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EXCLUSIVE

Ontario court decision on bias against black Canadians called 'a game changer'

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An Ontario Superior Court justice has referenced systemic bias against black Canadians in reaching a sentence in the case of a young black man who pleaded guilty to illegal possession of a firearm. But the practical implications of the decision are receiving a mixed reaction from legal experts, with some calling it transformative but another saying it is merely an example of a judge doing his job properly.

Jamaal Jackson, 33, pleaded guilty to possession of a prohibited firearm with ammunition and breach of a prohibition order after a search by police discovered a .380-calibre Kruz firearm in the waistband of his pants. The pistol had one bullet in the chamber, and Jackson was subject to five separate weapons and ammunition prohibition orders under the Criminal Code. He also had a long rap sheet, having been convicted of assault, carrying a concealed weapon, uttering threats and numerous counts of robbery (R. v. Jackson 2018 ONSC 2527)

Justice Shaun Nakatsuru, in a decision brought down April 23, acknowledged the seriousness of Jackson's crime as well as his record, but also noted his "personal history of early racial conflict, identity confusion, and family disruption," which created the "conditions for him to slide easily into criminality." He pointed out Jackson suffered racist treatment in both Ontario and his home province of Nova Scotia and dealt with a mother with serious mental health issues.

And Justice Nakatsuru also noted, "African Canadians have been jailed three times more than their general representation in society for quite some time."

"Too many African Canadians are serving time in jail. Something more needs to be done," he said. "In this case, I hope to take a small step in changing that."

Justice Nakatsuru said his authority in looking at social context and systemic racial issues flows from s. 718.2(e) of the Criminal Code, which states that a "court that imposes a sentence shall also take into consideration … all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." He also said the framework set out in R. v. Gladue [1999] 1 S.C.R. 688, in which the Supreme Court said Indigenous people were also jailed too often and for too long, can provide useful guidance.

Faisal Mirza, Mirza Kwok Criminal Defence Lawyers

“While there is much to be gained from the jurisprudence regarding the sentencing of Indigenous persons, the sentencing of African Canadians should not be approached by simply layering a Gladue template on top,” he said. “[But] within the sentencing principles that currently exist, I believe there is room to build a framework of analysis that can begin to address the issue of disproportionate incarceration of African Canadians.”

Justice Nakatsuru said two decisions of the Ontario Court of Appeal, R. v. Borde [2003] O.J. No. 354, and R. v. Hamilton [2004] O.J. No. 3252, had “much to offer in analyzing the sentencing issues raised.” In Borde, the court declined to apply the analysis of Gladue to black defendants, noting s. 718.2(e) specifically places an affirmative duty on judges that only applies to Indigenous offenders. But the court also held that background factors were far from irrelevant because they could impact on the offender and the crimes he committed.

In the Hamilton decision, Justice David Doherty upheld a sentence against two black women convicted of importing cocaine, but noted “a sentencing judge is … required to take into account all factors that are germane to the gravity of the offence and the personal culpability of the offender,” including racial and gender bias.

Justice Nakatsuru noted, although Justice Doherty said that the evidence of difficult socioeconomic circumstances of the offender had to be a “direct” result of systemic racial and gender bias, he did not interpret that as a “rigid requirement that the offender show a direct and causal connection.”

“Seldom can such a direct causal connection ever be proven, in life or in law,” he said. “It should not be required in sentencing where the balancing of numerous, often competing factors, is more an art than a science.”

Justice Nakatsuru sentenced Jackson to five years for the firearm charge and one year for the breach of prohibition. He credited him with 1,203 days for his pretrial custody of 803 days on a 1:1.5 basis, with a total sentence of two years 257 days in prison.

“This is not a race-based discount,” he said. “Rather it is a fit sentence when all the circumstances are taken into account, including historical and systemic factors. It is a just sentence that recognizes that each sentence is individual based upon well-recognized principles of law. But also one that takes into account the long-standing and pressing problem of disproportionate incarceration of African Canadians.”

Faisal Mirza of Mirza Kwok Criminal Defence Lawyers, who represented Jackson, pointed out Justice Nakatsuru said a Gladue-type of analysis is not what is appropriate, and in fact that is not what he was arguing. But he said the ruling “provides a roadmap to say I recognize that discrimination against black people in criminal justice is distinct and that is how it should be factored and applied in sentencing.”

