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Between Her Majesty the Queen, and John Clarke, Gaetan Heroux and Stefan Pilipa, accused

INDEXED AS: R. v. Clarke

Ontario Superior Court of Justice
Toronto Region - Toronto, Ontario

JUDGES: Ferrier J.

[2003] O.J. No. 3883; 2003 ON.C. LEXIS 3454

DATE INFORMATION: January 29, 2003.

JUDGMENT DATE: January 29, 2003

COUNSEL:
[*1] V. Paris and J. Cisorio, for the Crown.
P. Rosenthal, for the accused Clarke.
R. Kellerman, for the accused Heroux.
J. House, for the accused Pilipa.

JUDGMENT:

[1] FERRIER J.:-- The applicants John Clarke, Gaetan Heroux and Stefan Pilipa are charged with various offences arising out of a demonstration held on June 15, 2000 at the Provincial Legislature at Queen's Park in Toronto. John Clarke is charged with counselling assault police and counselling participation in a riot, Gaetan Heroux and Stefan Pilipa are charged with participating in a riot.

[2] This is an application for an order granting the applicants the right to ask questions of prospective jury members as part of a challenge for cause. The parties have agreed on questions related to pretrial publicity and concerning any relationship a juror may have to a member of the police force, and I agree that such questions are appropriate.

[3] The following proposed question is objected to by the Crown:

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the people charged were participating in a demonstration on behalf of the homeless and the poor.

[4] The above [*2] referred demonstration was organized by the Ontario Coalition Against Poverty - OCAP. The demonstration was held to protest against the provincial government's having enacted the Safe Streets Act, cut welfare payments and eliminated programs to build affordable housing. The protesters asked that a delegation be permitted to address the legislature on these issues. When approximately 1,500 demonstrators arrived at Queen's Park in the afternoon of June 15, 2000, there were several hundred police officers awaiting their arrival. Superintendent Maher of the Toronto Police Services informed the demonstrators that no delegation would be allowed to enter the legislature. An

'Our research-papers and the submissions we received provided us with ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy. We believe there is a need to protect people who are poor from discrimination. ...

'We believe it is essential to protect the most destitute in Canadian society against discrimination. At the very least, the addition of this ground would ensure there it a means to challenge stereotypes about the poor in the policies of private and public institutions. We feel that this ground would perform an important educational function'."

[13] Professor Hermer is of the opinion that the general public has a prejudicial view of homeless people. He bases this opinion on the place that homeless people have in North American society and the ways in which their activities violate widespread traditional norms. Professor Hermer says this in his conclusion:

"... given the severe [*7] way in which homeless people violate widely held social norms and are subjected to widespread prejudicial stereotypes, it is my opinion that the majority of people in the general public are likely to be prejudiced against homeless people within the current norms and political climate of North American society. By extension, protest social movements which represent the interests of and act as a voice for homeless people, and which include homeless people in their movement, are likely to be subjected to the same prejudicial stereotypes."

[14] The Crown argues that there is no evidentiary basis in Professor Hermer's affidavit to support his conclusion. There is some strength to this argument, but I prefer to characterize the support for his opinion, as evidenced by his affidavit, as being somewhat thin. The point, however, goes only to the weight of the evidence, and I prefer in this case to rely in this application on the evidence of Mr. Porter.

[15] I note that in *Falkiner v. Ontario Ministry of Community and Social Services, (2002), 59 O.R. (3d) 481,* the Ontario Court of Appeal has held that the receipt of social assistance is to be recognized as an [*8] Analogous prohibited ground of discrimination under section 15(1) of the Charter. Among other findings on the evidence which the Court of Appeal did not interfere with was that,

"Social assistance recipients face resentment and anger from, others in society, who see them as freeloading and lazy.", and therefore subject to stigma leading to social exclusion.

[16] The law relevant to this application is stated clearly in *Regina v. Find, [2001] 1 S.C.R. 863,* and the following extracts from that decision are of assistance here.

"In order to challenge for cause under section 638(1)(b), one must show a 'realistic potential' that the jury pool may contain people who are not impartial, in the sense that even upon proper instructions by the trial judge, they may not be able to set aside their prejudice and decide fairly between the Crown and the accused. ...

