L.Q.R. 587

APPEAL from a judgment of Trafford J. (2002), 57 O.R. (3d) 615, 162 C.C.C. (3d) 27 (S.C.J.) allowing an appeal from a conviction for driving over 80.

J.K. Stewart, for applicant/appellant.

Philip Campbell and Steven Skurka, for respondent.

Julian N. Falconer and Julian K. Roy, for intervenor The Urban Alliance on Race Relations.

Sheena Scott and Lisa LaBorde, for intervenor The African Canadian Legal Clinic. [page164]

The judgment of the court was delivered by

MORDEN J.A.: --

INTRODUCTION

[1] This is an application for leave to appeal and, if leave is granted, an appeal by the Crown from an order of Trafford J., sitting as a summary conviction appeal court judge, that set aside the respondent's conviction on a charge of driving "over 80" contrary to s. 253(b) of the Criminal Code, R.S.C. 1985, c. C-46 and ordered a new trial. Trafford J.'s reasons are reported at 57 O.R. (3d) 615, 162 C.C.C. (3d) 27.

[2] Trafford J.'s decision to set aside the conviction is based on his conclusion that the trial judge's conduct of the trial gave rise to a reasonable apprehension of bias. The sole issue on this appeal is whether he rightly came to this conclusion. For the reasons that follow, I would dismiss the appeal.

OVERVIEW OF THE CASE

[3] Before addressing the appellant's submissions, I shall set forth a brief overview of the case and state the basic issue at the trial. On November 1, 1999, Constable Olson, who was an Acting Sergeant at the time in the Toronto Police Service (the "officer") was engaged in general patrol duties on the Don Valley Parkway in Toronto in a marked police supervisor's jeep. At around 12:55 a.m., he signalled Decovan Brown (the "respondent"), an African-American who was wearing a baseball cap and a jogging suit and driving a brand new Ford Expedition, to pull over to the right shoulder of the road. The officer informed the respondent that the speed limit was 90 kilometres an hour and that the respondent had been travelling "in excess" of that speed.

[4] The officer detected the odour of alcohol on the respondent's breath and suspected that he had alcohol in his body. The respondent, who was on his way home from a Halloween party, said that he had consumed a couple of drinks. He failed the roadside screening test demanded by the officer who then arrested him for "driving over 80". He was taken to the police station at 45 Strachan Avenue, which was the closest location where breath-testing equipment was set up and manned. The subsequent breath analysis showed that the respondent's blood-alcohol concentration was 140 milligrams of alcohol in 100 millilitres of blood. He was released after the breath test.

[5] There was only one issue raised at the ensuing trial: what was the reason for the officer stopping the respondent on the Don [page165] Valley Parkway? Was it because the respondent was

speeding and had twice crossed out of and back into the lane in which he was travelling, as testified to by the officer, or was it because he was a young black male driving an expensive car?

[6] At the outset of the trial the respondent's counsel applied under ss. 9 and 24(2) of the Canadian Charter of Rights and Freedoms for an order excluding the evidence of the breath analysis. The defence contended that the officer's stopping of him was an arbitrary detention under s. 9 because it was based, not on the fact that he was speeding, but rather on racial profiling.

[7] There is no dispute about what racial profiling means. In its factum, the appellant defined it compendiously: "Racial profiling involves the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group" and then quoted a longer definition offered by the African Canadian Legal Clinic in an earlier case, *R. v. Richards* (1999), 26 C.R. (5th) 286, 42 M.V.R. (3d) 70 (Ont. C.A.), as set forth in the reasons of Rosenberg J.A. at p. 295 C.R.:

Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.

[8] The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping.

[9] In the opening part of his submission before this court, counsel for the appellant said that he did not challenge the fact that the phenomenon of racial profiling by the police existed. This was a responsible position to take because, as counsel said, this conclusion is supported by significant social science research. I quote from the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer for Ontario, 1995) (Co-Chairs: M. Gittens and D. Cole) at p. 358:

The Commission's findings suggest that racialized characteristics, especially those of black people, in combination with other factors, provoke police suspicion, at least in Metro Toronto. Other factors that may attract police attention include sex (male), youth, make and condition of car (if any), location, dress, and perceived lifestyle. Black persons perceived to have many of these attributes are at high risk of being stopped on foot or in cars. This explanation is consistent with our findings that, overall, black people are more likely than others to experience the unwelcome intrusion of being stopped by the police, but black people are not equally vulnerable to such stops.
[page166]

[10] There is no dispute respecting the test to be applied under s. 9 of the Charter. The question is whether the police officer who stopped the motorist had articulable cause for the stop. Articulable cause exists where the grounds for stopping the motorist are reasonable and can be clearly expressed: *R. v. Wilson*, [1990] 1 S.C.R. 1291, 56 C.C.C. (3d) 142, at p. 1293 S.C.R., p. 144 C.C.C. If a police officer stops a person based on his or her colour (or on any other discriminatory ground) the purpose is improper (*Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223, 131 C.C.C. (3d) 1 (C.A.) at p. 238 O.R., p. 17 C.C.C.) and clearly would not be an articulable cause.

[11] Accordingly, to succeed on the application before the trial judge, the respondent had to prove that it was more probable than not that there was no articulable cause for the stop, specifically, on the evidence in this case, that the real reason for the stop was the fact that he was black.

[12] The trial judge heard the application. By agreement, the Crown adduced its evidence on the application and on the trial at the same time. It called two witnesses, the officer and Constable O'Donovan. The defence adduced evidence solely with respect to the application, calling the respondent and a private investigator, Albert Duncan, who had made a videotape of the stretch of the Don Valley Parkway where the events had occurred.

[13] Following the evidence and hearing submissions on behalf of the respondent, the trial judge, after stating that he did not need to hear from the Crown counsel, dismissed the application. No further evidence was offered at the trial and the trial judge convicted the respondent and imposed a fine of \$2,000.

AN OUTLINE OF THE EVIDENCE AND OF THE TRIAL JUDGE'S REASONS

[14] There are three southbound and three northbound lanes on the Don Valley Parkway. The officer testified that he was travelling at approximately 100 kilometres an hour southbound in the slow lane, on the right, near the Don Mills Road exit. Shortly after 12:45 a.m. he caught sight of the respondent's vehicle in his left rear-view mirror as it was overtaking him travelling southbound in the lane closest to the centre divider. The respondent's vehicle passed the officer at a speed that the officer estimated at 120 kilometres an hour. The Don Valley Parkway has a posted speed limit of 90 kilometres an hour.

