R. *v.* Williams, [1998] 1 S.C.R. 1128

Victor Daniel Williams *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada,
the Attorney General for Ontario,
Aboriginal Legal Services of Toronto Inc.,
the African Canadian Legal Clinic,
the Urban Alliance on Race Relations (Justice)
and the Criminal Lawyers' Association (Ontario) *Interveners*

Indexed as: R. *v.* Williams

File No.: 25375.

1998: February 24; 1998: June 4.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

on appeal from the court of appeal for british columbia

Criminal law -- Trial -- Procedure -- Challenge for cause -- Racial bias -- Whether prospective jurors can be questioned as to racial bias -- Criminal Code, R.S.C.,

1985, c. C-46, ss. 638, 649 -- Canadian Charter of Rights and Freedoms, ss. 7, 11(d), 15(1).

The accused, an aboriginal, pleaded not guilty to a robbery charge and elected a trial by judge and jury. The trial judge at the first trial allowed questions to be put to potential jurors but the Crown successfully applied for a mistrial on the basis of procedural errors and the "unfortunate publicity" of the jury selection process. At the second trial, the judge who heard the accused's motion for an order permitting him to challenge jurors for cause dismissed the motion. The judge who presided at the trial dismissed a renewed application and did not warn the jury, either in his opening or closing addresses, to be aware of or to disregard any bias or prejudice that they might feel towards the accused as a native person. The Court of Appeal dismissed an appeal from conviction. The courts below accepted that there was widespread prejudice against aboriginal people in the community. At issue here is whether the evidence of widespread bias against aboriginal people in the community raises a realistic potential of partiality.

Held: The appeal should be allowed.

The prosecution and the defence are entitled to challenge potential jurors for cause on the ground of partiality. Candidates for jury duty are presumed to be indifferent or impartial and this presumption must be displaced before they can be challenged and questioned. Usually the party seeking the challenge calls evidence substantiating the basis of the concern. Alternatively, where the basis of the concern is widely known and accepted, the law of evidence may permit a judge to take judicial notice of it. The judge has a wide discretion in controlling the challenge process and should permit challenges if there is a realistic possibility that the jury pool may contain people whose racial

prejudice might incline them to favour the Crown rather than the accused in deciding the matters that fall to them in the course of the trial.

Judicial directions to act impartially cannot always be assumed to be effective in countering racial prejudice. Where doubts are raised, the better policy is to err on the side of caution and permit prejudice to be examined. A motion to challenge for cause therefore need not be dismissed if there was "no concrete evidence" that any of the prospective jurors could not set aside their biases. The expectation that jurors usually behave in accordance with their oaths does not obviate the need to permit challenges for cause where it is established that the community suffers from widespread prejudice against people of the accused's race sufficient to create a realistic potential for partiality.

The contention that there need be some evidence of bias of a particular nature and extent against aboriginal persons, or even further, that racial prejudice in the community must be linked to specific aspects of the trial, is unduly restrictive. Evidence of widespread racial prejudice may, depending on the nature of the evidence and the circumstances of the case, lead to the conclusion that there is a realistic potential for partiality. The potential for partiality is irrefutable where the prejudice can be linked to specific aspects of the trial, like a widespread belief that people of the accused's race are more likely to commit the crime charged.

Racial prejudice against the accused may be detrimental to an accused in a variety of ways. The link between prejudice and verdict is clearest where there is an "interracial element" to the crime or a perceived link between those of the accused's race and the particular crime. Racial prejudice may also play a role in other, less obvious ways such as how jurors assess the credibility of the accused.

The trial judge has the discretion to determine whether widespread racial prejudice in the community, absent specific "links" to the trial, is sufficient to give an "air of reality" to the challenge in the particular circumstances of each case. It is impossible to provide an exhaustive catalogue of those circumstances. Where specific "links" to the trial exist, the trial judge must allow the challenge to proceed.

Section 638(2) of the *Criminal Code* requires two inquiries and entails two different decisions. The first stage is the inquiry before the judge to determine whether challenges for cause should be permitted. The test at this stage is whether there is a realistic potential or possibility for partiality. If the judge permits challenges for cause, a second inquiry occurs on the challenge itself. The defence may question potential jurors as to whether they harbour prejudices against people of the accused's race, and if so, whether they are able to set those prejudices aside and act as impartial jurors. At this stage, the question to be determined by the triers is whether the candidate in question will be able to act impartially.

Section s. 638(1)(*b*) is intended to prevent persons who may not be able to act impartially from sitting as jurors. This object cannot be achieved if the evidentiary threshold for challenges for cause is set too high. To require evidence that some jurors will be unable to set their prejudices aside is to ask the impossible. Similarly, extreme prejudice is a poor indicator of a realistic danger or potential of partiality. Widespread racial prejudice is not exceptional.

The appropriate evidentiary standard on applications to challenge for cause based on racial prejudice is a "realistic potential for partiality" (the rule in *R. v. Sherratt*). Absent evidence to the contrary, where widespread prejudice against people of the accused's race is demonstrated at a national or provincial level, it will often be reasonable

to infer that such prejudice is replicated at the community level. Prejudice less than widespread might in some circumstances meet this test.

A judge's discretion to allow challenge for cause must be exercised in accordance with the *Canadian Charter of Rights and Freedoms.* Section s. 638(1)(*b*) should be read in light of the fundamental rights to a fair trial by an impartial jury and to equality before and under the law. The rule in *Sherratt* suffices to maintain these rights without adopting the United States model or a variant on it. It protects the accused's right to a fair trial by an impartial jury and the privacy interests of prospective jurors while avoiding lengthening trials or increasing their cost.

