[Indexed as: R. v. Koh]

Regina v. Koh, Lu and Lim

131 C.C.C. (3d) 257

Ontario Court of Appeal
Court File Nos. C25847; C25944; C27462
Finlayson, Laskin and Rosenberg JJ.A.

Heard: November 9, 1998 and November 10, 1998
Judgment rendered: December 30, 1998

Appeal — Grounds — Jury selection — Trial judge refusing to permit accused to question prospective jurors with respect to fact that accused were of Chinese origin and visitors from Singapore — Trial judge erred in drawing distinction between social prejudice and prejudice in judicial context and in taking judicial notice of "fact" that Chinese people are judged individually, not as a race — New trial required — Although evidence tendered by accused at trial was marginally relevant to potential for bias, formal proof of community prejudice no longer required with respect to visible racial minorities absent sustainable objection by Crown — Challenge for cause with respect to race should therefore be permitted at new trial — However, challenge for cause with respect to accused's geographic origins would require proof of potential for prejudice — Appeal from conviction allowed and new trial ordered.

Jury — Empanelling — Challenge for cause — Visible minorities — Trial judge refusing to permit accused to question prospective jurors with respect to fact that accused were of Chinese origin and visitors from Singapore — Trial judge erred in drawing distinction between social prejudice and prejudice in judicial context and in taking judicial notice of "fact" that Chinese people are judged individually, not as a race — New trial required — Although evidence tendered by accused at trial was marginally relevant to potential for bias, formal proof of community prejudice no longer required with respect to visible racial minorities absent sustainable objection by Crown — Challenge for cause with respect to race should therefore be permitted at new trial — However, challenge for cause with respect to accused's geographic origins would require proof of potential for prejudice — Appeal from conviction allowed and new trial ordered.

Evidence — Judicial notice — Notorious facts — Fact of racism against visible racial minorities may well be proper subject of judicial notice as notorious fact — Absent sustainable objection from Crown, trial judge should allow challenge for cause by member of visible racial minority without requirement that accused establish that there exists realistic potential for existence of partiality.

The accused were charged with conspiracy to import heroin, conspiracy to traffic in a narcotic and possession of a narcotic for the purposes of trafficking. The trial ***[page258]*** judge refused to permit the accused to question prospective jurors on a challenge for cause with respect to the fact that the accused were persons of Chinese origin and visitors from Singapore.

On appeal by the accused from their convictions, **held,** the appeal should be allowed and a new trial ordered.

In drawing a distinction between racial prejudice in social settings, and prejudice in a judicial setting, the trial judge applied the wrong test. The threshold test is whether there is a realistic potential or possibility for partiality. The trial judge also held that, as a matter of judicial notice, Chinese people in the community were judged individually and not classed as a race. This was also an error. The trial judge was entitled to take judicial notice of the fact that there was a substantial population of persons of Asian origin in the community, but was not

entitled to take judicial notice of the "fact" that Chinese people are judged individually and not as a race. These errors required a new trial.

Although the evidence tendered by the accused at trial in support of their application to challenge prospective jurors for cause was only marginally relevant to the potential or possibility of bias, this was due to the paucity of such evidence available. However, the law relating to challenges for cause for racial prejudice has developed to the stage that, absent sustainable objection from the Crown, the trial judge should allow a challenge for cause by a member of a visible racial minority without strict compliance with the requirement that the accused establish a realistic potential for the existence of partiality. This is not to do away with this requirement generally, but rather, to find that in the light of the numerous trial and appellate decisions in this jurisdiction concerning various categories of visible minorities, this test has been met wherever the accused is a member of a visible racial minority. The fact of racism against visible minorities in this jurisdiction is a notorious fact which has repeatedly received judicial notice.

The fact of racism may well be amenable to judicial notice under the branch of the judicial notice rule which permits the acceptance without proof of facts that are so notorious as not to be the subject of dispute among reasonable persons. Alternatively, the accused member of a visible minority can be taken as having established a prima facie case by merely requesting the right to make the challenge in view of the successive authorities which have all spoken of the existence of the evil of racism. The suggestion that courts in this jurisdiction may now take judicial notice that reasonable persons must be taken to be aware of the history of discrimination of visible minorities also found practical support in the reality that an accused will often face insurmountable difficulties in marshalling evidence to meet the threshold test with respect to individual minorities of colour. There is no compelling reason why all accused who are members of a visible racial minority should not have a right to challenge prospective jurors for cause. The trial judge at the accused's new trial should allow challenges for cause with respect to the accused's membership in a visible racial minority. However, this challenge should not ***[page259]*** incorporate other features that are subsidiary to race, such as the fact that the accused were from Singapore, as any prejudice was racial, not geographical.

