

ONTARIO COURT OF JUSTICE
(TORONTO REGION)

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

MOHAMOD RIJAL

Appellant

Vartan HS Manoukian, for the appellant
Iwona Stamicar, for the respondent

On appeal from the conviction entered by Justice of the Peace J. Cottrell of the Ontario Court of Justice, on 16 December 2005, at Toronto, Ontario

Heard: 12 July 2010; Released: 9 August 2010

REASONS FOR JUDGMENT

Libman J. : -

Introduction

[1] Like some persons in the province of Ontario who are given a certificate of offence and go to trial under Part I of the *Provincial Offences Act*,¹ Mr. Rijal chose not to have any legal representative appear on his behalf. Instead, he conducted his own defence. As an unrepresented defendant, he appeared in court on the trial date where he met his judge and the prosecutor, as well as the officers who gave him a ticket for failing to stop for a school bus while he was driving his taxi. However, the justice of the peace hearing the case did not address the appellant before the trial started, and gave him no explanation of the process which followed. This lack of assistance resulted in the appellant not being

given sufficient guidance throughout the trial, such that the justice's duty to an unrepresented defendant to ensure that he has a fair trial and that his defence "is brought out with its full force and effect" (*R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 (Ont.C.A.) at 347) was not met. As a result, the appeal must be allowed, and, given the history and nature of these proceedings, an acquittal entered in place of the conviction imposed by the trial justice.

[2] In coming to this conclusion, I wish to explain why I do not share the concerns expressed recently by my brother, Justice Bellefontaine, in *R. v. Saeed*, 2010 ONCJ 251, whom in a decision concerning provincial offences trials of unrepresented defendants, stated at para. 10 that such trials would be unduly lengthened if the "accepted principles in a criminal trial" with respect to giving guidance to defendants without legal representation, applied to proceedings under Parts I and II of the *Provincial Offences Act*. I do not think, with respect, that justices of the peace should be constrained by the time it takes to ensure that an unrepresented defendant receives a fair trial. To the contrary, trial justices are under a duty to ensure that parties who defend themselves without legal representation do have a fair trial, even if the time that "the trials are scheduled for and usually completed to the conclusion of judgment and sentencing in 15 minutes" (*Saeed*, para. 2) is exceeded. The length of time required for giving meaningful assistance to unrepresented defendants who are charged with provincial offences must not be subject to arbitrary time limits of no precise duration. Trial justices, in other words, should not feel compelled to render less assistance to a person who chooses to defend himself/herself for a Part I or Part II offence, rather than one under Part III, on the basis that there is less time for fairness.

[3] Stated shortly, providing meaningful assistance through the trial process to an unrepresented defendant under the *Provincial Offences Act*, so that his/her defence is brought out with its full force and effect, should neither be subject to time constraints nor depend upon the nature of the provincial offences proceedings in question.

Circumstances of the Offence and History of Proceedings

[4] The appellant was given a ticket on 3 February 2005 for failing to stop his taxi as it approached a school bus, contrary to s.175 of the *Highway Traffic Act*.² The offence was alleged to have taken place at 11:23a.m., on Eglinton Ave East and Rosemount Drive, in the City of Toronto. The set fine for the offence was \$405, with a total payable of \$500. This amount represents the maximum fine permitted, at the time, under Part I of the *Provincial Offences Act*.³ It also carries six demerit points, which is the second highest number of demerit points available for a traffic infraction, thereby putting the appellant's offence in the same category as careless driving, stunt driving, and speeding 50 km/h or more.⁴

[5] Mr. Rijal filed his Notice of Intention to Appear in court on 16 February 2005. Six months later, on 11 August 2005, the clerk of the court issued the Notice of Trial to the appellant. It gave him a trial date of 27 October 2005, at 1:30p.m. However, this document mistakenly referred to the charge as being for the offence of failing to report

damage, contrary to s.175(1) of the *Highway Traffic Act*; the section number is also in error. This clerical mistake, though, caused the appellant to be confused as to the nature of his trial, as will be apparent from the very first words he uttered after entering his not guilty plea once the proceedings commenced.

[6] On 27 October 2005, the appellant duly appeared for his day in court. He intended to defend himself and was ready for his trial. As the original court documents have gone missing, the events that took place on this date may only be gleaned from a photocopy of the back of the certificate of offence. It appears that the matter could not be reached, and the trial was adjourned until 16 December 2005 at 9:00a.m.

The Appellant's Trial

[7] On the re-scheduled date for trial, 16 December 2005, Mr. Rijal appeared in court. Once again he had no legal representation. The opening remarks of the justice of the peace, clerk of the court, prosecutor and appellant, prior to the calling of the first witness at the trial, are as follows:

Ms. Stoeckl: Thank you Your Worship, if we can begin a trial matter, line 9 Mohamod Rijal.

The Court: Good Morning sir what is your name please?

Mr. Rijal: My name is Mohamod Rijal.

The Court: Thank you.

Ms. Stoeckl: And you are ready to proceed with your trial today sir?

Mr. Rijal: Yep.

Ms. Stoeckl: Thank you. Seeking arraignment please Your Worship.

Clerk of the Court: Mohamod Rijal is charged on the 3rd day of the second month, in the year 2005 at 11:23a.m. at westbound Eglinton Avenue East, east of Rosemount Drive in the City of Toronto, did commit the offence of Fail to Stop for School Bus Meeting, contrary to the *Highway Traffic Act*, section 175(11). How do you plead to this charge sir, guilty or not guilty?

Mr. Rijal: Not guilty. Actually I receive a different letter from that one ...

The Court: Thank you for the plea, sir.

Clerk of the Court: Just have a seat.

Ms. Stoeckl: Thank you. 65454. I'll ask the other officer to step outside Your Worship...

The Court: Yes, if you would please ...

Ms. Stoeckl: ... in terms of fairness...

The Court: ... thank you very much sir.

