R. *v*. S. (R.D.), [1997] 3 S.C.R. 484

R.D.S. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Women's Legal Education and Action Fund, the National Organization of Immigrant and Visible Minority Women of Canada, the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada *Interveners*

Indexed as: R. *v*. S. (R.D.)

File No.: 25063.

1997: March 10; 1997: September 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for nova scotia

Courts -- Judges -- Impartiality -- Reasonable apprehension of bias -- Testimony of the only two witnesses (accused and police officer) at odds and that of accused accepted -- Police officer white and accused a black youth -- Oral reasons

making reference to police and racism in general context -- Youth Court Judge's comments not tied to officer appearing before the Court -- Whether reasonable apprehension of bias.

A white police officer arrested a black 15-year-old who had allegedly interfered with the arrest of another youth. The accused was charged with unlawfully assaulting a police officer, unlawfully assaulting a police officer with the intention of preventing an arrest, and unlawfully resisting a police officer in the lawful execution of his duty. The police officer and the accused were the only witnesses and their accounts of the relevant events differed widely. The Youth Court Judge weighed the evidence and determined that the accused should be acquitted. While delivering her oral reasons, the Judge remarked in response to a rhetorical question by the Crown, that police officers had been known to mislead the court in the past, that they had been known to overreact particularly with non-white groups, and that that would indicate a questionable state of mind. She also stated that her comments were not tied to the police officer testifying before the court. The Crown challenged these comments as raising a reasonable apprehension of bias. After the reasons had been given and after an appeal to the Nova Scotia Supreme Court (Trial Division) had been filed by the Crown, the Judge issued supplementary reasons which outlined in greater detail her impressions of the credibility of both witnesses and the context in which her comments were made. The Crown's appeal was allowed and a new trial was ordered on the basis that the Judge's remarks gave rise to a reasonable apprehension of bias. This judgment was upheld by a majority of the Nova Scotia Court of Appeal. At issue here is whether the Judge's comments in her reasons gave rise to a reasonable apprehension of bias.

Held (Lamer C.J. and Sopinka and Major JJ. dissenting): The appeal should be allowed.

(1) *Consideration of Supplementary Reasons*

Per curiam: The supplementary reasons issued by the Youth Court Judge after the appeal had been filed could not be taken into account in assessing whether her reasons gave rise to a reasonable apprehension of bias.

(2) *Reasonable Apprehension of Bias*

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: The courts should be held to the highest standards of impartiality. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. The trial will be rendered unfair if the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer. Judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin.

If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. A reasonable apprehension of bias, if it arises, colours the entire trial proceedings and cannot be cured by the correctness of the subsequent decision. The mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the

correct result cannot alleviate the effects of a reasonable apprehension of bias arising from the judge's other words or conduct. However, if the judge's words or conduct, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be.

The basic interests of justice require that the appellate courts, notwithstanding their deferential standard of review in examining factual determinations made by lower courts, including findings of credibility, retain some scope to review that determination given the serious and sensitive issues raised by an allegation of bias.

Impartiality can be described as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues. Whether a decision-maker is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. Actual bias need not be established because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.

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. The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be

reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The test applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic.

The requirement for neutrality does not require judges to discount their life experiences. Whether the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements depends on the facts. A very significant difference exists between cases in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility.

Consideration of whether the existence of anti-black racism in society is a proper subject for judicial notice would be inappropriate here because an intervener and not the appellant put forward the argument with respect to judicial notice.

The individualistic nature of a determination of credibility and its dependence on intangibles such as demeanour and the manner of testifying requires the judge, as trier of fact, to be particularly careful and to appear to be neutral. When making findings of credibility a judge should avoid making any comment that might suggest that the determination of credibility is based on generalizations or stereotypes rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial. At the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics. It is only after an individual witness has been tested and assessed that findings of credibility can be made.

Situations where there is no evidence linking the generalization to the particular witness might leave the judge open to allegations of bias on the basis that the credibility of the individual witness was prejudged according to stereotypical generalizations. Although the particular generalization might be well-founded, reasonable and informed people may perceive that the judge has used this information as a basis for assessing credibility instead of making a genuine evaluation of the evidence of the particular witness' credibility.

That judges should avoid making comments based on generalizations when assessing the credibility does not lead automatically to a conclusion of reasonable apprehension of bias. In some limited circumstances, the comments may be appropriate.

The argument that the trial was rendered unfair for failure to comply with "natural justice" could not be accepted. Neither the police officer nor the Crown was on trial.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: Judges, while they can never be neutral in the sense of being purely objective, must strive for impartiality. Their differing experiences appropriately assist in their decision-making process so long as those experiences are relevant, are not based on inappropriate stereotypes, and do not prevent a fair and just determination based on the facts in evidence.

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. The reasonable person must know and understand the judicial process, the nature of judging and the community in which the alleged crime occurred. He or she demands that judges achieve impartiality and will be properly influenced in their deliberations by their individual perspectives. Finally, the reasonable person expects judges to undertake an open-minded, carefully considered and dispassionately deliberate investigation of the complicated reality of each case before them.

Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. An understanding of the context or background essential to judging may be gained from testimony from expert witnesses, from academic studies properly placed before the court, and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is a precondition of impartiality. A

reasonable person, far from being troubled by this process, would see it as an important aid to judicial impartiality.

The reasonable person approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. He or she understands the impossibility of judicial neutrality but demands judicial impartiality. This 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. Before finding a reasonable apprehension of bias, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. Awareness of the context within which a case occurred would not constitute evidence that the judge was not approaching the case with an open mind fair to all parties; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

(3) *Application of the Test*

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The oral reasons at issue should be read in their entirety, and the impugned passages should be construed in light of the whole of the trial proceedings and in light of all other portions of the judgment. They indicated that the Youth Court Judge approached the case with an open mind, used her experience and knowledge of the community to achieve an understanding of the reality of the case, and applied the fundamental principle of proof beyond a reasonable doubt. Her comments were based entirely on the case before her, were made after a consideration of the conflicting testimony of the two witnesses and in response to the Crown's submissions, and were entirely

supported by the evidence. In alerting herself to the racial dynamic in the case, she was simply engaging in the process of contextualized judging which was entirely proper and conducive to a fair and just resolution of the case before her. Although the Judge did not make a finding of racism, there was evidence on which such a finding could be made.

The impugned comments were not unfortunate, unnecessary, or close to the line. They reflected an entirely appropriate recognition of the facts in evidence and of the context within which this case arose -- a context known to the judge and to any well-informed member of the community.

Per Cory and Iacobucci JJ.: The Youth Court Judge conducted an acceptable review of all the evidence before making the impugned comments.

The generalized remarks about a history of racial tension between police officers and visible minorities were not linked by the evidence to the actions of the police officer here. They were worrisome and came very close to the line. Yet, however troubling when read individually, they were not made in isolation and must all be read in the context of the whole proceeding, with an awareness of all the circumstances that a reasonable observer would be deemed to know. A reasonable, informed person, aware of all the circumstances, would not conclude that they gave rise to a reasonable apprehension of bias or that they tainted her earlier findings of credibility. The high standard for a finding of reasonable apprehension of bias was not met.

Per Lamer C.J. and Sopinka and Major JJ. (dissenting): A fair trial is one that is based on the law and its outcome determined by the evidence, free of bias, real

or apprehended. Evidence showing propensity has been repeatedly rejected. Trial judges must base their findings on the evidence before them. Notwithstanding the opportunity to do so, no evidence was introduced showing that this police officer was racist and that racism motivated his actions or that he lied.

The Youth Court Judge's statements were not simply a review of the evidence and her reasons for judgment in which she was relying on her life experience. Even though a judge's life experience is an important ingredient in the ability to understanding human behaviour, to weighing the evidence and to determining credibility, it is not a substitute for evidence. No evidence supported the conclusions that the Judge reached. Her comments fell into stereotyping the police officer. Judges, as arbiters of truth, cannot judge credibility based on irrelevant witness characteristics. All witnesses must be placed on equal footing before the court.

What the Judge actually intended by the impugned statements is irrelevant conjecture. Given the concern for both the fairness and the appearance of fairness of the trial, the absence of evidence to support the judgment is an irreparable defect.

Cases Cited

By Cory J.

Applied: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **considered:** *R. v. Parks* (1993), 15 O.R. (3d) 324, leave to appeal denied, [1994] 1 S.C.R. x; *Pirbhai Estate v. Pirbhai*, [1987] B.C.J. No. 2685

(QL), leave to appeal denied, [1988] 1 S.C.R. xii; *Foto v. Jones* (1974), 45 D.L.R. (3d) 43; **referred to:** *R. v. Wald* (1989), 47 C.C.C. (3d) 315; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537; *R. v. Gushman*, [1994] O.J. No. 813 (QL); *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *Huerto v. College of Physicians and Surgeons* (1996), 133 D.L.R. (4th) 100; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Généreux*, [1992] 1 S.C.R. 259; *Liteky v. U.S.*, 114 S.Ct. 1147 (1994); *R. v. Bertram*, [1989] O.J. No. 2123 (QL); *R. v. Stark*, [1994] O.J. No. 406 (QL); *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *R. v. Elrick*, [1983] O.J. No. 515 (QL); *R. v. Lin*, [1995] B.C.J. No. 982 (QL); *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850; *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577; *R. v. Gough*, [1993] 2 W.L.R. 883; *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Wilson* (1996), 29 O.R. (3d) 97; *R. v . Glasgow* (1996), 93 O.A.C. 67; *White v. The King*, [1947] S.C.R. 268; *Brouillard v. The Queen*, [1985] 1 S.C.R. 39; *Inquiry pursuant to s. 13(2) of Territorial Court Act, Re*, [1990] N.W.T.R. 337; *R. v. Teskey* (1995), 167 A.R. 122.

