Regina v. Parks*

[Indexed as: R. v. Parks]

15 O.R. (3d) 324
[1993] O.J. No. 2157
Action No. C6626

**Court of Appeal for Ontario,
Krever, Doherty and Abella JJ.A.**

September 23, 1993

* An application for leave to appeal to the Supreme Court of Canada was dismissed April 28, 1994 (La Forest, Sopinka and Major JJ.).

Criminal law — Trial — Jury — Challenge for cause — Trial judge refusing to permit defence counsel in course of challenging potential jurors for cause to ask them whether their ability to judge evidence without partiality would be affected by fact that accused was black — Question relevant to juror's potential partiality — Realistic possibility existing that one or more potential jurors drawn from Metropolitan Toronto community would discriminate against black accused — New trial ordered.

The accused, a black drug dealer, was convicted of manslaughter in the death of a white drug user. The trial judge refused to permit defence counsel to ask prospective jurors, in the course of challenging them for cause, (1) whether their ability to judge witnesses without bias, prejudice or partiality would be affected by the fact that the witnesses were involved in drugs, and (2) whether their ability to judge the evidence without bias, prejudice or partiality would be affected by the fact that the accused was a black Jamaican immigrant and the deceased was a white man. In refusing to permit the questions, the trial judge relied on the "presumption" that duly chosen and sworn jurors can be relied on to do their duty and decide the case on the evidence without regard to personal biases and prejudices. The accused appealed, arguing that those questions should have been allowed.

Held, the appeal should be allowed.

There was no merit to the accused's argument as it related to the first question. A witness's involvement in the drug trade and his or her personal use of illicit drugs could properly be considered by the jury in its assessment of the credibility and reliability of witnesses.

The second question (disregarding the irrelevant matters of nationality and immigration status and approaching the question on the basis that it referred simply to a black accused) could not be criticized as either an attempt to obtain a favourable jury or, since race played no part in the defence, as an attempt to indoctrinate prospective jurors with the position to be advanced by the defence at trial. Nor was it a device designed by counsel to gain insight into the personality of

potential jurors so as to enable counsel to more effectively use his peremptory challenges. The proposed inquiry involved a single question focused on a specific issue.

The accused's right to challenge for cause based on partiality is essential to both the constitutional right to a fair trial and the constitutional right, in cases where the accused is liable to five or more years' imprisonment, to trial by jury.

In exercising his supervisory function over the challenge process, the trial judge must determine (a) whether the proposed questions are relevant to the juror's potential partiality and (b) whether there is a realistic potential for the existence of partiality on a ground sufficiently articulated in the application. Partiality cannot be equated with bias. A partial juror is one who is biased and who will discriminate against one of the parties to the litigation based on that bias. To be relevant to partiality, a proposed line of questioning must address both attitudes and behaviour flowing from those attitudes. A juror's biases will only render him or her partial if they will impact on the decision reached by that juror in a manner which is inimical with the duty to render a verdict based only on the evidence and an application of the law as provided by the trial judge.

In this case, the issue to be determined on a challenge for cause was not whether a particular potential juror was biased against blacks, but whether, if that prejudice existed, it would cause that juror to discriminate against the black accused in arriving at his or her verdict. The question framed by counsel for the accused was relevant to the potential partiality of jurors.

Studies and reports documenting the extent and intensity of racist beliefs in contemporary Canadian society lent support to counsel's submission that wide-spread anti-black racism was a grim reality in Canada and in particular in Metropolitan Toronto. There existed a realistic possibility that one or more potential jurors drawn from the Metropolitan Toronto community would discriminate against a black accused because of his or her colour. A trial judge, in the proper exercise of his or her discretion, could permit counsel to put the question posed in this case in any trial held in Metropolitan Toronto involving a black accused. Indeed, it would be the better course to permit that question in all such cases where the accused requests the inquiry.

The interracial nature of the violence in this case, and the fact that the alleged crime occurred in the course of the black accused's involvement in a criminal drug transaction, combined to provide circumstances in which it was essential to the conduct of a fair trial that counsel be permitted to put the question. The trial judge erred in refusing to allow counsel for the defence to ask the question.

Aldridge v. United States, 283 U.S. 308 (1931); Ham v. South Carolina, 409 U.S. 524 (1973); Ristaino v. Ross, 424 U.S. 589 (1976); Rosales-Lopez v. United States, 451 U.S. 182 (1981); Turner v. Murray, 476 U.S. 28 (1986), *consd*

Other cases referred to

Commonwealth v. Soares, 387 N.E. 2d 499 (Mass. S. Ct., 1979), cert. denied 444 U.S. 881 sub nom. Massachusetts v. Soares (1979); Irvin v. Dowd, 366 U.S. 717 (1961); Murphy v. Florida,

421 U.S. 794 (1975); People v. Mack, 473 N.E. 2d 880 (Ill. S. Ct., 1985); R. v. Barrow, [1987] 2 S.C.R. 694, 38 C.C.C. (3d) 193, 61 C.R. (3d) 305, 45 D.L.R. (4th) 487, 87 N.S.R. (2d) 271, 22 A.P.R. 271, 81 N.R. 321; R. v. Cloutier, [1979] 2 S.C.R. 709, 48 C.C.C. (2d) 1, 12 C.R. (3d) 10, 99 D.L.R. (3d) 577, 28 N.R. 1; R. v. Crosby (1979), 49 C.C.C. (2d) 255 (Ont. H.C.J.); R. v. Hubbert (1975), 11 O.R. (2d) 464, 31 C.R.N.S. 27, 29 C.C.C. (2d) 279 (C.A.), affd [1977] 2 S.C.R. 267, 38 C.R.N.S. 381, 33 C.C.C. (2d) 207, 15 O.R. (2d) 324n; R. v. Lim; R. v. Nola, Ont. H.C.J., Doherty J., April 2, 1990; R. v. Makow (1975), 28 C.R.N.S. 87, 20 C.C.C. (2d) 513, [1975] 1 W.W.R. 299 (B.C.C.A.); R. v. McCollin, Ont. Gen. Div., Dunnet J., December 7, 1992; R. v. Racco (No. 2) (1975), 23 C.C.C. (2d) 205, 29 C.R.N.S. 307 (Ont. G.S.P.); R. v. Sherratt, [1991] 1 S.C.R. 509, 63 C.C.C. (3d) 193, 3 C.R. (4th) 129, 73 Man. R. (2d) 161, 122 N.R. 241; R. v. Vermette, [1988] 1 S.C.R. 985, 34 C.R.R. 218, 41 C.C.C. (3d) 523, 64 C.R. (3d) 82, 50 D.L.R. (4th) 385, 14 Q.A.C. 161, 84 N.R. 296; R. v. Wood (1989), 51 C.C.C. (3d) 201, 33 O.A.C. 260 (C.A.) [leave to appeal to S.C.C. refused (1990), 56 C.C.C. (3d) vi, 40 O.A.C. 240n, 115 N.R. 319n, 116 N.R. 324n]; R. v. Zundel (1987), 58 O.R. (2d) 129, 29 C.R.R. 349, 31 C.C.C. (3d) 97, 56 C.R. (3d) 1, 35 D.L.R. (4th) 338, 18 O.A.C. 161, leave to appeal to S.C.C. refused (1987), 61 O.R. (2d) 588n, 56 C.R. (3d) xxviii, 23 O.A.C. 317n; State v. McAfee, 64 N.C. 339 (1870); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); United States v. Burr, 25 F. Cas. 49 (1807); Wainright v. Witt, 469 U.S. 412 (1985)

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APPEAL by the accused from his conviction on a charge of manslaughter.

Edward H. Royle, for appellant.

Susan G. Ficek, for the Crown, respondent.

