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COURT OF APPEAL FOR ONTARIO

WEILER, LASKIN and FELDMAN JJ.A.

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	
	)	**Christopher D. Hicks and**
	)	**Victor Giourgas**
Respondent	)	**for the appellant**
	)	
- and -	)	
	)	
	)	**Jennifer Woollcombe**
SEAN ANTHONY SPENCE	)	**For the respondent**
	)	
	)	
	)	
Appellant	)	**Heard: February 4, 2004**

On appeal from conviction by Justice Hugh R. Locke of the Superior Court of Justice, sitting with a jury, on April 11, 2002 and sentence imposed by Justice Locke on April 30, 2002.

FELDMAN J.A.:

[1] The appellant was convicted of robbery, using an imitation firearm and wearing a disguise, in connection with the robbery of a pizza deliveryman on June 28, 2000. The appellant asked to challenge the jury for cause, based on the fact that he is black and the victim is East Indian. The trial judge allowed the jury members to be canvassed on the basis that the appellant is black, but would not allow a question addressing the interracial nature of the crime. For the reasons that follow, I would allow the appeal and order a new trial.

FACTS OF THE OFFENCE AND THE ARREST

[2] The victim, Qaisar Saleem, who worked for Pizza Pizza, was instructed to deliver a pizza and chicken wings to 65A Emmett Avenue, Apartment No. 1502, Toronto, from an order received at 1:06 a.m. on June 28, 2000. He arrived at the building between 1:35 and 1:45 a.m., took the elevator to the 15th floor, and walked to the apartment at the end of the hallway beside the stairwell. The first assailant emerged from the stairwell holding a pistol. He was described as a black man, about twenty-five years old, taller than five feet six inches, and with a cloth over his face. The victim could only see his eyes and could not identify him or any of the other assailants. The assailant told the victim not to move. A second man then emerged from the stairwell, also armed and masked, between seventeen and twenty-three years old and shorter than the first man. Three more masked men then emerged, all between seventeen and twenty-three, but without weapons.

[3] The last three assailants grabbed the victim's arms, took the food from him and his money and receipts from his pockets. Two of them took him into the stairwell where they bound his hands and mouth and removed his wallet and some change from his pockets. They returned the empty wallet, loosened the hand ties, then all five men descended the staircase.

[4] The police found chicken bones and five Pizza Pizza receipts in the stairwell at about 4:00 a.m. that morning. Three fingerprints belonging to the appellant were found on the receipt for the delivery to the building. A fourth print belonged to another man who was charged as a young offender.

[5] Although the call ordering the food was traced to a phone belonging to a man not connected to the case, there was also a one-second call made to Pizza Pizza a few minutes earlier at 12:51 a.m. from a cell phone. Evidence was given at the trial that that cell phone was purchased by Ms. Gray, a cousin of the appellant. She had originally told the police and testified at the preliminary hearing that she purchased the phone for the appellant. However, at the trial she said she bought it for another man whom she had met at a club, Jamal Allen, and had left it for him at the home of the appellant's girlfriend. The cell phone was also connected to another robbery on July 5, for which the appellant was later charged as well.

[6] The appellant turned himself in to the police on August 7, 2000 in response to an outstanding warrant for robbery. The police first arrested him for one robbery and read him his rights including his right to counsel. Later, the police told him he would be charged with "robbery times 2." He spoke to a lawyer between the time he was charged with the first robbery, the June 28th, and the second robbery, the July 5th. When he was

charged with the second robbery, he was read his rights again, but not the right to counsel. The appellant then had a limited conversation with the police, before indicating that the lawyer had told him not to talk. In that conversation, he told the police he did not own a cell phone, that the cell phone number that had made the one-second call on June 28 belonged to Jamal Allen, and that the appellant's father lived at apartment 2110 in the 65A Emmett Avenue building.

ISSUES

[7] The appellant's position is that the trial judge made four errors that require this court to set aside the conviction and order a new trial:

(1) the trial judge erred in refusing to allow the jury to be challenged for cause on the basis that the crime was interracial;

(2) the trial judge erred in failing to give the jury specific instructions on their approach to prior inconsistent statements in connection with the testimony of the appellant's cousin with respect to the cell phone;

(3) the trial judge erred in admitting the appellant's statements to police when he was not given a second instruction about his right to counsel; and

(4) the trial judge erred in failing to specifically instruct the jury that they could use the exculpatory portions of the appellant's statement as evidence in his favour.

[8] The appellant also appeals against the sentence imposed by the trial judge.

ANALYSIS

(a) The *Parks* Question

[9] Originally the appellant was arraigned on charges in connection with both the June 28 and the July 5 robberies. Before the July 5 counts were severed, the challenge for cause issue was raised with the trial judge. Defence counsel requested that the following question be put to prospective jurors on the challenge for cause:

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused person is a black man charged with robbing white and East Indian persons?