Cases referred to

Committee for Justice and Liberty v. Canada (National Energy Board) (1976), 68 D.L.R. (3d) 716, [1978] 1 S.C.R. 369, 9 N.R. 115 -- *refd to*
Cronk v. Canadian General Insurance Co. (1995), 128 D.L.R. (4th) 147, 23 B.L.R. (2d) 70, 14 C.C.E.L. (2d) 1, 95 C.L.L.C. Para. 210-038, 25 O.R. (3d) 505, 85 O.A.C. 54, 57 A.C.W.S. (3d) 449 -- *refd to*
R. v. Francis (1996), 22 M.V.R. (3d) 211, 92 O.A.C. 308, 32 W.C.B. (2d) 24 -- *refd to*
R. v. Glasgow (1996), 110 C.C.C. (3d) 57, 93 O.A.C. 67, 32 W.C.B. (2d) 65 -- *refd to*
R. v. Ho, Watt J., Ont. Ct. (Gen. Div.), Court File No. P1241/95, May 10, 1996 -- *refd to*
R. v. Hubbert (1975), 29 C.C.C. (2d) 279, 31 C.R.N.S. 27, 11 O.R. (2d) 464, 15 N.R. 143 [affd 33 C.C.C. (2d) 207, [1977] 2 S.C.R. 267, 38 C.R.N.S. 381, 15 O.R. (2d) 324n, 15 N.R. 139] -- *refd to*
R. v. Parks (1993), 84 C.C.C. (3d) 353, 24 C.R. (4th) 81, 15 O.R. (3d) 324, 65 O.A.C. 122, 21 W.C.B. (2d) 121 (Ont. C.A.); leave to appeal to S.C.C. refused (1994), 87 C.C.C. (3d) vi, [1994] 1 S.C.R. x, 28 C.R. (4th) 403n, 72 O.A.C. 159n, 175 N.R. 321n -- *refd to*
R. v. Potts (1982), 66 C.C.C. (2d) 219, 134 D.L.R. (3d) 227, 26 C.R. (3d) 252, 14 M.V.R. 72, 36 O.R. (2d) 195 [leave to appeal to S.C.C. refused 66 C.C.C. (2d) 219n, 43 N.R. 270n] -- *refd to*

R. v. S. (R.D.) (1997), 118 C.C.C. (3d) 353, 151 D.L.R. (4th) 193, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74, 10 C.R. (5th) 1, 161 N.S.R. (2d) 241, 218 N.R. 1, 35 W.C.B. (2d) 520 -- refd to
R. v. Sherratt (1991), 63 C.C.C. (3d) 193, [1991] 1 S.C.R. 509, 3 C.R. (4th) 129, 3 W.A.C. 161, 73 Man. R. (2d) 161, 122 N.R. 241, 12 W.C.B. (2d) 517 -- *consd*
R. v. Williams (1998), 124 C.C.C. (3d) 481, 159 D.L.R. (4th) 493, [1998] 1 S.C.R. 1128, [1998] 3 C.N.L.R. 257, 15 C.R. (5th) 227, 52 C.R.R. (2d) 189, 174 W.A.C. 1, 226 N.R. 162, 38 W.C.B. (2d) 295 -- *consd*
R. v. Willis (1994), 90 C.C.C. (3d) 350 -- *refd to*
R. v. Wilson (1996), 107 C.C.C. (3d) 86, 47 C.R. (4th) 61, 29 O.R. (3d) 97, 90 O.A.C. 386, 31 W.C.B. (2d) 49 -- *refd to*
Willick v. Willick (1994), 119 D.L.R. (4th) 405, [1994] 3 S.C.R. 670, 6 R.F.L. (4th) 161, 81 W.A.C. 81, 125 Sask. R. 81, 173 N.R. 321, 51 A.C.W.S. (3d) 106 -- *refd to*

Statutes referred to

Canadian Charter of Rights and Freedoms
s. 11(d)
Criminal Code
s. 638(1)(b)
s. 649 [am. 1998, c. 9, s. 7]
s. 686(1)(b) [am. R.S.C. 1985, c. 27 (1st Supp.), s. 145; 1991, c. 43, s. 9, Schedule, item 8(1)]
[page260]

Narcotic Control Act, R.S.C. 1985, c. N-1 -- repealed by s. 94 of and replaced by Controlled Drugs and Substances Act, S.C. 1996, c. 19

Authorities referred to

Henry, Frances, The Colour of Democracy: Racism in Canadian Society (Toronto: Harcourt, Brace & Company, 1995) Sopinka, John, Sidney N. Lederman and Alan W. Bryant, The Law of Evidence in Canada, (Markham, Ont.: Butterworths, 1992)

APPEAL by the accused from their convictions on charges of conspiracy to import a narcotic, conspiracy to traffic in a narcotic and possession of a narcotic for the purpose of trafficking.

