

ONTARIO COURT (PROVINCIAL DIVISION)

HER MAJESTY THE QUEEN

- against -

DOUG CANNON

P R O C E E D I N G S

BEFORE THE HONOURABLE JUDGE R.E. BOGUSKY
on February 18, 1999, at NEWMARKET, Ontario

CHARGES: s.128, H.T.A. - Speeding

APPEARANCES

J. Gorda, Esq.

Counsel for the Crown

B. McLeod, Esq.

Agent for the defendant

MR. GORDA: Now if we can deal with the matter of line four, Doug Cannon.

MR. MCLEOD: Good morning, Your Honour. For the record, McLeod, initial "B" appearing as agent on behalf of Mr. Cannon.

THE COURT: Yes.

MR. MCLEOD: He's not before the court.

THE COURT: Thank you.

MR. MCLEOD: Your Honour, this is an appeal by the appellant. I don't know if Your Honour has a copy of the transcript.

THE COURT: Okay, I'm just opening it up now.

MR. MCLEOD: Okay.

THE COURT: Maybe you can take me to the guts of it.

MR. MCLEOD: Okay. Very briefly, Your Honour, you have a copy of it. It's basically of the judgment. The allegations were this was a - a speed zone that was monitored by several officers, one using laser and the other officers intercepting. The alleged offence happened back - first of all if we can get some dates, November the 13th of 1997. We conducted a trial and during that trial, it came out in - in-chief as well as cross-examination, Your Honour, the fact the device was tested five months prior to the date of the alleged offence and four months after the date of the alleged offence. So there was two tests conducted, nine months from the start, the first one to the second one. I put Your Honour's decision with respect to Tamon before the court. On page...

MR. GORDA: Page five, Your Honour.

MR. MCLEOD: Page five, Your Honour,...

THE COURT: Got it.

MR. MCLEOD: ...line five, Her Worship cites:

"In the case of R. v. Tamon, it's an appeal that was heard before Judge Bogusky and the court is bound by this decision. The decision is clear that a new machine has to be corroborated by an older recognized machine. It is silent, however, on how often this is to be done or where it is to be done."

Now, Your Honour, in that - your decision with respect to Tamon said that in fact, this machine, new - new technology, should be tested periodically against the more common speed-measuring devices we know as radar. I would submit, Your Honour, that in fact nine months from the first test to the second test, when in fact this machine, this laser L20-20, is used on a daily basis, every day it's used, I would submit that when you - when you made your ruling "periodically", I don't believe that nine months is periodically when in fact the machine is used on a daily basis. Perhaps once a week or at the most would be once a month, but certainly not nine months.

Your Honour, page six, it basically says on line 25:

"Further issue raised by defence is that nine months between testing is too much. The evidence is that comparison tests were conducted on the 13th of June, 1997 and the 13th of March, of 1998. It would be five months before the date of the offence and four months after the date of offence. Defence argues that the laser

device should be tested against the radar device on a regular basis and suggests Judge Bogusky indicates it should be done periodically."

Well I would submit, Your Honour, I feel that the justice of the peace erred when in fact she indicates that she's bound by your decision, however, it's not clear and precise as a number that we're looking for. The justice of the peace adopts the Sutherland decision which was out of Alberta. So today we're here, Your Honour, and I will submit that the fact that nine months, when you indicated in the Tamon decision "tested periodically" is well beyond the limits of periodically. And those would be my submissions. I think I've covered everything.

THE COURT: Yes. The - that decision that you - the Tamon decision, I - I recall that. Now just setting up - setting up the - the background of how this appeal court thing works. From time to time they - they pull us out of - out of the criminal division to come down here and do the appeals. Most of the time we're - we're shooting from the hip. Me personally, I - I had no knowledge of this laser equipment when - when I heard that case. It sounded like it was very sophisticated equipment.

MR. MCLEOD: Basically, it's...

THE COURT: It gives a very quick read-out and it can do a lot of cars in a short - short time. When I say I have no knowledge of it, I'm old and I'm a poky driver, so I don't get pulled over for those things. So they laid all this new technology on me and I kept thinking, well this is - this seems to be relatively new and very sophisticated. I don't

think they can just come into court and say it's new and sophisticated, please accept it. And I - and I took the position that maybe, even though it's better than the old, maybe they've got to go back from time to time and use the tuning fork on this thing and set up a radar just to see whether the laser is doing what the radar used to do.