[10] The trial judge ordered that the only question that could be asked was the question allowed in the case of *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (Ont. C.A.), leave to appeal to S.C.C. refused, (1994), 87 C.C.C. (3d) vi. However, the trial judge was under the misapprehension that that question was: "Would your ability to judge be affected by the fact that the accused is black?", and that it did not include any reference to the race of the victim. The following exchange took place between defence counsel and the court:

> Mr. Giourgas: It's the second paragraph [of the proposed question for the prospective jurors] that's in issue.
>
> > Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused person is a black man charged with robbing white and East Indian persons?
>
> …
>
> The Court: The answer is it will be the *Parks* challenge. The *Parks* challenge wording. I don't need to spend any more time on that. Court of Appeal (sic) may, but I have no intention of doing that. The basis is *Find*. It was my trial.
>
> Mr. Giourgas: Just for clarification, Your Honour –
>
> The Court: It will be the *Parks* question.
>
> Mr. Giourgas: So is it the question as I put it to you? Does your Honour agree that that is the *Parks* question as I –
>
> The Court: No, that's not the *Parks* question at all. You know what the *Parks* question is, I am sure.
>
> Mr. Giourgas: I think it was –
>
> The Court: "Would your ability to judge be affected by the fact that the accused is black."
>
> Mr. Giourgas: And –

> The Court: Period.
>
> Mr. Giourgas: And the deceased is white.
>
> The Court: The answer is no. It's black. I don't recall the *Parks* – the *Parks* question that I permitted over all these years, and counsel have all agreed, doesn't include the word "white".
>
> Now, if you can't do it, both of you get together and look at the *Parks* question, and I'll vet it in the morning. There is no problem about that.
>
> …
>
> Mr. Giourgas: Your Honour, just for clarification sake. Are you suggesting that I look at *Parks* and if, in fact, it does say "white" then I can re-address the issue with Your Honour, or –
>
> The Court: I think you should look at it first. I don't recall anything about the word "white" being in the *Parks* question at all. And if it is, I am not going to permit it. It's whether or not the prospective juror can try the accused without bias or prejudice by reason of the fact that his skin colour happens to be black, period.

[11] On the appeal the Crown concedes, as it must, that the trial judge erred in his recollection of the wording of the *Parks* challenge. In *Parks,* the question that the trial judge refused was:

> Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black Jamaican immigrant and the deceased is a white man? (p. 359)

[12] In *Parks*, the court of appeal overruled the trial judge and held that the accused was entitled to ask potential jurors if their ability to judge the evidence would be affected by the fact that the accused was black and the crime was interracial.

[13] In his reasons, Doherty J.A. identified two components of partiality in a potential juror: (1) biases, (2) that would render the juror unable to decide the case based only on the evidence and the instructions of the trial judge. He concluded that the proposed question in that case satisfied both components at p. 365:

> In this case, the issue to be determined on a challenge for cause was not whether a particular potential juror was biased against blacks, but whether if that prejudice existed, it would cause that juror to discriminate against the black accused in arriving at his or her verdict.
>
> The question framed by counsel for the accused captured both components of the partiality requirement. It asked whether a prospective juror's ability to act in accordance with the trial judge's directions would be affected by the colour of the accused and the interracial nature of the violence alleged. Its relevance to a juror's partiality is obvious if one contemplates the position of a juror who answered "yes" to the question as framed by counsel for the accused. Surely the triers of impartiality would be virtually compelled to reject that juror: *Aldridge v. U.S.*, 283 U.S. 308 (1931), at p. 312, quoting with approval, *State v. McAfee*, 64 N.C. 339 (1870).

[14] The court noted that although there was no suggestion that the crime in *Parks* was racially motivated, the interracial nature of the crime was one of the bases for the suggestion that racial bias by potential jurors could affect their ability to render a true verdict.

[15] The court concluded that there was no basis to doubt the fairness of the trial that was held, the impartiality of the particular jury or the validity of the verdict. Nevertheless, the accused had been denied his statutory right to challenge the jury for cause, which the court held is essential to the appearance of fairness and the integrity of the trial. Therefore, the conviction had to be quashed without the need to demonstrate any actual prejudice.

[16] The Supreme Court of Canada considered the issue of how racial prejudice could affect the ability of jurors to act impartially in the 1998 case of *R. v. Williams* (1998), 124 C.C.C. (3d) 481, where the accused was an aboriginal charged with the robbery of a pizza parlour and the complainant was white. The first trial judge had allowed a challenge for cause, including a question addressing the interracial nature of the crime. However, a mistrial had to be ordered. On the second trial, both a motion judge and the trial judge

refused to allow the challenge for cause, on the basis that although there was acknowledged widespread prejudice in the community against aboriginal people, it was accepted that jurors would put aside their prejudices in order to do their sworn duty as jurors. The Court of Appeal dismissed the accused's appeal.

[17] The Supreme Court reversed both courts. McLachlin J. (as she then was) emphasized the insidious nature of racial prejudice and stereotyping. Importantly for this case, she identified the interracial element of a crime as the first and most obvious way in which racial prejudice can be detrimental to an accused:

> Racial prejudice against the accused may be detrimental to an accused in a variety of ways. The link between prejudice and verdict is clearest where there is an "interracial element" to the crime or a perceived link between those of the accused's race and the particular crime. But racial prejudice may play a role in other, less obvious ways (para. 28).