[QL Ed. note: Notes for this judgment are appended to this document.]

The judgment of the court was delivered by

DOHERTY J.A.: —

I. OVERVIEW

The appellant was tried on a charge of second degree murder and convicted of manslaughter by the jury. The trial judge imposed a sentence of seven years. The appellant appeals his conviction and sentence.

The grounds of appeal do not require a detailed recitation of the evidence. The appellant was a drug dealer and the deceased was a cocaine user. The deceased approached the appellant and discussed the purchase of cocaine. The deceased gave the appellant some money but the appellant did not produce any cocaine. The deceased then grabbed the appellant and demanded his money back. This confrontation occurred in an elevator. Several other persons, including friends of the appellant, were in the elevator. The deceased produced a knife. The appellant had that knife (or some other knife) at some point during the struggle. The two men wrestled and eventually a group of people, including the appellant and the deceased, moved from the elevator to a hallway. Moments later the deceased was lying in the stairwell bleeding to death from a stab wound in the heart. The appellant fled the scene. He was arrested later the same day. He had been stabbed in the left hand during the altercation with the deceased.

The appellant did not testify at trial; however, the evidence gave rise to defences based on identity, lack of intent, and provocation. Self-defence was also available on the evidence. The jury found against the appellant on the identity issue, and rejected the defence of self-defence. The jury, however, found in the appellant's favour on one of the two remaining issues.

II. THE GROUNDS OF APPEAL

The principal ground of appeal arises out of the trial judge's refusal to permit defence counsel to ask prospective jurors certain questions in the course of challenging those jurors for cause. Before addressing that issue I will dispose of the other grounds of appeal raised by the appellant.

A. The Cross-Examination of the Witness Dobson

Michael Dobson was on the elevator when the altercation between the appellant and the deceased occurred. He was interviewed by the police and made a videotaped statement. A verbatim transcript of that videotaped statement was prepared at some time prior to trial. The Crown called Mr. Dobson as a witness at the trial. His testimony was inconsistent with parts of his earlier videotaped statement to the police. The Crown applied, under s. 9(2) of the Canada Evidence Act, R.S.C. 1985, c. C-5, to cross-examine Mr. Dobson on the contents of the earlier statement.

Section 9(2) of the Canada Evidence Act requires that the statement on which it is sought to cross-examine be "in writing, or reduced to writing". The appellant contends that because the statement was videotaped it was neither in writing nor reduced to writing. The same argument was made to the trial judge.

I cannot improve on the trial judge's response to this argument. He said:

> In my view, a verbatim transcript of the videotape conforms to the requirements of s. 9.2 of the Canada Evidence Act. I do not think, however, that the videotape itself conforms to those requirements in that the language of s. 9.2 requiring a statement reduced to writing cannot be extended to encompass a videotape.
>
> For the purposes of the voir dire I can at present today find no reason not to allow the Crown, if he wishes, to use the videotape version of the statement of the witness and indeed it may be that the video version will aid me in exercising my discretion under the sixth point in Milgaard pertaining to the circumstances of the taking of the statement.
>
> However, unless the videotape becomes admissible upon a basis which is not presently available, I do not intend to allow cross-examination before the jury on the basis of the videotape even if I should exercise my discretion in favour of the Crown at the conclusion of the voir dire.

The appellant's submission that the ruling conflicts with the decision of this court in R. v. Wood (1989), 51 C.C.C. (3d) 201, 33 O.A.C. 260, cannot be sustained. In Wood, counsel sought to cross-examine the witness by showing the witness the videotape. There is no suggestion in

Wood that a transcript was produced or was even available. This court, not surprisingly, held that a videotape was not a written statement nor was it a statement reduced to writing. Wood, as the language of s. 9(2) requires, draws a distinction between the videotape and a transcript of the contents of the videotape. In this regard, Wood is entirely consistent with the ruling made by the trial judge. I would not give effect to this ground of appeal.

B. The Instructions to the Jury

The trial judge's instructions to the jury were thorough and even-handed. In the course of his instructions the trial judge repeatedly told the jury that it was their recollection of the evidence that counted, and that it was their assessment of the credibility of the various witnesses which must prevail. He indicated that anything he said about the substance of the evidence or the credibility of the witnesses was subject to their overriding recollection and assessment.

The trial judge's recollection of one potentially significant piece of the evidence proved to be inaccurate. The trial judge also referred to the credibility of one witness as not being in dispute when in fact it was a contentious issue.

Defence counsel raised both matters in the course of his very long and wide-ranging objections to the trial judge's instructions. Those objections and Crown counsel's reply to them lasted over two hours. Before those submissions were completed, the trial judge was advised that the jury had a question. The trial judge decided, after hearing further submissions concerning his instructions, that he should interrupt those submissions and deal with the question asked by the jury. He heard submissions regarding the question, recalled the jury and answered the question. The trial judge did not refer to the matters raised by counsel when answering the jury's question.

A relatively short time after the jury had received the answer to their first question they advised the trial judge that they had a second question. This question involved the definition of provocation. The trial judge, after hearing submissions from counsel, responded to that question. He then proceeded to correct the two factual mistakes he had made in his initial instructions to the jury. The jury retired and returned about 25-30 minutes later with their verdict.

In my opinion, even if uncorrected, the two errors made by the trial judge would not warrant reversal of the verdict. Neither related to the applicable law and both were subject to the trial judge's clear instruction to the jury as to their paramountcy in matters relating to the contents of the evidence or the credibility of witnesses. Given the overall balance maintained in the instructions, I cannot say that the appellant was prejudiced by either error.

Any possible prejudice to the appellant was eliminated when the trial judge corrected his earlier errors. The appellant maintains that the correction was to no avail as the jury had by that point in their deliberations found against the appellant on the central issue of identity. In making this submission, the appellant relies on the fact that the question put by the jury related to the defence of provocation.

I cannot agree with the appellant's submission. That submission requires that I assume the jury had reached a definite conclusion that the appellant had killed the deceased. It also requires that I

assume that because the jury had reached that conclusion, they chose to pay no heed to the corrections made by the trial judge. I will neither speculate as to what findings, if any, the jury had made when it addressed its second question to the trial judge, nor assume that the jury did not listen to his corrections and consider those corrections in their subsequent deliberations. This ground of appeal fails.

C. The Challenge for Cause

At the outset of the jury selection, defence counsel indicated that he intended to challenge prospective jurors for cause. He had reduced to writing the two questions which he wished to put to each potential juror. They were:

> As the judge will tell you, in deciding whether or not the prosecution has proven the charge against an accused a juror must judge the evidence of the witnesses without bias, prejudice or partiality:
>
> (1) In spite of the judge's direction would your ability to judge witnesses without bias, prejudice or partiality be affected by the fact that there are people involved in cocaine and other drugs?
> (2) Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black Jamaican immigrant and the deceased is a white man?

The trial judge refused to permit either question. On appeal, counsel for the appellant argued that both questions should have been allowed. I see no merit in the argument as it relates to the first question. The question implies that a witness's involvement in the drug trade and his or her personal use of illicit drugs should have no relevance in "judging witnesses". To the contrary, those factors could properly be considered by the jury in its assessment of the credibility and reliability of witnesses. I need say no more than to indicate my agreement with the trial judge's ruling on the first question posed by defence counsel.

The propriety of the second question does require detailed consideration.

The appellant is black and the deceased was white. There was, however, no suggestion that the homicide was racially motivated or that race-related matters had anything to do with the events to be placed before the jury. Further, while the question referred to the accused as "a black Jamaican immigrant", it does not appear that his nationality or immigration status were relevant, or would be made known to the jury. In this court (and in the trial judge's reasons) the question was approached on the basis that it referred to a black accused without regard to his country of origin or his status in Canada.