Ms. Stoeckl ... if there is an exclusion of witnesses, thank you Officer Momeni.

Clerk of the Court: Sir, you can just have a seat.

The Court: Just have a seat sir.

[8] Constable Ireland was the first witness to testify. No explanation was provided to the appellant beforehand as to the procedure for asking questions or the manner in which

witnesses would be called and examined, or how the trial was to be conducted at all. In fact, when the prosecutor asked for permission for the officer to refer to his notes, the justice did not address the appellant and merely stated, “Constable Ireland, feel free to use refer to your notes as required sir.”

[9] The officer proceeded to describe how the school bus in question was stopped in the curb lane of Eglinton Avenue East, with its red lights flashing, but that the appellant passed the bus in the centre lane without stopping. After describing how his was the only motor vehicle not to pull over for the bus school, the prosecutor had Constable Ireland confirm that he never lost sight of the appellant’s car, and that he was satisfied with the appellant’s identification.

[10] At the conclusion of the officer’s examination in chief, the following exchange occurred:

Ms. Stoeckl: Thank you. No further questions Your Worship for this officer.

The Court: Thank you. Mr. Rijal ...

Mr. Rijal: Yes.

The Court: ... do you have any questions for to ask the police officer at this time sir?

Mr. Rijal: Yeah, ahh.

The Court: Do you, yes or no?

Mr. Rijal: Yes.

Clerk of the Court: Stand up please sir.

The Court: Okay, please stand.

[11] By way of cross-examination, the appellant asked these questions:

Q. The first question I am asking the officer is that, I received this letter from the court that I have been charged on the 3rd day of February 2005, at 11:23a.m. at westbound Eglinton Avenue East; you did commit the offence of fail to Report damage contrary to the *Highway Traffic Act*, Section 175(1).

The Court: Pass that over to the prosecutor, please, I noticed that myself. There are two documents in they both make the same statement.

Ms. Stoeckl: As the Court is well aware – if I can address the issue, Your Worship, the charging document before the Court is the certificate of offence, the defendant does have his notice as well stating what the charge is before the court, as you know this is just a notice to the defendant to compel him to court, it is not the charging document before the Court.

The Court: The Court is fully aware of that. Sir, the charge before the Court is the charge of which the officer gave you a copy of the Part I certificate number 82774300 that is the official document before the Court sir, even though the receptionist or secretary or a clerk within the court, in fact typed the wrong charge. The charge with which you are charged is the

correct charge which is before this Court that being Fail to Stop for School Bus/Meeting contrary to the *Highway Traffic Act*, section 175 (11).

Continue with your questions sir.

Mr. Rijal: If I were charged on that offence actually – that’s true I was traveling and driving a taxi.

The Court: Where is your question sir? You have not been sworn in yet, the officer has been sworn in, this is your opportunity to ask any questions in your defence.

Mr. Rijal: Officer. Did I stop or I didn’t stop on to ..

Clerk of the Court: You are going to have to speak up sir; I need to be able to hear you for the recording.

Mr. Rijal: Okay, officer when you came to me, should I be traveling or I was stopping, because I stopped at ...

The Court: Nope, you are making a statement sir, this is your chance for question, you can do a preamble, briefly and then ask the question but I don’t want you making statements.

Mr. Rijal: I have no other question sir.

The Court: Are you positive?

Mr. Rijal: Yeah.

The Court: Okay.

Mr. Rijal: But ..

The Court: Thank you.

Mr Rijal: ... I’d like to make a statement.

Ms. Stoeckl: Thank you, no re-direct, thank you. If can call Officer Momeni please?

[12] The second witness, Constable Momeni, was also permitted to refresh his memory with his notes, without any explanation to the appellant of the procedure being followed, or asking whether he wished to ask any questions about the officer’s notes. Constable Momeni proceeded to state how he observed Constable Ireland pull over the appellant’s motor vehicle after it passed the stopped school bus, notwithstanding that all of its equipment had been activated.

[13] On this occasion, the appellant did ask a series of questions to the witness. He wanted to know how many other vehicles had gone by the stopped school bus ahead of his taxi cab. The officer replied that he was the last vehicle to pass it. He then asked the officer if he was sure that he had passed the school bus. The witness replied, “Oh yes sir, I have no doubt. I was watching you.” The appellant’s remaining questions were to ask which way he was traveling on Eglinton Avenue, and where the school bus was located.

[14] At the conclusion of the appellant’s questions, the prosecutor indicated that she had no questions in “redirect,” and closed her case. The justice of the peace then addressed Mr. Rijal:

The Court: Thank you. Mr. Rijal, do you wish to call any evidence sir?

Mr Rijal: I suppose ...

The Court: Yes or no sir? You wish to call any evidence ..
 Mr. Rijal: Yes I can call evidence.
 The Court: Okay. Up you come, please sir.
 Mr. Rijal: I don't have right now.
 The Court: You don't have what right now sir? You made a statement there about right now. I am wondering what you said.

[15] The appellant proceeded to be affirmed. His evidence in chief commenced in this manner:

The Court: Feel free to give evidence sir, just bear in mind that you may be cross-examined.
 Mr. Rijal: Okay.
 The Court: Feel free.
 Mr. Rijal: As I told you before my – I been received with this letter, indicating that I was charge it was a different charges, which is different from which I ...
 The Court: We already clarify that for you sir ..
 Mr. Rijal: Yes I understand.
 The Court: .. the official document is 827774300, which is Fail to Stop for School Bus/Meeting contrary to the *Highway Traffic Act*, 175(11), we've already stated that sir; and is the document before the court, the other document may say something different, however that document is not an official document.
 Mr. Rijal: I was traveling east bound on Eglinton, driving a taxi cab, plate number AMPC 956..