Cases Cited

Applied: *R. v. Sherratt*, [1991]1 S.C.R. 509; *R. v. Parks* (1993), 84 C.C.C. (3d) 353; **referred to:** *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279; *R. v. Zundel (No. 1)* (1987), 31 C.C.C. (3d) 97; *Aldridge v. United States*, 283 U.S. 308 (1931); *R. v. B. (A.)* (1997), 33 O.R. (3d) 321; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7, 11(*d*), 15(1).

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APPEAL from a judgment of the British Columbia Court of Appeal (1996), 75 B.C.A.C. 135, 123 W.A.C. 135, 134 D.L.R. (4th) 519, 106 C.C.C. (3d) 215, 48 C.R. (4th) 97, [1997] 1 C.N.L.R. 153, [1996] B.C.J. No. 926 (QL), dismissing an appeal from conviction by Vickers J. sitting with jury, [1994] B.C.J. No. 3160 (QL), after a judgment by Esson C.J. on a motion to challenge for cause (1994), 90 C.C.C. (3d) 194, 30 C.R. (4th) 277, [1995] 3 C.N.L.R. 178, [1994] B.C.J. No. 1301 (QL). Appeal allowed.

Joseph J. Blazina, for the appellant.

Dirk Ryneveld, Q.C., and *George Ivanisko,* for the respondent.

Graham Garton, Q.C., for the intervener the Attorney General of Canada.

Ian R. Smith, for the intervener the Attorney General for Ontario.

Kent Roach and *Noelle Spotton,* for the intervener Aboriginal Legal Services of Toronto Inc.

Steven M. Hinkson and *Julian K. Roy*, for the intervener the African Canadian Legal Clinic.

Julian N. Falconer and *Richard Macklin*, for the intervener the Urban Alliance on Race Relations (Justice).

James Lockyer, for the intervener the Criminal Lawyers' Association (Ontario).

//*McLachlin J.*//

The judgment of the Court was delivered by

MCLACHLIN J. --

Introduction

1 Victor Daniel Williams, an aboriginal, was charged with the robbery of a Victoria pizza parlour in October, 1993. Mr. Williams pleaded not guilty and elected a trial by judge and jury. His defence was that the robbery had been committed by someone else, not him. The issue on this appeal is whether Mr. Williams has the right to question (challenge for cause) potential jurors to determine whether they possess prejudice against aboriginals which might impair their impartiality.

2 The *Criminal Code*, R.S.C., 1985, c. C-46, s. 638, provides that "an accused is entitled to any number of challenges on the ground that . . . a juror is not indifferent between the Queen and the accused". The section confers discretion on the trial judge to permit challenges for cause. The judge should do so where there is a realistic potential of juror partiality. The evidence in this case established widespread racial prejudice against aboriginals. I conclude that in the circumstances of this case, that prejudice established a realistic potential of partiality and that the trial judge should have exercised his discretion to allow the challenge for cause.

History of the Proceedings

The First Trial

3 At his first trial, Williams applied to question potential jurors for racial bias under s. 638 of the *Code.* In support of his application, he filed materials alleging widespread racism against aboriginal people in Canadian society and an affidavit which stated, in part, "[I] hope that the 12 people that try me are not Indian haters". Hutchison J. ruled that Williams had met the threshold test and allowed potential jurors to be asked two questions:

> (1) 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 an Indian?
>
> (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 an Indian and the complainant is white?

On a number of occasions, Hutchison J. allowed additional questions to clarify responses to the first two questions. Forty-three panel members were questioned and 12 were dismissed for risk of bias. The Crown applied for a mistrial on the basis of procedural errors, including use of the same two jurors on all the challenges, coupled with "unfortunate publicity" of the jury selection process. The accused objected, arguing that the Crown was seeking a new trial in order to obtain reversal of the challenge for cause ruling. The trial judge replied that he doubted this would happen, given the case law, and granted the Crown's application for a mistrial.

The Second Trial (1994), 90 C.C.C. (3d) 194

4 Williams' motion for an order permitting him to challenge jurors for cause was heard by Esson C.J. In support of the application, Williams called four witnesses and filed the ruling of Hutchison J. on the right to challenge for cause and a transcript of the jury selection proceedings. Esson C.J. found, at p. 198, that the evidence tended to support the view "that natives historically have been and continue to be the object of bias and prejudice which, in some respects, has become more overt and widespread in recent years as the result of tensions created by developments in such areas as land claims and fishing rights". He acknowledged that there was a reasonable possibility that a potential

juror would be biased against an aboriginal person charged with robbery of a white person. He also accepted that the test for challenge for cause is "reasonable possibility" of influence by bias, or partiality: see *R. v. Sherratt*, [1991] 1 S.C.R. 509.

