

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

V.

MARIA ARVANITES

**BEFORE THE HONOURABLE JUDGE P. SHEPPARD
ON DECEMBER 6TH, 1999, AT TORONTO.**

APPEARANCES:

COUNSEL FOR THE CROWN

COUNSEL FOR THE ACCUSED

A. GUNNES, ESQ.

T. BROWN. ESQ.

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MR. GUNNES: The matter of Maria Arvanites.

MR. BROWN: My name's Todd Brown.

CLERK OF THE COURT: My name's Todd. Todd Brown for the record, Your Honour, appearing for Maria Arvanites, she is not before the Court.

THE COURT: The appeal is launched on the basis of the learned J.P. took notice of what radar does.

MR. BROWN: Your Honour, there has been some changes since that notice of appeal was filled out. You should find a factum in your file.

THE COURT: Okay, I have it.

MR. BROWN: Amended grounds for appeal. I don't know if the Courts have an opportunity to review ---

THE COURT: Probably, if this is to be argued, I should do that and the court reporter will get her morning break.

MR. BROWN: Before you do that, Your Honour, I looked in that file prior to commencing today and I did not find amended grounds for appeal and ---

THE COURT: When were they filed?

MR. BROWN: I am not certain. My friend did not have his copy either so ...

THE COURT: Sounds like they were not filed.

MR. BROWN: Filed or misfiled or not filed,

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something along those lines.

THE COURT: What is your friend's position.

MR. GUNNES: They were requested to file the grounds -- they is a certain time frame which the statutes provide for you to file and if you're not within that time frame, the appeal goes out the window.

THE COURT: Well, is the factum prepared on the basis of the amended grounds?

MR. BROWN: Yes, it is.

THE COURT: Did you get the factum?

MR. BROWN: The factum was filed and served. My friend should have it.

THE COURT: I have a factum that was marked and received by the provincial prosecutors November 26th.

MR. GUNNES: Yes, I do have that here.

MR. BROWN: That factum is missing one of the grounds for appeal, that's why ---

THE COURT: Well, you are not going to get to argue that, that is for sure because it is not here. The other ones are here, I mean, Mr. Prosecutor, if the other ones are here, you are on notice of that.

MR. GUNNES: Sure.

THE COURT: Okay. We will take our morning recess and I will look at it.

R E C E S S

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UPON RESUMING:

MR. GUNNES: Good morning, again Your Honour.

THE COURT: I will hear your submissions, I have now read the material.

MR. BROWN: Your Honour, if I could draw your attention to Page 2 of the factum, issues in the law, Number 1. It sets out that the officer in cross-examination indicates she did three tests on the machine and when suggested to him that there are more, indicates he does not know of any others. Just on that point, I would like to refer your attention to the actual trial transcript, I believe you would have one of those also. The officer on Page 7 at Line 18 indicates the test that were conducted -- it sets out that there were certain tests, Line 17, 'I guess it is, reads that there are internal tests, it's called the bob test, it's later learned to be a bulb test, later in the transcript -- that lights up all the numbers. "Is that the only tests you perform?" "No, there are also tuning fork tests and there is a ghost tests as well". That sets out the three tests that the officer claims to have tested on the date in question.

Now, His Worship summarizes what those tests were again and he also makes the finding that those were the three tests that were

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conducted. And then at Page 15, I'm sorry, 16, Your Honour, if I could just refer your attention there. The officer is asked under cross-examination about buttons that are on the machine and at Line 17 the question is, "Okay, is there a button that is called the 25 Test Button?" The answer is, "Yes, there is". And it's indicated, "Okay, and what happens?" Sorry, the question is, "What happens when you push this button?" Now, the answer is clear that it sets it out as a test. "It should light up and if it's not, there's a default somewhere".

Now, that test in and unto itself is clearly not one of the three tests set out in her evidence in-chief that were conducted. Nowhere in the transcript is it indicated that that test as described here on Page 16 was ever conducted. It simply sets out how the test is performed and what the results should be and given that, I think it's fair to infer that as set out in Number 1 of issues in the law in the factum, that there was a test that was apparently missed. And I think given that, that would certainly raise a doubt as to accuracy of the radar unit. I think it goes without saying, I don't know if My friend would dispute this or not but if the unit isn't tested according to the manufacturer's

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specifications, it certainly shouldn't be
relied on. I think it's a given in this
stage of radar evidence anyway, as I
understand.

