

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal of the *Provincial Offences Act*,
R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant (Respondent on Appeal)

— AND —

BRUNO CUCCAROLO

Respondent (Appellant on Appeal)

Before Justice M. J. Epstein

Reasons for Judgment released on November 24, 2009

Mr. R. Schmidt **for the prosecution**
Mr. M. Riddell **agent for the defendant Bruno Cuccarolo**

On appeal from a conviction by Justice of the Peace J. Dejong on and from the sentence imposed.

EPSTEIN J.:

[1] This is an appeal from a conviction on a charge of speeding contrary to section 128 of *The Highway Traffic Act* following a trial before Her Worship Justice of the Peace J. Dejong. Issues raised by the Appellant include the qualifications and training of the police officer who was operating a laser speed detection device, whether the officer properly tested the device, misapprehension by the Justice of the Peace with respect to the evidence and the sufficiency of reasons of the Justice of the Peace.

TRIAL EVIDENCE:

[2] Ontario Provincial Police members were conducting laser speed enforcement on Highway 401 near Cambridge on July 7th, 2007 during daylight hours when a 2008 BMW driven by the appellant came to the attention of Constable Collishaw who was operating a Laser Atlanta instrument which is a device approved for the accurate measure of the speed of

motor vehicles.

[3] Constable Collishaw was parked in a marked police cruiser on the shoulder of Highway #401 and was observing the three lanes of oncoming traffic. Constable Collishaw noticed the appellant's vehicle approaching at a high rate of speed which clearly seemed in excess of the posted limit of 100 kilometres per hour. She aimed the laser device at the front licence plate of the Appellant's vehicle and obtained a reading of 140 kilometres an hour at a distance of 135.21 metres. She testified that the speed reading was consistent with her observation of the speed of the vehicle. There were no other vehicles between the officer and the Appellant's vehicle. His was the lead vehicle and it was impossible that there was any splash of the laser beam onto another vehicle.

[4] Constable Fisher was operating a chase cruiser which was parked 50 metres beyond the cruiser of Constable Collishaw on the same side of the highway. He received a radio transmission from Constable Collishaw describing the Appellant's vehicle and advising of its speed. Constable Collishaw observed Constable Fisher pull onto the highway and take a position directly behind the Appellant's vehicle at which point she radioed him that he had the proper vehicle. She then saw that Constable Fisher activated his flashing lights but lost sight of both vehicles as they rounded a bend in the highway.

[5] Constable Collishaw described the traffic as medium and free flowing and noted that the highway was clear and dry and that it was a sunny day.

[6] Constable Fisher testified that when he received the radio transmission from Constable Collishaw that he immediately pulled onto the highway and took up a position behind the Appellant's vehicle. When he was advised by Collishaw that he was positioned behind the correct vehicle he instituted a traffic stop of the vehicle which he found to be operated by the Appellant.

[7] It was the evidence of Constable Collishaw that she had tested the Laser Atlanta device in accordance with her training and the manufacturer's instructions at the beginning of her shift. She testified that she was a qualified laser operator having received her initial training in 1998 and her most recent requalification in November, 2006. She identified her original instructor and the requalification instructor and advised that both were qualified by the Ontario Provincial Police as laser instructors.

[8] Constable Collishaw again tested the laser device when she returned to her detachment shortly after her observations of the Appellant's vehicle. At the end of her shift some five hours or so later she made a third test of the device. All three tests indicated to her that the instrument was operating properly and was capable of accurately calculating the speed of moving motor vehicles. Moreover, it was her evidence that if the instrument is not functioning properly that it is immediately apparent to the user and that, in fact, the instrument cannot be used.

[9] In cross-examination the officer gave detailed evidence as to the steps she had taken to test the instrument in accordance with her training and the manufacturer's

specifications.

[10] The Appellant testified that he was travelling the speed limit but that, at the time Constable Collishaw made her observations, a car identical to his was ahead of him on the roadway and travelling at a higher rate of speed. It was his evidence that it must have been this vehicle that Constable Collishaw observed and that he was pulled over in error.

REASONS OF THE JUSTICE OF THE PEACE:

[11] Following the evidence and lengthy submissions by the prosecutor and by the agent for the appellant the Justice of the Peace reserved her decision. It was delivered orally on September 2nd, 2008.