James C. Fleming, for accused, appellant, Siew Thiam Koh.

P. Andras Schreck, for accused, appellant, Buan Huat Lim.

Peter J. Connelly, for accused, appellant, Eng Chuan Lu.

Robert Frater, for the Crown, respondent.

Lillian Y. Pan and Avvy Go, for intervener, Chinese Canadian National Council.

The judgment of the court was delivered by

¶ 1 **FINLAYSON J.A.**:— The appellants were convicted on September 26, 1996, by a jury presided over by Whealy J. of the Ontario Court (General Division), on an indictment charging them with conspiracy to import a

narcotic (heroin) into Canada, with conspiracy to traffic in a narcotic and with having possession of a narcotic for the purpose of trafficking, all contrary to the Narcotic Control Act, R.S.C. 1985, c. N-1. They all received life sentences for one or more of the counts and fixed term sentences on the remainder of the counts. They appeal their convictions and sentences.

¶ 2 This appeal involves convictions arising from what the Crown has indicated is the largest seizure of heroin destined for Canada. At trial, evidence was led that suggested that the street value of the seized shipment was up to $145 million.

Overview of the facts

¶ 3 In March of 1995, the ship Sea Lotus left Thailand and arrived in Tacoma, Washington on April 9, 1995, where U.S. Customs officials intercepted it and detained part of its cargo. The bill of lading described the cargo in issue as 25 wooden crates of ceramic dolls and ceramic vases and the consignee as Lim Chai Heng, 3 Massey Square, Apt. No. 3203, Toronto, Ontario. Each of the wooden crates contained a cardboard box as a container for each doll and vase. The ***[page261]*** cardboard boxes were protected by a wooden framework and stood on wooden pallets. Each of the wooden pallets had nine wooden blocks holding the cargo off the ground. An examination of the 225 blocks disclosed a total of 58.345 kilos of heroin secreted therein. The cargo and the heroin were turned over to the United States Drug Enforcement Agency and secured by them.

¶ 4 Upon being notified of the seizure, a number of R.C.M.P. officers, including P.C. Nicholson and Cpl. Penny, attended in Washington and 41.4 grams of this heroin was released into their custody. These officers reassembled the materials for "a controlled delivery" to Lim Chai Heng, the consignee in Toronto. A small amount of the seized heroin was placed in the blocks forming part of the pallets for this delivery. The R.C.M.P. officers also installed listening devices into the pallets for the interception of communications. The shipment was then transported to Toronto. On April 20, 1995, Nicholson and Penny observed the appellant Koh (who had identified himself to Customs as Lim Chai Heng) and Austin Chan at Canada Customs, where they arranged to have the goods released from the bonded warehouse in which they were stored.

¶ 5 On April 25, police officers disguised as delivery personnel attended at 3 Massey Square to complete the controlled delivery. When the goods would not fit in the apartment, Koh rented some space at the home of Austin Chan at 42 Magnolia Avenue, Toronto. On April 26, police officers completed the controlled delivery by leaving the "ceramics" in the laneway of 42 Magnolia. The appellant Lu and the appellant Lim were present; Koh arrived later in a taxi driven by Chan.

¶ 6 Following police surveillance and the interception of conversations from the hidden microphones, the appellants Koh and Lu were arrested on April 28 in a room of the Victoria Hotel. The appellant Lim was arrested shortly after he had exited the Victoria Hotel.

¶ 7 After trial, the appellant Lu was convicted of conspiracy to import a narcotic, conspiracy to traffic in a narcotic, and possession of a narcotic for the purpose of trafficking; he was sentenced to life for the conspiracy to import, 20 years concurrent on the conspiracy to traffic and 4 years concurrent on the possession for the purpose of trafficking. The appellant Lim was convicted of the same three offences, and was sentenced to terms of life, twenty years, and ***[page262]*** ten years, respectively, all terms to run concurrently. The appellant Koh was convicted of conspiracy to import a narcotic, importing a narcotic, conspiracy to traffic, and possession for the purpose of trafficking; he received life terms for each of the first three convictions and 10 years on the possession for the purpose charge, all to run concurrently.