[18] McLachlin J. minimized the need for any demonstrated connection between widespread racial prejudice and the crime in order to justify a challenge for cause in any particular case. At para. 30, she adopted the following passage from *Parks* as a correct statement of law:

> I am satisfied that in at least some cases involving a black accused there is a realistic possibility that one or more jurors will discriminate against that accused because of his or her colour. In my view, a trial judge, in the proper exercise of his or her discretion, could permit counsel to put *the question posed in this case*, in any trial held in Metropolitan Toronto involving a black accused. *I would go further and hold that it would be the better course to permit that question in all such cases where the accused requests the inquiry*.
>
> There will be circumstances in addition to the colour of the accused which will increase the possibility of racially prejudiced verdicts. It is impossible to provide an exhaustive catalogue of those circumstances. Where they exist, the trial judge must allow counsel to put *the question suggested in this case.* [Emphasis added.]

[19] The Supreme Court's approach is consistent with the observation of the court in *Parks*, that the challenge for cause based on the interracial nature of the crime was in no way premised on any suggestion that the crime itself was racially motivated.

[20] While acknowledging the trial judge's error in refusing the interracial question because he believed it was not part of the *Parks* question, the Crown takes the position on this appeal that the trial judge made no error in principle. The Crown submits that the potential for partiality was "greatly diminished" in this case, and that "there was no sense in which this case could be characterized as an 'interracial' one, or one in which the jury could have been affected by the interracial nature of the offence" (Crown factum at para. 24). The Crown relies on the recent decision of this court in *R. v. Campbell* (1999), 139 C.C.C. (3d) 258.

[21] In *Campbell*, the accused was a black man charged with the sexual assault and confinement of a sixteen year old white woman. The accused wished to challenge the jury for cause using the *Parks* question and, as in this case, the trial judge allowed a challenge because the accused was black, but refused to allow a question that referred to the interracial aspect of the crime. This court held that the trial judge erred in limiting the question by eliminating reference to the interracial nature of the crime. In the course of its reasons, the court, likely responding to an argument put to it, stated that there was no reason to distinguish the nature of the violence in *Parks*, a homicide, from the sexual assault in *Campbell,* and that: "If anything, the potential for partiality in a case involving the alleged sexual assault of a 16- year- old white girl by a black man is greater than in the case of alleged violence by one man against another man" (at p. 261).

[22] The Crown focuses on this comment by the court as the basis for its submission that the potential for partiality is to be assessed depending on the nature of the violence and the sex and race of the accused and of the victim. I do not read the reasons in that way. In my view, read in the context of the reasons as a whole, this comment was made by the court in order to respond to an argument put to it, and in effect to give the argument no credence by dismissing it on both a legal and factual basis. Later in its reasons, after quoting from *Williams* on the point, the court sets out its ratio clearly, including the aggravating role played by an interracial component on the potential for partiality in potential jurors:

> The respondent argues that the interracial nature of the crime was subsumed in the more general question permitted by the trial judge. We disagree. The interracial nature of the crime increases the possibility of partiality. There may be potential jurors who would consider that they would be able

> to reach an impartial verdict in the case of a black accused but not in the case where the victim of the alleged violence is white. At the time of the challenge for cause in this case, the potential jurors would not have known the colour of the complainant. The question permitted by the trial judge failed to inquire into the critical concern of partiality that may flow solely from the interracial nature of the offence. As this court held in *R. v. Glasgow* (1996), 110 C.C.C. (3d) 57, the defendant "was entitled to confront … potential bias head on in the challenge for cause process", and this required that the full *Parks* question be put to potential jurors (at p. 262).

[23] In my view, all of the case law makes it clear that where an accused who is entitled to challenge the jury for cause wishes to include the interracial nature of the crime in the question for potential jurors, the accused is entitled to have the question posed in that way. The potential for prejudice and partiality based on the interracial character of the crime has been universally acknowledged in all of the cases.

[24] In its submissions, the Crown also raises some other arguments that have been discounted in previous cases. For example, the Crown submits that the race of the victim was irrelevant to the crime in this case, as the attack was to be on whomever delivered the pizza. Again, this submission is based on a misunderstanding of the reason for the challenge for cause, which is to ensure a fair trial for both the accused and the Crown with a jury that is able to put aside any partiality (See, for example, *R. v. Rogers,* [2000] O.J. No. 3009, where a challenge for cause requested by the Crown was allowed where the accused was white and the deceased victim was aboriginal). Doherty J.A. made it clear in *Parks*, that the right to challenge for cause did not arise because a crime was racially motivated and that that was not a factor on the issue of challenge for cause.

[25] The Crown also submits that the case did not turn "to any degree" on the credibility of the complainant. It is unfortunately true that racial prejudice may influence a juror's approach to the credibility of any witness. It may be that in the appropriate case, where it is the race of the witnesses that may affect a juror's approach to the trial, a challenge based on that issue could be considered. However, just as the challenge for cause is not premised on a racially motivated crime, it is also not premised on anything as specific as whether the victim or the accused will even testify. Because racist attitudes are insidious, how they might affect a potential juror cannot be determined with precision. The interracial nature of a crime has the potential to pit stereotypical views about races against each other. A potential juror could hold stereotypical views about an accused because of race, or about a victim because of race, which views could result in bias

against the accused. If a potential juror is not able to set aside such views or biases, then that juror will be partial and unacceptable to serve.

