C.A.C. No. 117036

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. R.D.S., 1995 NSCA 201

Freeman, Pugsley and Flinn, JJ.A.

BETWEEN:

R.D.S.	)	Burnley A. Jones
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Robert E. Lutes, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	October 13, 1995
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	)	Judgment Delivered:
	)	October 25, 1995
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THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Pugsley, J.A. concurring; Freeman, J.A. dissenting on the ground that the summary conviction appeal court judge erred in law in concluding a reasonable apprehension of bias on the part of the trial judge.

FLINN, J.A.:

The appellant appeals, subject to leave, from a decision of Chief Justice Glube of the Supreme Court of Nova Scotia sitting as a summary conviction appeal court judge.

The Chief Justice ordered that a new trial be held, before a different judge, with respect to a charge, against the appellant, involving three counts of assaulting and resisting a peace officer. The Chief Justice determined that there was a reasonable apprehension of bias on the part of the Youth Court Judge who presided at the trial of the appellant.

The Youth Court Judge had acquitted the appellant of all counts in the Indictment.

The appellant is a 16 year old African Canadian. He was tried, as a young offender, on three separate counts arising out of one incident in Halifax on October 17th, 1993. He was charged with unlawfully assaulting Donald Stienburg, a peace officer, contrary to s. 271(a) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 (the **Code)**; with unlawfully assaulting Donald Stienburg, a peace officer, with intent to prevent the lawful arrest of another person contrary to s. 271(b) of the **Code**; and with unlawfully resisting Constable Stienburg, a peace officer, engaged in the lawful execution of his duty contrary to s. 129(a) of the **Code**.

Only two persons testified at the trial before the Youth Court Judge; namely, the peace officer named in the Indictment, Constable Stienburg, a caucasian, and the appellant. Their testimony conflicted and is summarized as follows.

Constable Stienburg has been a member of the Halifax Police Force for 8 years. On October 17th, 1993, he was standing near his police vehicle on Brunswick Street in Halifax with a young man whom he had just arrested, and who was to be charged with car theft. Previously, there had been a pursuit of a stolen van occupied by "five non-white males - young kids" as they were described to Constable Stienburg in a radio transmission. Constable Stienburg was in the vicinity of the pursuit, and, as a result of his participation, one of the young men was arrested.

While Constable Stienburg was waiting for "back-up", the appellant came on the scene driving a bicycle. Constable Stienburg testified that the appellant, who appeared to be in complete control of his bicycle, "cut directly across the street.....and drove right into my legs with the bike, without stopping, and started yelling at me .....He was trying to push me away from the person I had arrested and was very concerned about the person I had arrested ..... He was pushing me with his shoulders and his arms away from the accused that I had arrested".

He further testified that he could not move to avoid the appellant's bicycle because he had the young man, who had been arrested, in a neck restraint.

As a result of the appellant's actions, Constable Stienburg arrested the appellant. This arrest led to the three counts which were tried before the Youth Court Judge.

The appellant testified that on the day in question he was travelling from his grandmother's house to his own house on his bicycle. He testified that he saw the police car, together with a crowd that had gathered, and, being "nosy", he drove on his bicycle to the scene where Constable Stienburg had his suspect under arrest. The appellant knew the suspect and inquired of the suspect what had happened. He indicated to the suspect that he would call the suspect's mother. The appellant further testified that in response to his discussions with the suspect, Constable Stienburg said, "Shut up or you will be under arrest too". He then testified that when he again inquired of the person under arrest "Do you want me to go tell your mother?" that Constable Stienburg grabbed him, put him in a choke hold and told him he was under arrest. The appellant testified that he did not run into Constable Stienburg with his bicycle, nor did he hit the Constable; and had no explanation for why the Constable arrested him.

In an oral decision, rendered at the conclusion of the evidence and the submissions of counsel, the Youth Court Judge reviewed the facts, and made certain findings

based upon credibility in favour of the appellant.

