

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

Against

ABDULLAHI EGE

PROCEEDINGS

BEFORE THE HONOURABLE MR. JUSTICE M. H. KELLY

On Tuesday, October 2, 2001 at Toronto

APPEARANCES:

Provincial Prosecutor

Agent for the accused

Mr. T. Leacock.

Mr. M. Higgins.

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MR. LEACOCK: Yes, Mr. Higgins is here.

MR. HIGGINS: Good afternoon, sir.

MR. LEACOCK: Abdullahi Ege.

MR. HIGGINS: E-G-E. Mr. Ege is not before the court, Your Honour. Good afternoon, Higgins, initial M, if I may appear with the court's permission as his agent.

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THE COURT: Okay.

MR. HIGGINS: This matter, sir, applies by way of a defence appeal on a speeding trial which was held in front of Madam Justice Tivey in provincial offences court in Scarborough. Going briefly through the transcript evidence of the officer, we have evidence from Officer Hougerdyke(ph) that he was on Eglinton Avenue, observed a vehicle going the other way, that the vehicle appears to be speeding, that Officer Hougerdyke makes a u-turn and turns after him. And I'm not sure if Your Honour is familiar with the area of Eglinton Avenue and Brimley Road, the Go bridge, the underpass in that area.

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THE COURT: Yes.

MR. HIGGINS: He's initially traveling eastbound, this is the officer. He then comes westbound, loses sight of the green Lumina cab that he says was speeding going westbound or exceeding the speed limit, crests the hill and activates a radar device which he has which we find out later is called the Hawke. The officer then goes on
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5 in his evidence to indicate that he's qualified to operate that machine, that the machine was tested before and after its use, and as far as he was concerned, it was tested to the proper manufacturer specifications, the manufacturer's tests and the machine was capable of accurately measuring speeds.

10 THE COURT: Is this the one going 176?

MR. HIGGINS: 146.

THE COURT: 146.

15 MR. HIGGINS: Now, once into cross-examination, the officer's evidence I submit, and this is evidence adduced by the defence through the officer, really does start to unravel on a number of grounds, and if I may, starting at page seven, or starting at page nine in the cross because we've got him turned around now and coming up behind the defendant. The officer says on page nine at line 22, "The radar doesn't work from very far back." Now, again, he says he doesn't know what speed he was going as I was trying to catch up to him. I may have, I don't know, because I was asking if he, in fact, ever did himself more than 146 to catch him, but he doesn't know.

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Going over to ten, he indicates at one point that he's gaining on the vehicle and that's down around line 17, that he's gaining on this vehicle, and that's when I said, "That's why I asked you if your speed had ever exceeded 146." Again, he doesn't know.

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So is he gaining on it or is he not? If you're gaining on it, you've got to be doing better than 146, that's obvious. I don't know what speed he was going at that time. So there's no evidence he was speeding at that particular time, or still that there's no quantum upon in. He doesn't...he doesn't recall how far away the vehicle was he when initially regains the sight of it coming around McCowan Road.

THE COURT: Um-hm.

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MR. HIGGINS: He says that he levels his speed off, and this is on 11, and the top of 12. He travels the 50 or 60 yards, five seconds, and he's traveling at a high rate of speed, at some point, we have to figure out how far away he is over the crest of the hill, and of course, that's never given in evidence; he's not sure. We merely have evidence that at 100 meters away, he gets the reading of 146.

Now, the testing and capabilities of this machine were brought into question in cross-examination, and that starts very intensely on page 13.

THE COURT: Um-hm.

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MR. HIGGINS: When I indicate as to...he was originally trained...I know the officer...excuse me, originally trained on a MDR1 moving radar which I was as well, although that's not in evidence there obviously. He then says he's using the Hawke and he's trained by his supervisor. He's not

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trained by the manufacturer. He's trained by his supervisor, and we have no evidence whatsoever that that supervisor was trained on this machine or capable of authorizing someone else to use the machine. But we do know he was trained by a Sergeant Garfield, and I submit that's the only evidence of training he's received on this, nothing from the manufacturer, no tests, no pass, no fail; merely, he's received some training from Sergeant Garfield. He indicates, going down 14, that he has been given some written material with regards to this, received it from the sergeant, or it was given, sorry, produced under copyright by the force, not even so much Sergeant Garfield, but by the force as he puts it, and I questioned him with regards to say, "Is it more correct that you tested it according to the book you had, not necessarily manual, but the one you were given?", and I think he does agree with that because, again, as he repeats, it's copyrighted, so it must be a manual.