5 However, Esson C.J. rejected the argument that the widespread bias against Natives created a reasonable possibility of partiality sufficient to support a challenge for cause. "[I]t does not follow, in the absence of anything more than the race of the accused, that there is a realistic possibility that a juror would be influenced by such a bias in carrying out the solemn duty of deciding whether the accused is guilty of the crime charged" (at p. 206). In other words, Esson C.J. held that while there was a reasonable possibility that potential jurors would be biased against Williams, there was no reasonable possibility that this bias would translate into partiality at the trial, because jurors can be expected to put aside their biases and because the jury system provides effective safeguards against such biases. In his view, the law presumes impartiality, and evidence of general bias in the community is insufficient to displace this presumption. Esson C.J. buttressed this conclusion with a cost-benefit analysis. In his view, the cost and disruption that would result from allowing challenges for cause on the basis of racial bias in the community would far outweigh the putative benefit of supposedly fairer trials. He distinguished *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (Ont. C.A.), where challenge for cause on account of racial bias had been allowed, on the ground that the evidence there showed not only racial bias, but a widespread perception in the community of Toronto that black people were linked to violent crime.

6 Vickers J. presided at the trial. He dismissed a renewed application to challenge potential jurors for cause. Neither in his opening to the jury nor in his closing address to the jury did he instruct the jury that it ought to be aware of or disregard any bias or prejudice that they might feel towards Williams as a native person. Williams called

evidence to support his defence that another aboriginal person, not he, had committed the robbery. The jury convicted Williams. Williams appealed to the Court of Appeal on the issue of challenge for cause.

The Court of Appeal (1996), 106 C.C.C. (3d) 215

7 The Court of Appeal, *per* Macfarlane J.A., agreed with Esson C.J. that there is a presumption of juror impartiality, and that it is not discharged by evidence of general bias in the community against persons of the accused's race. To discharge the presumption, evidence of racist attitudes that would have particular significance in relation to a criminal trial is required. It dismissed the appeal, at pp. 229-30, because "there are no studies . . . in the evidence which conclude that persons in a jury setting may be inclined to find that an aboriginal person is more likely to have committed a crime than a non-aboriginal person". It held that while procedural cost cannot diminish the right to a fair trial, Esson C.J.'s cost-benefit analysis was collateral and did not vitiate his decision. The appeal was dismissed and the conviction upheld.

Statutory and Constitutional Provisions

8 *Criminal Code*, R.S.C., 1985, c. C-46

> **638.** (1) A prosecutor or an accused is entitled to any number of challenges on the ground that
>
> . . .
>
> (*b*) a juror is not indifferent between the Queen and the accused;
>
> . . .

(2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

. . .

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Analysis

What is the Rule?

The Prevailing Canadian Approach to Jury Challenges for Lack of Indifference Between the Crown and the Accused

9 The prosecution and the defence are entitled to challenge potential jurors for cause on the ground that "a juror is not indifferent between the Queen and the accused". Lack of "indifference" may be translated as "partiality", the term used by the Courts below. "Lack of indifference" or "partiality", in turn, refer to the possibility that a juror's knowledge or beliefs may affect the way he or she discharges the jury function in a way that is improper or unfair to the accused. A juror who is partial or "not indifferent" is a juror who is inclined to a certain party or a certain conclusion. The synonyms for

"partial" in Burton's *Legal Thesaurus* (2nd ed. 1992), at p. 374, illustrate the attitudes that may serve to disqualify a juror:

> bigoted, . . . discriminatory, favorably disposed, inclined, influenced, . . . interested, jaundiced, narrow-minded, one-sided, partisan, predisposed, prejudiced, prepossessed, prone, restricted, . . . subjective, swayed, unbalanced, unequal, uneven, unfair, unjust, unjustified, unreasonable.

10 The predisposed state of mind caught by the term "partial" may arise from a variety of sources. Four classes of potential juror prejudice have been identified — interest, specific, generic and conformity: see Neil Vidmar, "Pretrial prejudice in Canada: a comparative perspective on the criminal jury" (1996), 79 *Jud.* 249, at p. 252. Interest prejudice arises when jurors may have a direct stake in the trial due to their relationship to the defendant, the victim, witnesses or outcome. Specific prejudice involves attitudes and beliefs about the particular case that may render the juror incapable of deciding guilt or innocence with an impartial mind. These attitudes and beliefs may arise from personal knowledge of the case, publicity through mass media, or public discussion and rumour in the community. Generic prejudice, the class of prejudice at issue on this appeal, arises from stereotypical attitudes about the defendant, victims, witnesses or the nature of the crime itself. Bias against a racial or ethnic group or against persons charged with sex abuse are examples of generic prejudice. Finally, conformity prejudice arises when the case is of significant interest to the community causing a juror to perceive that there is strong community feeling about a case coupled with an expectation as to the outcome.

11 Knowledge or bias may affect the trial in different ways. It may incline a juror to believe that the accused is likely to have committed the crime alleged. It may incline a juror to reject or put less weight on the evidence of the accused. Or it may, in a general

way, predispose the juror to the Crown, perceived as representative of the "white" majority against the minority-member accused, inclining the juror, for example, to resolve doubts about aspects of the Crown's case more readily: see Sheri Lynn Johnson, "Black Innocence and the White Jury" (1985), 83 *Mich. L. Rev.* 1611. When these things occur, a juror, however well intentioned, is not indifferent between the Crown and the accused. The juror's own deliberations and the deliberations of other jurors who may be influenced by the juror, risk a verdict that reflects, not the evidence and the law, but juror preconceptions and prejudices. The aim of s. 638 of the *Code* is to prevent effects like these from contaminating the jury's deliberations and hence the trial: see *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279 (Ont. C.A.). The aim, to put it succinctly, is to ensure a fair trial.