In her remarks she said:

> "In my view, in accepting the evidence, and I don't say that I accept everything that Mr. S. has said in Court today, but certainly he has raised a doubt in my mind and, therefore, based upon the evidentiary burden, which is squarely placed upon the Crown, that they must prove all the elements of the offence beyond a reasonable doubt, I have queries in my mind with respect to what actually transpired on the afternoon of October the 17th."

The Youth Court Judge continued:

> "The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I'm not saying that the constable has misled this Court, although police officers have been known to do that in the past. And I'm not saying that the officer overreacted but certainly police officers do overreact, particularly when they're dealing with non-white groups. That, to me, indicates a state of mind right there that is questionable.
>
> I believe that probably the situation in this particular case is the case of a young police officer who overreacted. And I do accept the evidence of Mr. S. that he was told to shut up or he would be under arrest. That seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all of the evidence before the Court I have no other choice but to acquit."

Pursuant to the provisions of s. 813(b)(i) of the **Code**, the Crown appealed the acquittal on the grounds that the concluding paragraphs of the decision of the Youth Court Judge demonstrated an apprehension of bias.

The Chief Justice, referring to the concluding paragraphs of the oral decision of the Youth Court Judge, said the following:

> "On a thorough review of the transcript, I find no basis for these remarks in the evidence. There was no evidence before the trial court as to the "prevalent attitude of the day" or otherwise the remarks made relating to the police. With great respect, judges must be extremely careful to avoid expressing views which do not form part of the evidence.

> The test of apprehension of bias is an objective one, that is, whether a reasonable right-minded person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. In my respectful opinion, in spite of the thorough review of the facts and the finding on credibility, the two paragraphs at the end of the decision lead to the conclusion that a reasonable apprehension of bias exists.
>
> Having found that, I need go no further as such a finding requires that a new trial be ordered."

Since the appeal to this Court involves a summary conviction matter, leave to appeal is required, and the appeal is restricted to questions of law. If the summary conviction appeal court judge made no error in law in arriving at her decision, the appeal cannot be sustained.

Section 839(1)(a) of the **Code** provides for appeals to this Court in summary conviction matters as follows::

> "An appeal to the court of appeal as defined in s. 637 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against
>
> > (a) a decision of a court in respect to an appeal under s. 822."

The appellant raises three grounds of appeal:

(i) That the Chief Justice erred in law in overturning the acquittal of the appellant where that acquittal was based on findings of credibility by the Youth Court Judge;

(ii) The Chief Justice erred in law in finding a reasonable apprehension of bias on the part of the Youth Court Judge;

(iii) The Chief Justice erred in law in adopting a formal equality approach to the determination of a reasonable apprehension of bias rather than, as

mandated by ss. 15, 11(d) and 7 of the **Charter of Rights and Freedoms**, a substantive equality approach.

1. Overturning Acquittal Based on Findings of Credibility

It is clear that the decision of the Chief Justice was not based upon a re-examination, and determination, of issues of credibility. Her decision was based solely on the issue of apprehension of bias.

The Chief Justice, therefore, did not err at law, in failing to defer to the trial judge on a finding of credibility or fact.

I would therefore dismiss this ground of appeal.

2. Apprehension of Bias

The essence of counsel's argument here is that the Chief Justice applied too narrow a test in considering the question of apprehension of bias. Secondly, if the proper test had been applied, it would be unreasonable to conclude apprehension of bias on the part of the Youth Court Judge.

It is necessary to review the test for apprehension of bias as that has been formulated in judgments of the courts and in legal writings.

In **The Committee for Justice and Liberty v. The National Energy Board**, [1978] 1 S.C.R. 369 Laskin C.J., writing for the majority, said at p. 391:

> "This Court in fixing on the test of reasonable apprehension of bias, as in *Ghirardosi v. Minister of Highways for British Columbia*, [1966] S.C.R. 367, and again in *Blanchette v. C.I.S. Ltd*, [1973] S.C.R. 833 (where Pigeon J. said at p. 842-43, that "a reasonable apprehension that the judge might not act in an

entirely impartial manner is ground for disqualification") was merely restating what Rand J. said in *Szilard v. Szasz*, [1955] S.C.R. 3 at pp. 6-7 in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that

the National Energy Board is enjoined to have regard for the public interest."

de Grandpré J., while dissenting on the ultimate issue in the case, put the test this way at p. 394:

> ".....the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.'
>
> I can see no real difference between the expressions found in the decided cases, be they "reasonable apprehension of bias", "reasonable suspicion of bias", or "real likelihood of bias". The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience.'