[26] The suggestion was also raised that it is in cases where the victim is white that the interracial question has been allowed, and that it is the majority versus minority aspect of such situations that makes the interracial question necessary or appropriate in such cases. Consequently, where there are two racial minorities involved, there is no imbalance and no need or reason to raise the interracial nature of the crime as a basis for potential partiality. I do not agree with this suggestion.

[27] The concept of jurors being partial in favour of white victims because whites are or are perceived to be the majority and are associated with the prosecution, was discussed by the Supreme Court in *Williams*. McLachlin J. suggested at para. 29, that a prejudiced juror could view the Crown as non-black or non-aboriginal with two potential results: (1) the juror could favour non-aboriginal Crown witnesses against an aboriginal accused; or (2) the juror could consciously or unconsciously see "the Crown as a defender of majoritarian interests against the minority he or she fears or disfavours."

[28] However, I do not read the case law as suggesting that it is only where the victim is white that the interracial nature of the crime may result in jurors who cannot be impartial. As Doherty J.A. noted in *Parks*, when discussing empirical studies from the U.S. using mock juries as well as archival studies of the results of actual cases, "…there is a realistic possibility that jurors' verdicts are affected by the race of the accused where that accused is of a different race than the juror. This possibility is greater in crimes involving interracial violence where the victim is of the same race as the juror" (p. 373). Doherty J.A. did not suggest that this conclusion is limited to cases where the victim is white.

[29] In my view, it is not only an association of the white majority with the Crown that may result in partiality, but any racist or stereotypical views about the accused or the victim that may influence a potential juror's approach to the assessment of the evidence or to the outcome of the trial, together with an inability by that potential juror to put those views to the side.

[30] This court in *R. v. Koh* (1998), 131 C.C.C. (3d) 257, made it clear that where the accused is a member of any visible minority, there is no longer a need for counsel to file an evidentiary record to support a finding that racism exists against that visible minority in order to support a challenge for cause. Although this was said in the context of the race of the accused in that case, I see no reason to limit its application to exclude the victim

who belongs to a visible minority. The basis of the court's finding was that in this jurisdiction, "the fact of racism against visible minorities is a notorious fact" (para. 36).

[31] Nor is the interracial question premised on extreme violence such as murder or sexual assault perpetrated on a white victim, as the *Williams* case was also a robbery.

[32] I also note that in this case, the question that the trial judge rejected related to the original two charges and therefore referred to both East Indian and white victims – so that the fact that the victim in the June 28 robbery was East Indian (and not white) was not the basis on which the trial judge rejected the interracial question on the challenge for cause.

[33] Finally, the Crown takes the position that defence counsel at trial was given an opportunity by the trial judge to make further submissions on the challenge for cause and declined to so, and that that failure deprives the accused of the right to object on appeal. Following the severance of the counts and the disposition of all pre-trial motions, the trial judge asked counsel if they had agreed on the phraseology of the challenge for cause question. Defence counsel responded that the court had already ruled on it and the trial judge agreed. In my view, no fault can be attributed to trial counsel for not pursuing the issue again, particularly when the trial judge had already indicated that even if the *Parks* challenge did refer to the race of the victim, that was not going to influence his decision.

[34] As a trial judge conducting challenges for cause following the *Parks* case, I was distressed and surprised (it appears naively) to find that in our society there were potential jurors who stated that they would or could not be impartial because of their racist beliefs. In this case, the second potential juror called, when asked if he could decide the case fairly when the accused was black, said that he was ashamed to say that he already considered the accused guilty. What we do not know is whether there were any other potential prejudices that could have affected the verdict in this case, that would have been revealed had the interracial question been asked of all potential jurors.

[35] I adopt the observation made by Finlayson J.A. at para. 43 of *Koh* as applicable in this case:

> Finally, any opposition to extending the opportunities in which challenges for cause may be undertaken is more than countered by the salutary effects that these challenges have both on an individual trial and with respect to the criminal justice system as a whole. These include the removal of jurors who are forthright about their racist views; the sensitization of

> the remaining jurors; and the enhancement of the appearance of trial fairness, both in the eyes of the accused and members of minority groups. See *Williams* at 500-501; *Parks* at 379-380.

[36] As in *Parks*, there is no suggestion in this case that the jury was biased or that the verdict they reached was unfair. However, the denial of the full right to challenge for cause impairs the appearance of fairness and the integrity of the trial and necessitates the quashing of the conviction. (See *Parks*, *supra,* at p. 380, *Williams, supra,* at paras. 46-48 and *R. v. Wilson* (1996), 107 C.C.C. (3d) 86 at 99 (Ont. C.A.)).

[37] As the second ground of appeal may be relevant for the new trial, I will deal with it briefly.