By L'Heureux-Dubé and McLachlin JJ.

Applied: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **referred to:** *Valente v. The Queen*, [1985] 2 S.C.R. 673 ; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267; *United States v. Morgan*, 313 U.S. 409 (1941); *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50; *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833; *R. v. Bartle*, [1994] 3 S.C.R. 173; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Parks* (1993), 15 O.R.

(3d) 324; *Moge v. Moge*, [1992] 3 S.C.R. 813; *R. v. Smith* (1991), 109 N.S.R. (2d) 394; *Nova Scotia (Minister of Community Services) v. S.M.S.* (1992), 110 N.S.R. (2d) 91; *R. v. Burns*, [1994] 1 S.C.R. 656.

By Major J. (dissenting)

Metropolitan Properties Co. v. Lannon, [1969] 1 Q.B. 577; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256.

Statutes and Regulations Cited

Act to amend the Criminal Code and the Canada Evidence Act, S.C. 1987, c. 24, s. 18.
Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125, s. 5.

Canadian Charter of Rights and Freedoms, ss. 7, 11(*d*), 15, 27.

Criminal Law Amendment Act, 1975, S.C. 1974-75-76, c. 93, s. 8.

Authors Cited

Blackstone, Sir William. *Commentaries on the Laws of England*, Book III. Oxford: Clarendon Press, 1778.

Canadian Judicial Council. *Commentaries on Judicial Conduct*. Cowansville, Que.: Yvon Blais, 1991.

Cardozo, Benjamin N. *The Nature of the Judicial Process.* New Haven: Yale University Press, 1921.

Devlin, Richard F. "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995), 18 *Dalhousie L.J.* 408.

Nedelsky, Jennifer. "Embodied Diversity and the Challenges to Law" (1997), 42 *McGill L.J.* 91.

Nova Scotia. Royal Commission on the Donald Marshall, Jr., Prosecution. *Royal Commission on the Donald Marshall Jr. Prosecution*. Halifax: The Commission, 1989.

Omatsu, Maryka. "The Fiction of Judicial Impartiality" (1997), 9 *C.J.W.L.* 1.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*. Concord, Ont.: Irwin Law, 1996.

APPEAL from a judgment of the Nova Scotia Court of Appeal (1995), 145 N.S.R. (2d) 284, 418 A.P.R. 284, 102 C.C.C. (3d) 233, 45 C.R. (4th) 361, dismissing an appeal from a judgment of the Nova Scotia Supreme Court (Trial Division), [1995] N.S.J. No. 184 (QL), allowing an appeal from acquittal by Sparks F.C.J. with oral reasons December 2, 1994, with supplementary written reasons, [1994] N.S.J. No. 629 (QL). Appeal allowed, Lamer C.J. and Sopinka and Major JJ. dissenting.

Burnley A. Jones and *Dianne Pothier*, for the appellant.

Robert E. Lutes, Q.C., for the respondent.

Yola Grant and *Carol Allen*, for the interveners the Women's Legal Education and Action Fund and the National Organization of Immigrant and Visible Minority Women of Canada.

April Burey, for the interveners the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada.

The reasons of Lamer C.J. and Sopinka and Major JJ. were delivered by

1 MAJOR J. (dissenting) -- I have read the reasons of Justices L'Heureux-Dubé and McLachlin and those of Justice Cory and respectfully disagree with the conclusion they reach.

2 The appellant (accused) R.D.S. was a young person charged with assault on a peace officer. At trial, the Crown's only evidence came from the police officer allegedly assaulted. The appellant testified as the only witness in his defence. The testimony of the two witnesses differed in material respects. The trial judge gave judgment immediately after closing arguments and acquitted the appellant.

3 This appeal should not be decided on questions of racism but instead on how courts should decide cases. In spite of the submissions of the appellant and interveners on his behalf, the case is primarily about the conduct of the trial. A fair trial is one that is based on the law, the outcome of which is determined by the evidence, free of bias, real or apprehended. Did the trial judge here reach her decision on the evidence presented at the trial or did she rely on something else?

4 In the course of her judgment the trial judge said:

> 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 am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are 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. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit. [Emphasis added.]

5 In view of the manner in which this appeal was argued, it is necessary to consider two points. First, we should consider whether the trial judge in her reasons, properly instructed herself on the evidence or was an error of law committed by her. The second, and somewhat intertwined question, is whether her comments above could cause a reasonable observer to apprehend bias. The offending comments in the statement are:

> (i) "police officers have been known to [mislead the court] in the past";
>
> (ii) "police officers do overreact, particularly when they are dealing with non-white groups";
>
> (iii) "[t]hat to me indicates a state of mind right there that is questionable";
>
> (iv) "[i]t seems to be in keeping with the prevalent attitude of the day"; and,
>
> (v) "based upon my comments and based upon all the evidence before the court I have no other choice but to acquit."

6 The trial judge stated that "police officers have been known to [mislead the court] in the past" and that "police officers do overreact, particularly when they are dealing with non-white groups" and went on to say "[t]hat to me indicates a state

of mind right there that is questionable." She in effect was saying, "sometimes police lie and overreact in dealing with non-whites, therefore I have a suspicion that this police officer may have lied and overreacted in dealing with this non-white accused." This was stereotyping all police officers as liars and racists, and applied this stereotype to the police officer in the present case. The trial judge might be perceived as assigning less weight to the police officer's evidence because he is testifying in the prosecution of an accused who is of a different race. Whether racism exists in our society is not the issue. The issue is whether there was evidence before the court upon which to base a finding that this particular police officer's actions were motivated by racism. There was no evidence of this presented at the trial.

7 Our jurisprudence has repeatedly prohibited the introduction of evidence to show propensity. In the present case had the police officer been charged with assault the trial judge could not have reasoned that as police officers have been known to mislead the Court in the past that based on that evidence she rejected this police officers credibility and found him guilty beyond reasonable doubt.

8 In the same vein, statistics show that young male adults under the age of 25 are responsible for more accidents than older drivers. It would be unacceptable for a court to accept evidence of that fact to find a defendant liable in negligence yet that is the consequence of the trial judge's reasoning in this appeal.

9 It is possible to read the trial judge's reference to the "prevalent attitude of the day" as meaning her view of the prevalent attitude in society today. If the trial judge used the "prevalent attitude of society" towards non-whites as evidence upon which to draw an inference in this case, she erred, as there were no facts in evidence

from which to draw that inference. It would be stereotypical reasoning to conclude that, since society is racist, and, in effect, tells minorities to "shut up," we should infer that this police officer told this appellant minority youth to "shut up." This reasoning is flawed.

10 Trial judges have to base their findings on the evidence before them. It was open to the appellant to introduce evidence that this police officer was racist and that racism motivated his actions or that he lied. This was not done. For the trial judge to infer that based on her general view of the police or society is an error of law. For this reason there should be a new trial.

11 In addition to not being based on the evidence, the trial judge's comments have been challenged as giving rise to a reasonable apprehension of bias. The test for finding a reasonable apprehension of bias has challenged courts in the past. It is interchangeably expressed as a "real danger of bias," a "real likelihood of bias," a "reasonable suspicion of bias" and in several other ways. An attempt at a new definition will not change the test. Lord Denning M.R. captured the essence of the inquiry in his judgment in *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.), at p. 599:

> [I]n 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 *Reg.* v. *Huggins*; and *Rex* v. *Sunderland Justices*, *per* Vaughan Williams L.J. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *Reg.* v. *Camborne Justice*, *Ex parte Pearce*, and *Reg.* v. *Nailsworth Licensing*

> *Justices, Ex parte Bird*. 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 inquire 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."

See also *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256.

12 The appellant and the interveners argued that the trial judge's statements were simply a review of the evidence and were her reasons for judgment. They said she was relying on her life experience and to deny that is to deny reality. I disagree.

13 The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence. The fact that on some other occasions police officers have lied or overreacted is irrelevant. Life experience is not a substitute for evidence. There was no evidence before the trial judge to support the conclusions she reached.

14 The trial judge could not decide this case based on what some police officers did in the past without deciding that all police officers are the same. As stated, the appellant was entitled to call evidence of the police officer's conduct to show that there was in fact evidence to support either his bias or racism. No such evidence was called. The trial judge presumably called upon her life experience to decide the issue. This she was not entitled to do.

15 The bedrock of our jurisprudence is the adversary system. Criminal prosecutions are less adversarial because of the Crown's duty to present all the evidence fairly. The system depends on each side's producing facts by way of evidence from which the court decides the issues. Our system, unlike some others, does not permit a judge to become an independent investigator to seek out the facts.

16 Canadian courts have, in recent years, criticized the stereotyping of people into what is said to be predictable behaviour patterns. If a judge in a sexual assault case instructed the jury or him- or herself that because the complainant was a prostitute he or she probably consented, or that prostitutes are likely to lie about such things as sexual assault, that decision would be reversed. Such presumptions have no place in a system of justice that treats all witnesses equally. Our jurisprudence prohibits tying credibility to something as irrelevant as gender, occupation or perceived group predisposition.