12 The practical problem is how to ascertain when a potential juror may be partial or "not indifferent" between the Crown and the accused. There are two approaches to this problem. The first approach is that prevailing in the United States. On this approach, every jury panel is suspect. Every candidate for jury duty may be challenged and questioned as to preconceptions and prejudices on any sort of trial. As a result, lengthy trials of jurors before the trial of the accused are routine.

13 Canada has taken a different approach. In this country, candidates for jury duty are presumed to be indifferent or impartial. Before the Crown or the accused can challenge and question them, they must raise concerns which displace that presumption. Usually this is done by the party seeking the challenge calling evidence substantiating the basis of the concern. Alternatively, where the basis of the concern is "notorious" in the sense of being widely known and accepted, the law of evidence may permit a judge to take judicial notice of it. This might happen, for example, where the basis of the concern is widespread publicity of which the judge and everyone else in the community is aware.

The judge has a wide discretion in controlling the challenge process, to prevent its abuse, to ensure it is fair to the prospective juror as well as the accused, and to prevent the trial from being unnecessarily delayed by unfounded challenges for cause: see *Hubbert*, *supra*.

14 Judicial discretion, however, must be distinguished from judicial whim. A judge exercising the discretion to permit or refuse challenges for cause must act on the evidence and in a way that fulfills the purpose of s. 638(1)(*b*) — to prevent persons who are not indifferent between the Crown and the accused from serving on the jury. Stated otherwise, a trial judge, in the exercise of the discretion, cannot "effectively curtail the statutory right to challenge for cause": see *R. v. Zundel (No. 1)* (1987), 31 C.C.C. (3d) 97, at p. 135 (leave to appeal refused [1987] 1 S.C.R. xii). To guide judges in the exercise of their discretion, this Court formulated a rule in *Sherratt*, *supra*: the judge should permit challenges for cause where there is a "realistic potential" of the existence of partiality. *Sherratt* was concerned with the possibility of partiality arising from pre-trial publicity. However, as the courts in this case accepted, it applies to all requests for challenges based on bias, regardless of the origin of the apprehension of partiality.

15 Applying *Sherratt* to the case at bar, the enquiry becomes whether in this case, the evidence of widespread bias against aboriginal people in the community raises a realistic potential of partiality.

Identifying the Evidentiary Threshold

16 Esson C.J. and the Court of Appeal applied the test of "realistic potential" of partiality. However, they took a different view from that of Hutchison J. as to when the evidence establishes a realistic potential of partiality. The debate before us divided on the same lines.

17 The Crown argues that evidence of widespread racial bias against persons of the accused's race does not translate into a "realistic potential" for partiality. There is a presumption that jurors will act impartially, whatever their pre-existing views. Evidence of widespread bias does not rebut that presumption. More is required. The Crown does not detail what evidence might suffice. However, it emphasizes that the evidence must point to not only bias, but also partiality, or bias that may affect the outcome. What is required, in the Crown's submission, is concrete evidence showing prejudice that would not be capable of being set aside at trial. The Crown interprets *Parks*, *supra*, where challenges for cause for racial bias in the community were permitted, as being an exceptional case where the nature and extent of the racial bias was sufficiently extreme to establish a reasonable possibility of partiality.

18 The defence takes a different view. First, it argues that *Sherratt*, *supra*, establishes that the right to challenge for cause is not exceptional or extraordinary or extreme. Second, it suggests that evidence of widespread prejudice against aboriginals in the community suffices to raise a "realistic potential" for partiality, entitling the accused to question potential jurors as to their prejudices as to whether they will be able to set them aside in discharging their duty as jurors. In the defence submission, the evidentiary threshold proposed by the Crown, Esson C.J. and the Court of Appeal is too high.

19 In my respectful view, the positions of the Crown, Esson C.J. and the Court of Appeal reflect a number of errors that lead to the evidentiary threshold for challenges for cause being set too high. I will discuss each of these in turn.

(1) *The Assumption that Prejudice Will be Judicially Cleansed*

20 Underlying the Crown's submissions (as well as the judgments of Esson C.J. and the Court of Appeal) is the assumption that generally jurors will be able to identify and set aside racial prejudice. Only in exceptional cases is there a danger that racial prejudice will affect a juror's impartiality. In contrast, the defence says that jurors may not be able to set aside racial prejudices that fall short of extreme prejudice. Is it correct to assume that jurors who harbour racial prejudices falling short of extreme prejudice will set them aside when asked to serve on a jury? A consideration of the nature of racial prejudice and how it may affect the decision-making process suggests that it is not.

21 To suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it. As Vidmar, *supra*, points out, racial prejudice interfering with jurors' impartiality is a form of discrimination. It involves making distinctions on the basis of class or category without regard to individual merit. It rests on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals. Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so. For this reason, it cannot be assumed that judicial directions to act impartially will always effectively counter racial prejudice: see Johnson, *supra*. Doherty J.A. recognized this in *Parks, supra,* at p. 371:

> 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.

22 Racial prejudice and its effects are as invasive and elusive as they are corrosive. We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice. Where doubts are raised, the better policy is to err on the side of caution and permit prejudices to be examined. Only then can we know with any certainty whether they exist and whether they can be set aside or not. 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*, 283 U.S. 308 (1931), at p. 314, and *Parks*, *supra*.