[15] The officer changed lanes, got behind the respondent and began to follow him. In his evidence in-chief, the officer said there appeared to be a single occupant in the car. In cross-examination [page 167] he said that he determined that there was one occupant in the car when he approached it on foot after they had come to a stop. He said that he had had "no indication whatsoever" whether there was one person or five people in the respondent's car when he was on the road. The defence contended that his reluctance in cross-examination to admit an ability to see into the car, which he had acknowledged in-chief, tended to support Mr. Brown's evidence (to which I shall refer) and to discredit his own.

[16] After the officer got behind the respondent's vehicle, it slowed down to between 80 to 85 kilometres an hour over the kilometre and a half to two kilometres that the officer estimated he followed the respondent. The wheels on the passenger side of the respondent's vehicle crossed over the lane dividing line twice. As the result of his observations, the officer activated his emergency equipment at 12:55 a.m. and pulled the respondent's vehicle over on the right shoulder of the road just north of the Bayview exit ramp on the southbound Don Valley Parkway.

[17] A printout from the Mobile Data Terminal (MDT), established that the officer had done a vehicle check on the respondent's vehicle at 12:52 a.m., before he pulled him over. An MDT is a small terminal in the police vehicle that allows the officer to run vehicle checks that can be read on a small screen. In this way, the officer can determine ownership of the vehicle being checked, run CPIC queries, and find out whether the vehicle has been reported stolen or if it had been the subject of other police inquiries. The officer said that such checks were a matter of police safety and that he did them routinely. The respondent's vehicle had not been reported stolen. The officer did not remember whether he received this information before or after he pulled the respondent over.

[18] After the officer had stopped the respondent, he approached the vehicle and the respondent put down his driver's side window. The officer asked him whether he knew what the speed limit was along the highway. The respondent suggested 100 kilometres an hour. The officer told him that it was 90 and that he had been in excess of that speed when he passed the officer. The respondent produced a Florida driver's licence on demand and told the officer that he played professional basketball for the Toronto Raptors. The officer described the respondent as being polite and quiet spoken.

[19] The respondent agreed in cross-examination that his and the officer's accounts of the roadside conversation seemed to "match". The respondent submits that it is noteworthy that in neither participant's account was the 120 kilometres per hour speed estimate mentioned. It was not suggested that the officer [page168] would have stopped the respondent for a speeding infraction if he were travelling only 10 kilometres an hour over the posted speed limit. The officer had admitted to driving at 100 kilometres an hour on the occasion in question.

[20] As stated in the overview above, the respondent failed the roadside screening test. He was arrested at 1:04 a.m. The officer explained to the respondent his right to counsel and made the demand that he accompany him for the purpose of providing samples of his breath so that an analysis of his blood-alcohol concentration could be made.

[21] Constable Steve O'Donovan had arrived on the scene by the time of the arrest. He sat in the back of the officer's jeep with the respondent for the ride to the police station. They left the scene at 1:06 a.m. The respondent testified that the officer had made notes on a piece of paper, scribbling something while he was sitting in the driver's seat of the jeep before they left for the station. A videotape record was made of the events that took place at the police station and portions of it were played at trial during the cross-examination of the officer. A piece of white paper was visible on the videotape and the respondent testified that it was the notes the officer made. The officer did not know what the paper was. He denied writing notes at the scene and denied making them on some later date. He testified that he prepared them in his notebook after he got to the station and before the respondent was handed over to the breath technician and that he referred to these notes when reporting to the technician.

[22] The respondent was detained in the station before the officer in charge at 1:19 a.m. and was taken to the breath technician at 1:45 a.m.

[23] The officer was questioned by the breath technician. The videotape showed him with his opened notebook, to which he referred as he answered the technician's questions. There were a number of discrepancies between his answers to the technician and the information recorded in his notebook, which demonstrated, according to the defence, that he was referring to the undisclosed white paper rather than the notebook.

[24] The officer was cross-examined on entries in his notebook relating to the appellant's speed. The officer wrote that he estimated the respondent's speed to be "10 120 kmp". This was an important point for the defence because, if the officer had originally intended to write a number between 100 and 109, it would have been supportive of the respondent's evidence that he was travelling at 100 kilometres an hour. [page169]

[25] The officer acknowledged that he had failed to have the officer in charge of the station sign off on his notes, as he was required to do when he reported off duty on November 1, 1999, and that

he had every opportunity to write the notes between November 1 and November 5, which was the next date entries were made in the notebook.

[26] As indicated, the respondent's evidence "matched" the officer's in many respects. He admitted that he was travelling in excess of the speed limit, although he estimated the speed as being only 100 kilometres an hour. He testified that he would never pass a police officer on the road. He was from the United States and that was something he would not do. He was travelling in the centre lane on the DVP and he first noticed the police jeep when, around Don Mills Road, he glanced to his right and saw it pull in next to him on his passenger side. It was there for a few seconds. He described the officer as looking into his vehicle. He changed lanes to the right in order to let the police vehicle pass him. The officer pulled him over. He did not know why he was being stopped.

[27] In his reasons on the application the trial judge accepted the evidence of the officer over that of the respondent and concluded that he was "satisfied that the officer stopped Mr. Brown for precisely the reasons that he stated in his evidence. I am satisfied that Mr. Brown was in fact speeding at an estimated 120 kilometres an hour."

[28] The trial judge did not accept the evidence of Mr. Brown on the basis that he had been drinking and on the basis that he had failed to notice the posted 90 kilometres an hour speed limit signs. There was evidence that there were a series of these signs. This led to the inference that he had not been particularly careful in the observations he was making that night, including his observations as to his speed.

[29] The trial judge dealt with several of the defence submissions respecting frailties in the officer's evidence. Generally, the trial judge concluded that they did not support "the kind of allegations that have been made here in this case". He did think that it was "a little odd" that the officer stated to the breath technician that the time of the offence was 12.58 a.m. (which was after the respondent had stopped driving) because this was the time that he decided that the respondent had committed an offence.

[30] The respondent before us expressed one or two mild criticisms of the trial judge's findings on his credibility. For example, he submits that the videotape showed that there were no signs of alcohol impairment. These points were not pursued and so I will say nothing more on them. I observe, however, that in two places [page170] there may be an indication that the trial judge had not grasped the point made by the defence. First, he said that he detected no basis to think that there was any racially motivated hostility on the part of the officer directed at Mr. Brown and that he saw no evidence to justify the conclusion that Mr. Brown was treated in a particular way because he was black or that he was a Toronto Raptor. This is not, however, responsive to the argument of subconscious racial profiling. Second, he dealt with the issue respecting the changing in the notes from "10" to "120" as though the defence was suggesting a fabrication of the notes. This was not the defence counsel's point.