17 Similarly, we have eliminated the requirement for corroboration of the complainant's evidence. The absolute requirement of corroboration for particular sexual offences and the lesser requirement of a warning to the jury about relying on the victim's uncorroborated testimony have been abolished: see *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93, s. 8, and S.C. 1980-81-82-83, c. 125, s. 5. Also eliminated is the need for corroboration in cases where a prosecution is based on the unsworn evidence of children: see S.C. 1987, c. 24, s. 18. The elimination of corroboration shows the present evolution away from stereotyping various classes of witnesses as inherently unreliable.

18 It can hardly be seen as progress to stereotype police officer witnesses as likely to lie when dealing with non-whites. This would return us to a time in the history of the Canadian justice system that many thought had past. This reasoning, with respect to police officers, is no more legitimate than the stereotyping of women, children or minorities.

19 In my opinion the comments of the trial judge fall into stereotyping the police officer. She said, among other things, that police officers have been known to mislead the courts, and that police officers overreact when dealing with non-white groups. She then held, in her evaluation of this particular police officer's evidence, that these factors led her to "a state of mind right there that is questionable". The trial judge erred in law by failing to base her conclusions on evidence.

20 Judges, as arbiters of truth, cannot judge credibility based on irrelevant witness characteristics. All witnesses must be placed on equal footing before the court.

21 The trial judge concluded the impugned part of her reasons with the following: "[a]t any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit." What did she mean by basing her judgment, in part, upon her own comments? Did she mean based on her stereotyping of police officers? Or, did she mean based on her comments analysing the evidence of the parties? Based on the trial record what is clear is that the trial judge did not reach her conclusion on any facts presented at the trial.

22 It is irrelevant conjecture as to what the trial judge actually intended by these statements. I agree with my colleague Cory J., that there are other plausible

explanations of these impugned comments. It may be that all of her remarks were merely intended as a hypothetical response to the Crown's suggestion that the police officer had no reason to lie, and therefore innocuous. However, we are concerned with both the fairness and the appearance of fairness of the trial, and the absence of evidence to support the judgment is an irreparable defect.

23 I agree with the approach taken by Cory J. with respect to the nature of bias and the test to be used to determine if the words or actions of a judge give rise to apprehension of bias. However, I come to a different conclusion in the application of the test to the words of the trial judge in this case. It follows that I disagree with the approach to reasonable apprehension of bias put forward by Justices L'Heureux-Dubé and McLachlin.

24 The error of law that I attribute to the trial judge's assessment of the evidence or lack of evidence is sufficiently serious that a new trial is ordered.

25 In the result, I would uphold the disposition of Flinn J.A. in the Court of Appeal (1995), 145 N.S.R. (2d) 284, and dismiss the appeal.

The reasons of La Forest and Gonthier JJ. were delivered by

26. GONTHIER J. -- I have had the benefit of the reasons of Justice Cory, the joint reasons of Justices L'Heureux-Dubé and McLachlin and the reasons of Justice Major. I agree with Cory J. and L'Heureux-Dubé and McLachlin JJ. as to the disposition of the appeal and with their exposition of the law on bias and impartiality and the relevance of context. However, I am in agreement with and adopt the joint reasons of L'Heureux-Dubé and McLachlin JJ. in their treatment of social context

and the manner in which it may appropriately enter the decision-making process as well as their assessment of the trial judge's reasons and comments in the present case.

The following are the reasons delivered by

L'HEUREUX-DUBÉ AND MCLACHLIN JJ. --

I. Introduction

27 We have read the reasons of our colleague, Justice Cory, and while we agree that this appeal must be allowed, we differ substantially from him in how we reach that outcome. As a result, we find it necessary to write brief concurring reasons.

28 We endorse Cory J.'s comments on judging in a multicultural society, the importance of perspective and social context in judicial decision-making, and the presumption of judicial integrity. However, we approach the test for reasonable apprehension of bias and its application to the case at bar somewhat differently fromour colleague.

29 In our view, the test for reasonable apprehension of bias established in the jurisprudence is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate

stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.

30 We find that on the basis of these principles, there is no reasonable apprehension of bias in the case at bar. Like Cory J. we would, therefore, overturn the findings by the Nova Scotia Supreme Court (Trial Division) and the majority of the Nova Scotia Court of Appeal that a reasonable apprehension of bias arises in this case, and restore the acquittal of R.D.S. This said, we disagree with Cory J.'s position that the comments of Judge Sparks were unfortunate, unnecessary, or close to the line. Rather, we find them to reflect an entirely appropriate recognition of the facts in evidence in this case and of the context within which this case arose -- a context known to Judge Sparks and to any well-informed member of the community.

II. The Test for Reasonable Apprehension of Bias

31 The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267. De Grandpré J. stated, at pp. 394-95:

> . . . 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.... [T]hat 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 [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

32 As Cory J. notes at para. 92, the scope and stringency of the duty of fairness articulated by de Grandpré depends largely on the role and function of the tribunal in question. Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances": *United States v. Morgan*, 313 U.S. 409 (1941), at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in *Commentaries on the Laws of England*, Book III, cited at footnote 49 in Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995), 18 *Dalhousie L.J.* 408, at p. 417, "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea". Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), at pp. 60-61.

33 Notwithstanding the strong presumption of impartiality that applies to judges, they will nevertheless be held to certain stringent standards regarding bias --

"a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification": *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, at pp. 842-43.

34 In order to apply this test, it is necessary to distinguish between the impartiality which is required of all judges, and the concept of judicial neutrality. The distinction we would draw is that reflected in the insightful words of Benjamin N. Cardozo in *The Nature of the Judicial Process* (1921), at pp. 12-13 and 167, where he affirmed the importance of impartiality, while at the same time recognizing the fallacy of judicial neutrality:

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them -- inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs.... In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.
>
> ...
>
> Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether he [or she] be litigant or judge.

35 Cardozo recognized that objectivity was an impossibility because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 12, "[t]here is no human being who is not the product of every social experience, every process of education, and every human contact". What is possible and desirable, they note, is impartiality:

> ...the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

III. The Reasonable Person

36 The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail (*Committee for Justice and Liberty*, *supra.*) The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.

37 It follows that one must consider the reasonable person's knowledge and understanding of the judicial process and the nature of judging as well as of the community in which the alleged crime occurred.

A. *The Nature of Judging*

38 As discussed above, judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity

of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

39 It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function. As David M. Paciocco and Lee Stuesser write in their book *The Law of Evidence* (1996), at p. 277:

> *In general, the trier of fact is entitled simply to apply common sense and human experience in determining whether evidence is credible and in deciding what use, if any, to make of it in coming to its finding of fact.* [Emphasis in original.]

40 At the same time, where the matter is one of identifying and applying the law to the findings of fact, it must be the law that governs and not a judge's individual beliefs that may conflict with the law. Further, notwithstanding that their own insights into human nature will properly play a role in making findings of credibility or factual determinations, judges must make those determinations only after being equally open to, and considering the views of, all parties before them. The reasonable person, through whose eyes the apprehension of bias is assessed, expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them.

41 It is axiomatic that all cases litigated before judges are, to a greater or lesser degree, complex. There is more to a case than who did what to whom, and the

questions of fact and law to be determined in any given case do not arise in a vacuum. Rather, they are the consequence of numerous factors, influenced by the innumerable forces which impact on them in a particular context. Judges, acting as finders of fact, must inquire into those forces. In short, they must be aware of the context in which the alleged crime occurred.

42 Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality. In that regard, Professor Jennifer Nedelsky's "Embodied Diversity and the Challenges to Law" (1997), 42 *McGill L.J.* 91, at p. 107, offers the following comment:

> What makes it possible for us to genuinely judge, to move beyond our private idiosyncracies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective .... It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible.

43 Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. For example, in a case involving alleged police misconduct in denying an accused's right to counsel, this Court inquired not simply into whether the accused had been read their *Charter* rights, but also used a contextual approach to ensure that the purpose of the constitutionally protected right was fulfilled: *R. v. Bartle*, [1994] 3 S.C.R. 173. The Court, placing itself in the position of the accused, asked how the accused would have experienced and responded to arrest and detention. Against this background, the Court went on to determine what was required to make the right to counsel truly meaningful. This

inquiry provided the Court with a larger picture, which was in turn conducive to a more just determination of the case.

44 An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context: *R. v. Lavallee*, [1990] 1 S.C.R. 852, *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), and *Moge v. Moge*, [1992] 3 S.C.R. 813, from academic studies properly placed before the Court; and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is not only consistent with impartiality; it may also be seen as its essential precondition.

45 A reasonable person far from being troubled by this process, would see it as an important aid to judicial impartiality.

B. *The Nature of the Community*

46 The reasonable person, identified by de Grandpré J. in *Committee for Justice and Liberty*, *supra*, is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s. 15 of the *Charter* and endorsed in nation-wide quasi-constitutional provincial and federal human rights legislation. 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:

> 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* (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.M.S.* (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 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.

49 Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

IV. Application of the Test to the Facts

50 In assessing whether a reasonable person would perceive the comments of Judge Sparks to give rise to a reasonable apprehension of bias, it is important to bear in mind that the impugned reasons were delivered orally. As Professor Devlin puts it in "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S.", *supra*, at p. 414:

> Trial judges have a heavy workload that allows little time for meticulously thought-through reasoning. This is particularly true when decisions are delivered orally immediately after counsel have finished their arguments.

(See also *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664.)

It follows that for the purposes of this appeal, the oral reasons issued by Judge Sparks should be read in their entirety, and the impugned passages should be construed in light of the whole of the trial proceedings and in light of all other portions of the judgment.