Counsel for the accused did not call any evidence in support of the proposed challenge. He argued that anti-black racism in Toronto was a "notorious fact" which could assert itself through one or more members of the jury drawn from that community who were charged with the responsibility of determining the fate of a black man charged with murdering a white man. Counsel contended that the extent of race-based prejudice in Metropolitan Toronto and the

interracial nature of the homicide provided a sufficient foundation for the limited inquiry he proposed.

The trial judge disagreed. He relied on the "presumption" that duly chosen and sworn jurors can be relied on to do their duty and decide the case on the evidence without regard to personal biases and prejudices. The trial judge held there was nothing particular in this case which negated that "presumption".

The "presumption" relied on by the trial judge is well established, both as a fundamental premise of our system of trial by jury, and as an operative principle during the jury selection process. [Note 1] The trial judge's conclusion that the "presumption" could be relied on to overcome potential racial prejudice against a minority accused is consistent with rulings made by other trial judges in this province: R. v. Racco (No. 2) (1975), 23 C.C.C. (2d) 205 at p. 208, 29 C.R.N.S. 307 (Ont. Co. Ct.); R. v. Crosby (1979), 49 C.C.C. (2d) 255 (Ont. H.C.J.); R. v. McCollin (December 7, 1992), Toronto, Ont. Gen. Div., Dunnet J. Only one trial decision to the contrary has been brought to my attention. That was my decision in R. v. Lim; R. v. Nola, April 2, 1990, Ont. H.C.J. In that case, however, I went no further than to hold that a trial judge had the discretion to allow a challenge based on alleged racial prejudice.

Before turning to the principles controlling the challenge for cause process, the nature and ambit of the proposed question must be clearly understood. Counsel did not seek to challenge for cause based on race. He did not suggest that a person could be successfully challenged on the basis of his or her colour, or that only persons of a particular race would be challenged for cause. The question as posed was race neutral and did not assume that only non-blacks would be subject to the challenge. The question also did not seek to challenge prospective jurors based only on their opinions, beliefs or prejudices. The question went beyond that and was directed to the jurors' ability to set aside certain beliefs, opinions or prejudices when performing their duty as a juror. The appellant does not challenge the proscription against challenges based on race, or the beliefs, opinions or prejudices of potential jurors set down in Hubbert [Note 2], and reiterated in R. v. Zundel (1987), 58 O.R. (2d) 129 (C.A.) at p. 165, 31 C.C.C. (3d) 97 at p. 133, leave to appeal to S.C.C. refused (1987), 61 O.R. (2d) 588n, 56 C.R. (3d) xxviii.

The question which counsel wanted to put to potential jurors cannot be criticized as either an effort to obtain a favourable jury or an attempt to indoctrinate prospective jurors with the position to be advanced by the defence at trial. A "no" answer to the question would hardly suggest that the potential juror would be more likely to side with the defence than the Crown. A "yes" answer to the question could be based on a racial bias in favour of the accused in which case, a defence-initiated challenge would result in the loss of a juror who was potentially favourable to the defence. Similarly, as race played no part in the defence to be advanced, it could not be said that counsel sought to use the challenge for cause process to fire the first volley in a race-based defence.

I would not characterize the question as a device designed by counsel to gain some insight into the personality of potential jurors so as to enable counsel to more effectively use his peremptory challenges. The proposed inquiry involved a single question focused on a specific issue. It asked only the potential juror's own evaluation of his or her ability to abide by the juror's oath despite

the colour of the accused and the interracial nature of the homicide. Counsel did not seek to inquire into individual jurors' lifestyles, antecedents, or personal experiences with a view to exposing underlying racial prejudices. He did not propose the kind of wide-ranging personalized disclosure involved in voir dire inquiries into potential racial prejudice permitted in some American jurisdictions: e.g., see E. Krauss and B. Bonora, eds., Jurywork: Systematic Techniques, 2nd ed. (New York: Clark Boardman, 1985), at pp. 10-53 - 10-56. Canadian courts have resisted that approach to jury selection [Note 3]. Attempts to introduce that methodology in the context of challenges for cause based on racial prejudice raise very difficult problems, which need not be addressed here, given the single and very specific question counsel wished to ask potential jurors.

Nor do I agree with Crown counsel's submission that the question proposed could be counterproductive in that it would "inject racial . . . overtones into a case where none existed previously". This submission is borrowed from the concurring opinion of Powell J. in Turner v. Murray, 476 U.S. 28 (1986) at p. 49; see also People v. Mack, 473 N.E. 2d 880 (Ill. S. Ct., 1985) at pp. 892-93. The argument, however, only has validity if one assumes that none of the prospective jurors is racially biased. If one or more are biased, their presence in the array, and their potential role as jurors, "injects" racial overtones into the proceeding. A question directed at revealing those whose bias renders them partial does not "inject" racism into the trial, but seeks to prevent that bias from destroying the impartiality of the jury's deliberations.

I also cannot agree with the Crown's submission that in a case like the present it is somehow fairer to a black accused to prohibit a challenge premised on race-based partiality. Where that accused wishes to make that inquiry, presumably because of a perceived danger of partiality based on race, I do not think it lies with the Crown to argue that the accused should be protected from himself or herself by denying the request in the interest of fairness to the accused.

I turn now to the principles applicable to the challenge for cause process. The accused's right to challenge for cause based on partiality is essential to both the constitutional right to a fair trial and the constitutional right, in cases where the accused is liable to five or more years' imprisonment, to trial by jury. An impartial jury is a crucial first step in the conduct of a fair trial: R. v. Sherratt, [1991] 1 S.C.R. 509 at p. 525, 63 C.C.C. (3d) 193 at p. 204. The accused's statutory right to challenge potential jurors for cause based on partiality is the only direct means an accused has to secure an impartial jury. The significance of the challenge process to both the appearance of fairness, and fairness itself, must not be underestimated.

The Criminal Code, R.S.C. 1985, c. C-46, provides for: the right to challenge for cause based on partiality (s. 638(1) (b)); the form in which the challenge may be presented (s. 639); and the way in which the validity of the challenge is to be determined (s. 640). The rest of the controlling law is judge-made. Under the prevailing jurisprudence, the trial judge must supervise and control the challenge process so that it remains within the bounds of a legitimate inquiry into the impartiality of potential jurors. In exercising this supervisory function, the trial judge does not decide the ultimate validity of any challenge for cause based on partiality, but only whether the challenge should proceed: R. v. Barrow, [1987] 2 S.C.R. 694 at p. 714, 38 C.C.C. (3d) 193 at p. 209.

Trial judges often perform their supervisory function by vetting the questions counsel propose to ask prospective jurors. The questions must go to an issue which is relevant to the jurors' potential partiality, that is, the answers to the question or questions must provide a rational basis upon which the triers may assess partiality. It is not, however, enough that the questions be relevant. The party seeking to put the questions must go further and establish grounds for legitimate concern with respect to the basis for the alleged partiality put forward.

In R. v. Sherratt, L'Heureux-Dubé J. discussed the second facet of the trial judge's supervisory powers (at pp. 535-36 S.C.R., pp. 211-12 C.C.C.):

> Perhaps more pertinent to the issue here is the question of what degree of pre-trial publicity or, more generally, non-indifference is necessary to lead to the right to challenge for cause and thus have the trial of the issue proceed before the "mini-jury". . . .
>
> A number of factors need to be addressed in answering this question. To begin with, s. 567 (now s. 638) of the Criminal Code places little, if any, burden on the challenger. On the other hand, a reasonable degree of control must be retained by the trial judge and, thus, some burden placed upon the challenger to ensure that the selection of the jury occurs in a manner that is in accordance with the principles I have previously articulated and also to ensure that sufficient information is imparted to the trial judge such that the trial of the truth of the challenge is contained within permissible bounds. Thus, while there must be an "air of reality" to the application, it need not be an "extreme" case. . . .
>
> The threshold question is not whether the ground of alleged partiality will create such partiality in a juror, but rather whether it could create that partiality which would prevent a juror from being indifferent as to the result. In the end, there must exist a realistic potential for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed.

