

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Sparks*, 2022 NSPC 51

Date: 20220504

Docket: 8491489, 8491490

Registry: Halifax, NS

Between:

Her Majesty the Queen

v.

Adrian Terrell Sparks

DECISION CHARTER APPLICATION

Judge: The Honourable Judge Perry F. Borden

Heard: April 7, 2022, in Provincial Court, Halifax, Nova Scotia

Decision: May 4, 2022

Charges: Sections 145(4)(a) and 733.1(1)(a) *Criminal Code of Canada*

Counsel: Zachary Firlotte, for the Crown
Asaf Rashid, for the Defence

By the Court:

Introduction

[1] At issue in this trial is alleged the racial profiling, and consequently, purported violations of Mr. Sparks' ss. 8 and 9 *Charter* rights.

Background

[2] Mr. Sparks was subject to a release order precluding him from having any contact with Ms. F., and a probation order requiring him to keep the peace and be of good behavior.

[3] On January 17, 2021, at approximately 4:15 p.m., Constable Sym Dewar and Constable Zack Johnson were operating a marked police cruiser on Dunbrack Street in Halifax. Constable Dewar recognized Ms. F.'s vehicle, a white Audi, approaching from behind his vehicle, and noted she was in the passenger seat. He also noted the vehicle was being driven by a Black male.

[4] Constable Dewar possessed a Notice to Parent to serve on Ms. F., concerning an unrelated matter. He slowed his vehicle for the Audi to pass and in doing so observed who he thought was Ms. F.; again, noting a Black male driver. Thereafter,

a licence plate search was conducted, and the same confirmed it was indeed Ms. F.'s vehicle.

[5] Constable Dewar was aware of Ms. F.'s and Mr. Sparks' history and understood Mr. Sparks to be bound by a no contact release order relating to Ms. F. He followed the vehicle to Ms. F.'s residence and activated his emergency equipment. The vehicle pulled over and Constable Dewar approached the driver's door, suspecting it was Mr. Sparks, inquired the driver's name, and arrested him on the breach charges.

Position of the Parties

[6] Mr. Rashid submits racial profiling was the catalyst behind this investigation. He argues the officer did nothing to confirm his suspicion other than assume the Black male driving was Mr. Sparks. As a result, he argues for a stay of proceedings, pursuant to s. 24(1) or an exclusion of evidence under section 24(2) of the *Charter*.

[7] The Crown submits Mr. Sparks' rights were not breached and the arrest and subsequent search were lawful. However, should the Court find Mr. Sparks' rights were breached, the Crown submits a stay of proceedings or exclusion of the evidence is not an appropriate remedy.

Issue

[8] The issues raised at trial are as follows:

(a) Did Constable Dewar violate Mr. Sparks' s. 9 *Charter* rights when he detained him on January 17, 2021?

(b) Did Constable Dewar violate Mr. Sparks' s. 8 when he was searched after detention?

The Law

[9] André, J., in *R. v. Tutu*, 2021 ONSC 5375 (CanLII) relied on *Peart v. Peel (Regional Municipality) Police Services Board* (2006), 2006 CanLII 37566 (ONCA)

43 C.R. where the Court of Appeal noted, at paras 89-90 that:

Racial profiling occurs when race or racialized stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or suspect treatment. The one exception to this is where race is used as part of a known suspect's physical description, the description is detailed, and an individual is investigated because he or she reasonably matches that description.

[10] Moreover, Justice Doherty further opined at paras 95-96 that

... The courts, assisted by various studies, academic writings, and expert evidence have come to recognize a variety of factual indicators that can support the inference that the police conduct was racially motivated, despite the existence of an apparent justification for that conduct...

The indicators of racial profiling recognized in the literature by experts and in the caselaw can assist a trier of fact in deciding what inferences should or should not be drawn and what testimony should or should not be accepted in a particular case....

[11] In *R. v. Le*, 2019 SCC 34, 2019 CSC 34, 2019 CarswellOnt 8589, at para 74-76 the court differentiates between race and racial profiling under s. 9 of the *Charter* and noted:

[74] It is important, at the outset, to understand both the place and purpose of race as a consideration in the detention analysis and how it differs from the concept of racial profiling.

[75] At the detention stage of the analysis, the question is how a reasonable person of a similar racial background would perceive the interaction with the police. The focus is on how the combination of a racialized context and minority status would affect the perception of a reasonable person in the shoes of the accused as to whether they were free to leave or compelled to remain. The s. 9 detention analysis is thus contextual in nature and involves a wide ranging inquiry. It takes into consideration the larger, historic, and social context of race relations between the police and the various racial groups and individuals in our society. The reasonable person in Mr. Le's shoes is presumed to be aware of this broader racial context.

[76] In contrast, the concept of racial profiling is primarily concerned with the motivation of the police. It occurs when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment (Ottawa Police Service, *Racial Profiling* (June 27, 2011), Policy No. 5.39 (online), at p. 2).

[12] In *R. v. Dudhi*, 2019 CarswellOnt 13562 at paragraph 63, Justice Paciocco provided a concise interpretation of racial profiling jurisprudence and found that:

[63] ...Where race or racial stereotypes are used to any degree in suspect selection or subject treatment, there will be no reasonable suspicion or reasonable grounds. The decision will amount to racial profiling.