51 Judge Sparks was faced with contradictory testimony from the only two witnesses, the appellant R.D.S., and Constable Stienburg. Both testified as to the events that occurred and were subjected to cross-examination. As trier of fact, Judge Sparks was required to assess their testimony, and to determine whether or not, on the evidence before her, she had a reasonable doubt as to the guilt of the appellant R.D.S. It is evident in the transcript that Judge Sparks proceeded to do just that.

52 Judge Sparks briefly summarized the contradictory evidence offered by the two witnesses, and then made several observations about credibility. She noted that R.D.S. testified quite candidly, and with considerable detail. She remarked that contrary to the testimony of Constable Stienburg, it was the evidence of R.D.S. that when he arrived on the scene on his bike, his cousin was handcuffed and not struggling in any way. She found the level of detail that R.D.S. provided to have "a ring of truth", and found him to be "a rather honest young boy". In the end, while Judge Sparks specifically noted that she did not accept all the evidence given by R.D.S., she nevertheless found him to have raised a reasonable doubt by raising queries in her mind as to what actually occurred.

53 It is important to note that having already found R.D.S. to be credible, and having accepted a sufficient portion of his evidence to leave her with a reasonable doubt as to his guilt, Judge Sparks necessarily disbelieved at least a portion of the conflicting evidence of Constable Stienburg. At that point, Judge

Sparks made reference to the submissions of the Crown that "there's absolutely no reason to attack the credibility of the officer", and then addressed herself to why there might, in fact, be a reason to attack the credibility of the officer in this case. It is in this context that Judge Sparks made the statements which have prompted this appeal:

> 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 am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are 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. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit.

54 These remarks do not support the conclusion that Judge Sparks found Constable Stienburg to have lied. In fact, Judge Sparks did quite the opposite. She noted firstly, that she was not saying Constable Stienburg had misled the court, although that could be an explanation for his evidence. She then went on to remark that she was not saying that Constable Stienburg had overreacted, though she was alive to that possibility given that it had happened with police officers in the past, and in particular, it had happened when police officers were dealing with non-white groups. Finally, Judge Sparks concluded that, though she was not willing to say that Constable Stienburg did overreact, it was her belief that he probably overreacted. And, in support of that finding, she noted that she accepted the evidence of R.D.S. that "he was told to shut up or he would be under arrest".

55 At no time did Judge Sparks rule that the probable overreaction by Constable Stienburg was motivated by racism. Rather, she tied her finding of probable overreaction to the evidence that Constable Stienburg had threatened to arrest the appellant R.D.S. for speaking to his cousin. At the same time, there was evidence capable of supporting a finding of racially motivated overreaction. At an earlier point in the proceedings, she had accepted the evidence that the other youth arrested that day, was handcuffed and thus secured when R.D.S. approached. This constitutes evidence which could lead one to question why it was necessary for both boys to be placed in choke holds by Constable Stienburg, purportedly to secure them. In the face of such evidence, we respectfully disagree with the views of our colleagues Cory and Major JJ. that there was no evidence on which Judge Sparks could have found "racially motivated" overreaction by the police officer.

56 While it seems clear that Judge Sparks did not in fact relate the officer's probable overreaction to the race of the appellant R.D.S., it should be noted that if Judge Sparks had chosen to attribute the behaviour of Constable Stienburg to the racial dynamics of the situation, she would not necessarily have erred. As a member of the community, it was open to her to take into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background.

57 That Judge Sparks recognized that police officers sometimes overreact when dealing with non-white groups simply demonstrates that in making her determination in this case, she was alive to the well-known racial dynamics that may exist in interactions between police officers and visible minorities. As found by Freeman J.A. in his dissenting judgment at the Court of Appeal (1995), 145 N.S.R. (2d) 284, at p. 294:

> 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.

58 Given these facts, the question is whether a reasonable and right-minded person, informed of the circumstances of this case, and knowledgeable about the local community and about Canadian *Charter* values, would perceive that the reasons of Judge Sparks would give rise to a reasonable apprehension of bias. In our view, they would not. The clear evidence of prejudgment required to sustain a reasonable apprehension of bias is nowhere to be found.

59 Judge Sparks' oral reasons show that she approached the case with an open mind, used her experience and knowledge of the community to achieve an understanding of the reality of the case, and applied the fundamental principle of proof beyond a reasonable doubt. Her comments were based entirely on the case before her, were made after a consideration of the conflicting testimony of the two witnesses and in response to the Crown's submissions, and were entirely supported by the evidence. In alerting herself to the racial dynamic in the case, she was simply engaging in the process of contextualized judging which, in our view, was entirely proper and conducive to a fair and just resolution of the case before her.

V. Conclusion

60 In the result, we agree with Cory J. as to the disposition of this case. We would allow the appeal, overturn the findings of the Nova Scotia Supreme Court (Trial Division) and the majority of the Nova Scotia Court of Appeal, and restore the acquittal of the appellant R.D.S.

The judgment of Cory and Iacobucci JJ. was delivered by

61 CORY J. -- In this appeal, it must be determined whether a reasonable apprehension of bias arises from comments made by the trial judge in providing her reasons for acquitting the accused.

I. Facts

62 R.D.S. is an African-Canadian youth. When he was 15 years of age he was charged with three offences: unlawfully assaulting Constable Donald Stienburg; unlawfully assaulting Constable Stienburg with the intention of preventing the arrest of N.R.; and unlawfully resisting Constable Stienburg in the lawful execution of his duty.

63 The Crown proceeded with the charges by way of summary conviction. There were only two witnesses at the trial: R.D.S. himself and Constable Stienburg. Their accounts of the relevant events differed widely. The credibility of these witnesses would determine the outcome of the charges.

A. *Constable Stienburg's Evidence*

64 Constable Stienburg testified that he was in his police cruiser with his partner when a radio transmission alerted them that other officers were in pursuit of a stolen van. In the car was a "ride-along", Leslie Lane, who was unable to testify at the trial. The occupants of the stolen van were described as "non-white" youths. When Constable Stienburg and his partner arrived at the designated area they saw

two black youths running across the street in front of them. Constable Stienburg detained one of the individuals, N.R., while his partner pursued the other. He testified that there were a number of other people standing around at the time.

65 N.R. was detained outside the police car since the "ride along" was in the back seat. While Constable Stienburg was standing by the side of the road with N.R., the accused, R.D.S., came towards Constable Stienburg on his bicycle. Constable Stienburg testified that R.D.S. ran into his legs, and while still on the bicycle, yelled at him and pushed him. R.D.S. was then arrested for interfering with the arrest of N.R., and Constable Stienburg called for back-up. Constable Stienburg stated that he put both R.D.S. and N.R. in "a neck restraint". When R.D.S. was finally brought to the police station, he was read his rights, and charged with the three offences.

66 In cross-examination, it was suggested to Constable Stienburg that R.D.S. had been overcharged. It was pointed out that R.D.S. had no prior record and it was suggested, although not particularly clearly, that R.D.S. had been singled out because he was black.

B. *Testimony of R.D.S.*

67 R.D.S. testified that he remembered that the weather on the particular day was misty and humid. While riding his bike from his grandmother's to his mother's house he saw the police car and the crowd standing beside it. A friend told him that his cousin N.R. had been arrested. R.D.S. approached the crowd, and stopped his bike when he saw N.R. and the officer. R.D.S. then tried to talk to N.R. to ask him what had happened and to find out if he should tell N.R.'s mother. Constable Stienburg told him: "Shut up, shut up, or you'll be under arrest too". When R.D.S. continued

to ask N.R. if he should call his mother, Constable Stienburg arrested R.D.S. and put him in a choke hold. R.D.S. indicated that he could not breathe, and that he heard a woman tell the officer to "Let that kid go . . . ." He also heard her ask for his phone number. He could not talk so N.R. gave the number to her. R.D.S. indicated that the crowd standing around were all "little kids" under the age of 12. He denied that he ran into anyone or that he intended to run into anyone on his bike. He also testified that his hands remained on the handlebars, and he did not push the officer.

68 In cross-examination, he indicated that the reason he approached the crowd was because he was "being nosey". He remembered that N.R. was handcuffed when he arrived. Both R.D.S. and N.R. were placed in a choke hold at the same time. He repeated his denial that he touched the officer either with his bicycle or his hands. He also denied that he said anything to Constable Stienburg prior to his arrest. He indicated that all his questions were directed to N.R.

C. *History of Proceedings*

69 In Youth Court, Judge Sparks weighed the evidence of the two witnesses and determined that R.D.S. should be acquitted. In her oral reasons, she made comments which were challenged as raising a reasonable apprehension of bias. They are the subject of this appeal. After the reasons had been given and an appeal to the Nova Scotia Supreme Court (Trial Division) had been filed by the Crown, Judge Sparks issued supplementary reasons which outlined in greater detail her impressions of the credibility of both witnesses and the context in which her comments were made.

70 In the Trial Division, Glube C.J.S.C., sitting as summary conviction appeal judge, allowed the Crown's appeal. She held in oral reasons that a new trial was warranted on the basis that the remarks of Judge Sparks gave rise to a reasonable apprehension of bias. This decision was upheld in the Nova Scotia Court of Appeal by Flinn J.A. and Pugsley J.A., Freeman J.A. dissenting.