Issue

¶ 8 A number of grounds of appeal were argued but the court called on the Crown with respect to only three. The first was with respect to sentence for all three appellants. In the second, the appellant Lu took issue with the instruction of the trial judge with respect to his participation on the charge of conspiracy to import the heroin. These reasons concern themselves with what I consider to be the main ground of appeal against conviction,

namely the refusal of the trial judge to permit a question to prospective jurors on a challenge for cause respecting the racial and national origin of all the appellants. The question was:

> Would the fact that the accused are persons of Chinese origin and visitors from Singapore affect your ability to judge the evidence fairly and without prejudice?

Evidence supporting application for challenge

¶ 9 The question is similar to that permitted in R. v. Parks (1993), 84 C.C.C. (3d) 353 (Ont. C.A.), leave to appeal to S.C.C. denied (1994), 87 C.C.C. (3d) vi, with appropriate modifications. The appellants filed materials in support of the challenge in the form of an Application Record. This Record contained, inter alia, the affidavit of Professor Cynthia Peterson referred to by Doherty J.A. in Parks, supra, at p. 378; an affidavit of Professor Neil J. Vidmar; and the affidavit of Professor Alan Hutchison filed in the case of R. v. Willis, Bishop and Champagnie (1994), 90 C.C.C. (3d) 350 (Ont. C.A.). Additionally, the appellants filed an Angus Reid Group Poll of April 18, 1995 that canvassed attitudes in Metro Toronto on the relationship between race and crime. It included the finding that 45 percent of respondents believed that there was a linkage between race and the commission of crimes. Portions of a text entitled The Colour of Democracy: Racism in Canadian Society (Toronto: Harcourt, Brace & Company), which dealt in part with the treatment of Chinese Canadians historically, was also part of the Record. ***[page263]***

¶ 10 All of this evidence was proffered in order to meet the threshold "air of reality" test laid out in R. v. Sherratt (1991), 63 C.C.C. (3d) 193 (S.C.C.). L'Heureux-Dubé J. set out the test at 212:

> The threshold question is not whether the ground of alleged partiality will create such partiality in a juror, but rather whether it could create that partiality which would prevent a juror from being indifferent as to the result. In the end, there must exist a realistic potential for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed. [Emphasis in the original.]

Ruling of the trial judge

¶ 11 The appellants had asked that they be permitted to pose two questions to the jury, the second relating to possible prejudice in the event that the appellants testified and required the assistance of an interpreter. The treatment of this second question is well within the discretion of the trial judge. In my opinion, the challenge based on the second question trivialises the very real problem of how to deal with the spectre of racial prejudice that hangs over the trial of visible minorities. As to the first question, the one I have set out above, the trial judge stated:

> In respect of the question that was, in fact, argued and that I set out first, I would first observe that there is a distinction to be made between the concept of racial prejudice in a social sense, that is, in terms of obtaining jobs or rental premises, and that sort of thing, and a racial bias in the judicial setting of a jury trial. It is very important that this distinction be made. The former may only mean that one favours one's own race in preference to others. It may be a little stronger than that. The reverse image might be expressed, that one does not like or admire other races as compared to one's own. The latter goes a good deal further, in my view. It suggests that one is prepared to act on one's prejudices against the interests of other races, in particular, in this issue, Chinese, rather than one's own race.

¶ 12 The trial judge then discussed this court's judgment in R. v. Parks, supra, and subsequent judgments by this court. He continued:

> Parks also recognizes racial groups other than the black races may suffer from a level of prejudice in a social sense, and that there may arise a reasonable apprehension or air of reality that bias in the judicial setting exists as well. If so, the challenge for cause in the same limited scope should be granted if the evidence links the accused to such a group. There must be

> evidence in the latter case establishing not only the first proposition, that is, racial prejudice in the social sense, but it must be sufficient to create an apprehension of the latter, that is, racial bias in the judicial setting. The apprehension must be linked to the accused making the application before the court. ***[page264]***
>
> I do not think the evidence here establishes a social level of prejudice against "Asians" or "Chinese" so great as to raise an apprehension of bias in the judicial setting.

¶ 13 The appellants submit that the trial judge erred by drawing a distinction between "social prejudice" and "prejudice in a judicial setting". That the trial judge applied the wrong test is supported by R. v. Williams (1998), 124 C.C.C. (3d) 481, a decision of the Supreme Court of Canada released subsequent to the ruling on appeal. In Williams, the Court considered the propriety of a similar distinction between "general" prejudice and prejudice that can be equated with partiality. In that case, the courts below had held that evidence of a general prejudice in the community against persons of the accused's race was insufficient to justify a challenge for cause. Rather, the accused was required to adduce evidence that racist attitudes had significance in relation to a criminal trial. The Supreme Court rejected this distinction. Writing for a unanimous Court, McLachlin J. stated at 493-4:

> The [British Columbia] 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 as that another aboriginal committed the crime, race could have no relevance because the jury was obliged to decide between two aboriginals.
>
> I cannot, with respect, accept this distinction. 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 a 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.