In **Szilard v. Szasz**, (supra) Rand J. said at pp. 6-7:

> "These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs."

A similar test is used in England. In **Metropolitan Properties Ltd. v. Lannon**, [1968] 3 All E.R. 304 Denning M.R. said at p. 310:

> ".....in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there

> was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *R. v. Huggins*, [1895-99] All E.R. Rep. 914; [1895] 1 Q.B. 563; *R. v. Sunderland Justices*, [1901] 2 K.B. 357 at p. 373, per Vaughan Williams, L.J. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *R. v. Camborne Justices, Ex p. Pearce*, [1954] 2 All E.R. 850 at pp. 8; [1955] 1 Q.B. 41 at pp. 48-51; *R. v. Nailsworth Justices, Ex p. Bird*, [1953] 2 All E.R. 652. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'."

In **Judicial Review of Administrative Action**, de Smith, 4th edition at p. 250, the following is said concerning apprehension of bias:

> "In developing the modern law relating to disqualification of judicial officers for interest and bias, the superior courts have striven to apply the principle that it 'is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done,' without giving currency to 'the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done'. The emphasis has shifted from the simple precepts of the law of nature to the more subtle refinements of public policy. In order that public confidence in the administration of justice may be fully maintained, no man who is himself a party to proceedings or who has any direct pecuniary interest in the result is qualified at common law to adjudicate in those proceedings. If, however, it is alleged that the adjudicator has made himself a partisan, or is to be suspected of partisanship, by reason of his words or deeds or his association with a party who is instituting or defending the proceedings before him, the courts will not hold him to be disqualified unless the circumstances point to a real likelihood or reasonable suspicion of bias. They have generally (but not invariably) disclaimed any power to inquire whether bias has in fact been shown by a judge or magistrate."

In **Administrative Law and Practice**, Reid & David, 2nd edition at p. 231, the authors write:

> "...They (referring to courts) consist essentially of a neutral

> judge deciding contests brought before him by others upon facts which are revealed only in a hearing attended by all persons having an interest. He decides in accordance with "the law" which comprises legislation and reports of decisions in similar cases.
>
> 'The keystone in this structure is the neutrality of the judge. Should even the appearance of it be lost the usefulness of the court is at an end and the structure collapses. In a celebrated, if overworked, phrase, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done".
>
> 'This overriding need for neutrality, in appearance as well as in fact, dictates a standard requiring freedom from even the appearance of bias. Nothing less will do. The nature of the tribunal itself governs the nature of the rule. Thus, the standard that courts apply to themselves, called here, for convenience, the "common law" bias rule, does not require proof that bias influenced the result; it is enough if appearances reasonably justify the apprehension that it might have done so."

These authorities, and others, were canvassed and approved by this Court in **J.B.B. & C.B.B. v. J.A.B. et al** (1992), 113 N.S.R. (2d) 60 and in the case of **R. v. Smith and Whiteway Fisheries Ltd.**, (1994) 133 N.S.R. (2d) 50.

From a review of the authorities, I conclude that the essential ingredients of the test to determine apprehension of bias are as follows:

(i) bias, in the context of this test, means nothing more, or less, than the inability of the judge to act in an entirely impartial manner, for whatever reason;

(ii) the test is an objective one; and the standard of reasonableness must be applied, not only to the person who perceives the alleged bias, but also to the apprehension of bias itself;

(iii) in applying the standard of reasonableness to the person who perceives the alleged bias, the courts ask: "What would a

reasonable and right-minded person think, with knowledge of all of the facts?" It is not, in this case, what the Youth Court Judge thinks, nor what the police officer (nor, indeed, the Police Department) thinks;

(iv) in applying the standard of reasonableness to the apprehension of bias itself, the courts have said that there is no essential difference between the phrases, invariably used, such as "reasonable apprehension of bias", "reasonable suspicion of bias," or "real likelihood of bias". The common thread running through these phrases, and the standard that must be applied, is that the apprehension, suspicion or likelihood of bias, must be a reasonable one. Surmise or conjecture is not sufficient; nor is the test related to the very sensitive or scrupulous conscience.