THE APPEAL TO THE SUMMARY CONVICTION APPEAL COURT

[31] The respondent's primary ground of appeal to the summary conviction appeal court was that the trial judge conducted the trial in a manner that gave rise to a reasonable apprehension of bias. The appeal judge gave effect to this ground. After correctly stating the legal test for reasonable apprehension of bias, which I will set forth later in these reasons, he analyzed "the trial as a whole". In

this part of his reasons the appeal judge said that there was "a significant amount of evidence to support the [s. 9] application" and concluded [at p. 621 O.R.]:

The approach of the defence was a simple one -- to attack the credibility of the arresting officer for the purposes of convincing the learned trial judge to reject his evidence on material points and to invite the Court to accept the testimony of Mr. Brown as credible and reliable evidence proving inferentially the subconscious racial stereotyping leading to the arrest. While the learned trial judge eventually knew and appreciated the essential nature of the application, he did not show such an understanding at all material times throughout the trial. The discretionary power given to a trial judge to call upon the defence at the beginning of an application under s. 24 of the Charter to summarize the anticipated evidence was not used in this case. See *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 at 301 (Ont. C.A.) for an elaboration of these principles.

[32] Following this, the appeal judge commented on four "specific aspects of the conduct of the learned trial judge in this case". It is in this part of his judgment that the appeal judge sets forth his reasons for concluding that there was a reasonable apprehension of bias in this case.

[33] Because I will be examining these aspects in some detail later in these reasons, I will now merely set forth a brief description for each aspect in the order the appeal judge dealt with them:

1. Remarks made by the trial judge at the conclusion of the sentencing of the respondent; [page171]
2. Remarks made by the trial judge during the respondent's counsel's submissions to him after the evidence had been called;
3. Remarks made by the trial judge during the cross-examination of the officer; and
4. Remarks made by the trial judge admonishing defence counsel for his tone of voice in cross-examination of the officer and references to the amount of time being taken to present the application.

[34] The appeal judge concluded his reasons as follows [at p. 624 O.R.]:

Looking at these themes, in the context of the trial as a whole, I am satisfied that there is a reasonable apprehension of bias in this case. This is not a case of a trial judge being biased. This analysis on appeal is not a substitution of my view of the merit of the application for the view of the learned trial judge. The result he arrived at was not unreasonable. However, this is a case where a reasonable person who is aware of the prevalence of racism in our community, the nature of the application and the traditions of integrity and impartiality in the judiciary would, after looking at the trial as a whole, reasonably apprehend a bias on the part of the learned trial judge.

THE GROUNDS OF THE APPEAL TO THIS COURT

[35] The appellant advances three grounds of appeal:

1. Although the appeal judge correctly stated the test for reasonable apprehension of bias, he erred in his application of the test in this case.

2. The appeal judge erred in finding that there was any, let alone substantial, evidence to support the defence contention that the arrest of the respondent resulted from racial profiling.
3. The appeal judge erred by setting, in effect, a lower standard for the application of the test for a reasonable apprehension of bias in cases involving allegations of racism.

[36] There is some overlap in these grounds of appeal in that there are factors or considerations that are relevant to each ground or, at least to two of them. Having noted this, I should say at the outset that the main and most comprehensive ground is the first. For this reason, I shall address it after dealing with the second and third grounds. Before considering any of the grounds of appeal, I shall deal with the test for reasonable apprehension of bias and then the standard of appellate review applicable to this appeal. [page172]

THE TEST FOR DETERMINING REASONABLE APPREHENSION OF BIAS

[37] The test, which both sides accept on this appeal, is set forth in the following portion of the reasons of L'Heureux-Dubé J. and McLachlin J. in *R. v. S.* (R.D.), [1977] 3 S.C.R. 484, 118 C.C.C. (3d) 353, at pp. 501-03 S.C.R., pp. 367-68 C.C.C.:

The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, [1985] 2 S.C.R. 673, 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161; *R. v. Lippé*, [1991] 2 S.C.R. 114, 64 C.C.C. (3d) 513; *Ruffo v. Conseil de la Magistrature*, [1995] 4 S.C.R. 267, 130 D.L.R. (4th) 1. De Grandpré J. stated, at pp. 394-95:

. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

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The grounds for this apprehension must, however, be substantial and I . . . [refuse] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

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Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considera-

ble deference by appellate courts inquiring into the apprehension of bias. This is because judges "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances": *United States v. Morgan*, 313 U.S. 409 (1941) at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in *Commentaries on the Laws of England III*, cited at footnote 49 in Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Radicalized Perspective in *R. v. R.D.S.*" (1995), 18 Dal. L.J. 408, at p. 417, "[t]he law will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea". Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.) at pp. 60-61.

Notwithstanding the strong presumption of impartiality that applies to judges, they will nevertheless be held to certain stringent standards regarding bias -- "a reasonable apprehension that the judge might not act in an [page173] entirely impartial manner is ground for disqualification": *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833 at pp. 842-43, 36 D.L.R. (3d) 561.

[38] L'Heureux-Dubé J. and McLachlin J. at pp. 507-08 S.C.R., p. 372 C.C.C. elaborated upon the knowledge to be attributed to "the reasonable and informed person" in his or her assessment whether the decision maker would decide fairly:

The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the Charter's equality provisions. These are matters of which judicial notice may be taken. In *Parks*, supra, at p. 342, Doherty J.A., did just this, stating:

Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.

[39] With respect to the "strong presumption of impartiality" Cory J. said at p. 533 S.C.R., p. 392 C.C.C.:

. . . [D]espite this high threshold, the presumption can be displaced with "coherent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.

THE STANDARD OF APPELLATE REVIEW

[40] The jurisdiction of the court to hear the appeal is dependent on the appeal being based on a question of law alone (*Criminal Code*, s. 839(1)). The respondent, in raising no jurisdictional objection, accepts, correctly in my view, that the appeal is based on a question of law alone. The application of the legal test for reasonable apprehension of bias to the facts in this case involves a question

of law: *R. v. Biniaris*, [2000] 1 S.C.R. 381, 143 C.C.C. (3d) 1 at para. 23; *R. v. Araujo*, [2000] 2 S.C.R. 992, 149 C.C.C. (3d) 449 at para. 18; and see, generally, Murneik, "The Application of Rules: Law or Fact?" (1982) 98 L.Q.R. 587. Accordingly, the standard of review is that of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, 211 D.L.R. (4th) 577 at paras. 8 and 9. This means that if our view is different from that of the appeal judge on the application of the test for reasonable apprehension of bias, it is our duty to substitute our conclusion for his.

[41] I shall now deal with the grounds of appeal.

THE GROUNDS OF APPEAL CONSIDERED

(I) Is there Evidence of Racial Profiling in this Case?