¶ 14 McLachlin J. went on to confirm the proper test at 495:

> The [threshold] 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. [Emphasis in original.] ***[page265]***

¶ 15 In his ruling, the trial judge continued:

> There is no evidence before me of the percentage of Chinese speaking people in Canada, assuming that means persons who look Oriental, but I can take judicial notice of the community in which the court lives, that there is a noticeable and substantial Oriental-looking resident population. It is, in the obvious sense, a visible minority. But what is said to be the typical Chinese that is the subject of prejudice? Is there a profile? The simple answer is no. Chinese people in this community seemed to be judged individually and not are classed as a race. There is no evidence to the contrary.

¶ 16 Although the trial judge was entitled to take judicial notice of the fact that there is a substantial population of persons of Asian origin in the community, it is my opinion that he was not entitled to take judicial notice of the "fact" that Chinese people are judged individually and are not classed as a race.

¶ 17 In R. v. Williams, supra, McLachlin J. re-affirmed the well-established parameters of the doctrine of judicial notice, at p. 502:

> 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 to 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 [(Toronto: Butterworths, 1992)], at p. 976.

¶ 18 The "facts" which the trial judge took notice of do not fall within either of the two categories enumerated above: see Willick v. Willick (1994), 119 D.L.R. (4th) 405 (S.C.C.) at 420, per L'Heureux-Dubé J.; R. v. Francis (1996), 92 O.A.C. 308 (C.A.) at 310; Cronk v. Canadian General Insurance Co. (1995), 25 O.R. (3d) 505 (C.A.) at 517-8; and R. v. Potts (1982), 66 C.C.C. (2d) 219 (Ont. C.A.) at 225-30, leave to appeal to S.C.C. refused loc. cit.

Analysis

¶ 19 It is apparent from the conflicts between the trial judge's ruling and the subsequent judgment of the Supreme Court of Canada in Williams, supra, that the ruling cannot stand. This court in R. v. Wilson (1996), 107 C.C.C. (3d) 86 (Ont. C.A.) at 94, held that this type of error does not lend itself to the curative provisions of s. 686(1)(b)(iii) of the Criminal Code. However, I do not agree with the Crown's submission that this appeal should be dismissed because of the absence of an evidentiary foundation for the challenge for cause. There must be a new trial.

¶ 20 That, however, is not the end of the matter. The appellants urge us to make a finding that the record before us justifies a finding ***[page266]*** on our part that the appellants have satisfied the onus of establishing an apprehension of racial bias against persons of Chinese origin and that we should send the matter back with instructions to the new trial judge to permit the challenge in its present form.

¶ 21 The record in this appeal illustrates the problems that arise when the trial judge must make a finding whether the particular accused is a member of a racial minority that is the target of prejudice within the community such that "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 trial judge": Williams, supra at 495 (italics in the original).

¶ 22 I agree with the Crown that the evidence of community prejudice put forward with reference to persons of East Asian/ Chinese origin is problematical at best. The affidavits of Professors Peterson, Hutchison and Vidmar addressed the issue of black racism and failed to assert the necessary nexus between the race of the appellants (Chinese) and the community (Metro Toronto) where the trial took place. The Angus Reid Group Poll demonstrated that of 400 people polled in Metro Toronto, 45% believed that there was a linkage between race and the commission of crime. Of this 45%, some 10%, that is, 5% of the overall group, linked Asians in general with crime. In addition, some 8% of this 45%, or 4% of the entire sample, linked persons of Vietnamese origin to crime. The appellants rely almost exclusively on the Angus Reid Group Poll to establish the nexus.

¶ 23 Polling such as that proffered here would be more relevant to the Sherratt threshold test if the question directed to those polled elicited information that could bear more directly on the issue as formulated by McLachlin J. in Williams. Such a question could be framed to determine if the persons polled, if selected as a juror in a case where the accused person was a member of an ethnic group or a visible racial minority, would be true to their oath as a juror and treat the accused's ethnicity or race as irrelevant to their consideration of his or her guilt or innocence.