Now, if I could move on, the officer says
that she can't recall seeing the
manufacturer's manual and that was also set
out in the trial transcript at Page 8, Line
20 through 25. There's a case that has been
included and Your Honour should have it, the
Agnalado decision, and the Agnalado decision
is a decision that's on that point. It
ultimately sets out that there is a doubt to
be found when an officer gives evidence that
they've referred to manufacturer's
specifications and then it's later learned
that they haven't seen the actual manual.
That in itself infers a doubt as to whether
the tests were done properly and the learned
Justice found for the defence on that point.
To make it clear that there was another
point, I think, and it was a much more minor
point in the Agnalado decision with respect
to what the radar could do. And at any rate,
His Honour sets out clearly in His judgement
and he even actually repeats the question on
Page 19 of the Agnalado decision, Line 5,
"How could it be according to the
manufacturer's specifications that you did
your test if you haven't seen the actual

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5 manual?" He indicated, "Presumed that the instructor I had was teaching from the manual." And goes on to say, we can't be certain of that. In his judgement, His Honour finds that that point should infer a doubt or raise a reasonable doubt that the radar machine was being tested, was tested properly and in proper working order.

10 Now, there's a secondary issue on that point and that is in the Arvanites trial, I believe that the agent representing the accused was clearly attempting to explore this issue that is found in *Agnalado* and in doing so, he started out with a question that was almost word for word, the question that was found in the *Agnalado* decision. Now, if I could just get to that page, that would be Page 8 of the Arvanites trial transcript. Page 8, approximately Line 22, I'm not asking you, I'm sorry, at -- even higher about Line 16 or 17. The question is, "Okay, have you seen manufacturer's material?" The answer is, "It's been a long time since I was qualified as radar operator. I do not have the material, no." That clearly wasn't the answer -- the answer doesn't necessarily fit the question -- and that is ultimately questioning along the lines of reasoning that are set out in *Agnalado*. Now, the question is, "You

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indicated that you performed manufacturer's test. If you have not seen the manual, then how can you indicate those tests you performed were manufacturer's tests?" And I think that is the all important question. Now, that question is not answered by the officer. Not with an answer that seems to fit the question anyways. "It has been a long time, if I did see the manual, I do not remember." Of course, the question is, whether or not you saw it but how it is one can be certain of performing proper tests when not having ever seen the manual or perhaps not seen the manual.

Now, on the next page, the Courts intervened to some extent and essentially what takes place is that line of reasing is no longer pursued. I guess the agent suggested to the officer that your telling us is that you do not know if the test you perform is manufacturer's test. And the Court at that point intervenes at Line 6, "That's not what she said at all." And there is some discussion on the pont and then ultimately, it would appear that the issue is laid to rest and with some finality at Line 15, the Court says, "That is what she said." And the issue isn't pursued an y further. So it would be one thing to ask this Court to consider the principle set out in Agnalado

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and then apply it to the matter in Arvanites but we didn't even necessarily get that far in the Arvanites matter because of the intervening of the learned trial justice who for whatever reason, seems to somewhat, and I don't say this strenuously but he seems to have some degree curtailed the cross-examination on that point alone. So ultimately, what's taken place, is we've never had an answer of what I've described is the all important question that you found in Aganalado, and that's back at the page again, I'll repeat it, Page 9, Line 18, 20, "If you indicated you performed manufacture's tests, if you have not seen the manual, how can you indicate those test you performed are manufacturer's tests?" It's unfortunate that we have never had a direct answer, a proper answer to that question and I think depending on that answer, it would have been open then to rely on the Aganalado decision or not to rely on the Aganalado decision which the officer could offer a reasonable explanation as to why she feels that she's confident she is doing the proper tests or whether she is not confident. At any rate, that opens the door for a number of arguments but those arguments were never explored and I would submit to some degree, that's because the intervening of the trail justice in the

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cross-examination.

Just in support of that point, Number 3, on the issues in the law of the factum, it says the officer states she was trained by another officer, that's at Page 9, Line 25 through to the end. The officer was trained '92. She at no time says she's been trained by the manufacturer which is ultimately the point here. She's given a document and she says there is no reason to believe that it's not the manual that sets out the proper tests for that unit. And after reviewing that manual or after looking at it -- I'll just go back to the first issue I raised. That's when it's discovered that there is an apparent fourth test that wasn't set out in examination in-chief. It was found in cross-examination after reviewing the manual that there is a fourth test and that test of course, is the 25 test button and 100 test button. And the officer sets it out as a test because she tells us what the result would be and says that if it were not functioning properly it would give an error message or something to that effect.

