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R. v. Wahabi

Ahmed Wahabi, Appellant and Her Majesty the Queen, Respondent

Ontario Court of Justice

E.N. Libman J.

Heard: April 20, 2010

Oral reasons: April 20, 2010

Docket: None given.

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Counsel: Ms K. Peterkin, for Respondent

Mr. D. Allen, for Appellant

Subject: Public; Constitutional

Motor vehicles.

Libman J. (orally):

1 The matter here involves a charge of speeding, where the defendant was given a notice of trial, which reflected the following: the offence date alleged; 21 April 2008, the first trial date was May the 19th of 2009. On that date, according to the ticket the defendant's brother appeared and adjourned the trial until July 29th of 2009, which at that time allowed the defendant's representative to bring an application seeking to stay the proceedings.

2 The basis of the argument then, which is not framed in the same terms as Mr. Allen's argument to me today, was that it was simply in relation to the delay between the offence date to the first trial date that should have merited 11 (b) analysis. The Justice approached the matter in a thoughtful and timely -- in a thoughtful and precise way I should say, however, at the conclusion of the reasons of His Worship, he made the following comment, "The defendant had, since August the 28th 2008, to notify the courts that he was not satisfied with the length of the trial being delayed until May the 19th 2009 and that was unreasonable." The reference to August 28th, was the date of the notice of trial being issued. "Had the defendant or his agent done so in a timely fashion, that would have allowed the prosecutor well before the May 19th date to seek a trial date much sooner so that the court could have heard this matter in a timely fashion and that the trial could have been held in a timely fashion, thereby minimizing prejudice. The actions of the defence in this matter do not speak to setting -- to seeking a timely fashion, a trial in a timely manner and on that basis the court is going to find that the application, the court has not heard persuasive evidence to satisfy me on the balance of probability that the section 11(b) right to a trial within a reasonable period of time has been violated. This application will be denied."

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3 In my respectful opinion, the Justice fell into error in employing this form of reasoning. There is no positive duty on defendants who have no say in the scheduling, of their trial to complain about the date in a peremptory fashion otherwise, they will be precluded from arguing 11(b) at their trial. The Justice was of the view that by the defendant's failure to seek an earlier trial date than the one and only given to him, meant that his application ought to be viewed in a different manner. While I take no issue with the manner in which the Justice of the Peace was alive to the various factors, this however, was to effectively place an onus on the defendant to secure an earlier trial date. I note that unlike matters that are scheduled in the criminal courts, the defendant's trial was scheduled to him merely by way of a notice of trial being given to him. The type of logic employed by the Justice would lead to the situation where individuals would be expected to then have to try to seek different trial dates than the ones that an administrative procedure gives to them. There is no basis for imposing this requirement. Accordingly, the Justice fell into error in my respectful opinion by engaging in the 11(b) analysis taking into account that the defence made no steps to seek an earlier trial date.

4 It may well, have been that the Justice ought to have gone on and additionally taken into account the period of delay from the first trial date of May the 19th of 2009, to the 29th of July 2009. Notwithstanding that point, however, what is more, it seems to me, relevant to the analysis is the fact that the prosecutor was not prepared to proceed to trial either by virtue of its disclosure requirements.

5 On the second trial date of July 29th 2009, the defence representative had not been given disclosure of the Crown's case. It may well have been preferable had the representative brought this to the attention of the trial judge in advance of the motion. As he commented at page 24, "I still haven't received the disclosure. If I can have the disclosure while I'm conducting the trial, I'm prepared to have it today and have the trial today." The court then instructed the officer it appears, to show the agent the notes to which the agent replied, "I would require the while the officer is giving his evidence for me and to be able to have something to read along with". Accordingly, the defendant additionally should not have been put in the position of arguing the motion while the disclosure requirements themselves had not been fulfilled.

6 On the totality of the proceedings before me, the record is not satisfactory. The defendant's rights to have a trial without unreasonable delay were violated. The basis for rejecting the application that no positive steps were taken by the defendant to secure an earlier date, all the while the disclosure obligation not having been fulfilled to the Crown must not be accepted as interpretation of 11(b) that can stand. Accordingly the appeal must be allowed the conviction set aside, a verdict of acquittal will be entered on appeal. Thank you both.

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