¶ 24 In any event, it appears to me that the proffered affidavit evidence and the polling data are only marginally relevant to the issue in question, namely, the potential or possibility of bias such that a challenge for cause should be permitted. That this is the case is not due to the failure of the appellants to properly marshal such evidence in aid of their application. Rather, there is a paucity of such evidence ***[page267]*** available. This is in part due to the

nature of the proposition that is sought to be proved. As Doherty J.A. stated in Parks, supra, at 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." Moreover, s. 649 of the Criminal Code, criminalizing jurors who disclose the deliberations of their fellow jurors, dramatically inhibits the conduct of empirical research aimed at understanding how racial biases affect the jury's deliberations; see Williams, supra, at 496-7.

¶ 25 However, in spite of the absence of compelling evidence in support of the Sherratt threshold test, it is not to be doubted that racist sentiment against persons of Chinese origin is present amongst the residents of Toronto and in sufficient numbers to raise serious concerns. Indeed, the Crown expressly admits in its factum that it "does not deny that anti-Chinese racism may exist in Toronto or elsewhere in Canada. It was found to exist in R. v. Ho (unreported) (Ont. Ct. (Gen. Div.)) (Watt J., May 10, 1996, File No. P1241/95), based on evidence put before the Court". The requirement of evidence follows the instruction of the Supreme Court of Canada in R. v. Sherratt, supra. That was a case where the concern relating to prejudice arose out of pre-trial publicity, but the judgment relates to challenges for cause generally.

¶ 26 In Ho, the accused was charged with first degree murder. Prior to jury selection, he moved to challenge for cause; the question proposed was:

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged with the offence is of East Asian/Chinese origin?

¶ 27 The affidavit of Dr. Frances Henry, a professor of social anthropology at York University, was submitted in Ho, supra, in support of the application to challenge jurors for cause. Dr. Henry discussed in some detail the various stereotypes that have been imposed upon people of Chinese origin, particularly those stereotypes regarding their supposed propensity for criminal activities. Watt J. allowed the application, concluding that:

> Racism exists. It is not confined to anti-black racism. The affidavit of Dr. Frances Henry satisfies me that racism is not unique or indigenous to anti-black racism. Racism exists in relation to persons of Asian/Chinese origin. It may not be quite so broadly based as in the case of anti-black racism, but is nonetheless extant. Its influence is as insidious in the one case, as it is in the other. ***[page268]***

¶ 28 Unfortunately, the decision in Ho does not appear to have been drawn to the trial judge's attention. But given the Crown's position in the present appeal, and the fact that the Sherratt threshold test was found to have been met in Ho, there is little point in going through this exercise again at a new trial with the addition only of a proper Williams instruction. Indeed, having regard to the amorphous nature of what is termed evidence on the issue of racism generally, we might now ask the question as to whether the issue of prejudice against visible minorities has been the subject of sufficient judicial concern that consideration can be given to accepting similar challenges without formal proof of community prejudice in the case of all visible minorities.

¶ 29 This court, supported by the judgment of the Supreme Court in Williams, has decided that racism is a fact of judicial life and that it must be addressed directly through court approved challenges to members of the jury pool. In doing so we have been prepared to make an exception to the traditional approach that jury panels can be trusted to be true to their individual oaths and try the case on the evidence in accordance with the law as given to them by the trial judge. This conclusion was arrived at incrementally and on the accepted wisdom that racism is omnipresent and where once established through an evidentiary showing with respect to a specific race, need not be the subject of formal proof in subsequent proceedings involving the same race.

¶ 30 Indeed, in this jurisdiction, I think we have arrived at the stage in the development of the law relating to challenges for cause for racial prejudice that, absent sustainable objection from the Crown, the trial judge should allow a challenge for cause by a member of a visible racial minority without strict compliance with Sherratt, supra. I stress visible when referring to minorities, because I accept the submission of the intervener that distinctions between the various ethnic groups that make up the Asian community are unhelpful. The prejudice, where it occurs, is triggered by skin colour. The same would apply to all visible non-Caucasian minorities.

¶ 31 It might be said that this opinion does away with the requirement laid down by the Sherratt threshold test. I disagree. The "air of reality" test must still be met wherever an application for a challenge for cause is made under s. 638(1) (b) of the Criminal Code. The effect of this holding is not to do away with this requirement ***[page269]*** generally, but rather, is to find that in the light of the numerous trial and appellate decisions in this jurisdiction concerning various categories of visible minorities, this test has been met wherever the accused is a member of a visible racial minority. After all, Sherratt was triggered by pre-trial publicity, which is distinctive to the individual case. The potential for racism pervades all cases involving minority accused.