"As a practical matter, establishing a realistic potential for juror partiality generally requires satisfying the Court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial [*9] decision. These two components of the challenge for cause test reflect, respectively, the attitudinal and behavioral components of partiality. ... "These two components of the test involve distinct inquiries. The first is concerned with the existence of a material bias, and the second with the potential effect "of the bias on the trial process.

However, the overarching consideration, in all cases, is whether there exists a realistic potential for partial juror behaviour. The two components of this test serve to ensure that all aspects of the issue are

examined. They are not watertight compartments, but rather guidelines for determining whether, on the record before the Court, a realistic possibility exists that some jurors may decide the case on the basis of preconceived attitudes or beliefs, rather than the evidence placed before them.

"The test for partiality involves two key concepts: 'bias' and 'widespread'. It is important to understand how each term is used." "'Bias' in, the context of challenges for cause, refers to an attitude that could lead jurors to discharge their function in the case at hand in a prejudicial and unfair manner."

"Bias is not determined at large, but [*10] in the context of the specific case. What must be shown is a bias that could, as a matter of logic and experience, incline a juror to a "certain party or conclusion in a manner that is unfair. This is determined without regard to the cleansing effect of trial safeguards and the direction of the trial judge, which become relevant only at the second stage consideration of the behavioral effect of the bias." "... 'bias' may flow from a number of different attitudes, including: a personal interest in the matter to be tried ...; prejudice arising from prior exposure to the case, as in the case of pretrial publicity ...; and prejudice against members of the accused's social or racial group."

[17] And I pause to emphasize the words "social group".

"The second concept, 'widespread', relates to the prevalence or incidence of the bias in question. Generally speaking, the alleged bias must be established as sufficiently pervasive in the community to raise the possibility that it may be harbored by one or more members of a representative jury pool (although, in exceptional circumstances, a less prevalent bias may suffice, provided "it raises a realistic potential of juror partiality." [*11]

"If widespread bias is shown, the second question arises: may some jurors be unable to set aside their bias despite the cleansing effect of the judge's instructions and the trial process? This is the behavioural component of the test. The law accepts that jurors may enter the trial with biases. But the law presumes that jurors' views and biases will be cleansed by the trial process. It therefore does not permit a party to challenge the right to sit on a jury because of the existence of widespread bias alone."

"A party may displace the presumption of juror impartiality by calling evidence and/or by asking the judge to take judicial notice of facts. In addition, the judge may draw inferences from events that occur in the proceedings and may make common sense inferences about how certain biases ... may affect the decision-making process."

"Ultimately, the decision to allow or deny an application to challenge for cause falls to the discretion of the trial judge. However, judicial discretion should not be confused with judicial whim. Where a "realistic potential for partiality exists, the right to challenge must flow. ... If in doubt, the judge should err on the side of permitting challenges. [*12] Since the right of the accused to a fair trial is at stake, '[i]t is better to risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges which are necessary'."

[18] I have no difficulty on the evidence in concluding that there is widespread prejudice against the poor and the homeless in the widely applied characterization that the poor and homeless are dishonest and irresponsible and that they are responsible for their own plight. It is not a large leap to conclude that this bias could incline a juror to a certain party or conclusion in a manner that is unfair. Will the features of the trial process and the trial judge's instructions as referred to in Regina v. Find cleanse the bias in this case? The evidence of Mr. Porter, which is not challenged, is that the prejudice against the poor and homeless is similar to racial prejudice. That, it seems to me, would clearly support permitting the challenge.

[19] In addition, however, if in doubt, the trial judge should err on the side of caution. The bias in this context is so widespread and, on the evidence, the bias is firmly held by so many in our community, I conclude that one or more

jurors may be [*13] incapable of setting aside the bias despite the trial safeguards that have been referred to in Regina v. Find and that the challenge requested is proper and the question ought to be permitted.

[20] I come to this conclusion notwithstanding the fact that the applicants themselves may or may not be homeless and may or may not be among the poor. A biased juror would, in my view, just as likely be unable to overcome the bias in the case of these applicants considering the circumstances of the event of June 15, 2000 and their involvement that day as demonstrators and so-called leaders of the demonstration.

[21] In the unique circumstances of this case, I conclude that the challenge ought to be permitted.

[22] There is no issue concerning the words of the question and it will be allowed as proposed by the applicants.