[16] Mr. Rijal went on to explain that there were a number of cars ahead of him, but that he did not pass the school bus. He maintained that he had not passed it, although the other cars ahead of him did so. When he attempted to give evidence as to his conversation with the officer who pulled him over, the prosecutor objected, leading to this exchange:

Ms. Stoeckl: I am gonna object...
 Mr. Rijal: ... that I attempted, I tried to stop.
 Ms. Stoeckl: ... further to any statements that ...
 The Court: It's hearsay. I am fully aware...
 Ms. Stoeckl: Yes.
 The Court: .. hearsay. I am trying to get one word from this gentleman ...
 Ms. Stoeckl: I know Your Worship, and that why..
 The Court: ... that he had said seven times ...
 Ms. Stoeckl: ... I haven't been ...
 The Court: Yeah.
 Ms. Stoeckl: .. objecting.
 The Court: I am trying to get one word from him, that he has used seven times and I still don't understand what the word is. You keep saying that the officer stopped you and he something to you.⁵

Mr. Rijal: He said you tried to stop, you attempted to stop.
 The Court: No, that's not the word I keep hearing, sounds to me like bullied, but I'm...
 Mr. Rijal: No, I was not bullied.
 The Court: ... Sure.
 Mr. Rijal: He came to me and he told me that I attempted to stop the school bus.
 The Court: Okay.
 Mr. Rijal: I tried to stop the school bus, but I failed to stop, but in that case I was already in a stop position, I didn't pass the school bus and the officer knows that.
 The Court: Okay. Any cross-examination?
 Ms. Stoeckl: Yes.

[17] Without any explanation to the appellant as to the procedure that was about to follow, the prosecutor proceeded to ask her questions. The first question was to have the appellant acknowledge that the school bus was on the south side of Eglinton, and that, secondly, the officer had pulled him over. He maintained, however, that he did not pass the school bus, and that he had stopped his vehicle by the time the officers came over to speak to him.

[18] The prosecutor concluded her questions shortly afterward. The Court then addressed the appellant as to what would happen next:

Ms. Stoeckl: Thank you, no further questions Your Worship.
 The Court: Thank you sir, do you have further witnesses to call?
 Mr. Rijal: I don't have witness's sir ...
 The Court: Okay.
 Mr. Rijal: ... at this time.
 The Court: Thank you very much, round in front please. Submissions, please, Mr. Rijal final statements to the court sir.

[19] There was no further explanation as to what was meant by “submissions” or “final argument”, or asking the prosecutor to address the Court first so that the appellant would know what the prosecutor's position was. The appellant made this statement to the Court:

Mr. Rijal: Ah, I believe that I – I believe that I didn't pass the school bus. I did the best way to stop, I stop from the school bus, look at the children getting – unloading the school bus and - I believe I'm not guilty.
 The Court: Any further statement?
 Mr. Rijal: No.

[20] The prosecutor then made her submissions to the Court, stating that the prosecution had presented “a prima facie case and a case beyond a reasonable doubt.” She asked that a conviction be imposed. The trial justice did not ask the appellant if he wished to say anything in reply, and instead delivered his reasons for judgment, finding him guilty. In

doing so he observed that the appellant did not “have the foggiest notion what was going on” at the time he approached the stopped school bus, and that he did not believe the appellant’s testimony as he appeared confused as to which way he was traveling.

[21] Having found Mr. Rijal guilty of the offence of failing to stop for the school bus, His Worship asked the prosecutor for submissions as to penalty. She declined to make any, stating that she would “leave it in the Courts hands.” The Court then proceeded to impose the set fine of \$405 without asking the appellant if he wished to say anything on sentencing.

Providing Assistance to Unrepresented Defendants in Provincial Offences Proceedings

Overview

[22] The task that a court faces when conducting a provincial offences proceeding where the defendant is unrepresented is a challenging one, notwithstanding that it is a quasi-criminal offence, and not a true crime, that is the subject of such a trial. As Harris J. observed in *R. v. Sholtens*, 2008 ONCJ 282 at para. 16, it requires the trial justice to engage in a “complex balancing act that must be undertaken between impartiality and the judicial obligation to provide assistance to the unrepresented.”

[23] Justice Harris proceeded to explain this quandary as follows:

This case highlights one of the fundamental weaknesses of the adversarial system – its underlying assumption that both sides of the litigation, the adversaries, are evenly matched thus permitting the impartial decision-maker to remain above the conflict. When that assumption is untenable because the defendant is unrepresented and the matter involves some complexity, every step a court takes to assist the unrepresented party tends to erode the confidence of the opposing litigant in the court’s fairness and impartiality. Jurists who preside in courts where most accused are unrepresented, find themselves on the horns of this insoluble dilemma on a daily basis.

[24] Of course, the challenge posed by an unrepresented defendant is one that trial courts, of every level across the province, encounter on a not infrequent basis. With respect to criminal charges, the Ontario Court of Appeal has provided trial judges with guidance as to the appropriate level of assistance that should be provided to unrepresented defendants in such cases.

[25] In a decision rendered over twenty years ago, *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 at 347, the Ontario Court of Appeal stated:

Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him

throughout the trial in such a way that his defence is brought out with its full force and effect. How far the trial judge should go in assisting the accused in such matters as the examination and cross-examination of witnesses must be of necessity a matter of discretion.

[26] The Court went on to observe that a judge is not required to become the defendant's advocate.

[27] Subsequent decisions of the Court of Appeal have echoed these comments. In *R. v. Taubler* (1987), 20 O.A.C. 64, the Court opined that while a trial judge has a duty to ensure that an unrepresented accused has a fair trial, that duty only extends to doing what is "reasonable under the circumstances." The judge cannot be the advocate for the defendant and remain an impartial arbiter at the same time. Neither does the court's duty extend to providing the accused, at each stage of the trial, the kind of advice that counsel would be expected to provide if the defendant were represented by counsel.