23 It follows that I respectfully disagree with the suggestion in *R. v. B. (A.)* (1997), 33 O.R. (3d) 321 (C.A.), at p. 343, that a motion to challenge for cause must be dismissed if there is "no concrete evidence" that any of the prospective jurors "could not set aside their biases". Where widespread racial bias is shown, it may well be reasonable for the trial judge to infer that some people will have difficulty identifying and eliminating their biases. It is therefore reasonable to permit challenges for cause. This is not to suggest that a prospective juror who on a challenge for cause admits to harbouring a relevant racial prejudice must necessarily be rejected. It is for the triers on the challenge for cause to determine: (1) whether a particular juror is racially prejudiced in a way that could affect his or her partiality; and (2) if so, whether the juror is capable of setting aside that prejudice.

24 Parliament itself has acknowledged that jurors may sometimes be unable to set aside their prejudices and act impartially between the Crown and the accused, despite our hope and expectation that they will do so. It is implicit in s. 638(2) that in

Parliament's view, jurors may harbour knowledge and prejudices that may not be entirely offset by the trial judge's direction to decide the case impartially on the evidence. If judicial cleansing were a complete answer to the preconceptions and predispositions of jurors, there would be no need for s. 638(1)(*b*). Trial judges may conclude that some predispositions can be safely regarded as curable by judicial direction. However, s. 638(1)(*b*) reminds us that judicial cleansing is not always a complete answer. Where the predisposition is one as complex and insidious as racial prejudice, we should not assume without more that the judges' instructions will always neutralize it.

25 This Court rejected the argument that prejudice based on pre-trial publicity could be cured by the safeguards in the trial process in *Sherratt*, *supra*, at p. 532, *per* L'Heureux-Dubé J.:

> While it is no doubt true that trial judges have a wide discretion in these matters and that jurors will usually behave in accordance with their oaths, these two principles cannot supersede the right of every accused person to a fair trial, which necessarily includes the empanelling of an impartial jury.

The same may be said of many forms of prejudice based on racial stereotypes. The expectation that jurors usually behave in accordance with their oaths does not obviate the need to permit challenges for cause in circumstances such as the case at bar, where it is established that the community suffers from widespread prejudice against people of the accused's race.

(2) *Insistence on the Necessity of a Link Between the Racist Attitude and the Potential for Juror Partiality*

26 The Court of Appeal, *per* Macfarlane J.A., stated that the existence of a significant degree of racial bias in the community from which the panel is drawn is, by

itself, not sufficient to allow a challenge for cause because bias cannot be equated with partiality. The court held that in order for the appellant to be successful, there must be some evidence of bias against aboriginal persons which is of a particular nature and extent; evidence which only displays a "general bias" against a racial group is insufficient to warrant a challenge for cause. The Crown goes even further, arguing that racial prejudice in the community must be linked to specific aspects of the trial in order to support a challenge for cause. More particularly, it asserts that where, as here, the defence was that another aboriginal committed the crime, race could have no relevance because the jury was obliged to decide between two aboriginals.

27 I cannot, with respect, accept this contention. In my view, it is unduly restrictive. Evidence of widespread racial prejudice may, depending on the nature of the evidence and the circumstances of the case, lead to the conclusion that there is a realistic potential for partiality. The potential for partiality is irrefutable where the prejudice can be linked to specific aspects of the trial, like a widespread belief that people of the accused's race are more likely to commit the crime charged. But it may be made out in the absence of such links.

28 Racial prejudice against the accused may be detrimental to an accused in a variety of ways. The link between prejudice and verdict is clearest where there is an "interracial element" to the crime or a perceived link between those of the accused's race and the particular crime. But racial prejudice may play a role in other, less obvious ways. Racist stereotypes may affect how jurors assess the credibility of the accused. Bias can shape the information received during the course of the trial to conform with the bias: see *Parks, supra*, at p. 372. Jurors harbouring racial prejudices may consider those of the accused's race less worthy or perceive a link between those of the accused's race and crime in general. In this manner, subconscious racism may make it easier to conclude that

a black or aboriginal accused engaged in the crime regardless of the race of the complainant: see Kent Roach, "Challenges for Cause and Racial Discrimination" (1995), 37 *Crim. L.Q.* 410, at p. 421.

29 Again, a prejudiced juror might see the Crown as non-aboriginal or non-black and hence to be favoured over an aboriginal or black accused. The contest at the trial is between the accused and the Crown. Only in a subsidiary sense is it between the accused and another aboriginal. A prejudiced juror might be inclined to favour non-aboriginal Crown witnesses against the aboriginal accused. Or a racially prejudiced juror might simply tend to side with the Crown because, consciously or unconsciously, the juror sees the Crown as a defender of majoritarian interests against the minority he or she fears or disfavours. Such feelings might incline the juror to resolve any doubts against the accused.

30 Ultimately, it is within the discretion of the trial judge to determine whether widespread racial prejudice in the community, absent specific "links" to the trial, is sufficient to give an "air of reality" to the challenge in the particular circumstances of each case. The following excerpt from *Parks*, *supra*, at pp. 378-79, *per* Doherty J.A., states the law correctly:

> 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.

31 At the second stage of the actual challenge for cause, the issue of how any prejudice may play out in the context of the trial comes to the forefront. The triers may conclude that the connection between a prospective juror's prejudices and the trial are so small that they cannot realistically translate into partiality. Conversely, the triers might conclude that a prospective juror's beliefs that people of the accused's race are more likely than others to commit the type of crime alleged are highly indicative of partiality. Such considerations, while not essential to finding a right to challenge for cause, may be determinative on the challenge for cause itself.