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On page 15, I ask him if he's ever had an opportunity to compare it to an original manual. He says, "No.", and that's at line 12. We find out from Sergeant Garfield's manual right after that, it's thick and it's a combined manual that each section is separate. We find out it's a small booklet, and we find out that it doesn't even actually say this is the manual for the Hawke, but it

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has a Hawke section in this book. I ask him questions on 16, "Does it contain the specifications and limitations of the Hawke?" In other words, that I'm asking I think clearly what it's capable of, how to use it, limitations, where and when you don't. His answer, "I don't believe so, no.", and I ask again, "All right, with regards to that machine, what is the actual distance limitation of the Radar Beamon(ph) Hawke according to the manual." Actually...this is his answer, "Actually, I don't know. I know that it doesn't work from a very far distance.", and again, we have a reading at 100 meters. We have no idea if this is within the machine's capabilities or not, but we have that reading, and we know it doesn't work very far. I do ask him, "If I'm correct in saying you operated the machine from a distance of 100 meters if you're not sure what the final operating range of the machine is?" He says, "No." So again, I submit, there evidence here that could certainly raise a doubt that the machine is not being used within capabilities and/or properly according to its intent and scope.

On 17, we go through the matter of speed differential from motor vehicles as to whether or not he's reading his speed or another vehicle's, and he's asked on 23, "What is the minimum speed differential according to the manual between the patrol

speed and the target speed?" Answer again, "I don't know."

Going through line 18, or sorry, page 18, where the officer has said earlier in evidence in-chief, and this is all unchallenged there, that the machine is capable of accurately measuring the speed of a moving motor vehicle. I ask him, "Is that term in the manual you have? Does it say in there this machine is capable of...", etcetera, etcetera, etcetera. "I don't believe so." Then he says that that's his evidence that that machine is capable of that. I ask him if he's an expert on radar, if he's received...an expert in electronics. He says he has some training. He's never qualified as an expert. So I submit, if he says that's my evidence that that's what this machine does, that's opinion and should not have been allowed there because that's where it was brought into play. He was not qualified as an expert, so his opinion, I submit is worthless with regards to it.

Going further down 18 at line 27 I ask him, "Have you contacted the manufacturer of the machine or advised them of your use of it?" "No, not personally." I ask him again, "Have you had occasion to receive communication from them saying that Officer Hougerdyke, we're aware of your qualifications and you're authorized to use the machine?" Answer, "No." I ask, "Have

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you had occasion to take the manual which you were given, this little booklet provided by the police, to send a copy of the custom-signals(ph) Hawke Manufacturer for verification of its accuracy with its testing procedures?" "No, I haven't.", and at the very end of it...at the very end of it, the very last question I ask him, "Are you aware of what the original manufacturer's manual says?" He says, "No.", and that ends cross-examination.

Now, I submit, with regards to the...

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THE COURT: This booklet, he got that from his superior, did he?

MR. HIGGINS: He got that from a supervisor, yes.

THE COURT: Supervisor, yeah, okay.

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MR. HIGGINS: Now, I submit, I do have one case on point on that, Your Honour, if I may. I've given a copy to my friend. It's a case before your Brother Judge Carry(ph) Evans in Barrie, November 27th, 1998 which is very specific on the point of radar manual testing, and for the record, Madam Clerk, the case is called Philip with one L, Agnoletto, A-G-N-O-L-E-T-T-O. This was a Barrie POA appeal, Your Honour, where Judge Evans found in a number of instances through that transcript, and I'll just go briefly through the references to it. On page four, in the Agnoletto transcript, "In this case, he's indicated he hasn't even seen the manual.",

5 and that's on page four at line 22, this is the court picking that up. Going through that transcript of Agnoletto...

THE COURT: Could I just at this stage get, and I'm not trying to cut you off; but just hear what the prosecutor has to say at this stage. I'll let you continue in a minute.

10 MR. HIGGINS: Okay. I'm actually very close to the end.

THE COURT: Oh, well, okay.

MR. HIGGINS: It's up to Your Honour.

THE COURT: No, no, go ahead.

15 MR. HIGGINS: I'm very close to the end. The court on Agnoletto on page ten says, "How could he possibly stand...", I think this is excellent, page ten, line 20, this is the court, "How could he possibly stand before the court as a qualified technician or qualified operator of that mechanism if he's saying I do things according to the manufacturer's checklist, but I haven't even seen the manual that dictates is." That's alluded to several times.

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25 The Crown, Ms. Burke, challenges certainly all the way through with regards to it. In the final decision in the reasons for judgment on page 18, and this is at line 13, the court says, "There's no evidence before the court the machine is capable of testing the speed of moving motor vehicles as set out in the evidence.", and I submit here, that's an opinion given by the operator who's not
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ever qualified as an expert, merely, he's got some training in electronics. I submit that's on point here on that.

With regards also to the manual issue, at the bottom of 18, His Honour Evans indicates, "When asked if he'd recognize a copy of the manufacturer's manual with respect to this radar device, the officer indicated no.", and the court goes on to say, "A number of areas in evidence presented that could raise a reasonable doubt, and the learned justice erred in not assessing all the evidence presented in this matter. Ms. Michaels in closing argument said that there was no evidence to the contrary, and the justice believed that and also made an allegation alluding to this officer just picked you out of no where." I submit quite clearly the officer can make a mistake because he admits he lost sight of a vehicle that he was looking for.

