Case Name:

R. v. Saunders

Between
Her Majesty the Queen, respondent, and
Neville Saunders, defendant (appellant)

[2003] O.J. No. 3013

Ontario Court of Justice
Central East Region
Stone J.

Heard: April 24 and June 5, 2003.
Judgment: July 16, 2003.
(28 paras.)

S. 128 Highway Traffic Act - Speeding — S. 7(5)(a) Highway Traffic Act - Fail to Produce Vehicle Registration — S. 3(1) Compulsory Automobile Insurance Act - Fail to Produce Certificate of Insurance

Counsel:

J. Foote, for the appellant.
G. Hendry and G. Kelly, Municipal Prosecutor, for the respondent.

¶ 1 **STONE J.**:— This is an appeal from the decision of Her Worship B. Brown, J.P., at Whitby, Ontario on November 28, 2002, convicting the appellant on charges of speeding and failing to surrender the ownership of his vehicle, contrary to the Highway Traffic Act, and failing to produce the certificate of insurance for the vehicle, contrary to the Compulsory Automobile Insurance Act.

¶ 2 The ground of appeal set out by the appellant, who represented himself at trial, was "I was denied a fair trial as I was not allowed to fully cross-examine the officer." This appeal came on for hearing before me on April 24, 2003, but was adjourned to June 5 after the appellant, now represented in part by his agent and father-in-law, Mr. Foote, raised the issue of racial profiling. The provincial prosecutor appearing on April 24, Mr. Kelly, wished to seek the help of counsel, and so the continuation of the appeal on June 5 was argued by Mr. Hendry, for the Crown.

¶ 3 For the record, and as discussed in court, the appellant has not seriously pursued the original ground of appeal as set out above, and my review of the transcript of the trial does not reveal improper interference with Mr. Saunders' cross-examination of the officer, Constable Michalowsky. He has also not directly attacked the speed allegedly recorded by the officer, or suggested a different speed.

¶ 4 Although the submissions made at trial were not transcribed, it appears the Justice of the Peace heard some arguments regarding racial issues, because she mentioned Mr. Saunders' perception that race had played a part in the actions of the officer. She discussed that issue and convicted the accused. She appeared to accept that the ownership and insurance were not in the rental car, and that Mr. Saunders had tried to show the rental contract to Constable Michalowsky to prove ownership and insurance. She convicted on those two counts, apparently because they were offenses of absolute liability, and fined the appellant $10 on each. She also determined that the appellant had been speeding 112 k.p.h. in an 80 k.p.h. zone, and convicted on that count.

The Facts:

¶ 5 On July 17, 2002, at about 4:26 p.m., the appellant was operating a rental car on Regional Road 21 in Durham Region. Constable Michalowsky was proceeding in the opposite direction. The officer, operating a marked cruiser, was on general patrol and was equipped with a form of radar that could be activated to determine the speed of vehicles travelling in either direction. Later evidence disclosed he actually teaches the use of this equipment to other police officers, and is responsible on behalf of the Durham Regional Police Service for purchasing, testing, and arranging the servicing and repair of such units.

¶ 6 He testified he believed the oncoming vehicle was exceeding the posted limit, so he switched on the radar in forward-looking mode and clocked the appellant at 113 k.p.h. After Mr. Saunders had passed him, Constable Michalowsky made a U-turn and pursued and stopped the appellant's vehicle. While he was speaking with Mr. Saunders, the officer asked for his licence, ownership and insurance. The appellant produced his driver's licence, but the other two documents were apparently not in the vehicle. The appellant tried to have Constable Michalowsky accept the car rental agreement as proof of the ownership, and that the vehicle was insured.

¶ 7 The officer testified that he returned to his cruiser to write up the speeding ticket, and then returned to Mr. Saunders and asked if he had found the registration and insurance certificate. Upon receiving a negative answer, he issued the other two tickets. He said the appellant then made an unsavoury comment to him as he turned to leave.

¶ 8 The appellant testified that all three tickets were presented at once, after the officer had been in his cruiser for about 15 minutes. Mr. Saunders further testified that he said to the officer, "Does this make you feel better?"

Issues:

¶ 9 Against this backdrop, the appellant argues that this is a case of racial profiling. His agent and he contend that if it is, the conviction must be quashed. It is said that the police procedure which allows an officer to determine a speed, then pass the offending driver and determine his race, permits decisions in the nature of racial profiling to be made, and should be abolished.