Now, of course, Your Honour has read the trial transcripts, the defendant was present at her trial, she did take the stand. She

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offered somewhat of an explanation as to the evidence that the officer offered. The trial justice asked the defendant if she could see any reason why the officer would perjure herself and the defendant says, no. But as far as defence evidence goes, she has essentially touched on certain points where the defendant's evidence and the officer's evidence don't fall on all fours. Now, the officer has received a reading of a motor vehicle traveling 92 kilometers per hour. The defendant's evidence is that she wasn't speeding and there was a vehicle who passed her. And the officer was inside her car and had to alight from her vehicle and stop the defendant. The defendant offers evidence that at that time, the other motor vehicle had already passed and eluded the officer stopping it.

Just in closing, Your Honour, there were some comments that were made by the trial justice that I think are cause for some concern. On Page 16 of the trial transcript, Line 29, approximately Line 29, the justice says that -- and I'm not quite certain what this is meant to mean -- the last line on Page 16, Your Honour is, "I do not know. It is destroying radar, that is for sure." Prior to that, this is part of a cross-examination -- I wouldn't think the

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questions are improper -- moving up to about Line 10, talking about a range switch which is on the machine, moving down. "Did you test this?" She said she tested it on high. And this is actually where we learn that there's a test button called the 25 test button and the results of what that test should be and what other buttons are there and the prosecutor, Mr. Simpson at that time, seems to be a little facetious in his objection, he says, are we going to ask how this gets plugged into the dash as well. Equally facetious, Mr. Alfano says, no, he's content that that was plugged in properly. And then the Court interjects and says, "I don't know, it's destroying radar for sure." Taking that comment, in tandem with the comment by the same justice set out in his judgement which as radar was immaterial, I think those two comments together are a little disheartening to the defence in that, to have a trial based almost solely on technical issues, it's almost as though one's cry would be falling on deaf ears in that the trial justice clearly feels that the radar is immaterial and that given his comment on Page 16 that, "it's destroying radar, that's for sure." That comment seems to lend some type of credibility or accuracy to radar itself and of course, it has no statutory standing. It doesn't share or

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enjoy the legislative notice, for instance, that a Breathalyzer machine does or other machines of that nature. So when His Worship says that "it's destroying radar, that's for sure", would lead me to believe, anyway that the trier of fact isn't allow the prosecution from the ground up in establishing what radar does, how it works, if it's working properly and whether it's being utilized properly. It seems that the trial justice may have in fact, have a position in his mind already as to what it is radar does. He seems to be granting some type of credibility in the first comment and then the last comment, sort of, throws everything out with the dishwater and says, "well, it's immaterial anyway." Which is, again, is a little disheartening to go through a lengthy radar trial and the angle that the defence ought to choose is to attack the crown's case in these situations, often times it is purely technical and has everything to do with the finer points of radar, the machinery, the training and whatnot. To have the trier of fact to dismiss it out of hand and to say, "well, none of this matters", I don't think is in the best interest of justice. Subject to your questions, Your Honour, those are my submission.

MR. GUNNES: I'm not sure I know what the

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basis of the grounds here are but dealing with one at a time. There were three tests that were performed by the officer. The manufacturer at no time, indicates how many tests should be performed. Once an operator performs one test and is satisfied that the machine is working properly, that's the end of it; the machine is working properly. Not only that, in this case specifically, the officer tested the machine after issuing the ticket to verify the fact it was working before issuing the ticket, and after issuing the ticket.

The radar, Your Honour, is a machine -- anybody can physically look at a motor vehicle and say, "yes, that vehicle is speeding". But they cannot put in an amount. That's the reason we have the radar. When it's functioning properly in the hands of a qualified radar operator, then the Court has to accept that prima facie, this was the amount projected by the device. The officer indicates that 1992 was when she last probably saw the manual. And common sense would dictate that if an officer starts training back in 1992, here we are now in 1997, or 1998 -- I'm not going to read the manufacturer's manual every time I take this unit outside to do a radar check. Also, the fact that the manufacturer provides manual,

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is one of the reason why the manufacturer's responsibility is not to go out and train every individual police officer that's, the purpose of the manual. So one of the grounds for appeal is saying this officer was not trained by the manufacturer; it's done through the manual by another police officer and the Courts have accepted that. So those two issues, I would submit, Your Honour, is proper and there is nothing wrong from the justice of the peace point of view when he heard the evidence before him.

And I'm going through this transcript here in relation to the issue that was raised by the defence and I can find no -- not even a case to say how many tests have to be performed, one, two, three, four, five tests. These issues weren't even raised by the defence or to call the manufacturer to rebut and say, "the crown tendered evidence and we did three tests". The defence never saw fit to bring someone from the manufacturer to say, "No, there should be four tests, five tests, six tests". My submission on that point, I would say, that one test is sufficient once she knew it was functioning properly.