[28] In *R. v. Tran*, [2001] O.J. No. 3056 at para. 33 (QL) (C.A.), Borins, J.A., for the Court, specified the type of matters upon which the trial judge should be expected to give assistance to an unrepresented defendant. After noting that the defendant appeared to be confused as to how he should plead to the charge, and was thus "ignorant of the most basic stage of his trial – his arraignment", the Court stated that it was incumbent upon the trial judge to recognize that the task of conducting a fair trial for this particular unrepresented defendant would require a "significant degree of instruction and vigilance on his part." Justice Borins proceeded to state:

At this stage of the trial, to satisfy the minimum requirement of providing assistance for the appellant, the trial judge should have explained to the appellant the course which the trial was to take, beginning with his arraignment, followed by the Crown Attorney calling her witnesses, his right to cross-examine the witnesses and to object to irrelevant evidence, his right to call witnesses and to testify, the risks inherent in testifying and not testifying, and finally, the right to make closing argument.

[29] The *Tran* judgment was applied in *R. v. Gonsalves* (2005), 196 O.A.C. 83 at para. 3 where the Court found that the trial judge had failed to provide the unrepresented defendant "with the minimum level of assistance as described in *Tran*." By way of example, it was noted that at the outset of the trial no explanation was provided to the defendant of the court proceedings and how they would unfold. Neither did the trial judge tell the defendant he was entitled to object to evidence led by the Crown, nor adequately explain the purpose of cross-examination of a witness and how to conduct it. The purpose of *voir dire*s respecting the police officers' and security persons' notes was not explained. Finally, the trial judge did not explain the factors an accused should consider before testifying on his own behalf. In the result, the defendant did not receive a fair trial.

Provincial Offences Proceedings for Part III Offences: Applying the *McGibbon* Standard of Assistance to Unrepresented Defendants

[30] While the *McGibbon* decision, and those that follow it in the Ontario Court of Appeal respecting trials of unrepresented defendants, involve criminal charges, it has been applied on many occasions to provincial offences trials involving persons who defend themselves without legal representation. Moreover, it has been found in several such instances, that a fair trial did not take place on account of the lack of a minimum level of assistance provided by the trial justice.

[31] These cases, while not reaching the level of the Ontario Court of Appeal, have firmly taken root and dot the provincial offences landscape. Accordingly, it is beyond question that a trial justice conducting a provincial offences proceeding has a duty to provide minimal assistance to an unrepresented defendant to ensure that there is a fair trial, and that the person's defence is brought out with its full force and effect. What is not so clear, however, is the extent that such assistance should take.

[32] Let me illustrate with a number of decisions that have considered the scope of the trial justice's duty to conduct a fair trial in provincial offences cases where the defendant has been unrepresented.

[33] In one of the earliest cases to consider this issue, *R. v. Messina*, 2005 ONCJ 560, the unrepresented defendant was convicted of the *Highway Traffic Act* offences of careless driving and failing to remain at the accident scene. The charges were laid under Part III of the *Provincial Offences Act*. It was conceded by the prosecutor that the presiding judicial officer has a "heightened duty" in such a case to "ensure the fairness of the trial process, a concession accepted by Bovard J. as being in keeping with the *McGibbon* decision. (*Messina*, para. 28).

[34] Justice Bovard went on to set out what he considered would be reasonable to do in most provincial offences trials of unrepresented defendants so as to ensure that "the spirit of *McGibbon* is followed":

- Ask why the person is unrepresented. And if they want to be represented, find out if there is any reasonable thing that could be done to assist them in getting representation. For example, granting an adjournment to retain counsel or an agent.
- If the Court concludes that the trial can proceed fairly without representation,
 1. Determine if the defendant understands the charges and what the case is that he or she has to meet. Explain the charge and what the prosecution is required to prove.
 2. Explain that the Prosecution has the onus of proof and that the standard is proof beyond a reasonable doubt.

3. Explain briefly the mechanics of the trial. For example, the right of each side to call witnesses, introduce documentary evidence, object to evidence adduced, the choice to testify or not, and that if the persons chooses to testify they will be cross-examined, and the right to make submissions at the appropriate junctures during the trial.
4. The same should be done if a *voir dire* is held. And if one is held, what a *voir dire* is should be explained.
5. Ask if the person needs pen and paper to take notes during the trial.
6. Explain the role of the Justice vis-à-vis the undefended person, that the Justice is there to ensure that he or she has a fair trial and can offer some guidance regarding the procedures of the trial, but cannot act as the person's advocate.
7. Ask if the person has any questions, and tell the person to ask if during the trial there is something that they do not understand.
8. Make an order for the exclusion of witnesses.

[35] Other decisions in the provincial offences appeal court, involving convictions of unrepresented defendants charged under the provisions of Part III, have given rise to similar sentiments. For example, in *R. v. Rodriguez*, [2010] O.J. No. 1665 (QL) (C.J.), the trial justice was found to have failed in her duty to ensure that the unrepresented defendant received a fair trial for careless driving. It was noted in this regard that the justice failed to explain to the defendant the court proceedings and how they would unfold, even though the defendant indicated he understood the “procedure of a trial.” However, it became evident, early in the proceedings, that in fact he did not. The trial justice did not tell the defendant that he was entitled to object to evidence led by the prosecutor, or the factors the defendant should consider before testifying on his own behalf. Neither did she explain the purposes of cross-examination of a witness and how to conduct it; the defendant had difficulty putting into questions the issues he wished to raise in cross-examination of the witnesses. Lastly, it was observed that English was not the defendant's first language, and the trial justice should therefore have assisted him in the proper formulation of questions.

[36] In another case, however, the defendant appeared to be a “well prepared and well informed self-represented litigant, who understood the issues and was familiar with the documentation”: *North Perth (Municipality) v. McTaggart*, 2009 ONCJ 710 at para.61. Accordingly, McKerlie J. found that, unlike in *Tran*, there was no indication that the defendants, who were charged with *Building Code Act* violations, did not understand the court process or the issues for trial. In fact, the justice made inquiries to ensure that they knew about their right to counsel, and had decided to proceed to trial without counsel. When the defendant made her submissions, the justice interrupted and made inquiries to ensure that she understood she had a right to call evidence.