(b) The instruction on the prior inconsistent statements of the appellant's cousin regarding the cell phone

[38] The main issue for the defence in this case was identity. The defence sought to explain the presence of the appellant's fingerprints on the Pizza Pizza receipt in the stairwell by the evidence that the appellant's father lived in the building. The other evidence that could link the appellant to the robbery was the one-second cell-phone call to Pizza Pizza on a cell phone that had been purchased by the appellant's cousin, Ms. Gray. At trial she testified that a man she met at a club named Jamal said he would give her money to buy him a phone, that she did not want to but asked her cousin, the appellant, for advice and he told her to go ahead and buy the phone. When she bought the phone she delivered it to be picked up by Jamal at the appellant's girlfriend's apartment. She had no contact with the phone after that.

[39] However, when the police had asked her about this phone, she did not mention Jamal, but told them that the appellant told her to buy it, and she maintained that testimony at the preliminary hearing. Ms. Gray explained her change of story at the trial by saying that when the police asked her about the phone, she said Sean (the appellant) asked her to buy the phone because she did not know Jamal too well and she was scared. She denied that she had been influenced by the appellant to change her story for the trial and never adopted her previous statement or preliminary hearing testimony at the trial.

[40] In his charge to the jury the trial judge included a proper instruction on the jury's use of prior inconsistent statements, but he did not relate that instruction specifically to the evidence of Ms. Gray, nor did he instruct the jury that she had not adopted her previous statements in evidence.

[41] In her closing address, Crown counsel referred to Ms. Gray's testimony as linking the appellant to the cell phone. When reviewing the Crown's position, the trial judge also listed the evidence of Ms. Gray as part of what linked the appellant to the cell phone.

[42] The appellant's position on this appeal is that the trial judge erred by failing to instruct the jury that because Ms. Gray did not adopt her previous statements, they could not use disbelief of her denial of those previous statements as positive evidence that she bought the phone for the appellant.

[43] When a witness who is cross-examined on a prior inconsistent statement does not adopt that statement, the jury should be instructed that the witness did not adopt the statement and that the jury may not use the prior statement as evidence, but may use the fact of the inconsistency to assess the credibility of the witness generally: *R. v. Moore* (1984), 15 C.C.C. (3d) 541 at 562 (Ont. C.A.). To the extent that Crown counsel at trial suggested otherwise to the jury in her closing, this was an error that should have been corrected by the trial judge. The appellant also submits that the trial judge erred by not specifically telling the jury that previous testimony under oath, such as testimony given at a preliminary inquiry that is inconsistent, is treated the same way as previous inconsistent statements not under oath. In *Moore*, Martin J.A. suggested that this was the better practice for trial judges to follow.

[44] Leaving aside the prior inconsistent statement, the evidence that the Crown was entitled to rely on regarding the cell phone was the evidence that Ms. Gray gave at trial: that the appellant knew about the phone, that he told her to go ahead and purchase it, and that it was left for pick-up at his girlfriend's apartment. From that evidence, together with the other evidence at the trial, the jury was entitled to infer that he had used the phone that night to make the one-second call to Pizza Pizza.

[45] The other grounds of appeal relate to the statement the appellant made to police. Following a voluntariness and s. 10(b) *voir dire*, the trial judge ordered that the statement could be admitted, after editing out references to the July 5 offence. The order was based on findings of fact the trial judge made on the evidence he heard on the *voir dire*. As I would order a new trial, where other evidence may be called, in this case it is more appropriate that I not deal with these issues on the appeal. It is also unnecessary to consider the sentence appeal.

CONCLUSION

[46] I would set aside the conviction and sentence and order a new trial.

Signed: "K. Feldman J.A."

"I agree K.M. Weiler J.A."

Released: "KMW" November 1, 2004

LASKIN J.A. (Dissenting):

I. Introduction

[47] The main issue on this appeal is whether the trial judge committed a reversible error in refusing to permit defence counsel to challenge potential jurors for cause by asking:

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused person is a black man charged with robbing an East Indian person?

but allowing him to ask the following question:

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused person is a black man?

[48] In her thoughtful reasons Feldman J.A. concludes that the trial judge's failure to permit a question that referred to the race of the victim impaired the appearance of the trial's fairness and integrity. She would quash the conviction on this ground alone. I conclude that although the interracial question requested by defence counsel was certainly not objectionable, and may even have been highly desirable, the trial judge did not improperly exercise his discretion in refusing to allow it. In my view, the question permitted by the trial judge adequately protected the appellant's right to an impartial jury and, therefore, to a fair trial.

[49] Accordingly, I would not give effect to the appellant's submission on the challenge for cause question. Nor would I accept his three other grounds of appeal against conviction, which are listed in my colleague's reasons. I would, however, reduce the appellant's sentence. After taking account of pre-trial custody, I would reduce the appellant's sentence from five years to three and one-half years imprisonment.

II. Factual background

[50] Feldman J.A. has accurately set out the factual background giving rise to the appellant's convictions and appeal. In brief, five masked assailants robbed a Pizza Pizza delivery man at gunpoint in the hallway of a highrise apartment building in Toronto. The principal issue at trial was identity. The victim could not identify any of the assailants.