(3) *Confusion Between the Two Phases of the Challenge for Cause Process*

32 Section 638(2) requires two inquiries and entails two different decisions with two different tests. The first stage is the inquiry before the judge to determine whether challenges for cause should be permitted. The test at this stage is whether there is a realistic potential or possibility for partiality. The question is whether there is reason to suppose that the jury pool may contain people who are prejudiced and whose prejudice might not be capable of being set aside on directions from the judge. The operative verbs at the first stage are "may" and "might". Since this is a preliminary inquiry which may affect the accused's *Charter* rights (see below), a reasonably generous approach is appropriate.

33 If the judge permits challenges for cause, a second inquiry occurs on the challenge itself. The defence may question potential jurors as to whether they harbour prejudices against people of the accused's race, and if so, whether they are able to set

those prejudices aside and act as impartial jurors. The question at this stage is whether the candidate in question will be able to act impartially. To demand, at the preliminary stage of determining whether a challenge for cause should be permitted, proof that the jurors in the jury pool will not be able to set aside any prejudices they may harbour and act impartially, is to ask the question more appropriate for the second stage.

34 The Crown conflates the two stages of the process. Instead of asking whether there is a potential or possibility of partiality at the stage of determining the right to challenge for cause, it demands proof that widespread racism will result in a partial jury. The assumption is that absent such evidence, no challenge for cause should be permitted. This is not the appropriate question at the preliminary stage of determining the right to challenge for cause. The question at this stage is not whether anyone in the jury pool will in fact be unable to set aside his or her racial prejudices but whether there is a realistic possibility that this could happen.

(4) *Impossibility of Proving That Racism in Society Will Lead to Juror Partiality*

35 To require the accused to present evidence that jurors will in fact be unable to set aside their prejudices as a condition of challenge for cause is to set the accused an impossible task. It is extremely difficult to isolate the jury decision and attribute a particular portion of it to a given racial prejudice observed at the community level. Jury research based on the study of actual trials cannot control all the variables correlated to race. Studies of mock juries run into external validity problems because they cannot recreate an authentic trial experience: see Jeffrey E. Pfeiffer, "Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings?" (1990), 69 *Neb. L. Rev.* 230. As recognized by Doherty J.A. in *Parks, supra*, at p. 366,

"[t]he existence and extent of [matters such as] racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts".

36 "Concrete" evidence as to whether potential jurors can or cannot set aside their racial prejudices can be obtained only by questioning a juror. If the Canadian system permitted jurors to be questioned after trials as to how and why they made the decisions they did, there might be a prospect of obtaining empirical information on whether racially prejudiced jurors can set aside their prejudices. But s. 649 of the *Code* forbids this. So, imperfect as it is, the only way we have to test whether racially prejudiced jurors will be able to set aside their prejudices and judge impartially between the Crown and the accused, is by questioning prospective jurors on challenges for cause. In many cases, we can infer from the nature of widespread racial prejudice, that some jurors at least may be influenced by those prejudices in their deliberations. Whether or not this risk will materialize must be left to the triers of impartiality on the challenge for cause. To make it a condition of the right to challenge to cause is to require the defence to prove the impossible and to accept that some jurors may be partial.

(5) *Failure to Read s. 638(1)(b) Purposively*

37 The object of s. 638(1)(*b*) must be to prevent persons who may not be able to act impartially from sitting as jurors. This object cannot be achieved if the evidentiary threshold for challenges for cause is set too high.

38 As discussed above, to ask an accused person to present evidence that some jurors will be unable to set their prejudices aside is to ask the impossible. We may infer in many cases, however, from the nature of racial prejudice, that some prospective jurors, in a community where prejudice against people of the accused's race is widespread, may

be both prejudiced and unable to identify completely or free themselves from the effects of those prejudices. It follows that the requirement of concrete evidence that widespread racism will cause partiality would not fulfill the purpose of s. 638(1)(*b*).

39 Similarly, an evidentiary threshold of extreme prejudice would fail to fulfill the object of s. 638(1)(*b*). Extreme prejudice is not the only sort of prejudice that may render a juror partial. Ordinary "garden-variety" prejudice has the capacity to sway a juror and may be just as difficult to detect and eradicate as hatred. A threshold met only in exceptional cases would catch only the grossest forms of racial prejudice. Less extreme situations may raise a real risk of partiality. Yet there would be no screening of jurors in those situations. The aim of the section -- to permit partial jurors to be identified and eliminated -- would be only partially achieved. The exceptional nature of a situation is a poor indicator of whether there is a realistic danger or potential of partiality. Widespread racial prejudice is by definition not exceptional. Indeed, the very fact that it is not exceptional may add to a concern that some members of the jury pool may possess attitudes that may interfere with the impartial discharge of their obligations.

40 This raises the question of what evidentiary standard is appropriate on applications to challenge for cause based on racial prejudice. The appellant appears to accept the standard of widespread racial prejudice in the community. Interveners, however, urge a lower standard. One suggestion is that all aboriginal accused should have the right to challenge for cause. Another is that any accused who is a member of a disadvantaged group under s. 15 of the *Charter* should have the right to challenge for cause. Also possible is a rule which permits challenge for cause whenever there is bias against the accused's race in the community, even if that bias is not general or widespread.