[37] Justice McKerlie went on to find that the trial justice provided the minimum level of assistance required by the self-represented litigants in the case, stating at para. 59:

It must be remembered that unlike the indictable criminal charges in *Tran*, this was a trial in Provincial Offences Court. As explicitly set out in section 2(1) of the *Provincial Offences Act*, the purpose of the Act is to replace the summary conviction procedure for the prosecution of provincial offences ... with a procedure that reflects the distinction between provincial offences and criminal offences.

Provincial Offences Proceedings for Part I Offences: Less Assistance for Less Serious Offences?

[38] The cases reviewed to this point respecting the duty of the trial justice to provide assistance to unrepresented defendants so as to ensure that there is a fair trial, and that the party's defence is brought out with its full force and effect, have concerned prosecutions under Part III of the *Provincial Offences Act*. However, there are also many instances where provincial offences appeal courts have ruled that there is the same obligation on justices presiding over Part I trials of unrepresented defendants.

[39] In *R. v. Zimmerman*, [2005] O.T.C. 301 (S.C.J.), Trafford J., in a prerogative remedy application, considered the trial justice's role in assisting an unrepresented defendant to bring a *Charter of Rights* application for unreasonable delay in a careless driving case where the matter was charged under Part I of the Act. He observed that the "statutorily mandated informality" of provincial offences proceedings "was not intended to mandate a significant departure from principles of natural justice or procedural fairness. Rather, such statutory informality merely provides the context within which the essential fairness of the proceedings is to be maintained." (*Zimmerman*, para. 20)

[40] Justice Trafford held that the trial justice had a duty to assist the defendant, an unrepresented litigant, in the conduct of his defence, including the presentation of the application under s.11(b) of the *Charter*. The trial justice, he pointed out, could have "easily described to the defendant at the outset of the application the need for transcripts of the prior proceedings or, as a substitute, an agreed statements of facts to properly rule on the application," doing so "in simple language, maintaining the impartiality of the Court and the appearances of justice, on the one hand, and, on the other hand, ensuring the orderliness and fairness of an unrepresented defendant's trial." (*Zimmerman*, para. 22)

[41] Making reference to the *McGibbon* and *Tran* decisions, Trafford J. observed at para. 23:

... the Courts emphasize the duty of a trial judge, in a criminal case, to provide assistance to an unrepresented defendant so as to ensure that his defence is brought out with full force and effect, keeping in mind that this duty does not require the trial judge to provide the sort of advice that could be expected of a fully-retained counsel. The spirit of these principles applies with equal force in the quasi-criminal proceedings under the POA, given their informality.

[42] In *R. v. Shinbin*, [2006] O.J. No. 3403 (QL) (C.J.), another careless driving prosecution under the Part I trial procedure resulted in a conviction of a defendant who lacked legal representation. Although the appeal was allowed on other grounds, Shamai J. rejected the argument that the trial justice did not provide sufficient assistance to the defendant. Indeed, assistance was provided to the defendant during his trial by both the justice of the peace and the prosecutor; during the testimony of the first witness the prosecutor interrupted the evidence to suggest that the justice urge the defendant to seek legal representation “in view of the seriousness of the incident.” Justice Shamai considered that while the assistance offered to the unrepresented defendant was “not at a standard of perfection, it was not bad either”. (*Shinbin*, para. 4).

[43] Similarly, in *R. v. Kulwant*, 2007 CarswellOnt 5751 (C.J.), it was noted at para. 5 that the trial justice explained the “mechanics of the trial” to the unrepresented defendant, including the procedure as to asking questions about the police officer’s notes, and his opportunity to give evidence in his own defence. It appeared, therefore, that the trial justice was “mindful of his obligation with an unrepresented defendant as he properly should be.”

[44] On the other hand, a conviction for speeding was set aside in *Durham (Regional Municipality) v. Singh*, 2008 CarswellOnt 3166 (C.J.) where the defendant was not provided “fulsome explanations for how the process worked.” As Devlin J. commented at para. 3, this was “particularly important given that he was representing himself.”

[45] In *R. v. Novelo*, 2009 ONCJ 346 at para. 6, Blouin J. made these observations in finding that the trial justice did not provide sufficient assistance to a person who defended himself on a charge of disobeying a stop sign:

Firstly, an adequate explanation of the trial process by the trial justice to an unrepresented defendant did not occur. In fact, there was no explanation. In my view, every defendant is entitled to be made aware, even in the most basic language, of the procedure involved in a trial. That explanation need not take more than a few minutes outlining the basic concepts of burden of proof, sequence of witnesses, relevant questions, and option of testifying or not. Here, there was no explanation.

[46] In the *Novelo* case, Justice Blouin made reference to the fact that the trial justice did not adequately deal with issues that arose during the trial, such as the defendant’s photograph evidence, and his option to testify or not. In particular, it was not explained to the defendant that he could rely on the position that the prosecutor had not proven beyond a reasonable doubt the prohibited act, as was its obligation, and that he did not have to testify.

[47] As for *Saeed*, a speeding case under Part I of the *Provincial Offences Act*, Justice Bellefontaine expressed the concern at para. 14 that “providing the full panoply of legal

information to a self-represented accused is inconsistent with the object of the legislation to provide speedy and efficient trials of these matters.” He continued:

These trials are overwhelmingly dealt with in an informal manner with self-represented accused by prosecutors who are not lawyers and in front of Justices of the Peace who are not lawyers. Detailed explanations of substantive and procedural criminal law are not in keeping with the nature of the proceedings. As the appeals and case law in this area continue to expand, each adding another requirement for Justices of the Peace to comply with, procedural complexity is eliminating any possibility of simple and efficient trial.