The issue with regards to argument made before the justice of the peace, I don't

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think there is any indication, Your Honour -
I think the justice of the peace held a fair
trial. The officer went and testified, the
agent was allowed to cross-examine the
officer at length. The case, Agnalado was
never presented, by looking at the
transcript, it was never presented to the
justice of the peace to take judicial notice
at that time. In order to present the case
at a trial, you have to present it to the
justice of the peace on the record how does
the case of Agnalado apply to the case
that's at bar at the time. This was not
presented to the justice of the peace. I'm
looking through the transcript and I can't
find anywhere where the justice of the
peace rejected the defence trying to present
that case at the time of trial. When the
justice of the peace made the comment to the
agent about ... destroying -- the justice
of the peace said, "I don't know, it's
destroying radar" it was just I don't know a
result of questions being asked under cross-
examination by the agent. He's not saying
he's destroying radar, he says, in a line or
a paragraph, you cannot overlook one
sentence that appears before another
sentence. The Court says, "I don't know. It
is destroying radar". He didn't say, "It is
destroying radar." He said, "I don't know."
So I find that the decedent was given an

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opportunity to testify, the crown was given an opportunity to present evidence to quantify the speeds, I could see nothing wrong with the manner in which the officer testified or the manner in which the officer handled the radar. She performed three tests and all the tests were functioning properly. She quantified the speed based on the physical observations and presented that evidence in court. The justice of the peace had an opportunity to observe witnesses for the crown and witnesses for the defence. He made a finding of credibility and he accepted the evidence of the police officer. Whenever a justice of the peace makes a finding of credibility based on their physical observation in a courtroom, the appeal court is in a quandary as to whether to overrule a credibility issue based on conduct by the justice of the peace. I can find nothing wrong with the justice of the peace conduct. When you weigh the evidence in it's totality, I can see no error in law or error in fact by the justice of the peace. In making a finding of guilt to speeding, the justice of peace was right and just and did not create a miscarriage of justice based on his findings at that time. Those would be my submission.

THE COURT: Thank you. In this matter the appellant was charged with speeding, 92

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kilometers and hour in a 40 kilometer zone on the 10th of March, 1997. This Court has heard submissions in respect of both the appellant and the defence and for reasons to be briefly given, I have concluded this appeal must be granted. With all respect to the learned justice of the peace that is due, a busy jurist sitting in a trial court, and this Court believes that His Worship was -- had misdirected his mind to the requirement of prosecution proving the case on a balance of probabilities. That of course, would be an error in law. The learned justice of the peace suggests in his brief reasons that the accused will be -- the accused/appellant will be convicted because he cannot see why the officer would commit perjury. That of course, is not the test that the learned justice of the peace ought to apply to the evidence. The test that the learned justice of the peace ought to apply to the evidence is, has the crown proved the case to the necessary evidentiary standard. Further, the learned justice misdirected his mind eight lines below when he makes comment as to his belief in certain physical results occurring at or to tires when vehicles are driven at different rates of speed. I make reference to the evidence of the accused's vehicle squealing a couple of tires. The learned justice then goes on to say that

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does not happen at 25 miles an hour or 40 kilometers, that's what she says she was going. Less than that, 39, 37. With all respect to the learned justice, I find no evidence in the transcript to support proposition he relies upon. I do not believe that he can take judicial notice. This is not an issue of common sense, variables in driving conditions will result in variables of results and to do so and to base the judicial notice you take as the basis for making an adverse credibility finding against the accused in the view of this Court, is also an error in law.

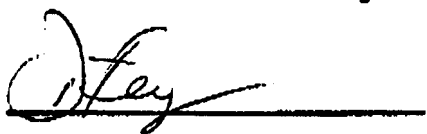
This Court does not accept the proposition both enunciated by the learned justice of the peace and argued by the prosecutor today that a person can be convicted of this offence because -- to use the prosecutor's words today -- anyone can tell when a vehicle is speeding. This is a particularized offence that requires the crown to prove the necessary evidentiary standard, a particular quantum. And to do that, it is necessary to rely on the read out from the radar device. It is not sufficient to apply as suggested by the prosecutor today, the notion of common sense to come to that result. It must be based on evidence and I find the learned justice of

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the peace erred as there was no evidence specific that could be accepted on the balance of probability as to the speed given the justice's own comment that the cross-examination of the officer had impugned the radar operation on the occasion in question. For all three of those above reasons, therefore, the appeal must succeed and an acquittal will be entered.

MR. BROWN: 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.



Debbie Ferguson
Official Court Reporter