[13] In the present case, the defence relies on the Halifax, Nova Scotia, “Street Checks Report” by Dr. Scott Wortley and its troubling findings that people of African descent are six times more likely to be stopped by police than people of European descent. Moreover, 30 per cent of all Black males in Halifax have been arrested for a crime at some point in their lives, as compared to 6.8 per cent of the white male population.

[14] It is against that backdrop that Mr. Rashid argues:

The mode of thinking by police in this case would have resulted in any Black man driving and having been stopped, with an attitudinal component (suspecting the Black person driving was involved in criminal activity) and causal component (this thinking led to the detention). This mode of thinking inevitably results in Black persons being disproportionately stopped and investigated by police on mere hunches, without having committed any wrongdoing.

The Evidence

[15] Constable Dewar provided the only *viva voce* evidence of the trial. He testified in a candid and straightforward manner, advising he has been employed with the Halifax Regional Police Department since September 2016.

[16] According to his evidence, in the last four years, he has had fewer than five interactions with Ms. F., and he noted that Mr. Sparks was present for two of those interactions. He described the F. – Sparks relationship as an on-again, off-again style relationship.

[17] He estimated the duration of one interaction with Mr. Sparks to be over an hour in length and the other interaction to be approximately five minutes.

[18] Constable Dewar's evidence on direct and cross was consistent in noting the vehicle was being driven by a Black male.

[19] He knew Mr. Sparks was on conditions precluding him from having contact with Ms. F.

[20] Upon stopping the vehicle, Constable Dewar proceeded to the driver's door and identified himself as a member of the Halifax Regional Police Department. He advised the driver he suspected he was Mr. Sparks, and the driver relayed his identity. Thereafter, Constable Dewar returned to his police vehicle and searched Mr. Sparks' information on Versadex. The identity matched and Mr. Sparks was arrested for the index offences.

Analysis

[21] I conclude from the evidence there was nothing out of the ordinary concerning the manner in which the white Audi was being driven. Indeed, when asked on direct examination why he did not conduct a traffic stop, Constable Dewar advised he had no lawful reason to stop the vehicle.

[22] A concern for the Court relates to Constable Dewar's knowledge of Mr. Sparks. In the past four years he has had two encounters with Mr. Sparks consisting of little more than an hour of interaction. Exactly when those interactions took place is anybody's guess as no evidence was elicited to establish a date associated with their contact. I can only conclude that their contact was sometime between September 2016 and January of 2021.

[23] Moreover, Constable Dewar's evidence lacks any semblance of specific identification. At no time did he provide a scintilla of identifying features associated with Mr. Sparks. There was no mention of skin tone, facial hair, complexion, weight, build, hairstyle, glasses, *et cetera*. A Black male is the only descriptor given on two separate occasions. The lack of any identifying features causes me considerable concern regarding the identity of the Black driver.

[24] Despite a litany of legal precedents concerning the fundamental dangers associated with eyewitness identification, there is little jurisprudence on the precariousness nature of cross-racial identification.

[25] In *R. v. Powell*, 2007 CanLII 45918 (ONSC), at para 15, Ducharme, J. provided a non-exhaustive list of eyewitness considerations. The applicable factors present in this case are as follows:

- i. *The passage of time.* It is unknown when Constable Dewar had interactions with Mr. Sparks.
- ii. *Knowledge of knowing the accused versus a complete stranger.* In this case, there is an interaction in excess of one hour over a four-year duration. This interaction is of little assistance in the present circumstances as there is no evidence on the genesis of that interaction.
- iii. *Circumstances of the sighting.* Factors such as distance, unobstructed view, whether the parties were moving or stationary at the time of the sighting are relevant considerations. Here, the vehicles were in motion. The first sighting was from a rear-view mirror of an unknown distance, and the second sighting was through an obstructed view of a passenger window.
- iv. *Duration of the observation.* Respectfully, this can be best described as a fleeting glance.
- v. *Quality of the witness identification.* Was it rich with detail or generic such as race and gender? The two separate references to a Black male are the quintessential definition of vague and generic.
- vi. *Where cross-racial identification is involved the trier of fact must be alive to*

the possibility that this might cause the eyewitness some difficulty or constitute a reason to regard their evidence with greater caution. Based on the lack I detail I have significant concern with the identification of the driver.

- vii. *Is there any other reliable circumstantial evidence capable of confirming or supporting the identification evidence in a material particular?* The existence of such evidence “can go a long way to minimizing the dangers inherent in eyewitness identification.” The F. and Sparks’ relationship and existing Undertaking is the circumstantial evidence. Respectfully, it does little to reduce the risk associated with the Black male identification.

[26] The evidence before me lacks any specific detail. Other than the driver being described as a Black male, there is nothing which would lead me to conclude the driver was Mr. Sparks.

[27] I have listened carefully to Constable Dewar’s evidence, and I conclude that over the last four years he has had limited interaction with Mr. Sparks. I am not persuaded that his limited dealings with Mr. Sparks would equip him with a foundation to provide a rich identification description of Mr. Sparks. While there may be a context to their limited history, they are essentially strangers.