¶ 32 In my opinion, such a result is consistent with a natural extension of the principles established in Sherratt, Williams, and the jurisprudence of this court. It is to be remembered that in Sherratt, L'Heureux-Dubé J. indicated at 211 that the threshold test was not to be set inordinately high; rather, "s. [638] . . . places little, if any, burden on the challenger . . . [t]hus, while there must be an 'air of reality' to the application, it need not be an 'extreme' case." At 212, L'Heureux-Dubé J. went on to state that "the ability to challenge for cause rests upon a showing by the challenger of a realistic potential for partiality. The process is neither 'extraordinary' nor 'exceptional'."

¶ 33 McLachlin J., writing in Williams, supra, had this to say about the appropriate level at which to set the Sherratt threshold test, at 492:

> 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. [Emphasis added.]

¶ 34 At 495, McLachlin J. went on to state that since the threshold test "is a preliminary inquiry which may affect the accused's Charter rights . . . a reasonably generous approach is appropriate". And later, at 497, she states that "[t]he 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 is set too high." ***[page270]***

¶ 35 However, later in her reasons, McLachlin J. may be taken as holding that there cannot be an automatic right to challenge for cause. She indicates at p. 498:

> [a] rule that accords an automatic right to challenge for cause on the basis that the accused is an aboriginal or a 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 . . . it is not correct to assume that membership in an aboriginal or minority group always implies a realistic potential for partiality.

¶ 36 I do not take these remarks to mean that there can never be a presumptive right, as opposed to an automatic right, to conduct a challenge for cause. The comments cited above are apropos where there is no evidentiary foundation that would permit a challenge for cause to proceed. That is not the case in this jurisdiction, where the fact of racism against visible minorities is a notorious fact, and has repeatedly received judicial notice. In Williams, McLachlin J. pointed out at 502 that the potential or possibility of juror partiality where an accused is a member of a racial minority should from now on be treated as an appropriate matter for judicial notice, thus obviating the need to lead evidence in support of the Sherratt threshold test.

¶ 37 Judicial notice may be taken of two kinds of fact: facts which are so notorious as not to be the subject of dispute amongst reasonable persons; and 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, (Markham, Ont.: Butterworths, 1992) at 976. Furthermore, judicial notice is permissible where previous courts have proven a certain fact. As stated by McLachlin J. at 502, "[w]idespread racial prejudice, as a characteristic of the community, may . . . sometimes be the subject of judicial notice. Moreover, once a finding of fact of widespread racial prejudice in the community is made on evidence . . . judges in subsequent cases may be able to take judicial notice of the fact."

¶ 38 It follows, in my opinion, that the rule against an automatic right to challenge for cause has no application. The fact of racism may well be amenable to judicial notice under the branch of the judicial notice rule which permits the acceptance without proof of facts ***[page271]*** that are so notorious as not to be the subject of dispute amongst reasonable persons. Alternatively, the accused member of a visible minority can be taken as having established a prima facie case by merely requesting the right to make the challenge in view of the successive holdings in Parks, Wilson, Ho, and now Williams, which all speak of the existence of the evil of racism. See also: R. v. Glasgow (1996), 110 C.C.C. (3d) 57 (Ont. C.A.) at 65-66.

¶ 39 There are helpful statements by McLachlin and L'Heureux-Dubé JJ. in R. v. S. (R.D.) (1997), 118 C.C.C. (3d) 353 (S.C.C.), that relate to judicial notice. The two justices were commenting on "the reasonable person" as referred to by de Grandpré J. in his articulation of the test for bias in Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369 at pp. 394-95. McLachlin and L'Heureux-Dubé JJ. said at pp. 372-3:

> The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the Charter's equality provisions. These are matters of which judicial notice may be taken. In Parks, supra, at p. 342, Doherty J.A. did just this, stating:
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> > "Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes."
>
> [47] The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues: Royal Commission on the Donald Marshall, Jr., Prosecution (1989); R. v. Smith (M.) and Thompson (1991), 109 N.S.R. (2d) 394 (Co. Ct.). The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It follows that judges may take notice of actual racism known to exist in a particular society. Judges have done so with respect to racism in Nova Scotia. In Nova Scotia (Minister of Community Services) v. S. (S. M) (1992), 110 N.S.R. (2d) 91 (Fam. Ct.), it was stated at p. 108:
>
> > "[Racism] is a pernicious reality. The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report (sub. nom. Royal Commission on the Donald Marshall, Jr., Prosecution). A person ***[page272]*** would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally."

> [48] We conclude that the reasonable person contemplated by de Grandpré J., and endorsed by Canadian courts is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality. The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality.