[12] After reviewing the evidence in some detail the Justice of the Peace concluded that Constable Collishaw was using an approved device for accurately measuring the speed of a moving motor vehicle, that she had properly tested the device in accordance with her training and the manufacturer's specifications, and that she was properly trained and qualified to operate the device. She indicated as follows at p. 3 line 27 of her judgment:

“ Under cross-examination Constable Collishaw confirmed the extent of her training and qualifications and explained in great detail the test performed on three separate occasions on the date in question. The cross-examination was vigorous and prolonged and it was clear that the officer was familiar with, and in fact had read the manual, and knows how to operate the laser properly from the manufacturer's instructions and from training.”

[13] The Justice of the Peace was content that the device had indicated that the Appellant was speeding at a rate of 140 kmph in a 100 kmph zone and that the detected speed was consistent with the officer's visual observations. She accepted that Constable Collishaw radioed her observations to Constable Fisher and that she observed Constable Fisher pull his cruiser behind the Appellant's vehicle at which time she advised him that he had targeted the correct vehicle. The Justice of the Peace found that Constable Collishaw observed the roof lights of Constable Fisher's cruiser being activated as it was directly behind the vehicle of the Appellant.

[14] The Justice of the Peace properly reviewed the evidence given at trial by the complainant. She referred in her reasons for judgment to the cases to which she was directed by agent for the Appellant during submissions. She distinguished all of those cases from the case at bar.

[15] In referring to the evidence of the Appellant the Justice of the Peace stated at p. 12 line 12 as follows:

“ By contrast the defendant wants us to believe he has cruise control set at 100 kilometres and hour on the 401 when there is traffic all around him. The defendant has very clear memory of all the vehicles including a convoy of tractor trailers to his right, one immediately in front which he is unable to describe but he knows it is carrying a heavy load and yet is still able to know there is an identical vehicle to his up ahead with alloy rims and no tinting because he was able to see the driver. The defendant also tells us about the police officers he was able to see after the breaks through the gaps in the tractor trailers. Despite all of these diligent observations by the defendant at the exact time he is being targeted by the officer and subsequently driving past their location, he does not see Constable Fisher pulling out onto the highway with emergency lights flashing and get into position immediately behind him for one kilometre or more. In view of all the testimony in totality it is the finding of this Court that there was (sic) no shortcomings, evidentiary deficiencies or lack of training or compliance with manufacturer’s instructions by Constable Collishaw and that based on both officers evidence there is no doubt in the Court’s mind that the defendant’s vehicle was the correct one that was stopped by Constable Fisher and that the defendant is mistaken in his memory of the events as they unfolded during the drive that day.”

ISSUES RAISED ON APPEAL:

- [16] Agent for the Appellant has raised the following issues on this appeal:
- 1) That the evidence did not support the conviction.
 - 2) That the Justice of the Peace misapprehended the evidence.
 - 3) That the reasons for judgment of the Justice of the Peace are manifestly inadequate.
 - 4) That the Justice of the Peace was wrong in finding that Constable Collishaw was qualified to operate the laser device and that she had tested it properly.

ANALYSIS:

- [17] I shall deal with the submissions of agent for the Appellant in an order different

from that in which they were advanced.

4) That the Justice of the Peace was wrong in finding that Constable Collishaw was qualified to operate the laser device and that she had tested it properly.

[18] Constable Collishaw testified that she had initially been trained on the use of laser speed detecting devices in April, 1998. She was initially trained on the Marksman LTI 20/20. Her training came from a qualified Ontario Provincial Police instructor. At the time of her original training the O.P.P. were not using the “Speed Laser” she testified. I take it from that evidence that she was referring to the “Laser Atlanta Speed Laser” which is the device she used in the case at bar.

[19] The officer requalified with a qualified O.P.P. instructor in November, 2006. In cross-examination she testified that she was familiar that the only maintenance required for the Laser Atlanta Speed Laser was to wipe the lens clean. She said that she learned this “from my training” when she requalified in 2006. She said she also obtained this information from “reading the manual”.

