

Right2YourFace Coalition

Case Summary: R v. Siddiqui

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Case Citation: *Doan v. Canada (Attorney General)*, [2023 ONCJ 128](#)

Facts:

This case concerns police use of facial recognition technology (FRT) in a criminal investigation and law enforcement's use of an individual's personal information, gathered from several sources and used simultaneously, without an individual's consent. In 2020, Keenan Kawall was charged with assaulting another man outside of the East York Town Centre (EYTC) in Toronto, Canada and was tried alongside his co-defendant, Aafaq Siddiqui. In the weeks preceding the assault, a community service officer, PC Espino, encountered Mr. Kawall with a group of men outside EYTC. Although the group was not engaged in any illegal behaviour, PC Espino took photographs of the group, including Mr. Kawall, without their consent.

Following the assault, Toronto police officers quickly identified co-defendant Mr. Siddiqui, but struggled to identify the second assailant. The police enlisted the assistance of PC Espino and they reviewed EYTC's video surveillance footage that captured the event. Upon viewing the footage, PC Espino informed the police that he believed he had encountered and captured photographs of the second assailant in the weeks preceding the assault. This image was then sent, along with stills from the EYTC surveillance video, to an officer who specialises in facial recognition technology analysis. The officer compared the photographs with a database of previously acquired police arrest mugshots and the software identified Mr. Kawall as a potential candidate. The police agents then reviewed Mr. Kawall's mugshot, compared it to the video surveillance footage, and PC Espino's photograph, and formed "reasonable grounds" to believe that Mr. Kawall was one of the suspects who participated in the assault.

This evidence was then used, along with other undisclosed information, to obtain a search warrant for Mr. Kawall's residence. During the search, the police seized clothing items that appeared similar to the assailant's in the video surveillance footage.

Issues:

The Defence brought a mid-trial application to exclude the photographs taken by PC Espino as evidence for infringing upon Mr. Kawall's section 8 rights under *the Charter of Rights and Freedoms*.¹ In its submissions, the Defence also alleged that PC Espino violated *O. Reg. 58/16: Collection of Identifying Information in Certain Circumstances – Prohibition and Duties* which is intended to protect individuals from racial profiling by prohibiting the arbitrary collection of identifying information by police.²

At trial, the Crown asserted that Mr. Kawall was the individual who appeared in the video surveillance footage and participated in the assault along with Mr. Siddiqui. The Defence disputed the Crown's evidence as being insufficient to prove that the second assailant was Mr. Kawall.

Outcome:

The mid-trial application brought by the defense to exclude the photographs taken by PC Espino as evidence for infringing Mr. Kawall's section 8 rights under the *Charter of Rights and Freedoms* was denied by the court.³ While the court acknowledged that PC Espino had violated *O. Reg 58/16*, it refused to exercise its discretion to find that the photographs taken by PC Espino that was used by police to obtain the search warrant was inadmissible as evidence.⁴

At trial, the judge accepted the Crown's physical evidence, including clothing recovered from Mr. Kawall's residence, that was obtained via the search warrant facilitated by FRT, the photos taken by PC Espino, and the surveillance video footage from EYTC. Considering the totality of the evidence before the court, the Crown was found to have proven beyond a reasonable doubt that Mr. Kawall participated in the assault, and he was convicted of various charges under the Criminal Code.

¹ *R v Kawall*, [2022 ONCJ 475](#).

² *O Reg 58/16*.

³ *R v Kawall*, *supra* note 1.

⁴ *Ibid* at paras 57 & 61.

Significance:

Worryingly, in its mid-trial application decision the Court rejected the Defence's argument that this case posed an opportunity for the court to act as a check on police use of new invasive technologies such as FRT. Instead, the court found that because PC Espino did not take the photographs of Mr. Kawall for the purpose of facial recognition analysis, Mr. Kawall's section 8 rights were not violated.⁵

This decision is troubling because the court ignored the devastating effects of the Toronto Police Services' investigative techniques, including a violation of the regulation specifically intended to reduce racial profiling in police practices, on Mr. Kawall's privacy and civil liberties. Mr. Kawall is a racialised person who was arbitrarily photographed by a community service officer in violation of an Ontario law. These same photographs were then used by law enforcement to ostensibly identify Mr. Kawall using FRT analysis and to convict him of several criminal offences. Despite PC Espino's stated initial intent, the photographs, subjected to FRT analysis, reveal core biographical information, and were ultimately used as a decisive tool by police services.

In this case, the court privileged law enforcement's invasive investigative techniques in the face of multiple violations of Mr. Kawall's right to be free from unreasonable search and seizure under the *Charter* and provincial law specifically passed to prevent the behaviour that was ultimately rewarded when the photographs were used.

This decision also raises another issue: the FRT system processes photographic information regardless of intent at the time of the photo. The idea that processing a photo through FRT is somehow more acceptable, despite the questionable context in which it was taken, simply because FRT analysis was not an explicit purpose for its acquisition opens a dangerous door for arguments that any photo taken for another reason in any context can be used for the secondary purpose of FRT analysis with impunity.

⁵ *R v Kawall*, *supra* note 1, at paras 56-57 & 61.