(Emphasis added)

In my view, the threshold test set down in Sherratt is both a recognition of the validity of the "presumption" that jurors will do their duty in accordance with their oath, and a recognition of the limits of that presumption. Where the threshold test is not met, the "presumption" is relied on. Where it is met, continued reliance on the "presumption" to the exclusion of the challenge process would negate the accused's right to a fair trial by an impartial jury: Sherratt, p. 532 S.C.R., p. 209 C.C.C.

Before examining the trial judge's reasons in light of the principles referred to above, one further principle must be addressed. The assessment of whether the particular circumstances warrant a specific line of inquiry into partiality involves the pondering and balancing of intangibles and is necessarily somewhat subjective. The trial judge must be given some latitude in deciding whether to permit a proposed inquiry. In reviewing that decision, an appellate court cannot simply decide whether it would have allowed or disallowed the questions. The appellate court must be concerned only with whether the trial judge's decision can be justified as a proper exercise of his or her discretion [Note 4].

This principle assumes importance here where the trial judge was not provided with any material in support of the application. In exercising his discretion, the trial judge had no alternative but to rely on his personal assessment of the nature and extent of racial prejudice and its potential impact on prospective jurors' ability to act impartially.

I turn now to the relevance of the question posed by counsel for the accused. To determine relevancy, one must define partiality in the context of the challenge for cause process. Partiality has both an attitudinal and behaviourial component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases [Note 5]. A partial juror is one who is biased and who will discriminate against one of the parties to the litigation based on that bias. To be relevant to partiality, a proposed line of questioning must address both attitudes and behaviour flowing from those attitudes.

Partiality cannot be equated with bias [Note 6]. Questions which seek to do no more than establish that a potential juror has beliefs, opinions or biases which may operate for or against a particular party cannot establish partiality. A diversity of views and outlooks is part of the genius of the jury system and makes jury verdicts a reflection of the shared values of the community. It is inevitable that with diversity come views which can be described as biases or prejudices for or against a party to the litigation. Those biases will take various forms and be of varying degrees. Some biases, such as the presumption of innocence, are crucial to the rendering of a true verdict. Others, by their very nature, will be irrelevant to the case in point. Those biases which can be set aside when a person assumes his or her role as juror are also irrelevant to the partiality of the juror. A juror's biases will only render him or her partial if they will impact on the decision reached by that juror in a manner which is immiscible with the duty to render a verdict based only on the evidence and an application of the law as provided by the trial judge [Note 7].

In this case, the issue to be determined on a challenge for cause was not whether a particular potential juror was biased against blacks, but whether, if that prejudice existed, it would cause that juror to discriminate against the black accused in arriving at his or her verdict.

The question framed by counsel for the accused captured both components of the partiality requirement. It asked whether a prospective juror's ability to act in accordance with the trial judge's directions would be affected by the colour of the accused and the interracial nature of the violence alleged. Its relevance to a juror's partiality is obvious if one contemplates the position of a juror who answered "yes" to the question as framed by counsel for the accused. Surely the triers of impartiality would be virtually compelled to reject that juror: Aldridge v. United States, 283 U.S. 308 (1931) at p. 312, quoting with approval State v. McAfee, 64 N.C. 339 (1870).

Having concluded that the question as put by counsel was relevant to the potential partiality of jurors, I must now determine whether the appellant satisfied the threshold test referred to in Sherratt. Was there a realistic possibility that one or more prospective jurors would, because of racial prejudice, not be impartial as between the Crown and the accused?

This question raises two discrete issues:

- Was there a realistic possibility that a potential juror would be biased against a black accused charged with murdering a white person? And,
- Was there a realistic possibility that a prospective juror would be influenced in the performance of his or her judicial duties by racial bias?

Both questions must be addressed. Just as the mere existence of prejudicial pre-trial publicity does not give an automatic right to challenge for cause, the existence of racial prejudice within the community from which jurors are drawn does not entitle an accused to challenge for cause. Counsel's right to challenge for cause on the basis put forward in this case is not resolved by accepting the self-evident proposition that there are people in Metropolitan Toronto who are racially biased. The inquiry must go further. The nature and extent of the bias, the dynamics of jury adjudication, and the effect of directions intended to counter any jury bias must all be considered. In other words, the presumption that jurors will perform their duty according to their oath must be balanced against the threat of a verdict tainted by racial bias.

The existence and the extent of racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts. Unlike claims of partiality based on pre-trial publicity, the source of the alleged racial prejudice cannot be identified. There are no specific media reports to examine, and no circulation figures to consider. There is, however, an ever-growing body of studies and reports documenting the extent and intensity of racist beliefs in contemporary Canadian society. Many deal with racism in general, others with racism directed at black persons. Those materials lend support to counsel's submission that wide-spread anti-black racism is a grim reality in Canada and in particular in Metropolitan Toronto.

That racism is manifested in three ways. There are those who expressly espouse racist views as part of a personal credo. There are others who subconsciously hold negative attitudes towards black persons based on stereotypical assumptions concerning persons of colour. Finally, and perhaps most pervasively, racism exists within the interstices of our institutions. This systemic racism is a product of individual attitudes and beliefs concerning blacks and it fosters and legitimizes those assumptions and stereotypes.

The 1989 report Eliminating Racial Discrimination in Canada addressed these three facets of racism in Canada:

> Racism and racial discrimination are facts of life in Canada.
> They exist openly and blatantly in attitudes and actions of individuals. They exist privately in the fears, in the prejudices and stereotypes held by many people, and in plain ignorance. And they exist in our institutions.
>
> . . . . .
>
> There's clear evidence that a significant number of Canadians have racist attitudes or, as one poll concluded, "are racist in their hearts". Such attitudes have resulted in actions ranging from name-calling and threatening gestures to writing hate propaganda directed at a specific racial group, damaging property or physical violence. More widespread and more difficult to deal with is the existence of what's

being called "silent" discrimination or "polite" prejudice in our institutions and in daily Canadian life. [Note 8]

That report referred to studies which substantiate its strong assertions. For example:

- Studies done between 1974 and 1989 showed that between 12 and 16 per cent of Canadians polled admitted to strong intolerance based on race. [Note 9]
- 94 per cent of job agency recruiters surveyed indicated that they had rejected job-seekers based on race. s1;s0 [Note 10]
- A 1986 survey showed that 31 out of 73 Toronto landlords discriminated on the basis of race. [Note 11]

The recent work of the provincial and federal Human Rights Commissions lends further support to the conclusions expressed in Eliminating Racial Discrimination in Canada. Between 1989 and 1991, 10-14 per cent of the complaints made to those bodies alleged racial discrimination: Ontario Human Rights Commission, Annual Report 1989-90 (Toronto, 1990) at p. 33; Ontario Human Rights Commission, Annual Report 1990-91 (Toronto, 1991) at pp. 17, 45; Canadian Human Rights Commission, Annual Report 1990 (Ottawa: Supply & Services Canada, 1991) at pp. 56, 90; Canadian Human Rights Commission, Annual Report 1991 (Ottawa: Supply & Services Canada, 1992) at pp. 31, 89.