[28] It is perplexing that the initial trigger, the Notice to Parent for Ms. F., ultimately becomes a non-issue. Constable Dewar had the Notice to Parent to serve upon Ms. F. This was front and center when he observed who he thought, and

subsequently confirmed, was Ms. F. This was the catalyst of his initial thought process. He knew where she was, and in fact, he followed her to her parking lot. Yet, when he decides to stop the vehicle, he does not approach Ms. F.

[29] Given the lack of identifying descriptors in his evidence, he could have used that opportunity, *i.e.*, the serving of the Notice to Parent, to acquire a more fulsome unobstructed view of the male driver.

[30] Moreover, prior to approaching the vehicle, he could have used his inhouse police databank system to acquire a Department of Motor Vehicle photo of Mr. Sparks. Simply put, other options existed other than approaching the Black male driver on a hunch that it might be Mr. Sparks. In these circumstances, more was required.

[31] I gather from Constable Dewar's evidence he has had limited interactions with Ms. F. and Mr. Sparks. Respectfully, due to their limited interactions, the Black male driving her vehicle could equate to almost any Black male in Nova Scotia.

Conclusions on Sections 8 and 9 of the *Charter*

[32] The Supreme Court of Canada in *R. v. Castlake*, [1998] 1 S.C.R. 51 at para. 13 noted that for a warrantless search to be authorised by law the arrest or detention must be valid or lawful.

[33] Drivers of motor vehicles are expected to have a valid driver's licence. Section 78(2) of the *Motor Vehicle Act* mandates drivers to possess their driver's licence while operating a motor vehicle, and to display the same at all reasonable times on the demand of a peace officer.

[34] Constable Dewar's evidence on his point was credible and concise. He did not have a reasonable purpose to perfect a traffic stop. Accordingly, I conclude that absent a legitimate reason to stop the vehicle, there is no articulable reason to detain Mr. Sparks, thus, violating his section 9 *Charter* right.

[35] I am of the opinion that this entire investigation was infected by racial profiling. In fairness to Constable Dewar, and to be perfectly clear, I am not suggesting that he was or is a racist. However, I am satisfied that consciously or unconsciously he permitted racial stereotypical reasoning to contribute to stopping, and detaining Mr. Sparks.

[36] Given my finding that Mr. Sparks was unlawfully detained, in these circumstances, it does not automatically follow that there was a violation of Mr. Sparks' s. 8 *Charter* right. A driver of a motor vehicle has a duty to provide their name upon a reasonable request.

[37] In the right set of circumstances, providing a name can be considered a search. I conclude, for the reasons previously mentioned, the lack of an investigation into the identity of the male driver violated Mr. Sparks' s. 8 rights.

Grant Analysis

[38] In *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104, the Supreme Court of Canada provided the framework for the exclusion of evidence. The test under s. 24(2) of the *Charter* involves a consideration of the following factors:

- a) the seriousness of the *Charter*-infringing conduct;
- b) the impact of the *Charter*-infringing conduct on the accused's *Charter*-protected interests; and
- c) society's interests in adjudication of a matter on its merits.

[39] In the present case, the only evidence gathered in Constable Dewar's investigation was Mr. Sparks' self-identification. Respectfully, the constellation of the *Charter* violations present in this instance warrant exclusion under s. 24(2) of the *Charter*.

[40] The jurisprudence in this area is clear, and courts have repeatedly emphasized the seriousness associated with racial profiling. Racial profiling exists and it is a constant reality for many members of our African Nova Scotian communities. The

seriousness of this conduct is profound and cannot be tolerated. I would place the seriousness of this conduct on the high-midpoint range of the *Charter*-infringing conduct. Mr. Sparks was stopped and detained for essentially driving while black.

[41] Arguably, the truth-seeking function of our justice system might favor admitting the evidence of Mr. Sparks' identity. After all, Mr. Sparks was on court ordered conditions which he was violating. That, however, is not the test. A hunch cannot justify an end-around of his constitutionality enshrined *Charter* rights.

[42] I recognize that the exclusion of the evidence would essentially gut the Crown's case.

[43] However, in the present case, the court cannot be seen acquiescing to behaviour that undermines a pillar of our democracy. Every Canadian ought to take solace in knowing that their rights against arbitrary detention and unlawful search and seizure cannot be usurped by police officers.

[44] Racial profiling and these specific *Charter*-infringing practices reverberate throughout our province. It is not lost upon me that this corrosive conduct has a significant history in Nova Scotia. The impact of these violations is profound as it affects the equality rights of the specific individual and the African Nova Scotian community in general.

[45] This factor tends strongly towards exclusion. Respectfully, I believe the public interest in a trial for these breach-related offences is low. In balancing the competing interests, I conclude the repute of the administration of justice would best be served by excluding the evidence, pursuant to s. 24(2) of the *Charter*.

[46] Excluding the evidence strips the Crown of an essential element of the offence. Accordingly, the charge is dismissed.

Judgement accordingly.

The Honourable Perry F. Borden
Judge of the Provincial Court