[42] I am satisfied that there was evidence before the trial judge which was capable of supporting a finding of racial profiling. The [page174] appeal judge made brief reference to it in para. 16 of his reasons under the heading: "The Analysis of The Trial as a Whole".

[43] Before outlining this evidence, it might be helpful to consider the legal considerations relevant to the proof of racial profiling in this case.

[44] A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.

[45] The respondent submits that where the evidence shows that the circumstances relating to a detention correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention, the record is then capable of supporting a finding that the stop was based on racial profiling. I accept that this is a way in which racial profiling could be proven. I do not think that it sets the hurdle either too low (which could be unfair to honest police officers performing their duties in a professional and unbiased manner) or too high (which would make it virtually impossible for victims of racial profiling to receive the protection of their rights under s. 9 of the Charter).

[46] In the present case, in addition to submitting that the facts (a young black person wearing a baseball hat and jogging clothes driving an expensive new car) fit the phenomenon of racial profiling, the respondent refers to several features of the evidence which support the argument that the officer was not being truthful about the real reasons for the stop. I have set forth some of it in the outline of the evidence, above, and will refer to the evidence again in my consideration of the grounds of appeal relating to the application of the test for reasonable apprehension of bias. Briefly, the record includes: the respondent's evidence that the officer looked into his car before following and stopping him; evidence of the second set of notes prepared by the officer to firm up his reasons justifying the stop after he became aware the person under arrest was a well-known sports figure likely to undertake a defence of the charge against him; a licence check that the officer made before he stopped the respondent; and discrepancies between the times recorded in his notebook and those which he gave to the breathalyzer technician.

[47] It appears to me that the appellant's submission that there is no evidence to support a finding of racial profiling is, in effect, [page175] an argument that racial profiling should not be found on the evidence presented. For example, the appellant submits that the positive evidence in support of a

proper reason for stopping the respondent, which the appellant submits was supported by the respondent, destroys any arguable claim of racial profiling.

[48] In response to this, it must be noted that all that the respondent agreed to is that the first matter that the officer raised with him was the speed at which he was travelling. The officer did not say to him that he was driving at 120 kilometres an hour. The respondent's evidence was that he was not exceeding 100 kilometres an hour. Further, the officer's statement respecting speed could have been a pretext for the stop. Accordingly, it can hardly be said that the respondent's evidence destroyed his claim.

[49] The appellant's other submissions under this heading similarly indicate a process of reasoning with the evidence to arrive at a conclusion that there was no profiling rather than showing an evidential record incapable of supporting racial profiling.

(II) Did the Appeal Judge Set a Lower Standard for The Test of Reasonable Apprehension of Bias?

[50] The appellant submits that the appeal judge erred by setting, in effect, a lower standard for the application of the test for a reasonable apprehension of bias because the case involved an allegation of racism. I do not think that this ground of appeal is made out. The appeal judge rightly observed, and the respondent took no issue with the observation, that a judge hearing any application based on an allegation of racial profiling "must be scrupulously aware of the need to maintain the public confidence and the ability of the Courts to hear and determine such applications fairly". In my view, this does not mean that the appeal judge was lowering the standard for determining reasonable apprehension of bias but was, rather, paying appropriate regard to the substantive context in which the allegation was made.

[51] Part of the appellant's argument in relation to this ground of appeal is that the trial judge erred in his application of the principles relating to the reasonable apprehension of bias to the evidence. This argument substantially overlaps submissions that are made in relation to the ground of appeal respecting error in the application of the test for reasonable apprehension of bias and I shall consider it in the next part of these reasons. [page176]

(III) Did The Appeal Judge Err in His Application of the Test for Reasonable Application of Bias?

[52] As I have said, the appeal judge based his conclusion of reasonable apprehension of bias on four aspects of the trial judge's conduct. The transcript of the whole trial must be considered in assessing the overall effect of the trial judge's conduct, and the most sensible way of doing this is to consider the parts of the trial in the order in which they took place. This is the manner in which a reasonable and informed observer of the proceedings would have seen them unfold before concluding, at the end of the trial, whether or not the trial judge's conduct gave rise to a reasonable apprehension of bias. Accordingly, I shall consider the appeal judge's conclusions respecting the conduct of the trial judge under the following headings: (a) during the giving of the evidence, specifically, the cross-examination of the officer; (b) during defence counsel's submissions on the s. 9 application; and (c) during the sentencing proceedings.

[53] It may be helpful at this point to note that the trial took two days. On the first day the officer gave his evidence. On the second day Constable O'Donovan gave brief evidence in the morning and

was followed by the respondent and his expert witness, Albert Duncan. In the afternoon of the second day, the respondent's counsel made his submissions on the application, the trial judge decided the application, and then, when no further evidence was offered, the trial was completed with the conviction of the accused and the passing of the sentence.

(a) During the cross-examination of the officer

[54] The appeal judge's conclusions respecting this part of the trial are as follows [at pp. 623-24 O.R.]:

Third, several remarks made by the learned trial judge during the cross-examination of the arresting officer on material aspects of the application, viewed in the context of the trial as a whole, appeared to show a failure to understand the importance of the evidence, a tendency to prejudge the merit of the application or an inclination to assist the officer at critical stages of the cross-examination. Interjections leading to these appearances occurred during the cross-examination of the arresting officer on a number of important themes -- the driver was believed to be a black man as soon as the arresting officer's attention was directed to the Ford Expedition, the existence of a second set of notes that was destroyed and not disclosed to the defence and the time when the appellant was pulled over in relation to the computerized check done by the arresting officer to see, inter alia, if the licence was reported stolen. Despite saying that he had not made up his mind and would listen to the application, the comments of the learned trial judge that ". . . it is a very serious allegation [the trial judge's words were "it is very serious allegations] . . . and if it is [really] based on the kind of questions you are [page177] asking now, I find it a little troubling . . .", viewed reasonably, created the appearances of a very different mindset at these and other critical stages of the trial.

Fourth, in the context of these points, the remarks of the judge admonishing the defence counsel for the tone of his voice in the cross-examination of the arresting officer and the references to the amount of time being taken to present the application take on a different meaning than might first be apparent. By themselves, they would not be sufficient to allow the appeal. In the context of the trial as a whole, they added to the appearances of injustice in this case.

[55] While I fully appreciate that the significance of any particular part of the trial can only be determined in the context of the trial as a whole, I shall, initially, separately address the matters referred to in the statements of the appeal judge. These include (i) a failure to understand the importance of the evidence, (ii) a tendency to prejudge the merits of the application or assist the officer, (iii) references to the amount of time being taken, and (iv) other references to the trial judge's conduct. In some instances, I will express a provisional opinion on the impugned conduct.

