

IN THE ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

against

FITZ ARANSEVIA

BEFORE THE HONOURABLE MR. JUSTICE R. KHAWLY.

AT TORONTO, ON NOVEMBER 21ST, 2002.

COURT PROCEEDINGS

APPEARANCES

COUNSEL FOR THE CROWN

COUNSEL FOR THE ACCUSED

MR. A. SMITH.

MR. S. PELACCIA.

IN COURT ROOM #125.

OLD CITY HALL

THE COURT: This is a matter of a Defence Appeal in the matter of Regina v. Fitz Aransevia. Appearing for Mr. Aransevia is...

MR. PELACCIA: Mr. Pelaccia, Your Honour, initial S., appearing as Agent for the appellant who is not before the Court. I do have instructions to proceed.

THE COURT: Appearing for the Crown is...

MR. SMITH: Smith, first initial A, acting for the Prosecution. I am with the City of Toronto.

THE COURT: ... read the cases provided by the Crown and the Appellant. What is also interesting is two cases filed, one by the Crown and one by the Defence, both decisions by Madam Justice Marion Lane and the second decision which is the latest one in time which the Crown relies on is from this summer. The one that the Defence relies on is from the spring and the one from the summer - the case of Odu Sania goes into a long review of cases.

There appears, however, Mr. Smith, that juxtaposing the two Decisions by Justice Lane, that the crucial point seems to be whether there is any kind of evidence that the machine was tested both prior and subsequent to the readings, not necessarily how ... it would have to be subsequent to the reading involving the case before us, but at some point during the day there had to have been some kind of a testing taking place both prior and after

MR. SMITH: With respect, Your Honour, I don't read it the same way.

THE COURT: Well, let's...

MR. SMITH: I would be relying on the case of Hue Hat Li by your colleague, Justice Fairgrieve...

THE COURT: No, I can only by...

MR. SMITH: What was put in.

THE COURT: No, not what was put in - I can only go by what the Court of Appeal says and Justice Lane takes the position that the Court of Appeal demands...

MR. PELACCIA: I think it's page 17, Your Honour.

THE COURT: ... page 17, starting at line 15. "Clearly if the Crown had established that the operator was trained and experienced and that he tested the device before and after its use in accordance with the manufacturer's instructions then that would be sufficient evidence to establish a prima facie case".

That's a decision of Rule of April but if we go to a decision in June...

MR. SMITH: You had me a bit confused there for a moment, Your Honour, I was looking at the June case.

THE COURT: Then if you go to the decision in June, page 5 and at line 17, that is the key point on which the Appellant hangs his hat because in the Vockry case there was a verification at some prior time with the comparison of the velocity test, the dynamic comparison test done between the laser and a radar test, the Appellant considers that to

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the speed of a moving motor vehicle. This was tested and found to be working by myself".

THE COURT: That's right.

MR. SMITH: Therefore, it would be my position, Your Honour, there was some evidence before the Court that there was testing. My position is this Court, as an Appeal Court, is no different than a situation by analogy where Your Honour perhaps sits as a trier of fact on a criminal case and makes a decision on an issue that might be construed as favourable to the Crown and then subsequently appealed.

The standard is was your conclusion reasonable and I would submit under the circumstances, yes, it was. We even played the tape back. As you may see in this particular case there was some issue about whether the officer had given any evidence of testing at all and the tape was subsequently played back and that's noted on page 9.

His Worship took the position that there was evidence before the Court of testing. There was nothing to the contrary. Therefore, the only evidence before the Court was that of the Crown and he made a conclusion that it was reasonable that he could accept that there was evidence of testing that he could accept so under those circumstances, Your Honour, I believe there was evidence of testing that the Court could



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reasonable conclusions with regard to this - this dissecting of every word and everything that one might say, the officer indicated that he was working at that location; he is qualified to do that; he tested it, found it working accurately I am willing to draw the conclusion that, in fact, the officer was referring to that particular day and that some other time or another month", but even if one were to assume that, Mr. Smith where is the that the learned Justice of the Peace is making a reasonable inference that he is satisfied that the officer also tested the device following the test... following the reading?

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MR. SMITH: Following the reading? There is no evidence of that, Your Honour. However, there is evidence before the Court that the Court could rely upon that the device was working properly. The officer was testifying about the day in question. He testified about what device he used and that he tested it and found it to be working. There is absolutely no evidence to the contrary. I believe, yes, there was a reasonable belief there was some evidence before the Court that the Court could rely upon - they had a trained and qualified laser and radar operator using the device and he indicated that he tested it and found it to be working.

No, there is not a specific reference to a time of testing it afterwards but, in this

particular case, there was evidence before the Court that the Court could rely upon that the device was, in fact, working properly. There was absolutely nothing to the contrary.