II. Judgments Below

A. *Youth Court*

71 In her oral reasons, Judge Sparks reviewed the details of Constable Stienburg's testimony, and noted that R.D.S.'s evidence was directly opposed to it. In describing R.D.S.'s testimony, she observed that she was impressed with his clear recollection of the weather conditions on that day, and his candour in pointing out that he was simply being nosey in approaching the crowd. She also noted that his description of being placed in the choke hold was vivid. R.D.S. stated clearly that when he was placed in the choke hold, he could not speak and had difficulty breathing. In fact, he was unable to respond when a woman asked him for his phone number so she could notify his mother.

72 The Youth Court Judge paid particular attention to R.D.S.'s testimony that N.R. was handcuffed when R.D.S. arrived on the scene. This aspect of R.D.S.'s testimony suggested that N.R. was not a threat to the officer. Significantly, Constable Stienburg did not mention that N.R. was handcuffed, and gave the court the distinct impression that he had difficulty restraining N.R. In Judge Sparks' view, R.D.S.'s testimony that N.R. was handcuffed had "a ring of truth" to it, which raised questions

in her mind about the divergence between R.D.S.'s evidence and the evidence of Constable Stienburg on this point.

73 In general, Judge Sparks described R.D.S's demeanour as "positive", even though he was not particularly articulate. She found him to be a "rather honest young boy". In particular, she was struck by his openness in acknowledging his own "nosiness" and by his surprise at the hostility of the police officer. Judge Sparks indicated that she was not saying that she accepted everything that R.D.S. said, but noted that "certainly he has raised a doubt in my mind". She still had queries about "what actually transpired on the afternoon of October the 17th". As a result, she concluded that the Crown had not discharged its evidentiary burden to prove all the elements of the offence beyond a reasonable doubt.

74 She concluded her reasons with the controversial remarks that gave rise to this appeal. They are as follows:

> 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 am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are 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. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit.

In conclusion, she agreed with the defence counsel that the accused had been overcharged, and that the first two counts duplicated each other. However, nothing turned on this since she dismissed all three charges.

B. *Nova Scotia Supreme Court (Trial Division),* [1995] N.S.J. No. 184 (QL)

75 On appeal, Glube C.J.S.C. expressed the view that she could not consider the supplementary reasons provided by the Youth Court Judge. The decision was, in her view, made in the oral reasons at the original trial, and the supplementary reasons did not form the basis for the Crown's appeal. If Judge Sparks had intended to issue additional reasons, she should have indicated this to counsel either at the trial or shortly thereafter. Both parties agreed that Judge Sparks was *functus officio* when she issued her supplementary reasons, and that they could not be considered. Glube C.J.S.C. indicated that her own review of the case law supported this conclusion.

76 Glube C.J.S.C. then considered the allegations of actual and apprehended bias made by the Crown on the basis of Judge Sparks' final remarks in her oral reasons. She rejected the defence's argument that there is no appeal on questions of fact and summarized the general principles pertaining to appellate review of those findings. She observed, at para. 17, that a Crown's appeal from an acquittal will only succeed "where the verdict is unreasonable or not supported by the evidence".

77 She expressed the view that if a reasonable apprehension of bias arises, the verdict would not be supported by the evidence. Relying on *R. v. Wald* (1989), 47 C.C.C. (3d) 315 (Alta. C.A.), she indicated that the entitlement to an impartial decision-maker applies to the Crown as well as the accused. The principles of fundamental justice "includ[e] natural justice and a duty to act fairly" (para. 21).

These principles impose a duty on the decision-maker to be and to appear to be impartial. If these principles apply to administrative tribunals, they must apply even more to courts.

78 Glube C.J.S.C. found nothing in the transcript of the hearing itself that would give rise to an impression that Judge Sparks was biased. Furthermore, if the reasons of Judge Sparks had ended with her conclusion that the Crown had not satisfied its burden of proof, there would be no basis for the appeal. Judge Sparks had made clear findings of credibility that favoured the accused. Unfortunately, however, she went on and made the impugned comments. Glube C.J.S.C. was of the view that there was no basis in the evidence for Judge Sparks' statements. In particular, there was no evidence of the "prevalent attitude of the day" (para. 24). She stated at para. 25 that "judges must be extremely careful to avoid expressing views which do not form part of the evidence".

79 She found that the test for reasonable apprehension of bias is an objective one, based on what the reasonable, right-minded person with knowledge of the facts would conclude. In her view, the reasonable person would conclude that there was a reasonable apprehension of bias on the part of Judge Sparks, in spite of her thorough review of the facts and her findings of credibility. As a result, a new trial was warranted.

C. *Court of Appeal* (1995), 145 N.S.R. (2d) 284

(i) Flinn J.A. (Pugsley J.A. concurring)

80 Flinn J.A. noted that the Crown can only appeal a summary conviction acquittal on a question of law with leave of the court. If the summary conviction appeal court judge made no error of law, then there is no appeal from her decision. He then rejected the accused's argument that Glube C.J.S.C. had improperly reexamined and redetermined issues of credibility. Since her decision was based on reasonable apprehension of bias, she did not err in law in declining to defer to the trial judge's findings.

81 Flinn J.A. reviewed the test for reasonable apprehension of bias. He concluded that bias reflects the inability of the judge to act impartially. The test is objective and the standard of reasonableness applies to the person who perceives the bias, as well as the apprehension of bias itself. The test requires a consideration of what the reasonable, right-minded person, with knowledge of all the facts, would think with regard to the apprehension of bias. The apprehension must be reasonable, and suspicion or conjecture is not enough. Finally, it is not necessary to show that actual bias influenced the result.

82 In Flinn J.A.'s opinion, Glube C.J.S.C. made no error in applying the test to the decision of the Youth Court Judge. She was correct to point out that there was no evidence to justify Judge Sparks' comments. Whether or not the comments reflected "an unfortunate social reality", the issue was whether Judge Sparks considered factors not in evidence when she made her critical findings of credibility and decided to acquit the accused. Judge Sparks used her general comments to

conclude that Constable Stienburg overreacted. There was no evidence regarding "the prevalent attitude of the day" or the reasons why the officer overreacted. Concerns regarding overreaction were not canvassed in cross-examination of the officer, and the officer had no opportunity to address these concerns in his testimony.

83 As a result, Flinn J.A. was of the view that "[t]he unfortunate use of these generalizations, by the Youth Court judge" would lead a reasonable, fully informed person to conclude that Judge Sparks had based her findings of credibility at least partially on the basis of matters not in evidence. This was unfair. The appeal was therefore dismissed.

84 Finally, Flinn J.A. rejected the argument that Glube C.J.S.C. had inappropriately adopted a formal equality approach to the question of reasonable apprehension of bias. He agreed with the Crown that the appellant's *Charter* argument on this point was not properly raised by the appeal, and in any event, that Glube C.J.S.C.'s approach was not inappropriate.

(ii) Freeman J.A. (dissenting)

85 Freeman J.A. agreed with the articulation of the law set out by the majority. However, he was of the view at p. 292 that "it was perfectly proper for the trial judge, in weighing the evidence before her, to consider the racial perspective". He was not satisfied that this gave rise to a perception that she was biased.

86 He indicated that although it was not clear what Judge Sparks meant by her reference to the "prevalent attitude of the day", it was possible that she was referring to the attitudes exhibited on the day of R.D.S.'s arrest. There was evidence

before her on that point. At any rate, he was prepared to give Judge Sparks the benefit of the doubt on this remark, and to regard it as a neutral factor in the decision. The only remaining remarks related to the possible racism of the police.

87 Freeman J.A. was struck by the delicate racial dynamics of the courtroom. In his view, at p. 294, "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". He noted the unfortunate truth that most individuals generally know that police officers have on occasion misled the court or overreacted when dealing with non-white groups. Judge Sparks did not state that the officer did either of these things. Such a finding would have required evidence.

88 Judge Sparks did state that the officer overreacted, but she related it to her finding that she believed R.D.S.'s statement that the officer told him to shut up or he would be under arrest. This was not a biased conclusion, since it indicated her concern that the charges might have arisen more as a result of R.D.S.'s verbal interference, than of any physical act. There was certainly some evidence on which Judge Sparks could conclude that the officer overreacted, and this determination was within her purview. If the finding of overreaction did not give rise to a reasonable apprehension of bias, Freeman J.A. was not satisfied that any other comments made by Judge Sparks would do so. He would have allowed the appeal.

III. Issues

89 Only one issue arises on this appeal:

Did the comments made by Judge Sparks in her reasons give rise to a reasonable apprehension of bias?

IV. Analysis

A. *Can this Court Consider Judge Sparks' Supplementary Reasons*?

90 Glube C.J.S.C. correctly concluded that the supplementary reasons issued by Judge Sparks after the appeal had been filed could not be taken into account in assessing whether or not the reasons of Judge Sparks gave rise to a reasonable apprehension of bias. The parties did not dispute this determination in the Court of Appeal. In this Court, the appellant did not raise this issue in argument and proceeded on the basis that the supplementary reasons were not before the Court. The respondent Crown submitted in oral argument that the supplementary reasons should be considered as part of the overall picture in determining whether a reasonable apprehension of bias arose from Judge Sparks' conduct. The Crown appeared to be suggesting that the very fact of their issuance, as well as their substance, was an important factor in the impression of bias that was created. At this late stage it would be most unfair to accept that submission. Accordingly, the supplementary reasons should not be considered.

B. *Ascertaining the Existence of a Reasonable Apprehension of Bias*

(i) Fair Trial and The Right to an Unbiased Adjudicator

91 A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed

and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.