(i) A failure to understand the importance of the evidence

[56] The trial judge's comments that are relevant to this subject are not specified in the appeal judge's reasons. As a general matter, I do not think that a failure to understand the importance of evidence at the time it is given, by itself, affords a foundation for a finding of reasonable apprehension of bias. It is, merely, a failure to understand. A question by the trial judge designed to clarify

his or her understanding of the evidence, while it necessarily indicates a lack of understanding, is, of course, proper.

[57] If, however, there is a reasonable basis for concluding that the trial judge's failure to understand the evidence is the result of the judge having a closed mind on the issue to which the evidence is addressed, then the misunderstanding is a factor that should be taken into account. Having said this, I think I should add that the crucial time to assess the effect of a failure to understand the importance of the evidence is at the end of a case, after the judge has heard all of the evidence and counsel's submissions on it.

[58] There are passages in the transcript which indicate a failure on the part of the trial judge to understand the import of evidence sought on the cross-examination of the officer. I will not set forth the instances of this because they are, for the most part, followed by defence counsel taking advantage of the opportunity to explain the significance of his questions. Further, this particular [page178] point is also covered by parts of the transcript related to the appeal judge's conclusion that the trial judge showed a tendency to prejudge the merit of the application and an inclination to assist the officer at critical stages of the cross-examination. I turn to them now.

- (ii) A tendency to prejudge the merit of the application or an inclination to assist the officer at critical stages of the cross-examination

[59] The most significant conduct of the trial judge that falls under this heading is the trial judge's statement quoted, in part, in the appeal judge's reasons set forth above in para. 54. It relates to the cross-examination of the officer respecting whether he was reading from his notebook when he gave certain relevant times to the breathalyzer technician at the police station on November 1, 1999. As I have said, what happened at the police station was recorded on a videotape which was made at the station and was an exhibit at the trial. The following intervention then took place:

- A. Well sir, I'd like to see the videotape before I say any more.

MR. SKURKA: It's an important point, Your Honour.

THE COURT: Well without necessarily agreeing with that, I do not think there is any rule prohibiting you from asking this kind of question but, it is very serious allegations, Mr. Skurka.

MR. SKURKA: Yes.

THE COURT: And if it is really based on the kind of questions you are asking now, I find it a little troubling. I am obviously going to keep an open mind about all of this, but so far we have heard from the officer that he just made these notes a short time before he had this conversation with the Intoxilizer officer. There is no particular reason to assume, is there,

that everything that was in his mind a few minutes earlier had suddenly evaporated and he necessarily had to flip pages of his book to provide answers to questions and bearing in mind that this is not an experiment taking place in a nuclear physics laboratory where perhaps seconds and minutes being recorded with great precision matter. This just seems so far removed from the gist of the allegations here and what I would have thought the focus of the trial would be on.

[60] These statements amount to an admonishment of, or at least a warning to, defence counsel. The trial judge's expression of the view that the application raised "very serious allegations" and that he found it "a little troubling" appears to reflect an attitude that can reasonably be characterized as judicial resistance to the application. The allegation of racial profiling was, of [page179] course, serious -- just as serious as the impact of the racial profiling in question on the respondent, if such were the case. This was the issue that the trial judge would have to decide at the end of the application. While the evidence was being given, the proper judicial attitude should have been one of detachment rather than one which appeared to show only concern respecting the impact of the defence allegations on the officer.

[61] The trial judge's comment that he was "going to keep an open mind" reflected his recognition that the comments he had just made could well be understood as indicating a mind disposed against the application.

[62] The complaint arising from the trial judge's first intervention in the cross-examination relates to differing evidence the officer gave respecting the time when he first noticed that there was just one occupant in the Ford Expedition as it made its way down the Don Valley Parkway. In his evidence in-chief, he stated that there appeared to be a single occupant and then in cross-examination he said that he determined that there was a single occupant when he walked up and looked in the window of the vehicle. The following exchange took place:

A. I don't actually recall, sir, exactly what I said there in evidence in-chief. The determination that there's one person in that vehicle because of the glass on the vehicle, I really, I could not say for sure until I walked up and looked in the window of that vehicle. There could have been more people inside the vehicle. That's what I'm saying to you.

THE COURT: To be fair, Mr. Skurka, I think his evidence was that when he followed the vehicle, there appeared to be a single occupant.

MR. SKURKA: I'm sorry.

Q. There appeared to be -- you said -- that's the point that I'm putting to you sir, that you made a determination at the scene that there appeared to be a single occupant

in the car and that that was not a determination that you made when you got to the roadway and the car was stopped, correct, sir?

A. I disagree with you[.]

THE COURT: I do not think we have to get involved in a semantic debate. I think there may be a difference between appearances and a determination.

MR. SKURKA: I'll accept what your Honour is saying.

[63] This intervention reflected a misunderstanding of the object of the cross-examination at this point and it appeared to be on the side of the police officer. What the officer saw, or thought he saw, when he was in his vehicle, was an important part of the defence case. However, I think it is a small point in light of the [page180] ensuing cross-examination, where defence counsel continued to pursue the differences in the officer's evidence in-chief and in cross-examination.

[64] The next intervention followed evidence of discrepancies between the times of events recorded in the officer's notebook and the times which he gave to the breathalyzer technician. The defence's position was that the officer only purported to read the times from his notebook but was actually reading from notes on the white sheet that had not been disclosed to the defence. The intervention is reflected in the following exchange:

THE COURT: Mr. Skurka, you do seem to be spending an inordinate amount of time dealing with this, and on the face of them they don't seem all that important to the essence of this case.

MR. SKURKA: They're extremely important and I'll tell Your Honour I don't mind if the witness is here when I say this, and I'll tell you why. It's important because it's going to be the position of the defence that this officer prepared two notebooks, two set of notes and that's why it's crucial. And that he prepared a second set of notes days after November 1st when he realized who he was dealing with in terms of the accused in this case and what steps he had to cover up in terms of explaining his reasons for stopping Mr. Brown. So it's vital, crucial to the defence to provide Your Honour with -- I can't just come to you --

THE COURT: Yes, fine, fine. Go ahead.

MR. SKURKA: All right. Thank you, sir.

[65] Immediately following this, defence counsel said to the witness ". . . you're smiling, do you find this funny, sir? Is this a joke?" The following then took place:

THE COURT: Just a minute. I do not think we have to spend court time having that kind of exchange. Mr. Skurka, just ask questions and the officer will answer them and we'll made [sic] some progress in this case.

[66] The cross-examination of the officer on his reaction to defence counsel's explanation to the judge respecting the notes would seem to be proper and should have been allowed. The intervention appeared to protect the officer. It did not, however, deflect counsel from continuing to pursue all aspects of the notes, particularly the timing of the events.