Examination of racism as it impacts specifically on black persons suggests that they are prime victims of racial prejudice. In Nova Scotia, anti-black racism has been described by both blacks and non-blacks as "pervasive": W. Head & D.H. Clairmont, Discrimination Against Blacks in Nova Scotia: The Criminal Justice System, A Research Study Prepared for the Royal Commission on the Donald Marshall Jr. Prosecution (Halifax: Royal Commission on the Donald Marshall Jr. Prosecution, 1989) at pp. 43-47; see also Nova Scotia Royal Commission on the Donald Marshall Jr. Prosecution, Findings and Recommendations, vol. 1 (Halifax: Royal Commission on the Donald Marshall Jr. Prosecution, 1989) (Chair: T.A. Hickman C.J.N.S.) at pp. 148-84. In Ontario, Mr. Stephen Lewis was appointed as an Adviser on Race Relations to the Premier of Ontario in June of 1992. His conclusions with respect to the state of race relations in the province and particularly in Toronto, are most disturbing (Letter of S. Lewis to Premier Rae (9 June 1992) at p. 2):

> First, what we are dealing with, at root, and fundamentally, is anti-Black racism. While it is obviously true that every visible minority community experiences the indignities and wounds of systemic discrimination throughout Southern Ontario, it is the Black community which is the focus. It is Blacks who are being shot, it is Black youth that is unemployed in excessive numbers, it is Black students who are being inappropriately streamed in schools, it is Black kids who are disproportionately dropping-out, it is housing communities with large concentrations of Black residents where the sense of vulnerability and disadvantage is most acute, it is Black employees, professional and non-professional, on whom the doors of upward equity slam shut. Just as the soothing balm of "multiculturism" cannot mask racism, so racism cannot mask its primary target.

Mr. Lewis's report postdates the trial in this case; however, the conditions and attitudes he describes are obviously longstanding.

Mr. Lewis's report and the events which triggered it led to a series of government initiatives announced on September 29, 1992. [Note 12] Those initiatives constituted a multi-pronged attack on racism in this province. They included the formation of a Commission on Race Relations in Criminal Justice. The terms of reference of that commission included the following (Government of Ontario, "Terms of Reference: Commission on Race Relations in Criminal Justice", at p. 1):

> [T]he government recognizes that throughout society and its institutions patterns and practices develop which, although they may not be intended to disadvantage any group, can have the effect of disadvantaging or permitting discrimination against some segments of society (such patterns and practices as they affect racial minorities being known as systemic racism);
>
> AND WHEREAS it is deemed advisable in the public interest to conduct an inquiry into systemic racism and the criminal justice system in Ontario;

The Commission was instructed by its terms of reference to make anti-black racism the focal point of its inquiry, and to concentrate on urban centres: "Terms of Reference" at p. 2.

The present Government of Ontario accepts that racism, and particularly systemic racism, is a real and pressing problem. [Note 13] It has committed substantial resources aimed at studying, exposing and eradicating racism, especially within the criminal justice system. It is somewhat ironic, given the present policy of the Government, and the far-reaching measures it has taken, that counsel for the Crown should at the same time take the position that the very brief inquiry proposed by counsel in this case was unnecessary.

The perceptions of those said to be targets of racial prejudice should also be considered. In Ontario, one recent study showed that members of racial minorities believed that racism in society plays a major role in erecting barriers to the advancement of minority groups: A Community Consultation on the Perceptions of Racial Minorities, A Report Prepared by Equal Opportunity Consultants for the Ministry of the Attorney General (Ontario) (1990), at pp. 18-22. The same perception is noted in a recent study done on behalf of the Law Reform Commission of Canada, [Note 14] in the Report of the Race Relations and Policing Task Force, [Note 15] and in Mr. Lewis's report to the Premier. These materials also suggest that the perception of racism is particularly strong when minorities confront the criminal justice system.

The perceptions of those who claim to be victims of racial prejudice cannot, necessarily, be equated with the reality of such victimization. However, to reject such perceptions out of hand, especially when they are strong and wide-spread, is perhaps to demonstrate the very racial bias of which they speak.

I do not pretend to essay a detailed critical analysis of the studies underlying the various reports to which I have referred. Bearing that limitation in mind, however, I must accept the broad conclusions repeatedly expressed in these materials. 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. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.

In my opinion, there can be no doubt that there existed a realistic possibility that one or more potential jurors drawn from the Metropolitan Toronto community would, consciously or subconsciously, come to court possessed of negative stereotypical attitudes toward black persons.

The trial judge did not deal directly with the possibility that one or more potential jurors would harbour anti-black bias. I do not suggest that he was not alive to that possibility, although absent an opportunity to examine the relevant materials, he may not have appreciated the nature and extent of those biases within our community. The trial judge proceeded directly to the second issue raised by the proposed challenge. His reliance on the "presumption" referred to earlier indicates that he was satisfied that any concerns referable to anti-black bias could be effectively dealt with by the safeguards present in the post-jury selection phase of the trial. Many such safeguards exist. The juror's oath or affirmation no doubt binds the conscience of many who might otherwise be disposed to decide matters based on assumptions and preconceptions including racial biases. The seriousness of the jury's task and the solemnity of the occasion may have the same effect. [Note 16] The "diffused impartiality" produced by the melding of 12 diverse and individual perspectives into a single decision-making body may also counter personal prejudices: Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), per Frankfurter J. (dissenting) at p. 227; Commonwealth v. Soares, 387 N.E. 2d 499 (Mass. S. Ct., 1979) at p. 515, cert. denied, Massachusetts v. Soares, 444 U.S. 881 (1979); see also R. v. Makow (1975), 28 C.R.N.S. 87 at p. 94, 20 C.C.C. (2d) 513 (B.C.C.A.). Similarly, the dynamics of jury deliberations where minds are focused on the evidence, and individual opinions and conclusions must withstand the scrutiny of fellow jurors, offer protection against discriminatory behaviour. [Note 17]

Finally, the trial judge's warnings to the jury that they must not resort to preconceptions or biases, including racial biases, in arriving at their verdict will no doubt have a salutory effect. [Note 18] This safeguard is particularly significant in that it brings to the surface of the proceedings, at a crucial point, the danger of allowing racial biases to influence the verdict. In doing so, it alerts jurors to the need to closely examine their own assessments and conclusions to ensure that such bias has not seeped into their deliberations. This trial judge gave a strong warning against resort to prejudices or biases during the deliberation process.

There is a longstanding debate about the effectiveness of these trial safeguards. That debate is part of the wider dispute concerning the effectiveness of the jury system as an adjudicative process. [Note 19] Our system requires that I accept that the jury system is effective, and that the safeguards are effective, and generally produce verdicts based only on an application of the law as provided by the trial judge to the evidence adduced at trial. The availability of the right to challenge for cause based on partiality, however, demonstrates that in some situations these safeguards are seen to be insufficient, and must be supplemented by the challenge process.

In deciding whether the post-jury selection safeguards against partiality provide a reliable antidote to racial bias, the nature of that bias must be emphasized. For some people, anti-black biases rest on unstated and unchallenged assumptions learned over a lifetime. Those assumptions shape the daily behaviour of individuals, often without any conscious reference to them. In my opinion, attitudes which are engrained in an individual's subconscious, and reflected in both individual and institutional conduct within the community, will prove more resistant to judicial cleansing than will opinions based on yesterday's news and referable to a specific person or event. [Note 20]

Justice McLachlin recently described both the danger and potential power of bias in the decision-making process ("Stereotypes: Their Uses and Misuses" (Address to the McGill University Faculty of Law Human Rights Forum, November 25, 1992), at p. 11):

> Racial stereotypes serve a similar purpose to that served by gender stereotypes. We may decide to reject a person's opinion or refuse their application for employment on the basis of race because it saves us the trouble of really analyzing whether we should be accepting the person's point of view or candidature. I am not suggesting that people consciously decide to apply inappropriate racial stereotypes on the ground that they provide easier solutions than rational decision-making. The matter is more complicated, less express than that. In fact, the racial or sexual stereotypes are there, in our minds, bred by social conditioning and encouraged by popular culture and the media. Sometimes they are embedded in our institutions. We tend to accept them as truths. When faced by a problem, we automatically apply them because it is natural and easy -- much easier than really examining the problem and coming to a rational conclusion by the processes of thought and listening and evaluation.