¶ 10 Finally, the appellant contends that the Justice of the Peace was not alive to the issues of race or, to the extent she was, she was naive and in error, particularly in light of subsequent appellate authority. Racial issues would raise Charter concerns and, in this case, would also throw the credibility of the charging officer into question from a different perspective.

Discussion of the Issues:

¶ 11 Mr. Foote and Mr. Saunders argue that this was a case of racial profiling, and they rely on the language and ruling in R. v. Brown, [2003] O.J. No. 1251, 173 C.C.C. (3d) 23 (C.A). In that case, a police officer pulled over Mr. Brown's vehicle and informed him that the posted speed limit was 90 k.p.h. and that Mr. Brown had been travelling "in excess" of that speed. Mr. Brown was an African-American wearing a ball cap and jogging suit, driving a brand new Ford Expedition. When the officer spoke with Mr. Brown, he noted an odour of alcohol on Mr. Brown's breath, and pursued an investigation of that, resulting in breath tests and a charge of "over 80". No speeding charge was laid. The issue was not whether the drinking-driving investigation was flawed, but whether the officer had pulled the accused over because he was black, or was a black man driving a new S.U.V. This would be in breach of his Charter rights, section 9.

¶ 12 Mr. Hendry noted that although Crown counsel in Brown admitted, for the purposes of argument, that racial profiling exists, he was not obliged to make that same concession. I consider it is beyond question that racial profiling exists in society to some unquantified extent. For this purpose I apply the definition set out by Rosenberg, J.A., in R. v. Richards (1999), 26 C.R. (5th) 286 (Ont. C.A.), and apparently adopted in Brown p. 2 (C.C.C. pp. 28-29):

> Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.

¶ 13 The nature of racial profiling is further explained in Brown in the next paragraph on p. 2. (C.C.C. p. 29)

> The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping.

¶ 14 The thrust of the issue engaging s. 9 of the Charter in R. v. Brown was not that Mr. Brown was charged with drinking and driving but that he was arbitrarily and improperly stopped and detained at all, if that stop and detention flowed from the officer's suspicions based on racial profiling, rather than on articulable cause.

¶ 15 This illustrates why I think the argument of racial profiling in the case at bar is flawed or misdirected. In this case the traffic stop was, prima facia, made on articulable cause. Unless he was lying, or had recorded the speed of the wrong car, the officer had clocked the appellant's driving speed at 113 k.p.h. in an 80 k.p.h. zone, well before he could reasonably be argued to have been able to identify the race of the driver. The appellant argues that the process, that is, permitting the appellant to pass before executing a U-turn, allowed the officer to look into Mr. Saunders' car and see his skin colour, but taking that to be so, the officer had articulable cause to stop him. Other motorists would hope the officer would stop any driver who was 33 k.p.h. over the limit, for the sake of public safety.

¶ 16 In argument on April 24, Mr. Foote argued before me, inter alia, that "[Mr. Saunders] was dressed in the uniform of a T.T.C. (Toronto Transit Commission) bus driver, hardly the attire of choice of your average law-breaker". It seems to me to be very easy, even for those familiar with and railing against stereotyping, to risk falling into stereotyping themselves. The point is, that before the officer saw Mr. Saunders' race or, if he was wearing one, his T.T.C. uniform, he had registered the speed, and he had articulable cause for a traffic stop. He then had a lawful basis to demand the driver's licence, vehicle registration and insurance certificate. It is common ground that Mr. Saunders, for reasons beyond his present control, could not produce the latter two documents.

¶ 17 The appellant's argument that the process of passing a motorist, making a U-turn, and then stopping the motorist, is a recipe for racial profiling, and should be abolished, is overreaching. It is true that an officer who waits for a motorist to pass him or her can see the driver's race and gender. However, to suggest as was argued, that the officer roll down his window and wave, or turn in front of the oncoming car, or flash his high beams, or put on his emergency lights, all invite risks that are not warranted. In the first two, the officer could be injured or lose control of his vehicle. In the last two the wrong vehicle (such as the one in front of him) may stop, interfering with the officer's turn, or a person with more to hide may take advantage of the inherent delay to try to flee. It is true that some officer who is passing an oncoming vehicle might allow racial profiling to influence his decision to stop that vehicle without articulable cause, but the courts can deal with such situations. The evidence in this case is otherwise.

¶ 18 What it appears to me is being argued here is not racial profiling, but racism. Racial profiling, as Morden, J.A., stated in Brown (at p. 9; C.C.C. p. 37), "could rarely be proven by direct evidence." Generally speaking, if it is to be proven, "it must be done by inference drawn from circumstantial evidence." In respect of actions by a police officer, relating to enforcement techniques involving a member of an identifiable racial or ethnic group, the same would be true of racism. Where racism was established, it might well not relate to s. 9 of the Charter, but to sections 7, 8 or 15.