41 A rule that accords an automatic right to challenge for cause on the basis that the accused is an aboriginal or member of a group that encounters discrimination conflicts from a methodological point of view with the approach in *Sherratt*, *supra*, that an accused may challenge for cause only upon establishing that there is a realistic potential for juror partiality. For example, it is difficult to see why women should have an automatic right to challenge for cause merely because they have been held to constitute a disadvantaged group under s. 15 of the *Charter*. Moreover, it is not correct to assume that membership in an aboriginal or minority group always implies a realistic potential for partiality. The relevant community for purposes of the rule is the community from which the jury pool is drawn. That community may or may not harbour prejudices against aboriginals. It likely would not, for example, in a community where aboriginals are in a majority position. That said, absent evidence to the contrary, where widespread prejudice against people of the accused's race is demonstrated at a national or provincial level, it will often be reasonable to infer that such prejudice is replicated at the community level.

42 On the understanding that the jury pool is representative, one may safely insist that the accused demonstrate widespread or general prejudice against his or her race in the community as a condition of bringing a challenge for cause. It is at this point that bigoted or prejudiced people have the capacity to affect the impartiality of the jury.

43 I add this. To say that widespread racial prejudice in the community can suffice to establish the right to challenge for cause in many cases is not to rule out the possibility that prejudice less than widespread might in some circumstances meet the *Sherratt* test. The ultimate question in each case is whether the *Sherratt* standard of a realistic potential for partiality is established.

(6) *Failure to Interpret s. 638(1)(b) in Accordance with the Charter*

44 Parliament's laws should be interpreted in a way that conforms to the constitutional requirements of the *Charter*: see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. More particularly, where Parliament confers a discretion on a judge, it is presumed that Parliament intended the judge to exercise that discretion in accordance with the *Charter: see Slaight, supra.* This applies to the discretion conferred on trial judges by s. 638(2) of the *Code.*

45 The s. 11(*d*) of the *Charter* guarantees to all persons charged in Canada the right to be presumed innocent "until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". A *Charter* right is meaningless, unless the accused is able to enforce it. This means that the accused must be permitted to challenge potential jurors where there is a realistic potential or possibility that some among the jury pool may harbour prejudices that deprive them of their impartiality.

46 This Court in *Sherratt, supra,* at p. 525, *per* L'Heureux-Dubé J., asserted the need for guarantees, as opposed to presumptions, of impartiality if *Charter* rights are to be respected:

> The perceived importance of the jury and the *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place.

Doherty J.A. in *Parks*, *supra,* at p. 362, similarly underlined the need for safeguards of the accused's s. 11(*d*) *Charter* rights:

> 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.

47 The challenge for cause is an essential safeguard of the accused's s. 11(*d*) *Charter* right to a fair trial and an impartial jury. A representative jury pool and instructions from counsel and the trial judge are other safeguards. But the right to challenge for cause, in cases where it is shown that a realistic potential exists for partiality, remains an essential filament in the web of protections the law has woven to protect the constitutional right to have one's guilt or innocence determined by an impartial jury. If the *Charter* right is undercut by an interpretation of s. 638(1)(*b*) that sets too high a threshold for challenges for cause, it will be jeopardized.

48 The accused's right to be tried by an impartial jury under s. 11(*d*) of the *Charter* is a fair trial right. But it may also be seen as an anti-discrimination right. The application, intentional or unintentional, of racial stereotypes to the detriment of an accused person ranks among the most destructive forms of discrimination. The result of the discrimination may not be the loss of a benefit or a job or housing in the area of choice, but the loss of the accused's very liberty. The right must fall at the core of the guarantee in s. 15 of the *Charter* that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination".

49 Section s. 638(1)(*b*) should be read in light of the fundamental rights to a fair trial by an impartial jury and to equality before and under the law. A principled exercise of discretion in accordance with *Charter* values is required: see *Sherratt, supra.*

50 Although allowing challenges for cause in the face of widespread racial prejudice in the community will not eliminate the possibility of jury verdicts being affected by racial prejudice, it will have important benefits. Jurors who are honest or transparent about their racist views will be removed. All remaining jurors will be sensitized from the outset of the proceedings regarding the need to confront racial prejudice and will help ensure that it does not impact on the jury verdict. Finally, allowing such challenges will enhance the appearance of trial fairness in the eyes of the accused and other members of minority groups facing discrimination: see *Parks*, *supra*.

(7) *The Slippery Slope Argument*

51 The Crown concedes that practical concerns cannot negate the right to a fair trial. The Court of Appeal also emphasized this. Yet behind the conservative approach some courts have taken, one detects a fear that to permit challenges for cause on the ground of widespread prejudice in the community would be to render our trial process more complex and more costly, and would represent an invasion of the privacy interests of prospective jurors without a commensurate increase in fairness. Some have openly expressed the fear that if challenges for cause are permitted on grounds of racial prejudice, the Canadian approach will quickly evolve into the approach in the United States of routine and sometimes lengthy challenges for cause of every juror in every case with attendant cost, delay and invasion of juror privacy.

52 In my view, the rule enunciated by this Court in *Sherratt*, *supra*, suffices to maintain the right to a fair and impartial trial, without adopting the United States model or a variant on it. *Sherratt* starts from the presumption that members of the jury pool are capable of serving as impartial jurors. This means that there can be no automatic right to challenge for cause. In order to establish such a right, the accused must show that there

is a realistic potential that some members of the jury pool may be biased in a way that may impact negatively on the accused. A realistic potential of racial prejudice can often be demonstrated by establishing widespread prejudice in the community against people of the accused's race. As long as this requirement is in place, the Canadian rule will be much more restrictive than the rule in the United States.