However, cell phone records and fingerprints on one of the pizza receipts implicated the appellant in the robbery. He did not testify.

III. The challenge for cause issue

[51] Feldman J.A. has summarized the discussion between the trial judge and counsel over what challenge for cause question the defence could ask prospective jurors. I add to her summary the following. When defence counsel first asked to pose a question that included the race of the victim, the appellant was charged with two robberies, one committed on June 28, 2000, and the other a week later on July 5, 2000. The victim in the June 28 robbery was East Indian; the victim in the July 5 robbery was white. Therefore, the question requested by defence counsel included "the fact that the accused person is a black man charged with robbing white and East Indian persons".

[52] However, in a later ruling, the trial judge severed the charges against the appellant for the July 5 robbery (they were subsequently stayed). Therefore, the question the defence wanted to ask potential jurors must be narrowed to the June 28 robbery and should refer to "the fact that the accused person is a black man charged with robbing an East Indian person".

[53] In permitting the defence to ask a question limited to the race of the accused, the trial judge misunderstood the scope of the *Parks* question. Nonetheless, a ruling on a challenge for cause question is an exercise of judicial discretion. The issue on appeal then is whether the trial judge improperly exercised his discretion. See *R. v. Barnes* (1999), 138 C.C.C. (3d) 500 (Ont. C.A.) and *Parks*. Put differently, did the trial judge's refusal to permit the question sought by defence counsel deprive the appellant of his right to obtain an impartial jury and, therefore, a fair trial? I do not think that it did.

[54] The appellant alleges two sources of potential partiality: the accused's race and the interracial nature of the crime. The question put to the jurors adequately dealt with the first source; it did not address the second. If the interracial nature of the crime is a legitimate source of potential partiality, then the trial judge did not properly exercise his discretion.

[55] The appellant's position finds support in the Supreme Court of Canada's judgment in *Williams* and in this court's judgments in *Parks* and *Campbell*. In each case the court stressed that the interracial nature of the crime heightened the realistic potential for jury partiality; in each case the court approved a question that included the race of the victim as well as the race of the accused.

[56] *Campbell* is the most supportive of the appellant's position. There, this court disapproved of a question similar to the one the trial judge permitted here, a question that referred only to the race of the accused. Instead, at p. 262 the court insisted that the question must reflect the interracial nature of the crime because the interracial nature of the crime might cause juror partiality even when the race of the accused would not do so.

[57] But the context in which the courts in *Williams*, *Parks* and *Campbell* approved the "interracial" question differs profoundly from the context in this appeal. In *Williams, Parks* and *Campbell*, the accused was a member of a visible minority – Williams was Aboriginal, Parks and Campbell were black – and the victim was white. Thus, all three accused were members of a visible minority that had been subjected to historical and systemic discrimination, prejudice, and negative stereotyping by the white majority in our society, the same race as the victim in each of the three cases. In emphasizing the link between the interracial element of the crime and the question of potential juror partiality, each court focused on the fact that the victim was a member of the white majority.

[58] For example, in *Williams*, McLachlin C.J.C. discussed the many ways in which juror partiality may affect a trial. At para. 11 she commented: "[I]t may, in a general way, predispose the juror to the Crown, perceived as representative of the "white" majority against the minority-member accused, inclining the juror, for example, to resolve doubts about aspects of the Crown's case more readily". She returned to this theme at para. 29 of her reasons: "The contest at the trial is between the accused and the Crown....A racially prejudiced juror might simply tend to side with the Crown because, consciously or unconsciously, the juror sees the Crown as the defender of majoritarian interests against the minority he or she fears or disfavours".

[59] Jurors, especially white jurors, may more readily identify with a victim of the same skin colour as their own and of the prevailing majority in our society. In cases where the accused is a member of a minority community and the victim is white, one can readily understand how the interracial nature of the crime may increase the potential for juror partiality and why, therefore, a question that includes the race of the victim is essential to ensure a fair trial.

[60] By contrast, the victim in this case is, like the accused, a member of a visible minority, albeit a different visible minority. There is no evidence on the record suggesting that this minority community has historically subjected the black community to racism and discrimination. Instead, the East Indian community has also suffered from discrimination, prejudice, and negative stereotyping by the white majority community. Of that we can fairly take judicial notice.

[61] However, the appellant's contention invites us to take judicial notice of the following fact: where the victim is East Indian and the accused is black, the interracial nature of the crime, separately from the accused's race, increases the potential for juror partiality. I do not think that we can yet take judicial notice of this fact.

[62] This brings me to the crux of my disagreement with Feldman J.A. and what I view to be the missing link in her reasoning. I do not see how the fact the victim in this case is East Indian affects potential juror partiality. In Canada, potential jurors are presumed to be indifferent or impartial. We can displace that presumption by taking judicial notice where we have evident concerns about juror partiality. The courts have now taken judicial notice of potential partiality that may occur when a minority-member accused injures a majority-member victim or vice versa. We have now recognized discriminatory and prejudicial attitudes towards accuseds who are black, Aboriginal or members of another minority group; we have also recognized that these prejudicial attitudes may be heightened in crimes committed against a white victim.