(v) In applying the test, it is not necessary to show that actual bias influenced the result. The appearance of bias, assessed objectively, and whether intended or not, is sufficient.

The test which the Chief Justice applied in this case, in her words, was as follows:

> "The test of apprehension of bias is an objective one, that is, whether a reasonable right-minded person with knowledge of all of the facts would conclude that the judge's impartiality might reasonably be questioned."

In my opinion the Chief Justice made no error in law in the test which she applied to determine apprehension of bias on the part of the Youth Court Judge. She considered it necessary that there be an objective standard both with respect to the person who perceives the alleged bias, and with respect to the apprehension of bias itself.

In applying the test of apprehension of bias to the circumstances of this case, the Chief Justice correctly pointed out that there was no evidence before the Youth Court Judge with respect to the comments, in her decision, relating to the police.

It is apparent, from the words which the Youth Court Judge used, that she based her decision to acquit the appellant, at least in part, on her general comments with respect to the police. She said in the concluding part of her decision:

> "Based upon my comments, and based upon all of the evidence before the Court, I have no other choice but to acquit." {emphasis added}.

These words, in the decision of the Youth Court Judge, follow immediately after her comments that:

> ".....And I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they're dealing with non-white groups. That, to me, indicates a state of mind right there that is questionable.
>
> I believe that probably the situation in this particular case is the case of a young police officer who overreacted. And I do accept the evidence of Mr. S. that he was told to shut up or he would be put under arrest. That seems to be in keeping with the prevalent attitude of the day."

Counsel for the appellant argues that these comments do not indicate that the Youth Court Judge is biased against the police. He says they merely reflect an unfortunate social reality.

That may very well be so; however, it does not address the real issue here. The issue is whether or not the Youth Court Judge, considered matters not in evidence in arriving at her critical findings of credibility, and, hence, acquittal.

From the general proposition that "police officers overreact when they are dealing with non-white groups", the Youth Court Judge concluded that Constable Stienburg overreacted. She then accepted the appellant's evidence that Constable Stienburg told him

to "shut up or he would be under arrest," because "that seems to be in keeping with the prevalent attitude of the day."

There was no evidence before the Youth Court Judge as to what was the "prevalent attitude of the day"; nor, indeed, was there any evidence as to why Constable Stienburg overreacted.

If there were concerns in this regard, they were not canvassed in the cross-examination of Constable Stienburg; and, as a result, Constable Stienburg had no opportunity to address any such concerns in his testimony.

The unfortunate use of these generalizations, by the Youth Court Judge, would, in my opinion, lead a reasonable person, fully informed of the facts, to reasonably conclude that the Youth Court Judge would consider the important issue of credibility in this case, at least in part, on the basis of matters not in evidence; and, hence, unfairly.

Therefore, in my opinion the Chief Justice made no error in law, either with respect to the test for reasonable apprehension of bias or in the application of that test. I would dismiss this ground of appeal.

3. Formal Equality Approach v. Substantive Equality Approach

As to the appellant's third ground of appeal, I agree with counsel for the respondent that this **Charter** argument is not a proper issue in this appeal.

Quite apart from the fact that it was not raised before the summary conviction appeal court judge, the reference by the Chief Justice, to the case of **R. v. Wald** (1989), 44 C.C.C. (3d) 315, was for the sole proposition that the principles of fundamental justice and the requirement for a fair hearing applied not only to issues raised by the accused but to the trial in general including Crown witnesses.

In any event, the Chief Justice did not, in my view, apply an inappropriate

equality approach in her consideration of apprehension of bias.

I would grant leave to appeal, but would dismiss the appeal.

Flinn, J.A.