92 It is a well-established principle that all adjudicative tribunals and administrative bodies owe a duty of fairness to the parties who must appear before them. See for example *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636. In order to fulfil this duty the decision-maker must be and appear to be unbiased. The scope of this duty and the rigour with which it is applied will vary with the nature of the tribunal in question.

93 For very good reason it has long been determined that the courts should be held to the highest standards of impartiality. *Newfoundland Telephone*, *supra*, at p. 638; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 660-61. This principle was recently confirmed and emphasized by the majority in *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, at para. 7, where it was said "[t]he right to a trial before an impartial judge is of fundamental importance to our system of justice". The right to trial by an impartial tribunal has been expressly enshrined by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

94 Trial judges in Canada exercise wide powers. They enjoy judicial independence, security of tenure and financial security. Most importantly, they enjoy the respect of the vast majority of Canadians. That respect has been earned by their ability to conduct trials fairly and impartially. These qualities are of fundamental importance to our society and to members of the judiciary. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a

reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.

95 Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the *Charter*. Section 27 provides that the *Charter* itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin. This is a far more difficult task in Canada than it would be in a homogeneous society. Remarks which would pass unnoticed in other societies could well raise a reasonable apprehension of bias in Canada.

96 Usually, in a criminal trial, actual or perceived judicial bias is alleged by the accused. However, nothing precludes the Crown from making a similar allegation. Indeed it has a duty to make such a submission in appropriate circumstances. Even in the absence of explicit constitutional protection, it is an important principle of our legal system that a trial must be fair to all parties -- to the Crown as well as to the accused. See, for example, *R. v. Gushman*, [1994] O.J. No. 813 (Gen. Div.). In *Curragh*, *supra*, this Court recently upheld an allegation of perceived bias arising from the conduct of a trial judge towards a Crown attorney. In a slightly different context, it has been held that if a judge forms or appears to form a biased opinion against a Crown witness, for example, a sexual assault complainant, the trial may be unfair to the Crown: *Wald*, *supra*, at p. 336.

97 The question which must be answered in this appeal is whether the comments made by Judge Sparks in her reasons give rise to a reasonable apprehension that she was not impartial as between the Crown and the accused. The Crown's position, in essence, is that Judge Sparks did not give the essential and requisite appearance of impartiality because her comments indicated that she prejudged an issue in the case, or to put it another way, she reached her determination on the basis of factors which were not in evidence.

(ii) Standard of Review

98 Before dealing with the issue of apprehended bias, it is necessary to address an argument raised by the appellant and the interveners African-Canadian Legal Clinic et al. They stressed that this appeal turns entirely on findings of credibility. There were only two witnesses, and their evidence was contradictory. Judge Sparks' role was therefore simply to determine the issue of credibility. The appellant and the interveners argued that it is a well-established principle of law that appellate courts should defer to such findings, and that Glube C.J.S.C. improperly reviewed Judge Sparks' findings of credibility. In my view, these submissions are not entirely correct.

99 If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. See *Curragh*, *supra*, at para. 5; *Gushman*, *supra*, at para. 28. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. In the context of appellate review, it has recently been held that a "properly drawn conclusion that there is a

reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held": *Curragh*, *supra*, at para. 5.

100 If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See *Newfoundland Telephone*, *supra*, at p. 645; see also *Curragh*, *supra*, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances": *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, at p. 843. However, if the words or conduct of the judge, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be.

101 Therefore, while the appellant is correct that appellate courts have wisely adopted a deferential standard of review in examining factual determinations made by lower courts, including findings of credibility, it is somewhat misleading to characterize the issue in this appeal as one of credibility alone. If Judge Sparks' findings of credibility were tainted by bias, real or apprehended, they would be made without jurisdiction, and would not warrant appellate deference. On the other hand, if her findings were not tainted by bias, then the case turned entirely on her findings of credibility and an appellate court should not interfere with those findings, unless they were clearly unreasonable or not supported by the evidence. See for example, *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at pp. 131-32.

102 Thus the sole issue is whether Judge Sparks' reasons demonstrated actual or perceivable bias. If they did, then Glube C.J.S.C. not only had the jurisdiction to overturn them but also an obligation to order a new trial. A judicial determination at first instance that real or apprehended bias exists may itself be worthy of some deference by appellate courts: *Huerto v. College of Physicians and Surgeons* (1996), 133 D.L.R. (4th) 100 (Sask. C.A.), at p. 105. However, an allegation of judicial bias raises such serious and sensitive issues that the basic interests of justice require appellate courts to retain some scope to review that determination.

(iii) What is Bias?

103 It may be helpful to begin by articulating what is meant by impartiality. In deciding whether bias arises in a particular case, it is relatively rare for courts to explore the definition of bias. In this appeal, however, this task is essential, if the Crown's allegation against Judge Sparks is to be properly understood and addressed. See Prof. Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995), 18 *Dalhousie L.J.* 408, at pp. 438-39.

104 In *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685, Le Dain J. held that the concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". He added that "[t]he word 'impartial' . . . connotes absence of bias, actual or perceived". See also *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 283. In a more positive sense, impartiality can be described -- perhaps somewhat inexactly -- as a state of mind in which the

adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

105 In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. A helpful explanation of this concept was provided by Scalia J. in *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), at p. 1155:

> The words [bias or prejudice] connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). [Emphasis in original.]

Scalia J. was careful to stress that not every favourable or unfavourable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable -- in other words, it is not "wrongful or inappropriate": *Liteky*, *supra*, at p. 1155.

106 A similar statement of these principles is found in *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.), in which Watt J. noted at pp. 51-52:

> In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

See also *R. v. Stark*, [1994] O.J. No. 406 (Gen. Div.), at para. 64; *Gushman*, *supra*, at para. 29.

107 Doherty J.A. in *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), leave to appeal denied, [1994] 1 S.C.R. x, held that partiality and bias are in fact not the same thing. In addressing the question of potential partiality or bias of jurors, he noted at p. 336 that:

> Partiality has both an attitudinal and behavioural component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases.

In demonstrating partiality, it is therefore not enough to show that a particular juror has certain beliefs, opinions or even biases. It must be demonstrated that those beliefs, opinions or biases prevent the juror (or, I would add, any other decision-maker) from setting aside any preconceptions and coming to a decision on the basis of the evidence: *Parks*, *supra*, at pp. 336-37.

108 This analysis is certainly not exhaustive. Different factors may determine the issue where, for example, the allegation relates to direct pecuniary bias or some other personal interest in the outcome of a case. Yet the concepts articulated can be used as guiding principles in the consideration of this case.

(iv) <u>The Test for Finding a Reasonable Apprehension of Bias</u>

109 When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable

apprehension of bias. *Idziak, supra*, at p. 660. It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. See *Newfoundland Telephone, supra*, at p. 636.

110 It was in this context that Lord Hewart C.J. articulated the famous maxim: "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done": *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259. The Crown suggested that this maxim provided a separate ground for review of Judge Sparks' decision, and implied that the threshold for appellate intervention is lower when reviewing a decision for "appearance of justice" than for "appearance of bias". This submission cannot be sustained. The *Sussex Justices* case involved an allegation of bias. The requirement that justice should be seen to be done simply means that the person alleging bias does not have to prove actual bias. The Crown can only succeed if Judge Sparks' reasons give rise to a reasonable apprehension of bias.

111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

> [T]he 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. . . . [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. . . ."

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be

reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, *supra*, at pp. 54-55; *Gushman*, *supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, *supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

112 The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice and Liberty*, *supra*, at pp. 394-95:

> 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". [Emphasis added.]

Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. See *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850 (Q.B.D.); *Metropolitan Properties Co. v. Lannon*, [1969] 1

Q.B. 577 (C.A.); *R. v. Gough*, [1993] 2 W.L.R. 883 (H.L.); *Bertram*, *supra*, at p. 53; *Stark*, *supra*, at para. 74; *Gushman*, *supra*, at para. 30.

113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, *supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

114 The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram*, *supra*, at p. 28; *Lin*, *supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

115 Finally, in the context of the current appeal, it is vital to bear in mind that the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic. A judge who happens to be black is no more likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants. All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial.

(v) Judicial Integrity and the Importance of Judicial Impartiality

116 Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.

117 Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. See *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), and *Lin*, *supra*. This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. See *Smith & Whiteway*, *supra*, at para. 64; *Lin*, *supra*, at para. 37. The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.

118 It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the

community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

119 The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial

> does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

(Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12.)

It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging. See for example the discussion by the Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997), 9 *C.J.W.L.* 1. See also Devlin, *supra*, at pp. 408-9.

120 Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations.

(vi) Should Judges Refer to Aspects of Social Context in Making Decisions?

121 It is the submission of the appellant and interveners that judges should be able to refer to social context in making their judgments. It is argued that they should be able to refer to power imbalances between the sexes or between races, as well as to other aspects of social reality. The response to that submission is that each case must be assessed in light of its particular facts and circumstances. Whether or not the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements will depend on the facts of the case.

122 At the outset, I would note that this appeal was not put forward by the appellant as engaging the principles of judicial notice. Rather it was the appellant's contention that the references to social context by Judge Sparks simply made use of her background, experience and knowledge of social conditions to assist her in the analysis of the persons involved in the case. One of the interveners did argue that the principles of judicial notice apply in this case. However, since the appellant did not put forward this position, it would be inappropriate to consider the question as to

whether the existence of anti-black racism in society is a proper subject for judicial notice.