53 In addition, procedures on challenges for cause can and should be tailored to protect the accused's right to a fair trial by an impartial jury, while also protecting the privacy interests of prospective jurors and avoiding lengthening trials or increasing their cost.

54 In the case at bar, the accused called witnesses and tendered studies to establish widespread prejudice in the community against aboriginal people. It may not be necessary to duplicate this investment in time and resources at the stage of establishing racial prejudice in the community in all subsequent cases. The law of evidence recognizes two ways in which facts can be established in the trial process. The first is by evidence. The second is by judicial notice. Tanovich, Paciocco and Skurka observe that because of the limitations on the traditional forms of proof in this context, "doctrines of judicial notice [will] play a significant role in determining whether a particular request for challenge for cause satisfies the threshold test": see *Jury Selection in Criminal Trials* (1997), at p. 138. Judicial notice is the acceptance of a fact without proof. It applies to two kinds of facts: (1) facts which are so notorious as not be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy: see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at p. 976. The existence of racial prejudice in the community may be a notorious fact within the first branch of the rule. As Sopinka, Lederman and Bryant note, at p. 977, "[t]he character

of a certain place or of the community of persons living in a certain locality has been judicially noticed". Widespread racial prejudice, as a characteristic of the community, may therefore sometimes be the subject of judicial notice. Moreover, once a finding of fact of widespread racial prejudice in the community is made on evidence, as here, judges in subsequent cases may be able to take judicial notice of the fact. "The fact that a certain fact or matter has been noted by a judge of the same court in a previous matter has precedential value and it is, therefore, useful for counsel and the court to examine the case law when attempting to determine whether any particular fact can be noted": see Sopinka, Lederman and Bryant, *supra*, at p. 977. It is also possible that events and documents of indisputable accuracy may permit judicial notice to be taken of widespread racism in the community under the second branch of the rule. For these reasons, it is unlikely that long inquiries into the existence of widespread racial prejudice in the community will become a regular feature of the criminal trial process. While these comments are not necessarily limited to challenges for cause, the question whether they are applicable to other phases of the criminal trial is not to be decided in the present case.

55 At the stage of the actual challenge for cause, the procedure is similarly likely to be summary. The trial judge has a wide discretion in controlling the process to prevent its abuse, to ensure that it is fair to the prospective juror as well as to the accused, and to avoid the trial's being unnecessarily prolonged by challenges for cause: see *Hubbert*, *supra*. In the case at bar, Hutchison J. at the first trial confined the challenge to two questions, subject to a few tightly controlled subsidiary questions. This is a practice to be emulated. The fear that trials will be lengthened and rendered more costly by upholding the right to challenge for cause where widespread racial prejudice is established is belied by the experience in Ontario since the ruling in *Parks*, *supra*. The Criminal Lawyers' Association (Ontario), an intervener, advised that in those cases where

the matter arises, an average of 35-45 minutes is consumed. The Attorney General for Ontario did not contradict this statement and supports the appellant's position.

56 While cost-benefit analyses cannot ultimately be determinative, permitting challenges for cause on the basis of widespread prejudice against persons of the accused's race seems unlikely to lengthen or increase significantly the cost of criminal trials. Nor, properly managed, should it unduly impinge on the rights of jurors. As Doherty J.A. stated in *Parks, supra*, at p. 379:

> In reaching my conclusion I have not relied on a costs/benefit analysis. Fairness cannot ultimately be measured on a balance sheet. . . . 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.

Summary

57 There is a presumption that a jury pool is composed of persons who can serve impartially. However, where the accused establishes that there is a realistic potential for partiality, the accused should be permitted to challenge prospective jurors for cause under s. 638(1)(*b*) of the *Code*: see *Sherratt, supra*. Applying this rule to applications based on prejudice against persons of the accused's race, the judge should exercise his or her discretion to permit challenges for cause if the accused establishes widespread racial prejudice in the community.

Conclusion

58 Although they acknowledged the existence of widespread bias against aboriginals, both Esson C.J. and the British Columbia Court of Appeal held that the

evidence did not demonstrate a reasonable possibility that prospective jurors would be partial. In my view, there was ample evidence that this widespread prejudice included elements that could have affected the impartiality of jurors. Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity. As the Canadian Bar Association stated in *Locking up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release* (1988), at p. 5:

> Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals.

There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system: see Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*, at p. 33; *Royal Commission on the Donald Marshall, Jr., Prosecution: Findings and Recommendations*, vol. 1 (1989), at p. 162; *Report on the Cariboo-Chilcotin Justice Inquiry* (1993), at p. 11. Finally, as Esson C.J. noted, tensions between aboriginals and non-aboriginals have increased in recent years as a result of developments in such areas as land claims and fishing rights. These tensions increase the potential of racist jurors siding with the Crown as the perceived representative of the majority's interests.

59 In these circumstances, the trial judge should have allowed the accused to challenge prospective jurors for cause. Notwithstanding the accused's defence that another aboriginal person committed the robbery, juror prejudice could have affected the trial in many other ways. Consequently, there was a realistic potential that some of the jurors might not have been indifferent between the Crown and the accused. The potential for prejudice was increased by the failure of the trial judge to instruct the jury to set aside

any racial prejudices that they might have against aboriginals. It cannot be said that the accused had the fair trial by an impartial jury to which he was entitled.

60 I would allow the appeal and direct a new trial.

Appeal allowed.

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