MR. MCLEOD: Right.

THE COURT: Even though - even though we know the laser - looking at the material that was filed, the laser is far more sophisticated than the radar, I think, than the old tuning fork radar situation.

MR. MCLEOD: Well it's basically - it's a machine that is made to measure the distance. It calibrates the speed by the distance, but it is a machine that accurately measures the distance. When they conduct tests in the parking lot of the - the police detachment, it's beamed at a pole at 50 metres. So - and then they take it on the road and they say "Well, yeah, that car was 350 metres, it's doing such and such a speed", but where is the evidence of that? In fact it's a machine calibrated to measure speed. It is for - for distance, but it's brand new technology and in your decision - and you were right on the nail when you said that. This is brand new technology and just to have it come into the court and say well, we'll have to accept it because it's - it's far more sophisticated than the MDR-1, the - the radar with the tuning fork. But when you made - and it was based on the whole appeal, the conviction was in fact where - where Her Worship Romagnoli indicates that she's bound by your decision.

However, in the Tamon decision you didn't put a specific number, like we would all love to hear a number, the magic number with an unreasonable delay. It seems that there isn't a court that will give us the number.

THE COURT: I hope I'm not gulling up any case law as a result of that Tamon decision. I'll hear from the Crown.

MR. GORDA: Your Honour, in my respectful submission there's no basis, and I ask Your Honour to dismiss the appeal. In my respectful submission, the justice didn't err. There's no error of law that has been shown. On page seven of the transcript, the court seems to adopt the decision of R. v. Sutherland, and it states that the court is satisfied that comparison tests were conducted, not one but two times. Her Worship indicated that the court was satisfied that it would be safe to conclude that there was independent proof of technology. There was no issue regarding the accuracy of the device. Upon hearing evidence I am assuming from the officers or officer in the case, that there is no issue regarding the accuracy of the device, and - which was established by proofs of the prescribed tests. And therefore, according to her, it was not necessary for the court to address that matter. And although she did state that she was - that court's understanding of Your Honour's decision was that it was silent as to where and when the testing should be done and therefore, she relied on the Sutherland decision.

In my respectful submission and as the court found that Your Honour's decision didn't speak to when the tests and times were done, the court wasn't bound by your decision. The court in that case on the evidence to some extent seemed to decide the matter. And therefore, in my respectful submission, there - no error of law occurred and the justice of the peace based it's - based her decision mainly on the evidence which was heard that day.

Your Honour, the laser - both devices are established devices, the technology is proved to be accurate. In my respectful submission, if the - if Her Worship was satisfied on the trial date that the devices had been working properly that day and the proper tests had been done, in my respectful submission Your Honour shouldn't interfere with the justice's decision on that day. Subject to any questions you may have, those are my submissions.

MR. MCLEOD: May I respond just briefly, Your Honour?
THE COURT: Yes.

MR. MCLEOD: It's also been established, in fact, when the first device was tested in the State of Ohio, which no longer has that device, it had bridges clocked at doing 300 kilometres per hour. So it - it's open for fault. It's a mechanical device like anything else. But Your Honour, when - when the justice of the peace agrees with you that it's clear and it shall be tested periodically, it - it falls back to - well is nine months periodically enough. S.5(1) of the Provincial Offences Act states that:

"The clerk of the court shall as soon as practicable set a court date upon receiving the N.I.A. - Notice of Intention to Appear."

When in fact, if it takes - there's been certain - a lot of decisions when the clerk of the court sets a trial date some eight months - six months, five months after it was filed. There was cases where - now as soon as practicable, five to six months isn't as soon as practicable after receiving the Notice of Intention to apply for a court date. Setting it five, six months after it's been received by the court office, that's not practicable. I would submit that twice in nine months when periodically - when you describe it as periodically, that's not practicable, Your Honour, not when the device is used on a daily basis. We're going to get away - it's getting to the point where they're not going to have to test it. It's going to be relied on as a machine, this works and that's it. Well it's open - it's open for breakdown as well as any other device. THE COURT: Well that will arrive - that will happen, that it'll be just be taken on its face value.

MR. MCLEOD: Right.

THE COURT: I mean radar is basically that way. I - I remember 25 years ago when I had to do summary conviction work and I had to listen to the drone. I've had 30 tickets looking at me for the day and listened to the drone, radar is a device for blah-blah-blah, and it's testified. And I'd listen to the drone for four minutes and awaken.

MR. MCLEOD: Yes.