123 Certainly judges may, on the basis of expert evidence adduced, refer to relevant social conditions in reasons for judgment. In some circumstances, those references are necessary, so that the law may evolve in a manner which reflects social reality. For example, in *R. v. Lavallee*, [1990] 1 S.C.R. 852, expert evidence of the psychological experiences of battered women was used to inform the standard of reasonableness to be applied when self-defence is invoked by women who have been victims of domestic violence.

124 In *Lavallee*, the references to social context were based on expert evidence and were used solely to develop the relevant legal principle. In an individual case, however, it is still the responsibility of the woman putting forward the defence to establish that the general principles about women's experiences of domestic violence actually apply. The trier of fact still retains the important task of determining whether the evidence of a battered woman of her experiences in the particular case is in fact believable -- in other words, whether the generalizations about social reality apply to the individual female accused. See *Lavallee*, *supra*, at p. 891.

125 Similarly, judges have recently made use of expert evidence of social conditions in order to develop the appropriate legal framework to be utilized for ensuring juror impartiality. In *Parks*, *supra*, Doherty J.A. referred to a body of studies and reports documenting the prevalence of anti-black racism in the Metropolitan Toronto area. On the basis of his conclusions, at p. 338, that anti-black racism is a "grim reality" in that community he developed a legal framework

permitting jurors to be challenged for cause on the basis of racial preconceptions. This legal framework is applicable in circumstances where a realistic possibility exists that such preconceptions might threaten juror impartiality.

126 Other cases have applied and extended these principles on the basis of expert knowledge of the social context existing in the particular community, or in the particular relationships between parties to the case. See, for example, *R. v. Wilson* (1996), 29 O.R. (3d) 97 (C.A.); *R. v . Glasgow* (1996), 93 O.A.C. 67.

127 In *Parks* and *Lavallee*, for instance, the expert evidence of social context was used to develop principles of general application in certain kinds of cases. These principles are legal in nature, and are structured to ensure that the role of the trier of fact in a particular case is not abrogated or usurped. It is clear therefore that references to social context based upon expert evidence are sometimes permissible and helpful, and that they do not automatically give rise to suspicions of judicial bias. However, there is a very significant difference between cases such as *Lavallee* and *Parks* in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility.

(vii) Use of Social Context in Assessing Credibility

128 It is, of course, true that the assessment of the credibility of a witness is more of an "art than a science". The task of assessing credibility can be particularly daunting where a judge must assess the credibility of two witnesses whose testimony is diametrically opposed. It has been held that "[t]he issue of credibility is one of fact and cannot be determined by following a set of rules . . .": *White v. The King*, [1947]

S.C.R. 268, at p. 272. It is the highly individualistic nature of a determination of credibility, and its dependence on intangibles such as demeanour and the manner of testifying, that leads to the well-established principle that appellate courts will generally defer to the trial judge's factual findings, particularly those pertaining to credibility. See, for example, *W. (R.), supra*.

129 However, it is also the individualistic nature of a determination of credibility that requires the judge, as trier of fact, to be particularly careful to be and to appear to be neutral. This obligation requires the judge to walk a delicate line. On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence.

130 When making findings of credibility it is obviously preferable for a judge to avoid making any comment that might suggest that the determination of credibility is based on generalizations rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial. It is true that judges do not have to remain passive, or to divest themselves of all their experience which assists them in their judicial fact finding. See *Brouillard v. The Queen*, [1985] 1 S.C.R. 39; *Commentaries on Judicial Conduct*, *supra*, at p. 12. Yet judges have wide authority and their public utterances are closely scrutinized. Neither the parties nor the informed and reasonable observer should be led to believe by the comments of the judge that decisions are indeed being made based on generalizations.

131 At the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics. It is only after an individual witness has been tested and assessed that findings of credibility can be made. Obviously the evidence of a policeman, or any other category of witness, cannot be automatically preferred to that of accused persons, any more than the testimony of blue eyed witnesses can be preferred to those with gray eyes. That must be the general rule. In particular, any judicial indication that police evidence is always to be preferred to that of a black accused person would lead the reasonable and knowledgeable observer to conclude that there was a reasonable apprehension of bias.

132 In some circumstances it may be acceptable for a judge to acknowledge that racism in society might be, for example, the motive for the overreaction of a police officer. This may be necessary in order to refute a submission that invites the judge as trier of fact to presume truthfulness or untruthfulness of a category of witnesses, or to adopt some other form of stereotypical thinking. Yet it would not be acceptable for a judge to go further and suggest that all police officers should therefore not be believed or should be viewed with suspicion where they are dealing with accused persons who are members of a different race. Similarly, it is dangerous for a judge to suggest that a particular person overreacted because of racism unless there is evidence adduced to sustain this finding. It would be equally inappropriate to suggest that female complainants, in sexual assault cases, ought to be believed more readily than male accused persons solely because of the history of sexual violence by men against women.

133 If there is no evidence linking the generalization to the particular witness, these situations might leave the judge open to allegations of bias on the basis that the

credibility of the individual witness was prejudged according to stereotypical generalizations. This does not mean that the particular generalization -- that police officers have historically discriminated against visible minorities or that women have historically been abused by men -- is not true, or is without foundation. The difficulty is that reasonable and informed people may perceive that the judge has used this information as a basis for assessing credibility instead of making a genuine evaluation of the evidence of the particular witness' credibility. As a general rule, judges should avoid placing themselves in this position.

134 To state the general proposition that judges should avoid making comments based on generalizations when assessing the credibility of individual witnesses does not lead automatically to a conclusion that when a judge does so, a reasonable apprehension of bias arises. In some limited circumstances, the comments may be appropriate. Furthermore, no matter how unfortunate individual comments appear in isolation, the comments must be examined in context, through the eyes of the reasonable and informed person who is taken to know all the relevant circumstances of the case, including the presumption of judicial integrity, and the underlying social context.

135 Before applying these principles to the facts of this case, it may be helpful to review some selected examples of the way in which courts have dealt with allegations of bias in similar cases.

(viii) How Have Courts Addressed Allegations of Judicial Bias?

136 Allegations of reasonable apprehension of bias are entirely fact-specific. It follows that other cases in which courts have dealt with similar allegations are of

very limited precedential value. It is simply not possible to look at an individual case and conclude that the determination of the presence or absence of bias in that case must apply to the case at bar. Nonetheless, it is helpful to review some selected cases in which similar allegations have been made if only to observe the benchmarks against which the allegations were measured.

137 Thus, in *Bertram*, *supra*, some comments made by the trial judge during the course of a sentencing hearing suggested that he was predisposed to give effect to a joint sentencing submission before he had heard the details of the submission. Although the comments were described at p. 60 as "wholly inappropriate", Watt J. indicated that the remarks must not be looked at in isolation. On the basis of a review of the whole proceedings, Watt J. concluded that no reasonable apprehension of bias arose from the trial judge's conduct because he had on other occasions stressed his willingness to hear submissions on the question that he appeared to have predetermined. In the circumstances, therefore, it could not be said that a reasonable person hearing his comments, with knowledge of the case, would conclude that he might not be impartial. See also *Inquiry pursuant to s. 13(2) of Territorial Court Act, Re*, [1990] N.W.T.R. 337 (Bd. Inq.), at pp. 345-47; *R. v. Teskey* (1995), 167 A.R. 122 (Q.B.); *Lin*, *supra*.

138 In *Pirbhai Estate v. Pirbhai*, [1987] B.C.J. No. 2685, leave to appeal denied, [1988] 1 S.C.R. xii, the British Columbia Court of Appeal considered an allegation of reasonable apprehension of bias. The trial judge, in assessing the credibility of a witness commented that the demeanour of the witness had been shifty and evasive. The trial judge then said at p. 5, "[i]t is obvious to me that he carried on a successful business in Pakistan in a corrupt society . . . ." Seaton J.A. looked at the whole proceeding, and held, at pp. 5-6, that "I think the remarks unfortunate, but that

no reasonable person reading them would apprehend any bias on the part of the trial judge in this case". The remainder of the trial judge's reasons revealed that he came to his conclusions on credibility on the basis of the evidence, not on the basis of the kind of bias or prejudice suggested by his comments about the "corrupt society".

139 By contrast, a reasonable apprehension of bias was found in *Foto v. Jones* (1974), 45 D.L.R. (3d) 43 (Ont. C.A.). In that case, at p. 44, the trial judge in finding that the plaintiff in the case was not a credible witness stated that: "I regret to have to say that too many newcomers to our country have as yet not learned the necessity of speaking the whole truth. . . . They have not learned that frankness is essential to our system of law and justice". The Court of Appeal concluded that a reasonable apprehension of bias arose in that these were not acceptable ingredients of any judgment, and ought not to influence or appear to influence the trial judge's determination of credibility.

140 In the current appeal, the Crown's position is that in *Foto*, *supra*, the circumstances are precisely the same as in the case at bar. I disagree. In *Foto*, *supra*, the remarks of the trial judge were fundamental to his findings of credibility, and appeared to be the sole basis on which the witness was disbelieved. This is not the situation in the current appeal, which has to be assessed on its own particular facts, and in its own context.

141 These examples demonstrate that allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be

looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding.

C. *Application of These Principles to the Facts*

142 Did Judge Sparks' comments give rise to a reasonable apprehension of bias? In order to answer that question, the nature of the Crown's allegation against Judge Sparks must be clearly understood. At the outset, it must be emphasized that it is obviously not appropriate to allege bias against Judge Sparks simply because she is black and raised the prospect of racial discrimination. Further, exactly the same high threshold for demonstrating reasonable apprehension of bias must be applied to Judge Sparks in the same manner it would be to all judges. She benefits from the presumption of judicial integrity that is accorded to all who swear the judicial oath of office. The Crown bears the onus of displacing this presumption with "cogent evidence".

