

Case Name:

R. v. Black

Between

**Her Majesty the Queen, and
Michael Black**

[2004] O.J. No. 6235

Ontario Court of Justice
Chatham, Ontario

B.G. Thomas J.

Oral judgment: December 1, 2004.

(28 paras.)

Charges: S. 128 Highway Traffic Act - Speeding

Counsel:

M. Creed, for the Crown.

J. Allen, for the accused.

REASONS FOR RULING

1 B.G. THOMAS J. (orally):-- This matter is an appeal brought by Michael Black, the appellant in this proceeding, as against the Crown respondent in this case. The appeal is from conviction of a speeding offence of 134 Km. per hour in a 100 km. per hour zone, contrary to section 128 of the Highway Traffic Act. I mentioned I've had the ability to review the transcripts and listen to submissions of both the appellant and the respondent, many of which are similar to those that were made at trial.

FACTS

2 The justice of the peace was the trial judge in this case. She had the benefit of hearing the evidence. She considered in her reasons the matters that were not an issue, and those that were. She reflected in her reasons that she was alive to the issues and concerns raised by the defence at trial. I am however concerned about the manner in which the learned justice of the peace stated the law.

3 After a relatively lengthy trial considering the volume of evidence, the Justice of the Peace convicted the appellant and fined him the set fine as it appeared on the Certificate of offence.

ISSUES

4 The Appellant appeals from the determination made by the Justice of the Peace regarding officer Bell's independent recollection and the manner in which he was allowed to refresh his memory during the course of the trial.

5 It is clear from the trial proceedings that during the latter part of the cross-examination of officer Bell he was unable to recall anything regarding the testing procedures of the radar device. The officer then requested by suggestion of the prosecution that he be able to refer to the manufacturer's manual. Despite the objection from the defence at trial, the Justice of the Peace summarily let officer Bell refer to a photocopied portion of the manufacturer's manual. Indeed I agree with the appellant's submission that this was done improperly and was erroneously allowed by the Justice of the Peace at trial.

THE LAW

6 There are a number of reasons why it was so dangerous and erroneous for the Justice of the Peace to allow the officer to rely upon a copy of the manufacturer's manual in the fashion that she did. Firstly as the appellant correctly points out, it was not properly qualified which is a necessary prerequisite to any and all documents being used by any witness at trial.

7 I note that when the officer wanted to rely upon his notes contained in his memo book to refresh his memory at the outset of trial, they were qualified with a series of questions. Those questions included, who made the notes, when were the notes made, were the notes made in ink, was there any changes, alterations or deletions made to the notes, where were the notes kept and for what specific purpose was the officer relying upon them. None of these questions or any other questions regarding qualifying the manufacturer's document was asked of the officer in relation to him using a copy of portions of it to refresh his memory.

8 It is also important to note that in this regard it was a copy of the manufacturer's manual the officer was using and there was no evidence or mention if it was certified as being a true copy of the original or if the original was readily available. There was also no evidence that the original or a certified copy of the original manufacturer's manual was being used by the officer on the alleged offence date.

9 Furthermore, there was also no evidence that this portion of the manufacturer's manual had even been disclosed to the defence. It is trite to say that if the prosecution is going to be relying on something and disclosure is requested, as it had been by the defence in this case which the prosecution fully acknowledges, then the prosecution has an ongoing responsibility to make full and complete disclosure to the defence on each and every individual case.

10 The other disturbing part of the trial record was that the officer claimed to just need to refer to the manufacturer's manual to refresh his memory. However after acknowledging he had just read it again, he had to refer to it to answer each and every question asked of him in cross-examination relating to the testing procedures. In my view, this is a clear sign and demonstration that the manufacturer's manual had little if any effect in refreshing officer Bell's memory.

11 The officer gave his answers regarding the testing of the radar device by reading from the manual verbatim after just freshly reading and referring to it prior thereto. This clearly suggests he was not using it to refresh his memory but relying upon it to answer specific questions posed to him.

12 Also in cross-examination, officer Bell was asked if he had ever read the manual before and he stated he had. The officer was also asked if he had been qualified on the radar device and he stated he had and that he had also passed a test at the conclusion of his training. Again all the officer's prior answers solidifies that he knew, or at least ought to have known the answers regarding the manufacturer's testing specifications. Even after reading and referring to the manual on the witness stand in a very unusual fashion, he still had to refer to it when answering questions and he read the answers verbatim from the manual. This is clearly unacceptable and defeats to whole purpose of crossexamining the officer on the knowledge of his training, qualifications and demonstrative evidence regarding testing the radar unit.

13 It is fundamental to our system of justice that trial judges follow the well established jurisprudence on a particular area of law. This, the learned Justice of the Peace has failed to do or consider in the case at bar. As noted by Osborne J.A. in R. v. K.G.B., [1998] O.J. No. 1859 (O.C.A.),

"it is only where a present memory is actually revived that it can be said to be "refreshed." When one has a record of what was once remembered but is no longer remembered, it is a little difficult to categorise the process as one of "refreshing" memory - it is precisely because the memory has not been refreshed that one has to rely on the written record ... While terminology does not, in itself, matter a great deal, there is a danger that the restrictions which, as we shall see, apply to cases of past recollection recorded, will also be applied to cases of present memory revived, for which there is no reason or justification."