*

*

*

The practical reality is that given the time constraints that govern these trials, the imposition of a burden that meets the criminal standards will not be able to be met in the Provincial Offences courts. While this would not be determinative if the criminal standard of explanation was clearly required, I am reticent to interpret ambiguous law in a fashion that could require the government to double the number of trial justices at huge public expense thereby imposing legal obligations that are overwhelmingly ignored.

[48] Bellefontaine J. went on to explain that in order to have the “minimum assistance” provided to self-represented accused to meet the core objective of *R. v. McGibbon* and the cases following it, such that the presiding justice ensures an accused is able to bring out his intended defence with full force and effect, it was not necessary for the trial justice to “articulate to the accused any rules, procedures, rights or burdens that will assist the defence in raising a doubt about the Crown’s case.” (para. 15) Neither were “procedural explanations” required for matters including the right to object, or the right to not testify.

[49] On the other hand, the trial justice was required to explain “in basic and general terms appropriate to the case” the following: the right to cross examine witnesses; the right to call witnesses, including himself, in his defence, who may be cross-examined by the prosecutor; that any arguments he chooses to make at the completion of the trial must be supported by evidence; at the completion of evidence, explain the purpose of closing argument and give the accused an opportunity to make his arguments; assisting with questioning if it is needed to bring out the accused’s apparent defence; and prevent the prosecutor from adducing inadmissible evidence or asking improper or abusive questions.

[50] Justice Bellefontaine concluded at para. 18:

To be clear, setting out these minimal standards of explanation and assistance for self-represented accused does not detract from a justice’s obligation to ensure that the appropriate evidentiary and procedural

standards and burden of proof are met and complied with by the Crown. The obligation to follow standard court procedures, hold required *voir dire*s, prevent improper evidence from being led and applying the proper onus and burden of proof is still in place even if the duty to explain those matters to the accused has been lifted in Part I and Ii matters. The duty to provide a fair trial and allow an accused to make full answer and defence is fundamental and transcends any derogation of the duties to explain the court proceed to an accused.

[51] While the reasons of Bellefonatine J. in *Saeed* do not detract from the proposition that the trial justice conducting a provincial offences proceeding has a duty to ensure that the unrepresented defendant has a fair trial, and that his/her defence is brought out with its full force and effect, I am unaware of any other authority that suggests that this is to be done by less exacting means simply because the matter is governed by Part I of the *Provincial Offences Act*, as opposed to Part III.

[52] In my respectful opinion, there is no good reason for distinguishing between the trial justice's duty under a Part I or Part III proceeding as it relates to rendering assistance to unrepresented defendants. Indeed, I believe that the drafters of the *Provincial Offences Act*, as well as the courts in this province in interpreting it, have recognized the special role that trial justices play in dealing with those persons who come to this court without legal representation, but whose experience with the administration of justice in Ontario is so often informed through the lens of the *Provincial Offences Act*, regardless of the nature of the provincial offences proceedings in question.

[53] Writing at the time of the inception of this new statute, W. Douglas Drinkwater and J. Douglas Ewart, *Ontario Provincial Offences Procedure* (Carswell: Toronto, 1980) at 123-124 commented:

In most parts of the province, provincial offences proceedings will be segregated from proceedings in relation to criminal offences. Either separate courtrooms or separate appearance times can be used to accomplish this. Once a justice is sitting in a court containing only persons charged with provincial offences, it is expected that he or she will adopt a more relaxed attitude towards the defendants and the procedural formalities of trying them. This relaxed attitude, however does not apply to the offence-creating provisions themselves, to which full and fair effect must be given according to the ordinary principles of statutory interpretation.

[54] These comments were echoed by Justice Nadeau, who is credited by Drinkwater and Ewart as playing a role in the design of the legislation, in *R. v. Hill*, [1987] O.J. No. 1935 (QL) (Prov.Ct.) where he stated at 3:

The underlying philosophy of the *Provincial Offences Act* is such as to encourage persons to personally represent themselves at trials of

provincial offences. In the spirit of the Statute, Judges and Justices presiding in those courts should approach the proceedings with tolerance and understanding towards such unrepresented persons and should permit certain latitudes in matters of procedure and law, provided no offence be done to basic principles of law and evidence. Defendants are frequently uncomfortable and occasionally awed in courtrooms. Some will enlist the assistance of a friend or a relative to “speak” for them and the same consideration ought to be extended to such an agent.

[55] The Ontario Court of Appeal has also made it clear that the *Provincial Offences Act* was “intended to establish a speedy, efficient and convenient method of dealing with offences” under provincial statutes: *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 at 552. However, it was not, cautioned MacKinnon A.C.J.O., “intended as a trap for the unskilled or unwary but rather, as already stated, as an inexpensive and efficient way of dealing with, for the most part, minor offences.”

[56] More recently, in *R. v. Winlow*, 2009 ONCA 643 at paras. 71-72, Laskin J.A., on behalf of the Court, made these observations in a case involving the power of a trial justice to grant the prosecutor’s request to “amend up” the speed that the defendant is driving, in order to conform with the officer’s evidence, where he/she pleads not guilty to speeding at the reduced rate alleged in the certificate of offence:

Justices of the peace and prosecutors should be especially sensitive to the question of prejudice. As they know better than most, many defendants who appear in traffic court are self-represented; many have little or no knowledge of the justice system; many are poorly educated or have but a rudimentary knowledge of English. As McKinnon A.C.J.O. said nearly 30 years ago, in words still true today, “the *Provincial Offences Act* is not intended as a trap for the unskilled or unwary”: see *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 at p.562.

Special care must be taken to ensure that POA proceedings are fair to defendants. Where the prosecutor seeks to “amend up”, the prosecutor and the court should ensure, at a minimum, that the defendant understands the amendment, understands the consequences of the amendment and is given a reasonable opportunity to make submissions on why the amendment should not be granted.

