

Case Name:
R. v. Khan

Between
Her Majesty the Queen, Respondent, and
Intikhab Khan, Appellant

[2008] O.J. No. 1561

Ontario Court of Justice
Toronto, Ontario

E.N. Libman J.

Heard: March 11, 2008.
Oral judgment: March 11, 2008.

(12 paras.)

Counsel:

Counsel for the Respondent: E. Fernandez, Ms.

Agent for the Appellant: M. **Riddell**, Esq.

PROCEEDINGS ON APPEAL

REASONS FOR JUDGMENT

- 1** E.N. LIBMAN J. (orally):-- Thank you both for your argument dealing with the issue, in particular of remedy.
- 2** The principle view of the Crown that the record is unsatisfactory, justifying the order of a new trial.
- 3** The position of Mr. Riddell, on behalf of the appellant, is that the totality of the improprieties in the trial process is such that their cumulative totality ought to result in the ordering of a verdict of

acquittal, as opposed to directing a new trial.

4 This appeared to be a simple case of speeding. When I say simple, in the context of the challenge to this absolute liability offence, it was in the nature of challenging the reliability of the officer's testimony. The defendant brought a non suit application at the conclusion of the Crown's case.

5 It is unfortunate that the justice intervened numerous times during the balance of the transcript and it would not be unreasonable, as I indicated in oral argument, for the defendant, Mr. Khan, to have felt that he was not being treated impartially. The justice curtailed, at junctures, the cross-examination of the defence representative, Mr. Riddell, and did not hear the entirety of his submissions for a non suit.

6 One telling aspect of the transcript was the prosecutor herself noting that the defence had not concluded the submissions that he had made.

7 Mr. Riddell submits that the cumulative totality of the errors made on the face of the record ought to give rise to the entering of a verdict of acquittal. He has stated that the curtailing of the cross-examination and argument, when considered with the nature of the offence of speeding, the expense of ordering a new trial, the trial date being in March of 2007, the offence date in February, 2006, the brevity of the officer's notes and the challenge that he says could be mounted to the testing of the device all merit that exceptional order.

8 Ms. Fernandez, on behalf of the prosecutor, while fairly acknowledging that the record is unsatisfactory, takes the view that it is appropriate to direct a new trial, there being a *prima facie* case of speeding, and there being an evidentiary threshold of the proper testing of the machine.

9 S. 138 of the *Provincial Offences Act* provides the court, on appeal, which is styled an informal review, to have a broad discretion, in other words, to affirm, reverse, or vary the decision appealed from.

10 In my review of the record, what does stand out is that this defendant, through no fault of his own, has not had a fair trial. Although, in my view, the argument made with regard to the brevity of the notes, the record of testing, the nature of the charge itself, and even the unfairness inherent in curtailing the cross-examination and submissions, while it may have been that any one of those issues in and of itself would not result in an aura of unfairness such that a verdict of acquittal ought not to be entered, I am persuaded that on their cumulative totality it is not in the ends of justice to direct a new trial.

11 I have taken into account that the defence attempted to put a principled defence before the court, through no fault of the defendant that was not accommodated by the court. To order a new trial at this juncture would, in my view, be unfair and contrary to the interests of justice. Accordingly, on the basis of the record and having regard to the cumulative nature of the errors on

the record, I have determined that the appeal must be allowed as everyone recognizes, but that the appropriate remedy in these particular circumstances is not to direct a new trial but to order a verdict of acquittal.

12 Thank you all.

qp/s/qlmxm/qlpxm