[67] The next intervention during the cross-examination to which the respondent refers relates to discrepancies in the police officer's evidence on the time the offence was committed as set forth in a synopsis he prepared and the officer's reasons for these discrepancies. The trial judge said: [page181]

THE COURT: Sorry, you could have been referring to this record produced by the Intoxilizer when you prepared this, the synopsis?

THE WITNESS: I could very well have been, yes. Your Honour, I can honestly say I have no recollection of doing that synopsis, so what I used whether it was my memobook or the record from the Intoxilizer, I do not know.

[68] This intervention shows the trial judge coming to the assistance of the officer with a speculative suggestion of an answer that the officer himself had not thought of and which he did not ultimately adopt. It did not, however, prevent the cross-examination on the officer's previous answers continuing with its momentum as the respondent submits.

[69] The next part of the cross-examination to which the respondent refers is the passage in which the trial judge commented on defence counsel's tone of voice during his cross-examination of the officer on whether he had "clocked" the respondent's speed. The officer said that he had not. The following exchange then took place:

THE COURT: Can I just ask, Mr. Skurka, why you are using that tone? This is just a trial in a courtroom, there is no need to be so outraged and to use that kind of tone with the evidence.

MR. SKURKA: It's not outrage, Your Honour, with respect. It's simply the way I conduct my cross-examination.

THE COURT: Well tone it down because I do not think it is appropriate. I think you should treat the witness with some courtesy and try to stay calm.

MR. SKURKA: Yes, thank you, Your Honour.

[70] The respondent submits that because the respondent's excessive speed was the alleged reason the officer gave for stopping him, there was absolutely nothing wrong in the circumstances with counsel revealing his outrage on the subject. The respondent further submitted that such an intervention cannot fail to be distracting at best and intimidating at worst.

[71] It is not possible for anyone not present at the trial to come to a definitive conclusion on this submission. Certainly, the trial judge has a responsibility to regulate the decorum of the participants in a trial and I cannot say that the trial judge's comments were unwarranted. I would note that the intervention had no inhibiting effect on counsel pursuing the line of questioning on which he was embarked.

[72] The respondent relies on a further part of the cross-examination to show a reasonable apprehension of bias on the part of the trial judge. This segment relates to the cross-examination of the officer on the entry in his notebook relating to the respondent's [page182] speed in which he wrote "10 120 kmp". In the outline of the evidence above I explain why this was an important point for the defence. The following exchange took place:

- Q. So that this was going to be somewhere we know between 100 and 109, correct?
Before you crossed it out.
- A. I think it's just an error.
- Q. But as you were writing this, this was going to be a three digit number and it was going to be 100 to 109. We can agree on that, can't we?
- A. I think it's just an error sir.
- Q. Well you weren't going to say that you estimated it to be 10 kilometres an hour, were you, when you started to write this.

THE COURT: Mr. Skurka, he has explained three times. There is no point arguing with him. And it is quite visible what it is that it appears. Whether it is consistent with your theory or not is something you can argue later, but anybody looking at it can see that there is one zero with a line through it and 120 beside it. He has agreed that he made a mistake and corrected it.

MR. SKURKA: No, but with respect, if I could address this point. I'm merely making the point that it wasn't a two digit number that was crossed out, I'm suggesting to this officer that he was going to write a number that was

three digits. I'm obligated to put that to him if that's my position, with respect. Obligated.

THE COURT: Yes. I think you are obligated to put it once if it is important to you. I do not think it is necessary to repeat it three times.

MR. SKURKA: Fair enough, thank you, Your Honour.

[73] The respondent submits that the issue was not whether the officer had made an error, but whether the error reflected the truth respecting the respondent's speed. The respondent submits that the trial judge's intervention effectively shielded the officer from any questioning on the point.

[74] I agree with the comments of the trial judge that there was sufficient evidence in the record to enable defence counsel to make his point during the argument at the end of the evidence. I also think that counsel was entitled to develop the evidence supporting the point by further cross-examination of the officer on his thought processes. In fact, however, counsel very soon after cross-examined the officer on his thought processes when he "started to write in that notebook before [he] corrected the mistake . . .". There was no intervention by the trial judge in this cross-examination. In the result, the intervention did not shield the officer from answering questions on the point. [page183]

(iii) References to the amount of time being taken to present the application

[75] Part way through the first morning of the trial, the trial judge, as shown in the part of the record quoted previously in para. 64, said to defence counsel that he seemed "to be spending an inordinate amount of time dealing with this, and on the face of them they don't seem all that important to the essence of the case". Later in the morning he said that he "was a little curious about why a case like this had been set for two days".

[76] After the midday adjournment, defence counsel informed the trial judge that the two-day trial was fixed at a pre-trial conference over which a judge had presided. The judge concluded his response to this as follows:

. . . but in any event, you take as much time as you need. We obviously have the time available and there is no need to feel that you are being rushed at any time.

MR. SKURKA: Thank you, sir. I'm grateful for that.

[77] The matter of the time being taken by the trial was not raised again. While the trial judge's observations respecting the time may have indicated some impatience on his part in the early part of the trial and the failure to appreciate the potential significance of some of the evidence, it was clear by the beginning of the afternoon of the first day that counsel need not be concerned about the time factor.

(iv) Other references by the appeal judge to the trial judge's conduct

[78] The appeal judge referred to an interjection by the trial judge during the cross-examination on the "theme" that the driver was believed to be a black as soon as the arresting officer's attention was directed to the Ford Expedition. The officer's belief in this regard, was, of course, an essential element in the defence case but I do not think that the transcript shows any intervention by the trial judge during cross-examination on this subject and none were brought to our attention. It may be that the appeal judge had in mind the intervention relating to the cross-examination I have dealt with relating to when the officer knew there was just one occupant in the car.

[79] Further, although the subject of whether the officer had received the report back from the Mobile [Data] Terminal ("the Computerized check done by the arresting officer") before or after he stopped the respondent's car was an important matter covered in the cross-examination of the officer, the transcript [page184] shows no significant interventions of the trial judge during this part of the trial and none were referred to in the argument before us.

Summary

[80] If the argument supporting reasonable apprehension of bias were based solely on what happened during the cross-examination of the officer, I think that it would fail. Although the trial judge's expression of concern to defence counsel respecting the "serious" allegation made is troubling, I think that the record shows that the trial judge, generally, conducted the trial in a businesslike and even-handed manner. Defence counsel was denied no line of inquiry. This part of the record, on its own, falls short of showing the convincing and cogent evidence required to support a finding of reasonable apprehension of bias.