¶ 19 In this case, the argument would be that the officer intentionally or unintentionally, was overreaching because of racism. The only evidence that gives legs to this argument has to do with Constable Michalowsky's surprising use of his discretion. It is sometimes observed that more experienced officers have a more mature

sense of the use of a policeman's discretion. Depending on the circumstances, the officer might choose to charge a speeder with a lesser reading, perhaps permitting the motorist to escape demerit points he could be said to deserve. It appears that Constable Michalowsky thought it right to charge Mr. Saunders for every kilometre per hour that the radar showed. Mr. Saunders also committed the other two offenses, but it was not his car, and he was trying to prove the fact of ownership and insurance via the rental contract. Some officers, having satisfied themselves of lawful ownership and insurance coverage might have issued a warning, or might have demanded to see the original documents within 48 hours, particularly where the motorist was facing a speeding charge of this magnitude. This officer, Constable Michalowsky, delivered two more tickets. Justice of the Peace Brown showed her view of those last tickets by imposing $10.00 fines. I share Her Worship's negative opinion.

¶ 20 Did Constable Michalowsky fail to use any discretion in favour of Mr. Saunders because he has a narrow view of his ability to use discretion, or because his personal style is of strict enforcement, or because of something else that he did not put on the record, such as a feeling that Mr. Saunders was behaving in an anti-police fashion, or because Mr. Saunders was black? Similarly, did Constable Michalowsky use his discretion against Mr. Saunders for those reasons?

¶ 21 The very experienced Justice of the Peace carefully analyzed the officer's assertion that the radar unit was functioning properly, and considered the available objective circumstances supporting that assertion. It is clear she accepted the officer's evidence. She went on to deal with the charges involving the failure to produce the registration and insurance certificates. She used clear but judiciously restrained language to convey that Mr. Saunders was guilty of those offenses, but that perhaps other officers might have used the discretion to charge differently. While she referred to two or three of her own experiences, they were for purposes of example, and were not a misuse of judicial notice.

¶ 22 Then Her Worship dealt with racism. She acknowledged that Mr. Saunders feels he is a victim of systemic racism. She mentioned that no questions (in the trial) were raised on the issue. That could have ended the matter. She continued, however, as follows:

> And he is concerned, and as are many other people in our community that it may be because of frankly, the colour or skin, that he is stopped by police. There are many people in this community who may have, and I hope not, but many may hold the same view. We know that in the metropolitan community to the West of us that, at least the Chief of Police and the former Governor General (sic) of Ontario are setting up some kind of task force to see if they can't mitigate against what is considered to be systematic racism and violence. I don't know if the police in Durham are looking at that or not. I can only say with great hope that those things are not true.

¶ 23 The Justice of the Peace then discussed what the officer observed and knew, and whether the officer could reasonably have done otherwise than to have waited for Mr. Saunders to pass before performing the U-turn. He could not.

¶ 24 Finally, she in effect stated the current law, that there is no presumption of racism in a given traffic stop, and that some proof has to be adduced. She did assume that otherwise it had to be taken that the officer was "doing his work in a proper fashion." In that context I cannot say Justice of the Peace Brown was reversing the onus of proof on the trial proper, as that comment ties in with the observation that there were no questions posed on this issue. The appellant's evidence or questions of the officer by themselves did not require the trial Justice of the Peace to consider the issue to be alive. The issue was first raised in argument, and was nevertheless dealt with by the Justice of the Peace. She made no overt finding that Michalowsky acted out of racism. It was not unreasonable for her to resist such a finding of fact.

¶ 25 Mr. Foote suggested Her Worship's treatment of the racism issue was uninformed or naive. I see it as a balance, where there was no actionable evidence, where she tried to avoid either fanning the appellant's suspicion of racism in this case, or being an apologist for the police. But she obviously did not find racism in Michalowsky's actions.

¶ 26 I considered changing the sentence on the two counts of failing to produce documents, to a suspended sentence. It seems to me that would be mere tinkering. With respect to the speeding charge, that is the one that seems most important to Mr. Saunders, probably because of employment concerns. I can find no error in the trial transcript that would warrant my intervention to quash the convictions, order a new trial, reduce the charges, or reduce the penalties imposed.

¶ 27 The appeals will be dismissed.

¶ 28 Order accordingly.

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