THE COURT: And now we don't - I don't, you know - in

the last couple of years that radar was used, I don't think anybody had to go through that drill, explaining how it works, but I - I thought that the decision I had come down with was sort of a temporary thing. I - I can't recall when that radar - or when the laser thing came into existence. I thought the material that was given to me that it was about 1994, somewhere around there.

MR. MCLEOD: Would - would Your Honour - I have a - a friend of mine has a copy of the Tamon decision in his - in his car. If it would help the court just to go back over that.

THE COURT: I'd cite him for contempt. I - I - with the material that you've given me and you - you've quoted that Alberta case and that - that sort of brings down now as to where my mind was going. In R. v. Alladina, A-L-L-A-D-I-N-A, which came out of the Alberta Queen's Bench, they took - they took the sophisticated laser machine and they tested it as against a radar unit, and I think - I think my mind was - and in Alberta they thought that that was - with that comparison, the Alberta court took the position that the laser was working correctly. I think I was hooked into the same idea that - I - I think - I think I was thinking on a daily basis, not just that it should be tested whenever they go to use it with something that we now accept.

MR. MCLEOD: Accept it, correct.

THE COURT: Yes. But I think that would - now that I think about it, that's a bit ludicrous too because why would you use something old to test something new. I'll have every police cruiser all loaded up

with equipment 'cause one will be testing another and another and another.

MR. MCLEOD: Well perhaps in time, like Your Honour made his finding in the Tamon decision, but this goes back basically - it was shortly after. I don't recall the exact date when you came out with the Tamon decision, Your Honour, but this - this trial started within - within a week, two weeks after you handed down your decision and there is half a dozen appearances for this matter before the court now. The justice of the peace was unavailable, seized with the matter, unable to be in court, the shortage of justices...

THE COURT: Yes.

MR. MCLEOD: ...and then, finally judgment. That's why it came down so late, but it was shortly after.

THE COURT: Yes, I think my decision was within the last 12 months I think.

MR. MCLEOD: The - the last time this was up if - this is the second time before the appeal court, but the last time the transcript was picked up, the date of the - of the hearing, so it would adjourn.

THE COURT: Yes, okay. Okay, so if anything came out of my decision, it's this. That the police departments are in fact testing this laser machine with radar, but they're doing it quite infrequently I see, so the - the J.P. notes that both the machine - the laser which the police were using that particular day had been tested on an earlier day with radar and had been tested with radar on a later date. But as you say, a half year before and a quarter of a year after.

MR. MCLEOD: Exactly. There was another case Her Worship cited, however, she wasn't bound. It was her brother, Justice Leggate - I believe it was Chow. I may be wrong. No, it was - it was Sorless, where His Worship, Mr. Leggate indicated that in his ruling it should take place within 30 days prior to and 30 days after the charge is laid - the testing of the device. However, Her Worship indicated that this court was not bound by that decision, but it was one decision that His Worship, Bob Leggate...

THE COURT: And was that - was that about the same time?

MR. MCLEOD: Yes, it was - it was all around the same time.

THE COURT: Yes.

MR. MCLEOD: There was another decision, Rajinder Saini that was my matter that the Crown appealed, and two weeks prior to the appeal being heard, I was served notice - Mr. Dullege's office actually was served notice - we were on that together - that in fact the Crown was abandoning the appeal and it was right on that point, in fact, the comparison testing. And this is one that...

THE COURT: Well my old case plus this case plus the case - other cases cited are all - all indicate that what the court has to be satisfied with is the correctness of the readings, that is to say the machine has to be operating correctly. I think it's trite to say that if that proof involves saying to me, "Well we tested it six months before and three months after and it was okay", I don't think - I don't believe that would - would satisfy me as to

their proving that the machine was operating correctly. But here again, I won't tell you what the - but I will say this. J.P. Bob Leggate, with his ex-naval training and things, he's a bit of a machine buff and a mechanical buff and he enjoys things like these laser machines. If he says it should be done every 30 days I could live with that. So we'll - we'll enter an acquittal. Thank you.

MR. MCLEOD: Money - monies will be returned, Your Honour?

THE COURT: There's money left behind? Yes.

MR. MCLEOD: Yes.

THE COURT: Yes.

MR. MCLEOD: Thank you.

THE COURT: To your office or do we send it to...

MR. MCLEOD: To Mr. Cannon,

THE COURT: Okay.

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Gayle Ross
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