“We’re not trying to equate the experiences of Indigenous people and African Canadian offenders, but there are commonalities that should be used as an interpretive tool,” he said. “The Supreme Court of Canada has made it quite clear that sentencing is about individualization, which means you have to explore those aspects of what has brought the person before the court in order to get the right sentence. Only time will tell what the value of the decision is, but what I think it’s going to contribute is that roadmap to lawyers and judges on how to apply anti-black racism to criminal sentencing.”

Brian Gray, spokesperson for Ontario’s Ministry of the Attorney General, said it would be “inappropriate” to comment specifically on the Jackson case as it is still within the appeal period, but added “everyone in Ontario deserves to be treated fairly by our public institutions so that they can reach their full potential, no matter who they are, what they look like, what they believe or where they are from.”


Faisal Bhabha, Osgoode Hall Law School

Aba Stevens, secretary for Legal Aid Ontario’s Black Legal Action Centre (BLAC), said actors and decision-makers need to acknowledge the central role that their anti-black racism plays in the overrepresentation of black people in the criminal justice system.

“It is important that courts fairly and consistently apply the sentencing principles to help ensure equitable treatment of young black people within the justice system and to treat the mistakes of the young Jamaals of this world with the same understanding and empathy as the justice system affords to young white people,” she said. “Instead, imprisonment is often the default for black people because police, Crowns, justices and judges often view black people as inherently criminal and beyond saving.”

Faisal Bhabha, an associate professor at Osgoode Hall Law School who teaches human rights and anti-discrimination law, said the decision is “remarkable on many levels and it’s a game changer.”

“This judgment is radical in that takes quite a bit of liberty with the notion of stare decisis and binding precedence from appellate courts in order to push the law in a way it wasn’t going to go on its own,” he said. “That’s what makes it radical and transformative and truly remarkable.”

Bhabha said Justice Nakatsuru adopts an interpretation of s. 718.2(e) that represents a “deliberate shift in the way we think about sentencing principles for all offenders.”

“Gladue is specific to Indigenous communities, but [Justice Nakatsuru] has now said we can derive some general principles for s. 718.2(e) that support a shift in sentencing beyond just Indigenous offenders. We can also do this in the case of this vulnerable community that we’ve clearly established are disproportionately affected by the criminal justice system,” he said. “It is opening a door to a more compassionate sentencing regime writ large and I think that’s a good thing.”

Lisa Kerr, Queen's University Faculty of Law

But Lisa Kerr, a professor of criminal law at Queen's University Faculty of Law, said "at the end of the day" the actual sentence imposed didn't seem like it was particularly affected by the attention paid to the history and systemic discrimination that African Canadians have faced.

"If you look at the defence and Crown positions, the defence was asking for four years and the Crown was thinking between eight-and-half and 10 years," she said. "It's not usual to see a sentencing judge come somewhere down the middle, which is exactly what happened here. I think you have to think about what this defence was and this particular defendant's criminal record — I think those factors were just so significant in this case."

Kerr said the decision was indicative of the discretion given to judges in sentencing and how "profoundly individualistic" the sentencing process in Canada is, pointing to the wording in s. 718.2(e).

"Judges in sentencing are allowed to think about the social context within which the offence occurred," she said. "It's not a race-based sentencing discount. It's a sentencing process that is highly individualized that pays attention to collective experiences where they are relevant. Canadian sentencing judges can do the same thing for African Canadian defendants [as they are required to do for Indigenous defendants]. They could before this decision and they can going forward."

Stevens said the language of s. 718.2(e) is clear: "all available sanctions, other than imprisonment … should be considered for all offenders."

"While courts already have tools to take account of circumstances faced by African Canadians, Parliament also has a role to play," she said. "As criminal justice reforms are currently tabled in Parliament, the government has an opportunity to amend s. 718.2 to better and more clearly address the particular inequities faced by persons of African descent in the Canadian justice system." An Ontario Superior Court justice has referenced systemic bias against black Canadians in reaching a sentence in the case of a young black man who pleaded guilty to illegal possession of a firearm. But the practical implications of the decision are receiving a mixed reaction from legal experts, with some calling it transformative but another saying it is merely an example of a judge doing his job properly.

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