Concurred in:

Pugsley, J.A.

FREEMAN, J.A. (Dissenting)

The essential issue in this appeal is whether a trial judge gave rise to a reasonable apprehension of bias in remarks made in the case of a fifteen-year-old black youth arrested by a white police officer on charges of assaulting him, assaulting him with intent to prevent the lawful arrest of another person, and obstructing him.

This appeal is from a summary conviction appeal court judgment setting aside the youth's acquittal on grounds of apprehension of bias.

On October 17, 1993, Constable Donald Stienburg arrested N.R. after receiving a radio transmission that a number of "non-white" youths were seen running from an abandoned stolen vehicle. The appellant, R.D.S., a cousin of N.R., drove up on his bicycle to see what was going on.

Constable Stienburg said R.D.S drove his bicycle into his legs without attempting to stop and tried pushing him away from N.R. with his hands and shoulders. He said the incident lasted only a couple of seconds and R.D.S. was quite upset. He placed R.D.S. in a choke hold and informed him he was under arrest.

R.D.S. denied touching the officer with his bicycle or his hands. He denied telling the officer: "let my cousin go!" He said he was talking only to N.R., not the officer. He said Constable Stienburg told him "Shut up, shut up, or you'll be under arrest too."

A number of persons were at the scene but only Constable Stienburg and R.D.S. gave evidence.

I have had the benefit of reading the judgment of Justice Flinn, who develops the facts more fully. He has reviewed and summarized the law and I am in complete agreement with his conclusions as to the law, which I adopt and rely upon. I respectfully differ, however, as to whether, applying the tests he has set out, the remarks of the trial judge would give rise to a reasonable apprehension of bias. In my view, it was

perfectly proper for the trial judge, in weighing the evidence before her, to consider the racial perspective. I am not satisfied that in doing so she gave the appearance of being biased herself.

The Youth Court Judge, the Honourable Corrine Sparks, reviewed the evidence, including the evidence relating to credibility, and stated:

> ...I don't say that I accept everything that Mr. S. has said in Court today, but certainly he has raised a doubt in my mind. ...I have queries in my mind with respect to what actually transpired on the afternoon of October the 17th.

"Had it ended there," the summary conviction appeal court judge said, "there would have been no basis for this appeal..."

However the Crown had urged the trial judge to accept the evidence of Constable Stienburg over that of R.D.S., and Judge Sparks went on to give the explanation that has become the subject matter of this appeal. She stated:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I'm not saying that the constable has misled the court, although police officers have been known to do that in the past. And I'm not saying that the officer overreacted, but certainly police officers do overreact, particularly when they're dealing with non-white groups. That, to me, indicates a state of mind right there that is questionable.
>
> I believe that probably the situation in this particular case is the case of a young police officer who overreacted. And I do accept the evidence of Mr. S. that he was told to shut up or he would be under arrest. That seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the other evidence before the court, I have no choice but to acquit.

After quoting the first two of these paragraphs the summary conviction appeal court judge concluded:

> On a thorough review of the transcript, I find no basis for these remarks in the evidence. There was no evidence before the trial court as to the "prevalent attitude of the day" or otherwise the remarks

> made relating to the police. With great respect, judges must be extremely careful to avoid expressing views which do not form part of the evidence.
>
> The test of apprehension of bias is an objective one, that is, whether a reasonable right-minded person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. In my respectful opinion, in spite of the thorough review of the facts and the finding on credibility, the two paragraphs at the end of the decision lead to the conclusion that a reasonable apprehension of bias exists.

While it is not clear what Judge Sparks meant by the "prevalent attitude of the day", she may well have been referring to the attitudes exhibited on October 17, 1993, as the appellant's counsel suggests. In that event there would have been evidence before her. I would give the trial judge the benefit of the doubt and exclude that remark from the analysis as a neutral factor. That leaves the remarks about the police.

The officer and the accused entered Judge Sparks' courtroom on an equal footing. There was no evidence other than their testimony. Each was entitled to be believed. Her duty was to determine credibility when their testimony was in conflict. This is a notoriously difficult and inexact exercise in adjudication in which the judge's whole background experience plays a role in the assessment of demeanour and other intangibles.