(b) The trial judge's interventions during defence counsel's submissions

[81] With respect to the submissions segment of the trial, the appeal judge said [at p. 623 O.R.]:

Second, while dialogue with counsel during submissions can, and often times does, move the trial to an orderly conclusion by defining the issues to be determined and inviting counsel to make concise submissions on them, that is not what occurred in this case. Here, the learned judge entered into the following dialogue with the defence counsel during his submissions:

MR. SKURKA: What I would ask to be permitted, is to give you the building blocks of the position I'm taking, that's all.

THE COURT: I could be anxious if you did because . . .

MR. SKURKA: Thank you.

THE COURT: . . . and I think . . . if you want me to be frank with you so you know what my concerns are.

MR. SKURKA: I do want you to be frank.

THE COURT: But it does concern me that you have made such serious allegations, really quite nasty, malicious, potentially, accusations based on, it seems to me, nothing and you are going to have to persuade me that there is some appropriate basis on which to make this kind of accusation about an alleged racist motivation on the part of the officer. I did not understand your client to say that he had any difficulty with the officers in the dealings that he had with them. He agreed that the officer's evidence concerning the conversation they had was accurate. We saw the videotape. There did not seem to be any particular tension or hostility between the two when they were at the police station.
[page185]

This remark arguably showed a failure to appreciate material aspects of the evidence at a late stage in the trial. It also arguably showed a failure to appreciate that racial profiling can be a subconscious factor impacting on the exercise of a discretionary power in a multicultural society. Granted, the learned trial judge invited defence counsel to persuade him of the merit of his position. This invitation, however, was a hollow one as the appearances of this dialogue in the context of the trial as a whole are reasonably open to the interpretation that he had determined the merit of the application before counsel was heard on it and that he did not understand the practice of racial profiling. This interpretation of these remarks is consistent with the inappropriate remarks he made while sentencing the appellant.

[82] There were other comments made by the trial judge during the submissions which the respondent submits are relevant to this issue. I shall refer to them.

[83] Early in the argument the following exchange took place:

THE COURT: Well, I guess the question --

MR. SKURKA: Harassing is --

THE COURT: -- that arises then what evidence is there of any improper purpose on the part of the officer. Surely the fact that the driver who is speeding happens to be black does not provide any evidence that the officer stopped him.

MR. SKURKA: I haven't said that, Your Honour, with respect.

THE COURT: Well, all right. Well, I am asking you what evidence is there of any improper purpose?

[84] At this time the trial judge had heard evidence that the officer had pulled beside the respondent's car, looked toward the respondent, fell back and requested a Mobile Data Terminal check, signalled the respondent over and written a separate, undisclosed set of notes about the encounter. As counsel submitted, pulling over a person who "happens to be black" had never been the basis of the application. These words, at that stage of the case, could well have been understood as trivializing the application and indicating the trial judge's resistance to it.

[85] Soon after this the following exchange took place:

THE COURT: All right. And just so we are all on the same wave length, the illegitimate purpose here was what?

MR. SKURKA: The illegitimate purpose was to check this car out and the occupant of the car for criminal and quasi-criminal purposes related to the MDT check that he'd conducted with full knowledge that the person was being stopped because they were a person of colour.

THE COURT: And hence according to defence theory, why would Constable Duncan and Acting Sergeant Olson want to do that? He is employed by Traffic Services to patrol the highways. Why would he want --[page186]

MR. SKURKA: Because he made assumptions.

THE COURT: -- to conduct an improper groundless criminal investigation on somebody who just happened to be driving down the Don Valley Parkway.

MR. SKURKA: Well you could ask that about every racial profiling case. My respectful submission --

THE COURT: Oh no, I do not think so.

MR. SKURKA: All right.

THE COURT: It seems to me that if we are talking about Jane and Finch and some allegation concerning a pattern of abusive detentions of people who just happen to be using the streets it is one thing. When we are talking about the Don Valley Parkway, where thousands of drivers, a good percentage of whom I assume, given the demographics of this community, are people of colour, are stopped because of stated traffic reasons, how does that give rise to an allegation of improper purpose?

[86] Racial profiling provides its own motivation -- 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. Defence counsel was correct in saying that question could be asked of every racial profiling case. He could not be expected to advance a motivation for a racial profiling beyond the motive inherent in the practice itself.

[87] The trial judge's remark that it would be different if the case arose at Jane and Finch and involved a "pattern of abusive detentions of people who just happened to be using the street" reflects two misunderstandings. First, there was no evidence supporting the trial judge's assumption that racial profiling is more likely to occur in an area where the population includes a large proportion of the targeted racial group. Such evidence was not likely to be available. Studies on racial profiling establish that it is more likely to occur in areas where its victims look out of place than in areas where their skin colour is prominent: D. Harris, *Profiles on Injustice: Why Racial Profiling Cannot Work* (New York: New Press, 2002) at pp. 69-71.

[88] Second, the trial judge's reference to a "pattern of abusive detention" set the test higher than any individual litigant would practically be able to satisfy. It is difficult to see why he would have thought the respondent should be required to show a particular instance of police conduct that fit a wider pattern.

[89] A reasonable observer might have thought that these statements by the trial judge indicated a resistance to the actual defence before him: that a police officer had made assumptions [page187] about a black man driving an expensive car before stopping him and then lied about his reasons for the stop.

[90] Soon after this, the exchange set forth in para. 81 of these reasons took place. In his remarks the trial judge said that the defence had made "serious" and "quite nasty, malicious, potentially, accusations based on, it seems to me, nothing . . .".

[91] The reasonable observer could take from these words that the trial judge was strongly disposed against the application and that the most significant factor for him was the impact of the application on the officer. The description of the respondent's case as "serious" was a repetition of what the trial judge had said during the cross-examination.

[92] Later in the submissions, the following exchange took place.

THE COURT: Are we really at the point where a police officer has to worry about saying, I stopped a motor vehicle being driven by a driver who was black, because it gives rise to some allegation by the defence, that the reason the vehicle was stopped was because the driver was black?

MR. SKURKA: No, I'm not --

THE COURT: You seem to be suggesting that the officer knew he was black, but took deliberate steps to avoid saying that, because otherwise, somebody would have attached some significance to the officer's observation, suggesting that it was indicative of some improper motive.

[93] This reflects the same thought as that indicated in the trial judge's earlier intervention: "surely the fact that the driver who is speeding happens to be black does not provide any evidence that the officer stopped him [for an improper purpose]". The case for the defence was based on more [than] the fact that the driver of the car was black.