[63] But to get to the point where we can now take judicial notice of these facts, each court in the two foundation cases, *Williams* and *Parks*, considered numerous studies and other social science evidence demonstrating racial prejudice. In *Koh* this court accepted what had been established in *Williams* and *Parks* and recognized that an accused who was a member of a visible minority had at least a presumptive right to ask the kind of question permitted by the trial judge in this case.

[64] This, however, is the first case in which the court has been called on to examine the realistic potential for juror partiality because of the interracial nature of the crime where both the accused and the victim are members of a visible minority. I do not think we can simply take judicial notice of the potential for partiality. Instead, we require some evidence. Yet the appellant filed no evidence at trial or on appeal to demonstrate the link between this interracial crime and potential juror partiality. Nor did counsel on appeal suggest what that link might be.

[65] The only possible link that I see is the one suggested in *Parks*. There, Doherty J.A. observed: "[T]here is a realistic possibility that jurors' verdicts are affected by the race of the accused where that accused is of a different race than the juror. *This possibility is greater in crimes involving interracial violence where the victim is of the same race as the juror*" [at 373, emphasis added]. But again, the context for this observation is crucial. *Parks* dealt with a white victim, and likely a predominantly white jury. The case was premised on the white majority's well-documented discrimination against the black minority. Here the context is entirely different. Absent any evidentiary

record I am hesitant to transpose Doherty J.A.'s observation into the very different context of the present case.

[66] I therefore conclude where I began. The question requested was not objectionable. Because of its sensitizing effect and because we should err on the side of allowing what turn out to be unnecessary challenges for cause rather than risk prohibiting necessary challenges, the question was also likely desirable. But the trial judge's failure to permit it did not amount to an improper exercise of his discretion. The question he did allow, focusing on the race of the accused, adequately protected the appellant's fair trial interests. I would not give effect to this ground of appeal.

IV. The other grounds of appeal against conviction

(a) Did the trial judge err in his instruction to the jury on Ms. Gray's previous inconsistent statements concerning the cell phone?

[67] On this issue I agree with the reasons of Feldman J.A. If the trial judge erred in his instruction, the error was harmless. Ms. Gray's previous statements were consistent with her trial testimony to this extent: she bought the cell phone with the appellant's knowledge and encouragement, she left it with the appellant's girlfriend, and she never saw it again.

(b) Did the trial judge err in admitting the appellant's statement to the police?

[68] As I have said earlier, the appellant was charged with two robberies: the one that is the subject of this appeal, committed on June 28, 2000, and another committed a week later on July 5, 2000. In early August the appellant turned himself in. He was charged with the earlier robbery and given his right to counsel, which he eventually exercised. He was later charged with the July 5 robbery. Although cautioned, he was not again told of his right to counsel. He then gave a statement.

[69] After a *voir dire* the trial judge edited out the portion referring to the July 5 robbery and admitted the statement. The appellant submits that he erred in doing so because the police obtained the statement in contravention of his right to counsel under s. 10(b) of the *Charter*.

[70] I do not accept this submission. On the evidence led on the *voir dire* and the findings of the trial judge, the appellant did not establish that his statement was obtained in breach of s. 10(b). In *R. v. Evans* (1991), 63 C.C.C. (3d) 289 (S.C.C.) at 306-307,

McLachlin J. set out the principle governing this issue: the police have a duty to restate an accused's right to counsel "when there is a fundamental and discrete change in the purpose of the investigation, *one involving a different and unrelated offence* or a significantly more serious offence than that contemplated at the time of the warning" [emphasis added]. See also *R. v. Sawatsky* (1997), 118 C.C.C. (3d) 17 at 25-28 (Ont. C.A.).

[71] The purpose of this principle is to allow persons detained to decide whether to exercise their right to counsel in the light of the new risk or jeopardy they face. See *Sawatsky* at 27-28. That purpose was met here, even though the police did not restate the appellant's right to counsel after charging him with the July 5 robbery.

[72] Admittedly, the July 5 robbery was a different and unrelated offence. Therefore, the appellant had to be made aware of his jeopardy for that robbery before being given his right to counsel. Otherwise, his subsequent statement would be obtained in violation of s. 10(b). The police's evidence on the *voir dire* showed that before the appellant was given his right to counsel he was made aware that he faced charges for two robberies.

[73] When the appellant first came to the police station, the arresting officer told him that he would be charged with a robbery. A few minutes later, however, the staff sergeant told the appellant that he would be charged with "robbery times two", and he confirmed this by saying to the appellant that there would be "two counts of robbery". The staff sergeant then advised the appellant of his right to counsel.

[74] The trial judge accepted the police's evidence. Therefore, I accept the trial judge's finding that when the appellant gave his statement he knew that he faced charges for two robberies. I see no other reasonable conclusion because the appellant did not testify on the *voir dire*.

[75] Thus, although the police did not strictly comply with the requirements of *Evans* they did satisfy its underlying purpose. I would not give effect to this ground of appeal.