14 Also in R. v. K.G.B., [1998] O.J. No. 1859 (O.C.A.), the Court went on to adopt the following from the trial Judge:

"I am of the opinion that it is not an error for a witness to refresh his or her memory *out of court* from notes or a statement made by the witness at a time which is not contemporaneous with the events which are the subject of the testimony." [Emphasis added]

15 It is also interesting to note the following from Osborne J.A. In R. v. K.G.B the Court said at paragraph 14:

"This is not a case where either witness drew a blank in the witness box and sought to refresh her memory from a previous statement. They refreshed their memories well before trial."

16 However quite the contrary the case at bar is. Officer Bell drew a total blank in the witness box when being questioned on the radar unit's testing procedures and after which sought the manufacturer's manual for the answer. Officer Bell failed to refresh his memory before trial and wanted a copy of the manual not to refresh his memory, but for the specific answers in which he lacked knowledge of. Even once the officer received and subsequently reviewed the portion of the manufacturer's manual regarding the testing of the radar device, he still needed to refer to the manual to provide the answers which he did verbatim from the manual.

17 Also the weight to be given to such evidence given in the way that officer Bell presented his evidence has to be considered. When evidence is given in this type of manner, it clearly must diminish in value and weight. In R. v. K.G.B. the following was stated at paragraph 17:

"While I believe that it is permissible for a witness to refresh his or her memory out of court from notes which were not made contemporaneously with the events about which he or she is testifying it is equally clear that doing so can, and does, affect the weight to be given to the witness's evidence."

18 In R. v. Gwozdowski, [1972] O.J. No. 2055, the Chief Justice of the Court of Appeal for Ontario, as he then was, said at paragraph 8:

"There is another reason why the statement of John Gwozdowski should not have been introduced by the Crown, even for the purpose of refreshing the witness' memory. The statement consisted of words written by a police officer, allegedly at the dictation of the witness, some six months after the events being described. Accordingly, it lacked the necessary quality of contemporaneity which is required before such a statement may be shown to a party's own witness, even to refresh his memory."

19 In the case at bar there was no qualification done of the document sought to be used to refresh officer Bell's memory, that being a copy of a portion of the radar unit's manufacturer's manual.

20 Therefore there was no evidence of the necessary contemporaneity element which is required.

21 Subsequently in R. v. Gwozdowski, Gale, C.J.O. cited with approval from Phipson on Evidence, 11 ed. (1970), pp. 632-3, art. 1528:

"A witness may refresh his memory by reference to any writing made or verified by himself concerning, and contemporaneously with, the facts to which he testifies; but such documents are no evidence per se of the matters contained."

22 Recognizing that fact, I note what was said by Wigmore on Evidence, 3rd ed. (1940), para. 758, p. 125, says that there is no hard and fast rule, that anything in writing may be used to stimulate and revive a recollection. On the other hand, it may be improper in a given instance to allow a witness to refer to something written down. It all depends on the circumstances. [Emphasis added]

23 It is also important to recognize the purpose of the defence cross-examining the officer on the manufacturer's testing specifications. This was based on the fact that the officer gave evidence supporting the notion that he knew them prior to the defence commencing this particular line of questioning. That evidence was that he was a trained and qualified radar operator and had received training on the specific device he was using. The officer testified that he had been trained to test the radar device according to manufacturer specifications and that he had received classroom and field training and then subsequently passed a test. This evidence given by officer Bell clearly suggests that the officer has knowledge to know and answer questions regarding the manufacturer's testing specifications or else he could not reasonably be considered qualified to use the radar device.

24 When an officer has to rely upon the manual constantly and their answers to questions are given verbatim out of passages from the manual, it raises a concern that the officer was either not properly trained, or may not be qualified in the operation of such a device.

25 I, therefore, have concerns about the officer's training, qualifications and his ability to operate the radar device according to manufacturer's specifications.

26 I should say to that the propriety of the officer having read his notes or even the manufacturer's manual before coming into court to testify is considered proper. In my view, the case law is plentiful and clear that that is an appropriate thing to do, and it is not objectionable for any officer, or indeed any witness to, prior to testifying, refresh their memory by reference to a witness statement, or notes in a book, or some other aide-memoire.

CONCLUSION

27 In light of my aforementioned findings, I have considered the actions of the Justice of the Peace and the questionable manner in which she permitted the officer to answer specific questions and the fashion in which the prosecution was allowed to adduce its evidence. In my view, the trial

Justice of the Peace made a very fatal error in law in allowing the officer to utilize and read answers verbatim on questions which contained the answer in a copy of a portion of the manufacturer's manual.

28 The officer's prior evidence on his training and qualifications revealed that he had obtained the knowledge to know and answer questions regarding the manufacturer's testing procedures. Therefore the justice had no discretion for allowing an unqualified, undisclosed, unoriginal, uncertified and unadopted copy of a document that was read verbatim to answer specific questions asked in cross-examination. There was also no plausible evidence that it was being used to refresh his memory. Quite the contrary as it was quite evident that it revived little if any recollection after officer Bell reviewed it in its entirety. Accordingly, the appeal is allowed and a new trial is ordered.

B.G. THOMAS J.

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