

Lawyers ask judge to declare African-Canadians deserve special consideration in sentencing, like Indigenous people

SEAN FINE JUSTICE WRITER
TORONTO
PUBLISHED MARCH 26, 2018

Lawyers for a black man caught carrying a loaded gun are asking a judge to declare for the first time in Canada that African-Canadians should receive special consideration in sentencing, much as Indigenous peoples do.

The federal Criminal Code says expressly that sentencing judges must pay particular attention to the circumstances of Indigenous people. Parliament drafted that provision in 1996 in part to respond to a disproportionate rate of incarceration. Indigenous people make up 27 per cent of federal prisoners, and just 5 per cent of the country's overall population. But black Canadians, too, are disproportionately incarcerated. They make up 8.6 per cent of federal prisoners (those serving sentences of two years or more) and just 3 per cent of the population.

Lawyers Faisal Mirza and Emily Lam, representing Jamaal Jackson, 33, say African-Canadians, like Indigenous people, have faced dislocation, segregation, disproportionate rates of incarceration and discrimination in employment and education, plus over-policing of neighbourhoods and mistreatment in federal custody.

"In 2018 ... the experience of African-Canadians is sufficiently unique that it is in and of itself deserving of special recognition," Mr. Mirza told Ontario Superior Court Justice Shaun Nakatsuru in Toronto. Disadvantage in the black community, he said, may diminish the "moral culpability" of offenders. Just as it is mandatory for judges to consider an Indigenous offender's history of disadvantage, they should also be obliged to perform a similar analysis for black people. "I'm asking that it become presumptively the approach for African-Canadians."

But Justice Nakatsuru, whose Japanese-Canadian father was interned during the Second World War, told Mr. Mirza he is "struggling" with the idea. He said the Criminal Code already provides that all offenders are entitled to consideration of their individual circumstances, including discrimination and disadvantage, when they are being sentenced. To go further than that and create a presumption of special treatment for African-Canadian offenders raises difficult questions, he said. "Where does it end, to take judicial notice of a collective experience?"

Justice Nakatsuru mentioned the experiences of Asian-Canadians and other visible minorities. He said the experiences of African-Canadians are diverse, and in that sense do not fit well within a presumption of shared disadvantage. He also asked what cases, laws or constitutional principles would give him the authority to make such a declaration.

Mr. Jackson has a nearly continuous criminal record dating from his youth, prosecutor Sue Adams told the court. His most serious crime was an armed robbery of a Petro-Canada station with a sawed-off shotgun, for which he was sentenced to 81 months in prison. Released on parole, he violated his conditions and was returned to prison to serve out the full term. Seven months later, police attempting to fight the spread of guns caught him on a wiretap attempting over a two-day period to obtain a firearm. Judges had made five orders in previous cases prohibiting him from carrying weapons or ammunition. Police caught him with the handgun in Mississauga, west of Toronto, with a single bullet in its chambers.

The prosecutor is asking for a sentence of 7.5 to nine years, plus an additional year for violating his weapons prohibitions. She said she does not oppose detailed histories of an offender being put before the court, but said that given the seriousness and repeated nature of his crimes, he does not deserve special consideration in sentencing.

The defence has not yet recommended a sentence, but is expected to ask for four years.

It submitted a “race and culture assessment” by a Nova Scotia social worker, Robert Wright. Mr. Jackson spent part of his childhood and teen years in Cole Harbour, N.S., and part in London, Ont. As a light-skinned black person, Ms. Lam told the court, he was not accepted by whites or blacks. His extended family was large and had good jobs. But a lack of parental support left him seeking support from his peers. (He also identifies as Indigenous, but an Aboriginal legal group declined to take on his case, Ms. Lam said.)

If Justice Nakatsuru accepts the idea of special consideration, Mr. Mirza asked him to affirm that judges should order detailed reports on African-Canadian offenders, setting out how “intergenerational disadvantage” affected them. Such reports are done regularly for Indigenous offenders.

Mr. Mirza said that, while sentencing judges traditionally take into account the need to deter other criminals and protect communities, they should also consider that “overincarceration” perpetuates disadvantage in the African-Canadian community.

As far back as 2004, the Ontario Court of Appeal said that if racial or gender bias help explain why a crime was committed, it can be considered in sentencing.

The sentencing hearing continues Tuesday. Justice Nakatsuru is not expected to rule immediately.

SOURCE — <https://www.theglobeandmail.com/canada/article-lawyers-ask-judge-to-declare-african-canadians-deserve-special/>