Others suggest that perceptions based on racial bias are particularly influential in the decision-making process because they tend to filter or even alter the information provided to the decision-maker. [Note 21] Bias shapes the information received to conform with those biases. In doing so, it gives the decision reached, at least in the eyes of the decider, an air of logic and rationality.

The criminal trial milieu may also accentuate the role of racial bias in the decision-making process. Anti-black attitudes may connect blacks with crime and acts of violence. A juror with such attitudes who hears evidence describing a black accused as a drug dealer involved in an act of violence may regard his attitudes as having been validated by the evidence. That juror may then readily give effect to his or her preconceived negative attitudes towards blacks without regard to the evidence and legal principles essential to a determination of the specific accused's liability for the crime charged. [Note 22]

Extensive social science research in the United States gives further reason to believe that racially prejudiced attitudes translate into discriminatory verdicts within the jury room. The foundational work of Kalven and Zeisel reached no conclusion with respect to the impact of race on jury verdicts. The authors indicated that the "few scattered findings" available from their study provided no basis for any conclusion. [Note 23] They also observed that it was impossible based on their study to say anything about interracial crimes. [Note 24] Kalven and Zeisel did,

however, observe that jury "sympathy" for a particular defendant, a major contributor to jury leniency, was less likely to be shown in the case of a black defendant than in the case of a white defendant. Black defendants were more likely to be viewed as "unattractive". [Note 25]

Subsequent empirical studies in the United States using mock juries suggest that juries are more inclined to convict defendants who are not of the same race as the juror. This is especially so where the evidence against the accused is not strong, or where the victim of the offence is of the same race as the juror. Archival studies based on the results of actual cases are said to support this view. [Note 26]

The validity of applying the conclusions drawn from mock jury studies to the performance of real juries has been subject to strong and cogent criticism. There are also persuasive arguments against reliance on the archival data as a basis for concluding that juries discriminate based on race. [Note 27]

Even accepting that these studies suffer from the inadequacies detailed by the critics, they clearly go at least so far as to indicate that there is a realistic possibility that jurors' verdicts are affected by the race of the accused where that accused is of a different race than the juror. This possibility is greater in crimes involving interracial violence where the victim is of the same race as the juror.

Case law from the Supreme Court of the United States is also instructive. In examining the cases, however, the distinction between that court's limited constitutional jurisdiction to review state convictions and its wider supervisory jurisdiction over federal trial courts must be appreciated. The propriety of challenges for cause based on alleged racial prejudice arises in both contexts, but the scope of the review provided is wider in the case of appeals from the federal trial courts. That jurisdiction is more akin to this court's appellate jurisdiction than is the more limited constitutional jurisdiction over state court proceedings.

In Aldridge v. United States, supra, the court exercised its supervisory jurisdiction in reviewing a murder conviction entered by a trial court in the District of Columbia. The accused was black and the deceased was a white police officer. The District of Columbia had a challenge for cause procedure which required that the trial judge vet the proposed questions. Counsel wanted to put a question to the prospective jurors concerning potential partiality based on race. The trial judge summarily refused the request. The Court of Appeal affirmed that decision.

Chief Justice Hughes for the majority of the Supreme Court held that the question should have been allowed. He reviewed several state cases which in his view firmly established the "propriety of such an inquiry": Aldridge, at pp. 311-13.

The Chief Justice next responded directly to the prosecution's contention that the question was unnecessary because "the coloured race" enjoyed the full privileges and rights of citizenship in the District of Columbia (at p. 314):

> But the question is not as to the civil privileges of the negro, or as to the dominant sentiment of the community and the general absence of any disqualifying prejudice,

> but as to the bias of the particular jurors who are to try the accused. If in fact, sharing the general sentiment, they were found to be impartial, no harm would be done in permitting the question; but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit. Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry.

The Chief Justice also rejected the submission that by permitting the question, the administration of justice would be somehow demeaned (at pp. 314-15):

> The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

In Ham v. South Carolina, 409 U.S. 524 (1973), the court appeared to apply Aldridge in the context of a constitutional review of a conviction entered in a state court. Rehnquist J. speaking for the entire court on this point held that the "essential demands of fairness" (p. 526) required the court to permit a challenge for cause based on alleged racial prejudice where the accused was black and the circumstances of the case suggested racial overtones. Ham did not involve interracial violence, but did involve defence allegations that the charges were racially motivated.

The bright line drawn in Aldridge and Ham has been somewhat obscured in subsequent cases. In Ristaino v. Ross, 424 U.S. 589 (1976), a black accused was charged with robbery and assault of a white security guard. The trial judge refused to conduct an inquiry into the potential racial prejudice of prospective jurors. The majority of the Supreme Court upheld that exercise of his discretion, declaring that the fact that the accused was black and the victim of the violence was white did not create a constitutional right to challenge for cause based on racial prejudice. The court held that the entire circumstances of the case had to be examined (at p. 598):

> [T]he circumstances thus did not suggest a significant likelihood that racial prejudice might infect Ross' trial. This was made clear to the trial judge when Ross was unable to support his motion concerning voir dire by pointing to racial factors such as existed in Ham or others of comparable significance.

In a footnote the majority specifically held that the apparently wider rule announced in Aldridge had to be seen as an exercise of the court's supervisory jurisdiction over federal courts and not as setting a constitutional standard: Aldridge, p. 598.

The "significant likelihood" criterion for constitutional review of the state court decision announced in Ristaino v. Ross would appear to establish a considerably higher test than that described in Sherratt, supra.

The Supreme Court next visited the issue in Rosales-Lopez v. United States, 451 U.S. 182 (1981). The accused, a Mexican, was convicted in federal court of illegally smuggling aliens into the United States. The appellant, relying on several federal appellate court decisions, argued that accuseds were entitled to challenge for cause based on racial partiality in all cases where the accused was a member of a racial minority. The trial judge declined to permit the challenge. His decision was upheld on appeal to the Court of Appeals for the Ninth Circuit.

In the Supreme Court, Justice White, for four members of the six-person majority, reviewed the conflicting interests raised where counsel request a voir dire into the potential racial prejudice of prospective jurors. He went on to declare that federal trial courts were required to permit such inquiries when requested by counsel where there was a "reasonable possibility" that racial prejudice could influence the jury. He further held that such "reasonable possibility" was created in any case involving allegations of interracial violence involving minority defendants. Two extracts from his reasons for judgment are pertinent (at pp. 191-92):

> In our judgment, it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued. Failure to honour his request, however, will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.
>
> . . . . .
>
> Aldridge and Ristaino together, fairly imply that federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups. This supervisory rule is based upon and consistent with the "reasonable possibility standard" articulated above. It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise such a possibility. There may be other circumstances that suggest the need for such an inquiry, but the decision as to whether the total circumstances suggest a reasonable possibility that racial or ethnic prejudice will affect the jury remains primarily with the trial court, subject to case-by-case review by the appellate courts.

The "reasonable possibility" standard established for the review of decisions made in the federal trial courts seems consistent with the standard set down in Sherratt.

Justice White went on to hold that, on the facts of the case, there was no "reasonable possibility" of a racially driven verdict, and therefore there was no need to permit questions relating to racial bias.