Under those circumstances I believe there was a reasonable conclusion that the Justice of the Peace could make a finding that the device was accurate because there was some evidence before the Court and nothing to the contrary...

THE COURT: Yes, but that's the problem, isn't it, Mr. Smith? Some evidence may surmount one particular hurdle. To suggest that the Crown has satisfied a situation where a motion for a non suit would fail, but once you go beyond the Motion for a non suit can you say that it then satisfied the requirement proving beyond a reasonable doubt that the instrument was in proper working order.

In order to do that the Justice of the Peace would have to had to turn his mind with the idea that, "I am satisfied beyond a reasonable doubt" - not "just evidence" - that when he says, "I tested this machine it was in proper working order and that he had tested it both prior and subsequent".

In my view, that's a rather significant hurdle to suggest that a judge can make a reasonable inference of that, particularly when you should be mindful that the facts in Vancrie which is the Court of Appeal decision

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THE COURT: Hue Hat Li

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5 THE COURT: No, in fairness, are you taking
the position... I didn't think you were
because you are talking about some evidence -
that is not a prima evidence case. Some
evidence is merely that you have summounted
10 the hurdle on a motion for a non suit.

15 A prima facie case - what you are really
saying is the Crown has proven the case
subject to any evidence to the contrary that
the Court could look at and, in fairness, I
am not sure that the learned Justice of the
Peace turned his mind to the idea once he is
looking at it on the basis of whether or not
there is a prima facie case that he is
satisfied that there is evidence here of
testing subsequent.

20 MR. SMITH: Well, again I don't know of any
law or decision which requires...

THE COURT: Well again...

MR. SMITH: ... there has been the evidence
in certain cases but again there is no...

25 THE COURT: No, I'm sorry, that is not the
decision in Vancrie. The decision of the
Court of Appeal is very clear...

MR. SMITH: In that particular case.

30 THE COURT: I have to disagree because if you
then look at paragraph 23 in my view it is a
confirmation of what must be established to
have a prima facie case because when you read
it in conjunction with paragraph 22,
paragraph 23 says, "The only question left is
whether the radar test done some three to

four weeks before the date of the offence continue to serve the evidentiary purpose. In my view, when coupled with the fact that the unit was tested to be in good working order on the date of the offence the radar test was sufficiently approximate in time to provide prima facie evidence of the reliability of the instrument on that day", so the Court is suggesting (1) - we are taking the position that there was evidence of testing, both and after on the day off and that there was also a radar test done three to four weeks prior which we think when combined is sufficient, but there must be evidence of testing on the day of, both prior and after in order to make the prima facie case.

MR. SMITH: Respectfully I would disagree. As your colleague Justice Fairgrieve said there is no general pronouncement as the evidence. In that case, the paragraph you are referring to refers to a radar test which I respectfully submit is no longer necessary in light of all the cases that I have put in - the Moucasa, Hue Hat Ri and Odisania - I would argue that since the Vancrie decision the Courts now view it can be argued it is now common and accepted as a means of measuring speed.

THE COURT: Well that could be...

5 MR. SMITH: Therefore, the whole business of a radar testing that Your Honour has just referred to is now a moot point.

THE COURT: That could be your interpretation but that case is rather recent - 2000 was the decision...

10 MR. SMITH: Yes.

THE COURT: ... and it seems to be that rather entire than clarifying the issue I agree with you the subsequent decisions seem

15 MR. SMITH: No, actually I think the cases I have put in before you, including decision, including the most recent one of Judge Lane, including the most recent one, all points she expects the decision of your colleague, Judge Fairgrieve and accepts also the Mukasa case and also accepts the reference to the New Jersey State Supreme Court and the fact the device relied in Manitoba as now the Court can now accept it as common and accepted as a means of measuring speed, so I would submit the whole issue about radar and doing comparison tests is now very much a moot point. The Court left it open in Vancrey that including the future... put in the future be found to be common and accepted. The Court indicated in Vancrey that it would not ... the Court at this time that the weight of the device should be common and accepted, but now it seems with this line of cases that I put in

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5 on the last occasion, Your Honour, I believe
it can be properly argued that the laser
speed measuring device is now qualified as
common and accepted in all those decisions,
so I submit that the radar test that Your
Honour referred to is a legal point.