¶ 40 This court has already applied the doctrine of judicial notice with respect to challenges for cause in Wilson, supra. That case had the effect of expanding the holding in Parks so as to give all black accused in Ontario, regardless of the location of the trial, the right to challenge prospective jurors for cause without the need to adduce evidence in support of the application; see Wilson, supra, at 93-94. I cannot see how that differs in any principled respect from what is proposed here. As I mentioned above, McLachlin J.'s stricture against an automatic right to challenge for cause does not preclude the result arrived at either in the present appeal or in Wilson.

¶ 41 My suggestion that courts in this jurisdiction may now take judicial notice that reasonable persons must be taken to be aware of the history of discrimination against visible minorities finds practical support in the reality that an accused will often face insurmountable difficulties in marshalling evidence to meet the threshold test with respect to individual minorities of colour. Having satisfied ourselves that blacks and Asian/Chinese qualify as victims of prejudice, must we now embark on a judicial journey through other racial territory? Can we not accept all visible minorities as eligible for this minimal protection or must Tamils, East Indians, Japanese, Koreans, Arabs and others come forward in this demeaning process wherein they ask for judicial recognition that they are victims of racial prejudice? As I indicated above, the available evidence in this regard is often insufficient to the task. Indeed, given the nature of our multi-cultural nation, it is possible to imagine that there are racial minorities about which there exists little to no research that would satisfy the admittedly low evidentiary burden of the Sherratt test. Moreover, to require each and every visible minority accused to adduce evidence in support of an application does not strike me as consonant with the s. 11(d) Charter right to be tried by an independent and impartial tribunal: Williams, supra, at 499-500. ***[page273]***

¶ 42 Allowing a challenge for cause where requested by an accused who is a member of a visible minority will not unduly prolong the course of trials. Nor will it open the door to aggressive and time-consuming U.S. tactics, in which jurors are lengthily questioned, if not in fact tried themselves. The question or questions that are to be put to prospective jurors will remain within the discretion of the presiding trial judge, who will also possess the residual discretion with respect to the conduct of the challenge for cause; see R. v. Hubbert (1975), 29 C.C.C. (2d) 279 (Ont. C.A.) at 291; Williams, supra, at 489-490. Experience shows that our current practice, once challenges for cause are permitted, does not greatly extend the conduct of a criminal trial. Indeed, in Williams, the Supreme Court was advised that, on average, a challenge for cause procedure adds only some 35 to 45 minutes to a criminal trial; see Williams, supra, at 503. What inconveniences, if any, that might arise from an increased incidence of challenges for cause are to be tolerated in the name of preserving the impartiality of the jury and the respect that it requires in order to discharge its task. As L'Heureux-Dubé J. wrote in Sherratt, supra, at 210:

> If the challenge process is used in a principled fashion, according to its underlying rationales, possible inconvenience to potential jurors or the possibility of slightly lengthening trials is not too great a price for society to pay in ensuring that accused persons in this country have, and appear to have, a fair trial before an impartial tribunal, in this case, the jury. ***[page274]***

¶ 43 Finally, any opposition to extending the opportunities in which challenges for cause may be undertaken is more than countered by the salutary effects that these challenges have both on an individual trial and with respect to the criminal justice system as a whole. These include the removal of jurors who are forthright about their racist views; the sensitization of the remaining jurors; and the enhancement of the appearance of trial fairness, both in the eyes of the accused and members of minority groups. See Williams at 500-501; Parks at 379-380.

¶ 44 In conclusion, then, I can see no compelling reason why all accused who are members of visible racial minorities should not have a right to challenge prospective jurors for cause. Indeed, such a right is required as a natural extension of the principles outlined in Sherratt, Parks, and Williams, and gives full effect to the purpose of s. 638(1)(b), namely, the elimination of persons who are not impartial as between the Crown and the accused. ***[page274]***

Disposition

¶ 45 As I indicated, a new trial is required. The trial judge should allow challenges for cause on behalf of all accused who desire to make them related to their membership in a visible racial minority. The challenge for cause can only relate to race and should not incorporate other features that are subsidiary to race. For instance, in this case I would delete the limiting description of "from Singapore" from the proposed challenge. Any prejudice in this case is racial not geographical. Moreover, the fact that these appellants came from Singapore is an element of the Crown's case. The Crown asked the jury to draw inferences from this fact relative to the source and timing of the delivery by the Sea Lotus and the appellants' departure from Singapore. The appellants would have to comply with Sherratt, supra, if they wished to maintain that the geographic origins of the appellants could in any way lead to partiality or bias on the part of jurors. The question I would permit, based on R. v. Ho, supra, is:

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged with the offence is of East Asian/Chinese origin?

¶ 46 Accordingly, for the reasons given, I would allow the appeal, set aside the convictions of the appellants and order a new trial.

Appeal allowed; new trial ordered.