[20] Constable Collishaw made it clear in her evidence that she was completely familiar with the testing procedure for this device and that she had tested it and used it many times in the past. She spoke of the manual for the Laser Atlanta Speed Laser that she had “received in training”. She advised the agent for the Appellant that the “Speed Laser User’s Guide” that he presented to her in cross-examination was different from “the one that I was provided during my training”.

[21] In light of all of the foregoing I consider it obvious that Constable Collishaw had received training on the Laser Atlanta Speed Laser when she retrained in 2006. It was entirely appropriate for the Justice of the Peace to come to this conclusion on the evidence. There is no merit to the position of the Appellant that the evidence reflected that the officer was not trained on the device. Indeed, the evidence is to the contrary.

[22] Constable Collishaw went through her testing procedure with respect to the laser device in painstaking detail during cross-examination by the agent for the Appellant. There was ample evidence, in my view, to support the conclusion by the Justice of the Peace that the device was tested in accordance with the manufacturer’s specifications as the officer had been trained to do. The testimony from the officer revealed that she clearly understood the nature of the testing requirements and had satisfied each and every one of them.

[23] The agent for the Appellant took the position that she had improperly conducted the Horizontal Sight Alignment Test. The specifics of this test were acknowledged by Constable Collishaw to be the same as set out in Exhibit #1- Speed Laser User’s Guide and are as follows:

- a) Locate a tall, vertical object (such as a utility pole) with clear sky behind it (and preferably > 45 metres away.)

- b) Aim to the right of the object, and pull the trigger.
- c) While keeping the trigger pulled, slowly sweep the crosshair sight to the left.
Press (D) Done when completed.
- d) The distance should be displayed in the HUD only when the target edge is in view of the crosshair.

[24] At trial the agent for the Appellant had taken the position that the officer had incorrectly undertaken this test in that the utility pole which the officer used as a target was 47 metres away from her position. It was the position of the agent that the manufacturer's requirement was that the target be 45 metres away. I give no effect to this argument. The specifications in the User's Guide make it clear that the target should be "greater than" 45 metres away. Clearly it was.

[25] The agent also took the position that the test was improperly performed because the officer moved the device from left to right over the target rather than from right to left. There is not merit to this argument. From the User's Guide and from the evidence of Constable Collishaw it is clear that the purpose of this test is to sight an object in the distance and to then ensure, by moving the beam across the object, that the distance reading is not obtained until the beam hits the object. Constable Collishaw testified that she tested the device in accordance with her training and experience and it was obvious from her evidence that she had a full understanding of the purpose of this test. I am satisfied that the test result is not at all affected by whether the beam is moved left to right or right to left so long as the device provides an accurate distance measurement when the beam strikes the target. That is what occurred during the testing performed by Constable Collishaw. Additionally it should be noted that there is a diagram below the instructions in the User's Guide which depicts the beam being swept across the target object from either left to right or right to left.

[26] The agent for the Appellant misapprehended the evidence at trial regarding the Range Accuracy Test. Constable Collishaw set out in her evidence that on each of the three occasions that she had tested the device on the date of this incident she had run two tests – one from 10 metres and one from 25 metres. The officer indicated how she performed the tests and that she was aware that the display in the instrument matched the known distance from the target. Agent for the Appellant took the position that the officer did not properly perform the test as she had done only three tests and not six. The evidence of the officer was unambiguous that she had run the test from both distances on three separate occasions for a total of six tests. This was done exactly in accordance with the User's Guideline.

[27] The agent for the Appellant took issue with the Light Segment Test also referred to as the Head Up Display Test. The User's Guide sets out this test as follows:

2) Light Segment Test

Confirm the HUD is displaying the aiming – with the data 8888.

[28] It was the agent's submission that this test required two steps: 1) that the HUD displayed the aiming and 2) the data 8888.

[29] I disagree. A plain reading of the Guide leads to the conclusion that the display of the data 8888 confirms that the HUD is displaying the aiming. There is no two stage process involved. This interpretation is consistent with the evidence given by Constable Collishaw with respect to this test.

2) That the Justice of the Peace misapprehended the evidence.