10 THE COURT: Mr. Smith, we can't get over the
hurdle of accepting prior and after because
if you look at Judge Lane's decision which
you provided, the one from June, Odusanya,
page 10... "I turn now to the decision of my
15 brother Judge Fairgrieve in R. vs. Le... I
note that the evidence in R. vs. Le the
evidence before the Court was essentially the
same as the evidence before me in the case at
bar - (a) the operator was a qualified laser
operator; (b) he had tested the device prior
20 to setting it up and (c) after taking it
down". What evidence do we have of that
here? All we have is, "I am satisfied that I
tested it and it's in proper working order",
so what the trier of fact then must do in
order to find a prima facie case is to be
25 satisfied, beyond a reasonable doubt, that
what the officer means by that is that he had
tested it before and after. You are telling
me it is not a requirement; I am telling you
it is, according to those decisions.

30 MR. SMITH: But obviously His Worship was
satisfied beyond a reasonable doubt that
given...

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officer said about checking it twice so we heard it.

THE COURT: All right, thank you. Mr. Pelaccia.

MR. PELACCIA: Your Honour, in regards to my submissions I agree that there should not have been a reasonable inference and that there were tests done after the facts and that simply because the officer is an experienced officer does not preclude him from giving evidence in regards to the fact that he tested it before and after and that essentially that evidence was not before the Court and that essentially is evidence that is necessary to justify a conviction and for those reasons, Your Honour, I am not going to prolong the argument - nevertheless, the whole grounds of the appeal that there was no evidence of testing before and after and the Crown fell short in proving its case beyond a reasonable doubt and that the charge should have been dismissed.

THE COURT: All right, thank you. This case is relatively simple. How far can a Trial Court go in reading in evidence that is not before the Court?

In other words, was the Court entitled this particular case to make a reasonable inference as to the words used by the officer and their meaning or does that inference amount to speculation.

5 This is a speeding charge and the
evidence before the Court uncontradicted is
that the officer was operating a laser
device. He stated as follows - Page 7, line
7 - "I am also a trained and qualified radar
and laser speed measuring officer and I was
10 using a LTI Marksman 2020 measuring unit
which is capable of measuring the speed of a
moving vehicle. This was tested and found to
be working by myself".

15 The learned Justice of the Peace in his
decision stated, Page 10, line 6 - "I think
we have to draw some reasonable conclusions
with regard to this. This dissecting of every
word and everything that one might say, the
officer has indicated that he was working at
that location. He is qualified to do that.
20 He tested it; found it to be working
accurately. I am going to draw the
conclusion and find the officer was referring
to that particular day and not some other
time and other month. I am satisfied that it
is proper with regard to that".

25 What that means is that the learned
Justice of the Peace would have had to draw
the conclusion that the officer on that date
tested the machine both before and after at
some point that day, according to the
manufacturer's specifications. Othrwise the
30 Court could not be satisfied that it was
working properly."

Those are the words that the learned Justice of the Peace would have had to have read in and the issue is was that reasonable to do so or did it amount to speculation?

To answer that question we have to look at the decisions provided. All of them state rather clearly situations where there is direct evidence by the witness that the machine was tested both before and afterwards.

The Crown points to the case of Mr. Justice Fairgrieve in Hu Hat Le, heard on February 25th, 2002. In that case the evidence in part was as follows... "At this time I was operating a Laser Tech Marksman 2020 speed measuring device. At approximately 1:42 p.m. I observed a motor vehicle. I pointed the previously mentioned speed measuring device directly at the motor vehicle placing the red dot on the front of the motor vehicle, activated the speed measuring device" and so forth.

"I am a qualified laser operator. I had tested the device prior to setting it up on that date and after taking it down and found it to be in proper working order. These tests were conducted in accordance with manufacturer's specifications"

All the cases provided to me suggest that this must be established, namely, that a test was done prior and following before the

takedown in accordance with manufacturer's specifications.

In our case all we have is a bald statement, as I said earlier, by the officer that "This was tested and found to be working by myself". That's not good enough.

In my view, to make the leap that the learned Justice of the Peace made amounted to speculation and not to reasonable inference.

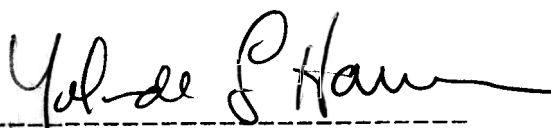
Mr. Smith says, "Well, the reason he can do that is that this is an experienced officer". Well, regardless - #1 - there is no evidence here that he is but even accepting that he is, so what? Just because one is an experienced officer doesn't necessarily give the trier of fact licence to read in words that are not there.

In my view, this case is crystal clear that the evidence provided by the Crown does not amount to a prima facie case and, accordingly, the appeal will be allowed.

MR. PELACCIA: Thank you, Your Honour.

MR. SMITH: Thank you, Your Honour.

THIS IS TO CERTIFY that the foregoing is a true and accurate transcript of my recordings to the best of my skill and ability.


YOLANDE GUERRA HARRISON,
OFFICIAL COURT REPORTER.