Justice Rehnquist and Chief Justice Burger joined the majority in the result, but rejected the requirement that the inquiry be conducted in all cases of interracial violence involving a black accused. [Note 28]

Justice Stevens, in dissent with two others, would have required that appropriate questions relating to racial prejudice be put in all cases where a minority defendant requested the inquiry into racial prejudice. He said (at pp. 196-97):

> An impartial tribunal is an indispensable element of a fair criminal trial [citations omitted]. Before any citizen may be permitted to sit in judgment on his peers, some inquiry into his potential bias is essential. Such bias can arise from two principal sources: a special reaction to the facts of the particular case, or a special prejudice against the individual defendant that is unrelated to the particular case. Much as we wish it were otherwise, we should acknowledge the fact that there are many potential jurors who harbour strong prejudices against all members of certain racial, religious, or ethnic groups for no reason other than hostility to the group as a whole. Even when there are no "special circumstances" connected with an alleged criminal transaction indicating an unusual risk of racial or other group bias, a member of the Nazi Party should not be allowed to sit in judgment on a Jewish defendant.

Finally, in Turner v. Murray, supra, the court reiterated the positions adopted in Ristaino and Rosales-Lopez. The court went on, however, to extend the Rosales-Lopez rule relating to interracial violence to state court cases involving the death penalty.

The majority position developed in the above authorities has attracted substantial academic criticism [Note 29] particularly as it relates to the limits placed on constitutional review of trial decisions in this area. There is considerable force to the contention that in attempting to control challenges for cause based on racial partiality, it is better to risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges which are necessary: see Aldridge v. United States, supra, at p. 314. In any event, the present position as it applies to federal courts in the United States would require an inquiry into race-based partiality in a case like this one where the accused is black and the deceased was white.

There are relatively little Canadian data relating to the impact of racial bias on jury verdicts. Section 649 of the Criminal Code effectively bars research into the effect of racial bias on actual jury deliberations. [Note 30] I have located only one Canadian mock jury study: R.M. Bagby and N.A. Rector, "Prejudicial Attitudes in a Simulated Legal Context" (1991), 11 Health Law in Canada 94. That study attempted to determine whether white jurors discriminated against a West Indian black accused on the basis of colour. The authors reported (at p. 95):

> It was found that (a) prejudicial attitudes were not replicated in this simulated legal setting; (b) there was an absence of prejudicial, subjective perceptions of the victim and the defendant; (c) the perception of the victim was not affecting the subject's perception of the defendant; and (d) guilt ratings and sentencing decisions were not prejudiced by the ethnic background of either the defendant or victim.

The authors did, however, refer to a second Canadian study (not available to this writer) which reached a contrary conclusion: J.E. Pfeifer and R.P. Ogloff, "Prejudicial Sentencing Trends in Simulated Jurors in Canada" (Paper presented at the 49th Annual Meeting of the Canadian Psychological Association, 1988). The study concluded (p. 96):

> We present this interpretation of the results with caution. Further investigation of prejudicial attitudes both within and outside of the legal context in Canada is necessary before any national comparison can be drawn with the United States.

Despite the lack of empirical data, Canadian commentators have no doubt that racist attitudes do impact on jury verdicts where the accused is a member of a racial minority. In 1984, Vidmar and Melnitzer referred to the "growing awareness that Canadian society is marked by racism and other prejudices that might jeopardize the right of an accused to a fair trial". [Note 31] More recently, Professor C. Petersen observed ("Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993), 38 McGill L.J. 147, at pp. 177-78):

> The threshold test, as established by the Supreme Court of Canada, is whether or not there exists a realistic potential for partiality on the part of a prospective juror. It remains to be seen whether the judiciary will be willing, in future cases, to admit the realistic potential for racist partiality on the part of virtually any juror.
>
> To refuse to do so would demonstrate a regrettable lack of even rudimentary race awareness. People of colour experience racism in all aspects of their lives (e.g. employment, housing, public transit and education). It is unrealistic to assume that racism will not also be present in the jury room.

Mr. D. Pomerant, in a paper prepared for the Law Reform Commission of Canada, reviewed the current practices relating to challenges for cause based on partiality. He found that they failed to adequately address claims of partiality based on general racial biases. He recommended:

> The law should clearly provide that lack of partiality may be established by evidence that a prospective juror harbours either general or specific discriminatory attitudes, beliefs or prejudices that will affect his or her judgment in the case to be tried. [Note 32]

The ever-developing awareness of the nature and extent of racism, and in particular anti-black racism in Metropolitan Toronto, suggests that the insights provided by the American material, and the conclusions of Canadian commentators, have at least some application to juries selected from among the residents of Metropolitan Toronto. I am satisfied that in at least some cases involving a black accused there is a realistic possibility that one or more jurors will discriminate against that accused because of his or her colour. In my view, a trial judge, in the proper exercise of his or her discretion, could permit counsel to put the question posed in this case, in any trial held in Metropolitan Toronto involving a black accused. I would go further and hold that it would be the better course to permit that question in all such cases where the accused requests the inquiry.

There will be circumstances in addition to the colour of the accused which will increase the possibility of racially prejudiced verdicts. It is impossible to provide an exhaustive catalogue of those circumstances. Where they exist, the trial judge must allow counsel to put the question suggested in this case.

In my opinion, the interracial nature of the violence involved in this case, and the fact that the alleged crime occurred in the course of the black accused's involvement in a criminal drug transaction, combined to provide circumstances in which it was essential to the conduct of a fair trial that counsel be permitted to put the question. [Note 33] With respect, I must conclude that the trial judge erred in refusing to allow counsel to ask the question.

In reaching my conclusion I have not relied on a costs/ benefit analysis. Fairness cannot ultimately be measured on a balance sheet. That kind of analysis, however, supports my conclusion Ham v. South Carolina, supra, at pp. 533-34, per Marshall J. (dissenting). The only "cost" is a small increase in the length of the trial. There is no "cost" to the prospective juror. He or she should not be embarrassed by the question; nor can the question realistically be seen as an intrusion into a juror's privacy.

There are at least three benefits to allowing the question. Some potential jurors who would discriminate against a black accused are eliminated. [Note 34] Prospective jurors who can arrive at an impartial verdict are sensitized from the outset of the proceedings to the need to confront potential racial bias and ensure that it does not impact on their verdict. In this regard, the challenge process would serve the same purpose as the trial judge's directions to the jury concerning the basis on which they must approach their task and reach their verdict. Lastly, permitting the question enhances the appearance of fairness in the mind of the accused. As indicated earlier, many blacks perceive the criminal justice system as inherently racist. A refusal to allow a black accused to even raise the possibility of racial discrimination with prospective jurors can only enhance that perception. By allowing the question, the court acknowledges that the accused's perception is worthy of consideration.

III. CONCLUSION

I have no reason to doubt the fairness of this trial, the impartiality of this jury or the validity of their verdict. However, the appellant was denied his statutory right to challenge for cause. That right is essential to the appearance of fairness and the integrity of the trial. The improper denial of this right necessitates the quashing of the conviction without any demonstration of actual prejudice: R. v. Cloutier, [1979] 2 S.C.R. 709 at p. 724, 48 C.C.C. (2d) 1 at p. 23, per Pratte J. I would allow the appeal, quash the conviction, and direct a new trial on the charge of manslaughter.

Appeal allowed.

Notes

1 R. v. Vermette, [1988] 1 S.C.R. 985 at p. 992, 41 C.C.C. (3d) 523 at p. 530; R. v. Hubbert (1975), 11 O.R. (2d) 464 (C.A.) at pp. 474-82, 29 C.C.C. (2d) 279 at pp. 289-96, affirmed [1977] 2 S.C.R. 267, 15 O.R. (2d) 324n.