[30] This issue is intertwined with the one previously discussed as the agent for the Appellant took the position that the Justice of the Peace misapprehended the evidence of Constable Collishaw as it related to the testing procedure which she undertook and concerning the requirements for testing set out by the manufacturer of the Speed Laser. Having reviewed the transcript of the trial including the submissions by the agent at that time and the reasons for judgment I can find no error by the Justice of the Peace in her assessment of the evidence. She seemed to have a good grasp of the evidence and her finding that the testing of the device by Constable Collishaw was in accordance with the manufacturer's requirements is amply supported by the evidence in my view.

3) That the reasons for judgment of the Justice of the Peace are manifestly inadequate.

[31] It was argued by the agent for the Appellant that the reasons for judgment by the Justice of the Peace did not meet the requirement set out in *R. v. Sheppard* [2002] 1 S.C.R. 869 in that the Justice of the Peace did not set out sufficient reasons for disbelieving the Appellant or articulate her reasons for convicting the Appellant. I disagree. The reasons of the Justice of the Peace make it clear that she considered the evidence in its totality. She reviewed the evidence of Constable Collishaw with respect to the testing of the instrument and her qualifications and she correctly concluded, in my view, that the officer was properly trained on the device and that she had tested it on the date of the offence in accordance with the specifications of the manufacturer. There was ample evidence to support these conclusions.

[32] She dealt with the evidence of the Appellant. She summarized it accurately and did not misapprehend any portion of his testimony. In my view she clearly did not accept his evidence although she charitably referred to him as being "mistaken" in his recollection of a similar car to his being in the vicinity. It is clear from a review of the reasons of the Justice of the Peace that she discounted the evidence of the Appellant because she did not accept that he had as selective a memory of the events as he said. She did not accept that he had such a detailed memory of all of the vehicles around him yet did not see Constable Fisher pull out behind him particularly in light of his testimony that he was aware of the presence of the officers conducting speed enforcement. Moreover, she made it clear that she had considered **all** of the evidence and that she accepted the evidence of the officers. It is

entirely appropriate for a Justice of the Peace in these circumstances to reject the evidence of a defendant and convict solely on the basis of the acceptance of the evidence of the prosecution witnesses **provided** that he or she gives the evidence of the defendant a fair assessment and allows for the possibility of being left in doubt, notwithstanding his or her acceptance of the prosecution's evidence. Moreover, a trier of fact is entitled to assess a defendant's evidence in light of the totality of the evidence including the testimony of prosecution witnesses and in so doing compare the evidence of witnesses. As long as the Justice of the Peace does not engage in the prohibited reasoning of considering the standard of proof as a credibility contest (ie. considering that the standard of proof has been met simply by preferring the evidence of the prosecution witnesses to the evidence of the defendant), it is permissible to compare the evidence of the defendant to that of the prosecution witnesses. In such circumstances it is a sufficient reason for rejecting the evidence of a defendant that the evidence of the prosecution witnesses is believed and leads to a conclusion of guilt beyond a reasonable doubt. When the evidence of a defendant is rejected based on a considered and reasoned acceptance of the truth of conflicting evidence there is a satisfactory explanation for the rejection of the evidence of the defendant. Such reasoning provides sufficient explanation to allow the defendant to know the reason for his conviction and enables an appellate court to have a proper basis for review. See *R. v. Jaura*, 2006 ONCJ 385 (O.C.J.) ; *R. v. Hull* [2006] O.J. No. 3177 (O.C.A.) ; and *R. v. J.J.R.D.* [2006] O.J. No. 4749 (O.C.A.)

[33] The reasons of the Justice of the Peace in this case make it clear that she considered all of the evidence, the reasons why she accepted the prosecution evidence , her problem with the evidence of the Appellant, and that she was satisfied beyond a reasonable doubt that the prosecution evidence was correct thereby assisting her to reject the evidence of the Appellant. The path of her reasoning is clearly set out and is supported by the evidence and is sufficient to enable the Appellant to understand the basis for the conviction and to provide for appellate review. I reject this ground of appeal.

1) That the evidence did not support the conviction.

[34] I have dealt with the other issues in such a fashion that it should be clear that I find that there was overwhelming evidence in this case to support the finding of guilt by the Justice of the Peace. The appeal is dismissed.

Appeal dismissed

Released: November 24, 2009

Signed: "Justice M. J. Epstein"