[57] In light of these statements as to the philosophy which illuminates provincial offences proceedings, and especially trials of persons who choose to defend themselves, it seems to me that omitting to give guidance on key aspects of the trial process and procedure so as to limit the time for justices to provide minimal assistance to unrepresented defendants in Part I matters only, is akin to imposing restrictions on the number of witnesses for the prosecutor to prove its case, or questions for the defence to ask in cross-examination.

[58] It is one thing to provide an estimation of the length of trial for the purposes of scheduling; it is another to impose limitation periods in order to ensure that the proceedings conclude within a pre-set time. Justices conducting provincial offences proceedings should not be expected to give a two minute warning because of the length of the time that it takes to ensure that the unrepresented defendant receives a fair trial.

[59] Moreover, it is not a workable distinction to mandate, as it were, “premium assistance” for unrepresented defendants in Part III proceedings, but only “economy assistance” for those under Part I. As the cases above demonstrate, offences such as careless driving might be the subject of proceedings under either Part I (*Zimmerman, Shinbin*) or Part III (*Messina, Rodriguez*), depending upon the charging decision of the officer. To permit less assistance in the former, merely because the court has fewer options on sentencing for the same offence, seems an arbitrary distinction.

[60] The trial process involving this unrepresented appellant exposed him to the maximum fine of \$500 permitted at the time for Part I proceedings, and six demerit points. For professional and novice drivers alike, the consequences of such a conviction could be significant, and the antithesis of a minor offence. Where, one might ask, should the line thus be drawn for providing less meaningful assistance under Part I if cases such as this one are deserving of more than the usual Part I standard of assistance: for fines of \$500 or less, now that the maximum penalty has been raised to \$1,000? In cases of no demerit points? Where there is no moving violation, such as improperly displaying a parking permit, but the matter is not prosecuted under Part III, as was the case in *Sholtens*? There is simply no bright line as to which of these provincial offences proceedings merits more or less meaningful assistance for the unrepresented defendant, and courts ought not to impose one.

[61] To be sure, the time required for hearing a case to its conclusion impacts on trial scheduling for the immediate and other cases. However, the justice’s statement to a defendant who represents himself/herself at the outset of the trial is only one part of the proceedings. To limit the time for same so as to shorten the proceedings to their usual allocation of 15 minutes, will inevitably result in a false economy of saved time, as important matters such as understanding the arraignment and process of the trial will neither be adequately explained, nor likely understood. On the other hand, a statement by the trial justice before the trial commences will have the effect of focusing the proceedings, not lengthening them, while permitting the unrepresented defendant to know what is properly the subject of the trial, and what matters should therefore be addressed in the evidence, including the defendant’s own testimony.

[62] As the instant case demonstrates, by not instructing the unrepresented defendant as to the trial process, Mr. Rijal from the moment of the arraignment through his cross-examination and testimony in chief, wished to address the court as to the erroneous information contained in his trial notice, a matter that was legally irrelevant. Moreover, while this issue had no bearing on the merits of the case, it exposed the appellant to being cross-examined by the prosecutor. The justice gave no warning to the appellant as to the consequence of testifying until after being sworn in, and then drew an adverse inference

from his evidence. Such persistent lack of assistance throughout the proceedings, and the results that flowed from it, is a recipe for a miscarriage of justice.

[63] In summary, I consider that there is no basis for holding that trial justices conducting proceedings under Part I under the *Provincial Offences Act* should render less assistance to unrepresented defendants than under Part III. There is no compelling reason in either law or logic for doing so. The overarching issue for the trial justice, in every proceeding, is to ensure that the unrepresented defendant receives a fair trial, and that his/her defence is brought out with its full force and effect. It should be left to the trial justice, who has the advantage of seeing and hearing the unrepresented defendant in person, to determine the length of time that is required for doing so.

[64] As for the parameters of such assistance, I commend the approach put forth by Bovard J. in *Messina*. After verifying that the unrepresented defendant wishes in fact to proceed to trial, the justice should determine during the course of his/her opening statement to the person whether there are circumstances such as language comprehension or the party's sophistication that require a greater degree of vigilance to ensure that there is a fair trial. Conversely, if it appears the party understands the court process and is prepared to conduct one's own defence, the justice may consider that the trial should proceed, with further explanations at appropriate junctures, such as prior to calling on the defendant to ask questions in cross-examination, or at the conclusion of the prosecution's case when deciding to call a defence, as well as making closing submissions.

[65] I wish to emphasize that the trial justice's duty to provide assistance to the unrepresented defendant throughout the proceedings is a continuous one. It does not end with the justice's statement, at the outset of the trial, as to the issues set out by Justice Bovard; there is no top ten list for unrepresented defendants, to be repeated one time only. Trial justices should be mindful that as the proceedings unfold, legal issues may arise, as occurred in the instant case: eg., the prosecutor's request for a police officer to be permitted to refer to a notebook for the purpose of refreshing the witness' memory; objections by the prosecutor to the defendant's evidence as hearsay. It is important that such matters are properly explained so that the unrepresented defendant is made aware of his/her right to address the Court, and to make submissions and/or indicate a position, on issues that the trial justice is required to make a procedural or evidentiary ruling. In addition, the trial justice may be called upon to help the party frame his/her questions in a way that that will not be objectionable, or focus the witness's testimony on matters that are relevant to the trial proceedings.

[66] To repeat the words of Laskin J.A. in *Winlow*, at para. 71, a case involving the trial of a party who conducted his own defence under Part I of the *Provincial Offences Act*, "Special care must be taken to ensure that POA proceedings are fair to defendants."

Application of Law to Facts

[67] The appellant in this case was not given the requisite minimal level of assistance by the trial justice so as to ensure he received a fair trial, and that his defence was brought

out with its full force and effect. Indeed, there was heightened need for vigilance by the trial justice with respect to providing such assistance, given the appellant's obvious lack of understanding of the trial process, as evident from the arraignment, which may have been exacerbated by his not speaking English as his first language.