(c) Did the trial judge err in failing to instruct the jury that it could use the exculpatory parts of the appellant's statement?

[76] When the Crown puts an accused's statement in evidence, the trial judge should tell the jury that it can rely on both the inculpatory and exculpatory parts of the statement. See *R. v. Lynch* (1988), 30 O.A.C. 49 (Ont. C.A.) at para. 7. Here, in his statement, the appellant said that his father lived in the apartment building where the robbery occurred.

The defence relied on this evidence to suggest that the appellant may have innocently touched the Pizza Pizza receipt while visiting his father. The appellant submits that the trial judge erred in failing to tell the jury expressly that it could use this exculpatory part of the appellant's statement. I do not agree with this submission for two reasons.

[77] First, the trial judge told the jury that if the Crown proved the statement was made then it could consider all, part, or none of what the accused said:

> If you find, however, that the Crown has proven that the statement was made, then please consider the total content of what you heard in the evidence of what Mr. Spence said. Again, please remember it is the answers he gave and not the questions put which constitutes the evidence, and it is open to you in the same way as any other piece of evidence to accept all of what was said by Mr. Spence, part of what was said or none at all. Please do not consider the contents of the statement, if you find that he made one, in isolation from the other evidence. If you find that he did make the statement, consider what he said along with all of the other evidence that you have heard in the trial and then apply it all separately as you must do to each count in the indictment.

[78] On the basis of this instruction alone the jury must have understood that in reaching its verdict it could use the appellant's statement to the police that his father lived in the building.

[79] Second, the trial judge also outlined for the jury the defence's theory "that Mr. Spence's father lived in the building as was indicated in the statement that had been given to the police officer" and, therefore, the jury could infer "from the evidence that the receipt was touched innocently by Mr. Spence". The trial judge's subsequent seemingly irrelevant comment that no evidence was led connecting the appellant's father to the pizza order did not undermine his charge on the defence's theory. I agree with the Crown that the jury undoubtedly would have appreciated it could consider the exculpatory part of the appellant's statement. I would not give effect to this ground of appeal.

V. The sentence appeal

[80] The appellant was twenty years old when he committed the offence and twenty-two when he was sentenced. The trial judge sentenced him to five years imprisonment: four years for the robbery plus the mandatory one year for use of an

imitation firearm. The appellant had served seven months in pre-trial custody, for which the trial judge credited him with one year. Effectively therefore the trial judge sentenced this youthful offender with no adult record to six years in jail. The Crown contends that although the sentence is at the high end of the range, it reflected no error in principle and was not demonstrably unfit. I do not agree.

[81] In my view, the trial judge erred in principle by not adequately taking into account the appellant's prospects for rehabilitation. Unquestionably the offence was serious. It reflected some planning and it was committed against a defenceless victim who, very much like a convenience store employee, was vulnerable to those seeking quick cash. A significant penitentiary sentence was called for.

[82] In fashioning the sentence, however, the trial judge all but ignored the appellant's prospects for rehabilitation. He focused on the seriousness of the offence and on general and specific deterrence. He acknowledged rehabilitation as a sentencing goal but diminished its importance in this case by saying the following:

> The principle of rehabilitation has been ruled by senior courts to be the most hopeful of all of the principles of sentence. Mr. Spence has some dim prospect, in my respectful view, of rehabilitating himself. That prospect is not extinguished, although it certainly does not shine very brightly on his horizon.

[83] I do not consider this a fair assessment. Rehabilitation remains an important objective for a youthful offender unless the offender's criminal record suggests that he or she cannot be rehabilitated. This caveat does not apply here.

[84] The appellant has no adult record. His youth record consists of two dated assault convictions, neither of which attracted so much as a closed custody disposition. For over a year before his trial the appellant lived with his grandparents and complied with very strict bail conditions. During that time he worked and gave more than one-third of his earnings to the mother of his two-year-old child. These facts suggest that the appellant's prospects for rehabilitation are better than "dim". They should have played a more important role in his sentencing.

[85] After crediting the appellant with one year for his pre-trial custody, I would reduce his sentence for the robbery from four years to two and one-half years. I would therefore sentence him to three and one-half years in the penitentiary.

VI. Conclusion

[86] Although the question requested by defence counsel to challenge prospective jurors for cause was not objectionable and was probably desirable, the more limited question the trial judge did allow adequately protected the appellant's right to an impartial jury and a fair trial. Thus, the trial judge did not improperly exercise his discretion in refusing to permit a question that referred to the race of the victim. I would therefore not give effect to this ground of appeal. I also do not agree with the appellant's other three grounds of appeal against conviction. Accordingly, I would dismiss the conviction appeal.

[87] I would, however, allow the sentence appeal. The offence was obviously serious and was perpetrated against a vulnerable victim. But the trial judge did not adequately consider the appellant's prospects for rehabilitation: he was twenty years old when he committed the offence and his youth record for two assaults was dated. I would grant leave to appeal the sentence and reduce the sentence from five years to three and one-half years. Including pre-trial custody, the sentence is effectively four and one-half years.

"John Laskin J.A."