COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

BRIAN KAMPE

Appellant

APPELLANT'S FACTUM

PART I
STATEMENT OF THE CASE

1. The Appellant appeals his conviction and sentence of 15 months jail on a charge of possession for the purpose of trafficking. The Appellant contends that the learned trial judge erred in law on the following two points:

    1. by failing to appreciate and consider the s. 15 constitutional violation raised by the Appellant and supported by the evidentiary record; and

    2. the learned trial judge erred in law in her analysis and treatment of the allegation of racial profiling raised by the Appellant.

PART II: THE FACTS

2. The Applicant was found guilty of possession of cocaine for the purpose of trafficking following a judge-alone trial in the Superior Court on or about October 12th, 2011 where he took the stand and testified that he committed no crime and that the police planted drugs on him to implicate him. He was sentenced to 15 months incarceration.

Trial transcript – Sept.28, 2011 p.80-156

Reasons for Judgment

3. The essence of the Applicant's defence focussed squarely on racial profiling. He testified in his own defence that the police planted the subject drugs on his person. The sole independent witness – a Caucasian female passenger in his car – was not investigated or charged by police. Consequently, the Applicant was deprived of her evidence at trial. The Appellant argued at trial that the failure of the police to charge the similarly situated Caucasian female passenger or even secure her identification and produce it to the defence was evidence of differential treatment in the application of the law and a violation of the Appellant's equality rights under the Charter and strong circumstantial evidence of racial profiling.

Defence submissions - Trial Transcript

Sept.29th, 2011 p.10, 18, 21,22-32

4. "The second point with respect to this case is that the defence has been very clear and consistent. This is a case involving the phenomenon, the regrettable, unfortunate and lamentable social problem of racial profiling, **denial of equality** of men of African Canadian background in the Canadian criminal justice system."

Defence submissions – Trial Transcript Sept.29th at p.10

5. The learned trial judge's Reasons do not address the following s.15 argument raised by the Appellant and the evidence in this case:

"This is a case in which the police, in my respectful submission, had no basis to do what they did, and then they claimed that they stumbled upon the commission of a crime. There was an independent material witness there. **You'll recall my cross-examination of police witnesses on that point. They all acknowledged Yes, she's a material witness, right ?** Now, I've been doing drug cases now for close to twenty years, and in my experience, when two people are in a car

and you heard the officer said that, “I saw them, they were looking down and have both of them,” that makes her a party. If that evidence is to believed and I am not suggesting you have to believe that evidence or that it happened, but let’s assume that it happened, right, that makes her a party to the offence. And as a party to the offence, she ought to have been jointly charged with Mr. Kampe. Fagu didn’t say that Mr. Kampe was manipulating this drug in his hand and that she was not aware, based on his observations and his testimony, they were both looking down at something in his hands. We don’t know what it was, but the invitation was that crack cocaine is said to be found, and therefore, that’s what they are looking at. So in my respectful submission, that makes her a party. **She ought to have been charged. She wasn’t charged. I think it would be quite proper for this Court to find on the totality of the evidence that that omission is crucial and critical to the Court’s assessment of racial profiling, an unequal application of the law on its face, the white woman doesn’t get charged, the black guy does. It’s wrong ? It’s hurtful. It stinks. It’s not right. This Court has the jurisdiction and the responsibility, the social and legal responsibility to cure this evil.**

The law must apply to all equally."

Defence submissions – Trial transcript

Sept.29th – p. 23-24

5. The learned trial judge failed to subject the evidence before her to the scrutiny mandated by this court in R v. Brown 2003 Canli 52142. The Reasons for Judgment make no reference to this binding authority and the trial judge did not take judicial notice of neither racial profiling or the phenomenon of Anti-Black discrimination in the criminal justice system.

Reasons for Judgment

6. The Appellant was sentenced to 15 months incarceration which he has already served.

Fact not in dispute

PART III: ISSUES

7.

(i) Did the learned trial judge err in law by failing to deal with the s.15 violation advanced by the Appellant at trial ?

(ii) Did the learned trial judge err in law in her consideration and application of the racial profiling advanced by the Appellant ?

PART III : THE LAW

8. "A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference from circumstantial evidence."

R v. Brown 2003 Canlii 52142 (Ont. C.A.)

Shaw v. Phipps 2012 ONCA 155

9. Every individual is equal before an under the law and has the right to the equal protection and equal benefit of the law without discrimination, and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Canadian Charter of Rights and Freedoms s.15(1)

10. IT IS RESPECTFULLY SUBMITTED THAT the record reveals the following fundamental errors with the decision of the learned trial judge:

1. The trial judge does not address the s.15 equality issued raised by the Appellant at trial and which is clear in the record before her;

2. A failure to apprehend and apply the evidence before her to the law set out in R v. Brown etc.; and

3. A failure to appreciate that the police failure to obtain the passenger particulars and or her statement was highly relevant to the defence raised and indeed the type of circumstantial evidence that is relevant to the defence advanced.

PART IV: ORDER REQUESTED

11. The Applicant requests an order quashing his conviction and entering an acquittal or a stay or ordering a new trial.

12. **ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

November 13th, 2012

Ernest J. Guiste

SCHEDULE A

1. R v. Brown 2003 Canli 52142 (Ont. C.A.)

SCHEDULE B

1. Canadian Charter of Rights and Freedoms – s.15(1)