In supplementary reasons for judgment filed after the appeal, and which do not play a part in it, Judge Sparks referred to the racial configuration of the court "which consisted of the accused, the defence counsel, the court reporter and the judge all being of African Canadian ancestry."

The case was racially charged, a classic confrontation between a white police officer representing the power of the state and a black youth charged with an offence. Judge Sparks was under a duty to be sensitive to the nuances and implications, and to rely on her own common sense which is necessarily informed by her own experience and understanding.

It is unfortunately true and within the scope of general knowledge of any individual that police officers have been known to mislead the court and overreact in dealing with non-white groups. That is a far cry from stating that Constable Stienburg did either. Such a statement could only be made on the evidence, and Judge Sparks was careful to make it clear, initially, that she was not saying he did. It was in that way she introduced the two concepts into her analysis as possible explanations for the conflict in the testimony, and she appeared to reject the first, that there was any attempt to mislead. That left overreaction.

Again, her precise meaning is unclear when she says "That, to me, indicates a state of mind right there that is questionable." She does not attribute that state of mind to Constable Stienburg. Rather, she seems to be directing herself to a need to take certain possibilities into account in her deliberations.

Then she takes the further step, in my mind the key one, of attributing overreaction to Constable Stienburg. That statement, if unsupported by evidence, could be seen as a reflection of stereotypical thinking capable of raising an apprehension of bias. Judge Sparks immediately tied it to evidence: "And I do accept the evidence of Mr. S. that he was told to shut up or he would be under arrest." This seems to indicate that Judge Sparks was concerned that the charges might have arisen more as a result of R.D.S.'s noisy verbal interference than the physical acts, assaults and obstruction, with which he was charged. Such an explanation, indicative of overreaction by the police officer, accorded with the testimony of R.D.S. It would not have been biased behaviour on Judge Sparks' part to reach this conclusion.

In her review of the evidence she had also expressed concern that Constable Stienburg had not testified that N.R. had been in handcuffs during the incident, and that he had laid three charges against the appellant as the result of an incident that by any standard was a minor one. In short, there was some justification for Judge Sparks' finding that

Constable Stienburg had overreacted, enough to justify her in tipping the scales in an assessment of credibility. Whether or not Constable Stienburg did overreact, a finding that he did, based on evidence, was within the purview of the trial judge.

If that finding is not capable of supporting an apprehension of bias, I am not satisfied that such an apprehension arises from any of Judge Sparks' other remarks.

The need to accord deference to a trial judge in the key judicial task of determining what evidence to believe is too important and well established a principle to require restating. Assessing credibility is an art as much as a science and it draws upon all of the judge's wisdom and experience. Questions with racial overtones make the difficulties more intense, yet these questions must be addressed freely and frankly and to the best of the judge's ability. Because of their explosive nature they are more likely than any others to subject the judge to controversy and allegations of bias, but they cannot be ignored if justice is to be done. For this reason appeal courts must adopt a cautious approach when examining the trial judgment to determine whether it gives rise to an apprehension of bias. The objective test is the proper one, and the jurisprudence makes it clear the standard is high. While actual bias need not be proven, the apprehension of it must be real, not conjectural or a matter of mere suspicion. I consider Judge Sparks' remarks to be more consistent with a fair inquiry into delicate subject matter than suggestive of bias on her own part.

In my view the summary conviction appeal court judge applied the correct test, but set too low a standard for the perception of bias. On close examination, the words of Judge Sparks, while not always clear and precise, would not cause a reasonable and informed person to be apprehensive that justice was not being done. I would set aside the summary conviction appeal court judgment and restore the acquittal entered at trial.

Freeman, J.A.

C.A.C. No. 117036

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

R.D.S.	)	
Appellant	)	
- and -	)	R E A S O N S FOR
	)	JUDGMENT BY:
HER MAJESTY THE QUEEN	)	
	)	FLINN, J.A.
	)	FREEMAN, J.A.
	)	(Dissenting)
Respondent	)	
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