2 Supra, note 1, at pp. 475-76 O.R., pp. 289-290 C.C.C.

3 R. v. Hubbert, supra, note 1, at pp. 474-76 O.R., pp. 289-90 C.C.C.

4 R. v. Hubbert, supra, note 1, at p. 476 O.R., p. 291 C.C.C.

5 J.E. Pfeifer, "Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings?" (1990), 69 Nebraska L.R. 230.

6 S.L. Johnson, "Black Innocence and the White Jury" (1985), 83 Michigan L.R. 1611 at pp. 1649-51; D.L. Suggs and B.D. Sales, "Juror Self-Disclosure in the Voir Dire: A Social Science Analysis" (1981), 56 Indiana L.J. 245 at p. 248.

7 Wainright v. Witt, 469 U.S. 412 (1985) at pp. 423-24; Murphy v. Florida, 421 U.S. 794 (1975) at pp. 799-800; Irvin v. Dowd, 366 U.S. 717 (1961) at pp. 722-23; United States v. Burr, 25 F. Cas. 49 (1807) at pp. 50-51; B.J. Gurney, "The Case for Abolishing Peremptory Challenges in Criminal Trials" (1986), 21 Harvard Civil Rights -- Civil Liberties L.R. 227 at pp. 246-48, 257-51; J.F. Gobert, "In Search of the Impartial Jury" (1988), 79 J. Crim. L. & Criminology 269, at p. 313.

8 Multiculturalism and Citizenship Canada, Eliminating Racial Discrimination in Canada (Ottawa: Supply & Services Canada, 1989) at pp. 3, 7; see also D.G. Hill & M. Schiff, Human Rights in Canada: A Focus on Racism, 3d ed. (Ottawa: Canadian Labour Congress and University of Ottawa, Human Rights Research & Education Centre).

9 Eliminating Racial Discrimination, ibid., at p. 7.

10 Ibid.

11 Ibid., at p. 10.

12 Government of Ontario, News Release Communique (29 September 1992); the initiatives were also announced by the then Attorney General Howard Hampton in a public statement on 29 September 1992.

13 See the comments of the Attorney General, supra, note 12. At the federal level, the then Minister of Justice Kim Campbell asked the Law Reform Commission of Canada to examine "as a matter of special priority" the Criminal Code and related statutes to determine the extent to which those statutes adequately served minority groups. That request produced several study papers and one report: Law Reform Commission of Canada, Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice, Report 34 (Ottawa: Law Reform Commission of Canada, 1991) (President: G. Létourneau). The Minister of Justice's Reference is Appendix A in D. Pomerant, "Jury Selection and Multicultural Issues" in Law Reform Commission of Canada, Consultation Document (1992).

14 Law Reform Commission of Canada, Consultation Document, supra, note 13, "Background", at p. 7.

15 Ontario, Report of the Race Relations and Policing Task Force (1989) (Chair: C. Lewis) at pp. 13-14. In a further report in 1992, the commission observed at p. 7 that the "sense of crisis"

existing in 1989 "has not diminished" but rather continued in 1992 (Ontario, Report of the Race Relations and Policing Task Force (1992) (Chair: C. Lewis).

16 Pfeifer, supra, note 5, at p. 245.

17 M.F. Kaplan and C. Scherscing, "Reducing Juror Bias: An Experimental Approach" in P.D. Lipsitt & B.D. Sales, eds., New Directions in Psycholegal Research (New York: Van Nostrand Reinhold, 1980), at p. 166; Gurney, supra, note 7, at pp. 247-48; see also Gobert, supra, note 7, at p. 279, where the author suggests that the reliance on the cleansing effect of group dynamics is suspect.

18 Pfeifer, supra, note 5, at pp. 247-48; Gobert, supra, note 7, at p. 325; Johnson, supra, note 6, at pp. 1678-79, suggests judicial warnings against resort to bias have little positive value.

19 See c. 1 in H. Kalven Jr. and H. Zeisel, The American Jury (Boston: Little, Brown & Co., 1966), where the authors survey the competing contentions; R. Hastie, S.D. Penrod & N. Pennington, Inside the Jury (Cambridge, Mass.: Harvard University Press, 1983); Law Reform Commission of Canada, The Jury in Criminal Trials, Working Paper No. 27 (Ottawa: Supply & Services Canada, 1980) (Chair: F.C. Muldoon), at c. II.

20 Johnson, supra, note 6, at p. 1679.

21 American Bar Association Advisory Committee on Fair Trial and Free Press, "Standards Relating to Fair Trial and Free Press" (Chicago, 1968) (Chair: P.C. Reardon), at p. 62; Gobert, supra, note 7, at pp. 320-21.

22 Johnson, supra, note 6, at pp. 1644-47.

23 Kalven and Zeisel, supra, note 19, at p. 343. The authors did however report at pp. 40-42 certain comments made by judges concerning jury verdicts in cases of interracial violence involving blacks which indicate that those judges had significant racial biases.

24 Ibid., at p. 344.

25 Ibid., at pp. 343-44.

26 Many of these studies are referred to and analyzed by Pfeifer, supra, note 5, and Johnson, supra, note 6. Johnson finds them persuasive; Pfeifer does not.

27 Pfeifer, supra, note 5, at pp. 241-47. Pfeifer argues that the archival data does no more than demonstrate the existence of racism at some stage of the criminal justice process but does not make the case for placing the label "racist" on juries. He also contends that the mock jury experiments are far removed from the reality of true jury deliberations.

28 Justice Rehnquist held at p. 195 that "the decision as to the inquiry on voir dire as to racial or ethnic prejudice remains primarily for the trial court subject to case-by-case review by the appellate courts".

29 E.g., see Johnson, supra, note 6, at p. 1673; J.B. Mintz "Baston v. Kentucky: A Half Step in the Right Direction" (1987), 72 Cornell L.R. 1026 at pp. 1044-45; P.N. Thompson, "Fair and Impartial Jury -- Catch as Catch Can" (1987), 31 St. Louis University L.J. 191 at pp. 221-26; J. Van Dyke, "Voir Dire: How Should It Be Conducted to Ensure that Our Juries are Representative and Impartial?" (1976), 3 Hastings Constitutional L. Quarterly 65 at pp. 93-94; M. Wyckoff, "Sixth Amendment -- Right to Inquire into Jurors' Racial Prejudices" (1986), 77 J. Crim. L. & Criminology 713; N.L. Alvarez, "Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry" (1982), 33 Hastings L.J. 959.

30 The Law Reform Commission of Canada has recommended that s. 649 be amended to permit exceptions in the case of specific research projects approved by the Chief Justice of the province: Law Reform Commission of Canada, Report 16: The Jury (Ottawa: Supply & Services, 1982) at p. 82. In Working Paper No. 27, supra, note 19, at p. 143, the commissioners supported such research as perhaps "the only way" to understand the jury process.

31 N. Vidmar and J. Melnitzer, "Juror Prejudice: An Empirical Study of a Challenge for Cause" (1984), 22 Osgoode Hall L.J. 487 at p. 489.

32 Pomerant, supra, note 13, at p. 60.

33 Even though reference to the factual context of the case must be made to assess the possibility of a racially biased verdict, the inquiry is still aimed at impartiality at the time of the challenge; see R. v. Hubbert, supra, note 1, at pp. 481-82 O.R., pp. 295-96 C.C.C.

34 This benefit depends on the truthfulness of the answers given by the prospective jurors. There is considerable debate about the reliability of answers provided by jurors during a challenge for cause inquiry: Vidmar & Melnitzer, supra, note 31, at p. 502; Gobert, supra, note 7, at p. 317; Suggs & Sales, supra, note 6, at pp. 268-69; Gurney, supra, note 7, at pp. 266-67.