[94] Finally, near the end of the submissions, defence counsel quoted a passage from *R. v. Parks* (1993), 15 O.R. (3d) 324, 84 C.C.C. (3d) 353 (C.A.) at p. 342 O.R. to the effect that a large segment of the community subconsciously operates on the basis of negative racial stereotypes. Part of this passage was quoted with approval by L'Heureux-Dubé J. and McLachlin J. in *R. v. S. (R.D.)*, supra, at para. 38 of these reasons:

Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes.

Defence counsel said that he relied on the last sentence in this passage. The following then took place: [page188]

THE COURT: Well, I honestly do not understand that. How can you say the officer is lying about your client doing 120, and yet in some subtle subconscious kind of racism, when you say that it has caused the officer to perjure himself in a courtroom with the object of having your innocent client, sorry not your innocent client, we are dealing here with a Charter application, but in order to justify an arbitrary detention. How can you say that that is subtle subconscious racism?

MR. SKURKA: Because I'm not saying that, what my point is this, that he has made, my respectful submission, stereotypes about the man in that car. It's not as if he holds or harbours racist views.

THE COURT: I do not think that is appropriate. You are making, it seems to me, a clear cut, serious, quite offensive allegation with respect to an officer, and I don't think it's really proper for you to mask it at the end of the day by quoting from Parks, and suggesting that some segments of society are subject to subconscious racial stereotyping, and perhaps that is what is happening here. You have made the allegation that the officer has fabricated a set of notes, that he has come to the courtroom and told all sorts of lies about your client. And in my view that simply is not consistent with this passage that you have chosen to read from Parks.

[95] It may be noted that this is the third time that the trial judge has characterized the application as being based on a "serious" allegation, as well as a "quite offensive" allegation. The main impact of this could be to make it clear to the observer that the trial judge disapproved of what had been said about the officer and that he was not open to the characterization of the officer as someone who was not an overt racist but, rather, one who acted on subconscious beliefs and then, when required to justify his actions, invented evidence for this purpose.

Summary

[96] As a general proposition, it may be said that a trial judge has considerably more scope to intervene during the submissions segment of the trial than during the evidence segment. The purpose of the intervening is to enable the judge to obtain the assistance of counsel on matters that are of concern to him or her in order to fully understand the case that is being submitted. Judicial interventions for this purpose do not have to take any particular form and I do not rule out blunt statements of the judge's tentative conclusions, provided that their purpose is to afford counsel the opportunity to "bring the judge around". I think that some of the trial judge's statements could be understood as serving this purpose. Others, however, such as those expressing the trial judge's view that the allegations in the application were [page189] "serious, offensive, nasty, or malicious", are somewhat like conversation-stoppers and serve mainly to indicate the judge's general antipathy to the application and not to elicit helpful responses.

[97] The foregoing considerations are of concern. I will return to them after considering the appeal judge's opinion respecting the trial judge's conduct during the sentencing.

(c) The trial judge's remarks during the sentencing

[98] Near the end of his reasons for the sentence he imposed, the trial judge said:

I should say as well that I do not know whether my tone this afternoon might have displayed my distaste for the matters that were raised during the course of the trial, but that really is not relevant to determining the sentence. I do not disagree with the officer's initial assessment of you. You dealt with him apparently in a polite and courteous way, and I had the impression when you were giving your evidence that you are that sort of person. So there is nothing inherently reprehensible about your conduct that I think should be treated as an aggravating factor when it comes to imposing sentence, which is not to say that it would not be nice if perhaps you might extend an apology to the officer because, I am satisfied, the allegations were completely unwarranted. But that is only my assessment. You are not required to share it and I will leave it to you to do what you think is right in that regard.

[99] The appeal judge said that "as the application was clearly one of arguable merit, [these] remarks . . . were completely inappropriate". He said that they created "an appearance of a mindset throughout the trial inconsistent with the duty to be impartial". He went on to say [at p. 622 O.R.]:

No defendant need apologize to anyone for an application brought at trial by a competent defence counsel where the application is of arguable merit, even if it does not succeed. For a trial judge to regard the presentation of such an application as distasteful is a significant departure from his/her obligation to ensure the appearances of justice and the essential fairness of the trial. It is materially inconsistent with the duty of a judge to hear and determine the application with an open mind. Similar observations by this court would be appropriate if the learned trial judge had accepted the defence position on the application and suggested to the police officer that he apologize to the defendant.

[100] The appellant submits that, while the trial judge's comments, especially in relation to the apology, would have been better left "unsaid", it is wrong to characterize them as creating the "appearance of a mindset throughout the trial inconsistent with the duty to be impartial" (emphasis added). Further, it was wrong to "reason back" from these comments at the end of the trial to say that they coloured everything that preceded them. The appellant further submits that the judge's "distaste" arose from the lack of a foundation for the allegations in the case. [page190]

[101] I am not persuaded by these submissions. There is no "reasoning back" involved in concluding that the trial judge's statement reflected a view that he held during the trial. His statement related directly to his "distaste for the matters that were raised during the course of the trial" (emphasis added) and indicates that his attitude was one of distaste for the defence position. The statement acknowledges that this attitude may have been noticed by the respondent and, necessarily, by all other persons in the courtroom.

[102] Further, as I have indicated earlier in these reasons, there was evidence on which racial profiling could be found. Accordingly, although it was open to the trial judge not to accept this evidence following a fair and impartial hearing, it cannot be said there was "a lack of foundation for the allegations in this case".

[103] I need not labour the point that the open indication of distaste or, to use a synonym, aversion, during the presentation of a case is utterly inconsistent with the duty of a judge to listen dispassionately with an open mind. It could reasonably have signalled to the respondent that the trial judge had a fixed and negative view of the defence raising issues of race.

[104] The suggestion of an apology, an act that is not part of the proper judicial function, was consistent with the judge's expression of distaste and reinforces the appearance of the primacy of his concerns for the effect of the application on the officer. It can only be seen as being demeaning to the appellant who had given evidence that, if accepted, supported a finding of racial profiling.

CONCLUSION

[105] Accepting that a finding of a reasonable apprehension of bias should not be made except on the basis of cogent evidence, I feel obliged to conclude, in agreement with the appeal judge, that on the record reviewed in these reasons the finding should be made. I have said that the evidence segment of the trial, standing alone, would not support such a finding. The submission segment gives rise to concerns. The remarks made during sentencing do not stand on their own. By their very terms they relate back to what took place during the trial and, in my view, remove any doubts about the impact of the trial judge's conduct on the mind of a reasonable observer who had been present throughout the trial. I think that this observer would have felt that the trial judge showed such an antipathy and resistance to the application that he was unable to hear and determine it with an open and dispassionate mind. [page191]

DISPOSITION

[106] I would grant leave to appeal but would dismiss the appeal.

Appeal dismissed.