[68] Indeed, no explanation was provided to the appellant of the proceedings at all. His plea of not guilty made reference to the erroneous information contained in the trial notice, as did his subsequent questions to the police officers, as well as his own evidence. He was not provided with any basic explanation of his right to make objections, or to ask questions in cross-examination, including when the police officers asked to refer to their notebooks to refresh their memories in testifying; the appellant was unable to successfully pose one question in cross-examination to the first witness who testified at his trial. In particular, the appellant was not afforded any explanation as to his right not to call any evidence and instead argue that the prosecution had not proven its case, and that should he decide to testify he could be cross-examined by the prosecutor. Neither was he instructed as to the purpose of making submissions at the conclusion of the trial, nor to make any reply to the prosecutor once he heard her submissions after his.

[69] A review of the record of the appellant's trial proceedings compels this conclusion. While his trial may well have been held within its allocated 15 minutes, too little time was spent determining that the appellant understood and meaningfully participated in the process. This reflects the fact that he was not provided with the minimal level of assistance required to ensure that there was a fair trial. The finding of guilt of the appellant was the product of a miscarriage of justice. In these circumstances, the conviction cannot stand and must be set aside.

Final Observations

[70] One of the unintended consequences of the *Access to Justice Act*,⁶ which has created under the auspices of the Law Society a new class of paralegal practitioners with the authority to appear in the provincial offences court, is that if the associated costs of licensing result in increased fees which are passed on to defendants charged with provincial offences, many such persons may choose instead to represent themselves in the provincial offences court. As a result, courts may continue to conduct a significant number of trials of unrepresented defendants under the *Provincial Offences Act*, particularly Part I proceedings.

[71] Innovative and creative strategies should therefore be encouraged, as Justice Bellefontaine stated in *Saeed* at para 9, such as making available a "memorandum for the accused without counsel in the Ontario Court of Justice", which is modified for provincial offences proceedings. Given the first attendance process that is now in place across the province for requesting provincial offences trials under Part I, such a handout could be made available at the time the defendant appears in person at the court location to meet with the prosecutor. Alternatively, it might be enclosed with the notice of trial which is subsequently sent to the defendant in the mail, or perhaps even made available

on-line by posting on the courts' website. Copies could also be provided, if necessary, to defendants at the time of appearing for their trial.

[72] The issue of overcrowded courts and lengthy dockets is hardly a new one. However, courts should not scale back the amount of minimal assistance given to unrepresented defendants out of concern for how such assistance may impact on administration and staffing issues. As I read the *Saeed* decision, the court's reference to additional judicial resources being required should the type of information conveyed at a criminal trial be imparted to unrepresented defendants charged with provincial offences, was not based upon evidence or statistical information put before it. Indeed, the Law Commission of Ontario has recently put forth a proposal in its November, 2009 Consultation Paper, which would free up a considerable amount of court time: replacing Part II of the *Provincial Offences Act*, which governs parking infractions, with administrative monetary penalties; such a regime might also be extended to some Part I offences: see *The Modernization of the Provincial Offences Act* at 10-12.⁷

[73] Chief Justice Bonkalo in her speech at the Opening of the Courts on 14 September 2009, observed the following as to the workload of the Ontario Court of Justice:

Our judges and justices of the peace preside in courtrooms across this vast province, from its biggest cities to remote communities without road access. Justices of the peace provide service seven days a week, 24 hours a day, for bail, search warrants and other emergency orders when necessary. Some 600,000 criminal charges, 27,000 family law matters and about 1.2 million provincial offences matters are handled by this Court. Many can be resolved quickly: some are complex, lengthy proceedings. Every one of them is important to the community and those directly affected by any given case.⁸

[74] Accordingly, there is no reason to think that a person charged with an offence under Part I of the *Provincial Offences Act*, and who defends himself/herself in court without legal representation, considers that the trial justice should view the matter as being less deserving of assistance so as to ensure that a fair trial is held, and that the defence is brought out with its full force and effect, than any other matter that the court hears. Neither should courts conducting trials for provincial offences proceedings.

Disposition

[75] The trial of this appellant, and the appeal proceedings which followed, do not present a flattering picture of the administration of justice in this province. Whereas the appellant responded to his certificate of offence within the requisite 15 days, his trial notice was not issued until 6 months later. Upon receiving the maximum penalty under Part I of the *Provincial Offences Act* at a trial where he was afforded little assistance by the Court, he filed an appeal within days; the transcript of his trial, which is approximately 20 pages in length, took two and one-half years to prepare. The certificate of offence has been lost. The offence which is the subject of these proceedings took place

more than five and one-half years ago. There is no societal interest in subjecting this appellant to any further provincial offences proceedings.

[76] In the result, the appeal is allowed, the conviction imposed by the trial justice set aside, and a verdict of acquittal entered.

¹ R.S.O. 1990, c.P.33.

² R.S.O. 1990, c.H.8

³ The *Good Government Act*, 2009, S.O. 2009, c.33, s.1(18), effective 15 December 2009, raised the maximum fine for Part I proceedings to \$1,000.

⁴ O.Reg. 339/94.

⁵ Although the Appellant did not request the use of an interpreter at trial, he required the assistance of a Somali interpreter for the appeal proceedings. The justice's difficulty in understanding what the Appellant was saying, and the Appellant's testimony in broken English, indicates that he would have benefited from the assistance of an interpreter at trial.

⁶ S.O. 2006, c.21.

⁷ Ontario Law Commission, *The Modernization of the Provincial Offences Act*. (Consultation Paper, November 2009) (Toronto: Law Commission of Ontario, 2009).

⁸ Opening of the Courts, 14 September 2009, Speech of Chief Justice Annemarie Bonkalo, at.1.