143 Similarly, her finding that she could not accept the evidence of Constable Stienburg cannot raise a reasonable apprehension of bias. Neither Constable Stienburg nor any other police officer has an automatic right to be believed, any more than does the accused R.D.S. or any other accused. Police officers cannot expect to be immune from a finding that their testimony is not credible on some occasions. The basic function of a trial judge to determine issues of credibility and make findings of fact would be rendered meaningless if the credibility of police officers were to be accepted without question whenever their evidence diverged from that given by another witness. An unfavourable finding relating to the credibility of Constable Stienburg could only give rise to an apprehension of bias if it could reasonably be perceived to have been made on the basis of stereotypical

generalizations, or as Scalia J. put it in *Liteky*, *supra*, on the basis of "wrongful or inappropriate" opinions not justified in the evidence.

144 The Crown contended that the real problem arising from Judge Sparks' remarks was the inability of the Crown and Constable Stienburg to respond to the remarks. In other words, the Crown attempted to put forward an argument that the trial was rendered unfair for failure to comply with "natural justice". This cannot be accepted. Neither Constable Stienburg nor the Crown was on trial. Rather, it is essential to consider whether the remarks of Judge Sparks gave rise to a reasonable apprehension of bias. This is the only basis on which this trial could be considered unfair.

145 Before finding that a reasonable apprehension of bias did arise Glube C.J.S.C. found that Judge Sparks conducted an acceptable review of all the evidence before making the comments that are the subject of the controversy. She concluded that if the decision had ended after the general review of the evidence and the resulting assessments of credibility, there would be no basis on which to impugn Judge Sparks' decision. I agree completely with this assessment. It is with the finding of a reasonable apprehension of bias that I must, with respect, differ.

146 A reading of Judge Sparks' reasons indicates that before she made the challenged comments, she had a reasonable doubt as to the veracity of the officer's testimony and had found R.D.S. to be a credible witness. She gave convincing reasons for these findings. It is clear that Judge Sparks was well aware that the burden rested on the Crown to prove all the elements of the offence beyond a reasonable doubt, and she applied that burden. None of the bases for reaching these initial conclusions on credibility was based on generalizations or stereotypes. Her

reasons for rejecting or accepting testimony could be applied to any witness, regardless of race or gender.

147 Did Judge Sparks' subsequent comments about race taint her findings of credibility? The unfortunate remarks took this form:

> 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 am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are 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. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.

148 The statement that police officers have been known to mislead the court, or to overreact is not in itself offensive. Police officers are subject to the same human frailties that affect and shape the actions of everyone. The remarks become more troubling, however, when it is stated that police officers do overreact in dealing with non-white groups.

149 The history of anti-black racism in Nova Scotia was documented recently by the *Royal Commission on the Donald Marshall Jr. Prosecution* (1989). It suggests that there is a realistic possibility that the actions taken by the police in their relations with visible minorities demonstrate both prejudice and discrimination. I do not propose to review and comment upon the vast body of sociological literature referred to by the parties. It was not in evidence at trial. In the circumstances it will suffice to say that they indicate that racial tension exists at least to some degree

between police officers and visible minorities. Further, in some cases, racism may have been exhibited by police officers in arresting young black males.

150 However, there was no evidence before Judge Sparks that would suggest that anti-black bias influenced this particular police officer's reactions. Thus, although it may be incontrovertible that there is a history of racial tension between police officers and visible minorities, there was no evidence to link that generalization to the actions of Constable Stienburg. The reference to the fact that police officers may overreact in dealing with non-white groups may therefore be perfectly supportable, but it is nonetheless unfortunate in the circumstances of this case because of its potential to associate Judge Sparks' findings with the generalization, rather than the specific evidence. This effect is reinforced by the statement "[t]hat to me indicates a state of mind right there that is questionable" which immediately follows her observation.

151 There is a further troubling comment. After accepting R.D.S.'s evidence that he was told to shut up, Judge Sparks added that "[i]t seems to be in keeping with the prevalent attitude of the day". Again, this comment may create a perception that the findings of credibility have been made on the basis of generalizations, rather than the conduct of the particular police officer. Indeed these comments standing alone come very close to indicating that Judge Sparks predetermined the issue of credibility of Constable Stienburg on the basis of her general perception of racist police attitudes, rather than on the basis of his demeanour and the substance of his testimony.

152 The remarks are worrisome and come very close to the line. Yet, however troubling these comments are when read individually, it is vital to note that

the comments were not made in isolation. It is necessary to read all of the comments in the context of the whole proceeding, with an awareness of all the circumstances that a reasonable observer would be deemed to know.

153 The reasonable and informed observer at the trial would be aware that the Crown had made the submission to Judge Sparks that "there's absolutely no reason to attack the credibility of the officer". She had already made a finding that she preferred the evidence of R.D.S. to that of Constable Stienburg. She gave reasons for these findings that could appropriately be made based on the evidence adduced. A reasonable and informed person hearing her subsequent remarks would conclude that she was exploring the possible reasons why Constable Stienburg had a different perception of events than R.D.S. Specifically, she was rebutting the unfounded suggestion of the Crown that a police officer by virtue of his occupation should be more readily believed than the accused. Although her remarks were inappropriate they did not give rise to a reasonable apprehension of bias.

154 A reasonable and informed person observing the entire trial and hearing the reasons would be aware that Judge Sparks did not conclude that Constable Stienburg misled the court or overreacted on the basis of the racial dynamics of the situation. This is clear from her observation "I am not saying that the Constable has misled the court" and "I am not saying that the officer overreacted". Although she went on to suggest that she believed he probably did overreact, she did not say that he did so because he was discriminating against R.D.S. on the basis of race. She links her findings that Constable Stienburg overreacted to the statement made to R.D.S.: "Shut up, shut up, or you'll be under arrest too".

155 Judge Sparks suggested that Constable Stienburg overreacted on some basis. Although she noted that he was young, she was careful not to make a final determination as to the reason for his overreaction. In fact, it was not necessary for her to resolve the question as to why the officer might have overreacted. The reasonable and informed observer would know that the Crown at all times bore the onus of proving the offence beyond a reasonable doubt. It was obvious that Judge Sparks had a reasonable doubt on the evidence. As long as she had a reasonable doubt regarding the veracity of the officer's testimony, R.D.S. was entitled to an acquittal. Judge Sparks' remarks could reasonably be taken as demonstrating her recognition that the Crown was required to prove its case, and that it was not entitled to use presumptions of credibility to satisfy its obligation.

156 Judge Sparks accepted the evidence of R.D.S. that he was told to shut up or he would be under arrest because that was the "prevalent attitude of the day". This comment is particularly unfortunate because of its potential to associate her findings of credibility with generalizations. However, it is ambiguous. It is not clear whether it refers to a prevalent attitude of anti-black racism, or the attitude that prevailed on the day in question. I accept that it refers to the specific day of the incident.

157 Finally, she concluded that "[a]t any rate", on the basis of her comments and all the evidence in the case, she was obliged to acquit. A reasonable, informed person reading the concluding statement would perceive that she has reached her determination that R.D.S. should be acquitted on the basis of all the evidence presented. The perception that her impugned remarks were made in response to the Crown's suggestion that she should automatically believe the police officer is reinforced by her use of the words "[a]t any rate".

158 A high standard must be met before a finding of reasonable apprehension of bias can be made. Troubling as Judge Sparks' remarks may be, the Crown has not satisfied its onus to provide the cogent evidence needed to impugn the impartiality of Judge Sparks. Although her comments, viewed in isolation, were unfortunate and unnecessary, a reasonable, informed person, aware of all the circumstances, would not conclude that they gave rise to a reasonable apprehension of bias. Her remarks, viewed in their context, do not give rise to a perception that she prejudged the issue of credibility on the basis of generalizations, and they do not taint her earlier findings of credibility.

159 Both Glube C.J.S.C. and the majority of the Court of Appeal correctly articulated the test to be applied when a reasonable apprehension of bias is alleged. However, in applying the test to the facts and circumstances of this case they failed to consider the impugned comments in context and to take into account the high threshold that must be met in order to find that a reasonable apprehension of bias has been established.

V. Conclusion

160 In the result the judgments of the Court of Appeal and of Glube C.J.S.C. are set aside and the decision of Judge Sparks dismissing the charges against R.D.S. is restored. I must add that since writing these reasons I have had the opportunity of reading those of Major J. It is readily apparent that we are in agreement as to the nature of bias and the test to be applied in order to determine whether the words or actions of a trial judge raise a reasonable apprehension of bias. The differences in our reasons lies in the application of the principles and test we both rely upon to the words of the trial judge in this case. The principles and the test we have both put

forward and relied upon are different from and incompatible with those set out by Justices L'Heureux-Dubé and McLachlin.

Appeal allowed, LAMER C.J. *and* SOPINKA *and* MAJOR JJ. *dissenting*.

Solicitor for the appellant: Dalhousie Legal Aid Service, Halifax.

Solicitor for the respondent: The Attorney General of Nova Scotia, Halifax.

Solicitor for the interveners the Women's Legal Education and Action Fund and the National Organization of Immigrant and Visible Minority Women of Canada: Women's Legal Education and Action Fund, Toronto.

Solicitor for the interveners the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada: African Canadian Legal Clinic, Toronto.