

ONTARIO COURT OF JUSTICE

AHMAD OMARZADAH

APPELLANT

AND

HER MAJESTY THE QUEEN

RESPONDENT

REASONS FOR JUDGMENT

**BEFORE THE HONOURABLE MADAM JUSTICE S. R. SHAMAI
ON DECEMBER 9, 2003, AT TORONTO.**

APPEARANCES:

PROSECUTOR

AGENT FOR THE ACCUSED

P. MCMAHON, ESQ.

P. PERITI, ESQ.

**OLD CITY HALL
COURTROOM 'M2'**

REASONS FOR JUDGMENT**S. R. SHAMAI (Ont. Court of Justice): (Orally)**

Mr. Omarzadah was convicted of a speeding offence on November 18th, 2002. He appeals on the basis that his Charter application was wrongly decided. As well, he raises an issue as to the fitness of sentence, effectively as an alternate ground of appeal.

Mr. Omarzadah was charged on September 18th, 2001 with the offence. He made application within the allotted time for his trial. The notice of trial was issued on October 31st, 2001, setting the November 18th trial date in 2002.

He filed a Notice of Application and constitutional issue on November 9th, 2001, raising the issue of an unreasonable delay in the trial of the matter. He asserted a total time of 13 months and 22 days from the issuance of the Certificate of Offence to the trial date and contends that it amounts to an unreasonably long delay, hence a violation of his Charter rights under s.11(b).

At trial on November 18th, 2002, his application was dismissed. The justice of the peace at trial calculated the delay from the date that the trial administration office generates a notice of trial to the trial date. In this case he calculated the time from

November 1st, 2001, to November 18th, 2002, as approximately a year.

He says about the delay, and I quote,

5 "Not the most preferable in my opinion.
Of course, there could have been an
earlier date than that. However, whether
or not it violates his Charter right is
something else again. There isn't a
10 template with regards to the particular
time frame."

15 The justice of the peace goes on to consider
the prejudice alleged by the applicant. He
says he is, "Not convinced". He takes the view
that as it is the only ticket the applicant
ever had and it would not affect his insurance
rate, and as it is a minor traffic offence with
no points attached to it, there could be no
20 prejudice. In the absence of such prejudice
the court concludes that the delay, while not
optimal, does not amount to a Charter
violation.

25 With respect, this reasoning so abridges the
analysis and factors to be considered that it
falls into error. In terms of the factors
considered, I am of the view that the trial
court ignores well established jurisprudence in
30 stating that there is not a template with
regards to a particular time frame. While it
is true that each case turns on its facts,

there is clearly some guidance in what might be considered a reasonable time to trial.

5 Criminal cases which proceed by summary conviction ought to be heard within six months according to the Court of Appeal in *R. v. MacMillan*. That is a case cited by my colleague, Justice Sheppard, relied on in a Provincial Offences appeal decision, *R. v. Mastroianni*, so as to apply to trials under the Provincial Offences Act as they are summary matters, albeit not criminal.

15 Mr. Justice Libman, also sitting on appeals in Provincial Offences, takes the view that a reasonable time for the trial of a Provincial Offences matter is more stringent than the time which might be permitted in criminal cases.

20 He says, and I quote,

"The very short time lines that govern under the *Provincial Offences Act* make it clear that speedy justice is the hallmark of proceedings under this Act."

25 That is from the case provided in the record here, *R. v. Farokhshadfar*, decided April 6, 2001.

30 Mr. Justice Sheppard took the same view in *Mastroianni*. I quote,

"The courts have set stricter limits for

the more minor matters which should be easier to prove and are not as complex."

5 The *Farokhshadfar* case makes another important point which bears on the present appeal. It involved a delay of 14 months and 10 days. Mr Justice Libman took the view that such a delay was prima facie unreasonable and the prosecution was required to justify the delay. This was outside the consideration of other factors.

10 In the case at bar, the delay of 13 months and 22 days was first not reckoned to be excessive on its face. Clearly, the weight of authority would require the Crown to respond when a delay which is prima facie excessive has occurred.

15 In any event, the trial court did not consider the other factors which the courts have time and again deemed necessary for consideration of an application under s.11(b). In addition to the consideration to the length of delay and prejudice, the court must examine the reasons for delay and whether there has been any waiver of time elapsed.

20 The trial court did not consider the several factors which must be taken into account. No consideration was given by the trial court to the issues of waiver and responsibility for the delay.

I conclude that the length of the delay was not properly reckoned and that in fact 13 months, 22 days, from the offence date to time of trial ought to be considered as the time Mr.

5 Omarzadah waited for his trial. According to the standards used by two of my colleagues sitting in this court, the time to trial in this case is more than twice what is reasonable. At that rate it ought to have
10 triggered a justification of reasonableness of the delay by the Crown who responded to the application. No such position was taken at trial nor on this appeal.

15 As for the reasons for delay, I see a record wherein the appellant acted promptly in setting down a trial and raising the Charter issue once the trial date was set. No extenuating
20 circumstances are offered for the delay. In this trial of a speeding offence there appears to be nothing but systemic delay.

25 Even in the face of a Charter application for a remedy for delay filed more than a year before the trial date, the Crown did nothing to bring the matter forward so as to alleviate the delay or in some way mitigate. The Crown has thus
30 done nothing in the face of alleged delay and in this way contributes to the delay Mr. Omarzadah experienced.

As to the issue of prejudice, the trial court

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replaced its consideration of the impact of
delay for that experienced by the appellant in
the case. While certainly the justice of the
peace is entitled to make findings of
credibility with regard to the testimony on the
issue of prejudice, in this instance the
estimation of the impact of prejudice was the
estimation of the justice of the peace himself
without dealing with the issue of the
credibility of the witness, the appellant in
this case.

In all of the circumstances, there is no
justification for a delay of this length and it
does not emerge from the status of
unreasonable, certainly not because of the
justice of the peace's assessment of
insufficient prejudice.

I am therefore allowing the appeal on the basis
of the Charter issue. I am setting aside the
finding and the trial which followed. A stay
is the usual remedy in a case of a finding of
unreasonable delay. There has been no
suggestion that anything but such a remedy
might apply in this case, and I am imposing a
stay.

December 9, 2003

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This is to certify that
the foregoing is a true
and accurate transcript
of my recordings to the
best of my skill and
ability.

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A handwritten signature in cursive script, appearing to read "Smith", written over a horizontal line.

Laura A. Smith
Official Court Reporter

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