THE COURT: In his evidence in-chief, I thought he said he didn't lose sight of it.

MR. HIGGINS: No, sir, he did lose sight of it, absolutely, and that would have....

THE COURT: No, I'm going by memory. I'm not arguing.

MR. HIGGINS: It's the very first part of cross just after seven.

THE COURT: You're right.

MR. HIGGINS: On seven at 17. He says later on he loses sight of it as well. So I mean,

it could be a mistaken vehicle, a reading from another...

THE COURT: All right.

MR. HIGGINS: I think there really should have been a reasonable doubt, and I think Agnoletto rests on the point of...

THE COURT: You're...you're ground for appeal is, number one, he could have made a mistake, and the speed was calculated erroneously or on a different car or something like that, and b, there's no evidence that the machine was operating in accordance with the manufacturer's specifications and manual?

MR. HIGGINS: I would say there's some evidence of that, but I think it certainly falls short of enough to prove a prima facie case...

THE COURT: Yes. Okay.

MR. HIGGINS: ...given evidence to the contrary by the defence.

THE COURT: Okay. Thank you.

MR. LEACOCK: Thank you. First of all, Your Honour, I would submit the officer, just to get on the points that my friend made, did not just arbitrarily pick up this radar unit and go to use it. Legislation provides for this, and the legislators found it necessary to use this particular equipment and they've also found that the equipment operates satisfactorily if used to manufacturer's specifications. So the officer is using this radar. Now...

THE COURT: Well, just a second, when you say you're using this radar in accordance with...

MR. LEACOCK: With manufacturer's specifications.

THE COURT: But how do you know that if you don't know what the specifica...

MR. LEACOCK: I'm getting to that argument as well. See,...

THE COURT: Who says this is a proper machine to use? There's regulation of some kind and it...

MR. LEACOCK: Yes, there is.

THE COURT: ...names this machine like a breathalyzer machine?

MR. LEACOCK: Exactly.

THE COURT: Okay. So we're using the right machine.

MR. LEACOCK: Now, my friend has a very good argument, however, unless he gets into the witness box and testifies as to what he knows about this radar, I'm afraid his argument falls short.

With regards to whether or not the radar was tested properly, now, there is case law that would indicate, "It was checked by myself...", and I'm reading from page five, "...before and after the shift and I found it to be in proper working order according to manufacturer specifications." Now, if my friend is challenging the officer says this, and there's case law from I believe the Ontario Court of Appeal that would indicate

5 that is sufficient to indicate that, unless
of course if you were to challenge it, to
indicate that the machine was working
properly. Now, to challenge it, my...

THE COURT: That's with no evidence to the
contrary?

10 **MR. LEACOCK:** That is correct. Now, the
evidence that my friend is indicating is to
the contrary, my friend did not come here
with...did not come to the trial, I should
say, with the manual indicating, well, the
manual says this and you're doing this. My
friend is coming with his own expertise and
as I'm saying, he's not getting into the
15 witness box, therefore, that expertise is not
supposed to be...the jurist is not required
to take cognizance of such expertise I would
submit, Your Honour. My friend was never a
witness on this matter. He was defending
20 this gentleman and he may insinuate certain
things to the witness, but we're not...we
cannot be convinced as the Appellate Court,
nor can the jurist as the trier of fact that
what Mr. Higgins is saying is gospel as well.
He does not have a manual to show to the
25 court...to show what...to say, well, this is
how it should be.

THE COURT: Well, I think Mr. Higgins isn't
saying how it should be done. He's saying
that there should be some doubt as to whether
it was done properly.

30 **MR. LEACOCK:** Exactly. Now, as I read his

5 Notice of Appeal, it indicates insufficient
evidence...officer gave insufficient evidence
to sustain a conviction, and the justice
erred in the interpretation and application
of said evidence. Now, what evidence is
that? Is it what he's just described to the
court today? I think not, Your Honour. As I
10 said, if it's his opinion and he may have
read the manual, but he did not bring it with
him to present to the court, and as I
indicated earlier, he's not a witness. So
what evidence falls short. All the evidence
here indicates the gentleman was speeding,
the tests were done and Mr. Higgins'
15 expertise coming up against Officer
Hougerdyke's expertise should be in evidence.
Mr. Higgins' expertise should be in evidence
if he wants to challenge what Mr. Hougerdyke
is saying, and in a nutshell, that's the
Crown's position here.

20 THE COURT: One of the things the Crown has to
show is that the machine was in proper
working order?

MR. LEACOCK: Exactly.

25 THE COURT: And the officer gave evidence it
was?

MR. LEACOCK: That it was, yes, and proper
evidence that it was.

THE COURT: All right. Thank you.

MR. LEACOCK: Tested evidence.

30 THE COURT: Just to repeat, one of the things
that the Crown has to prove beyond a

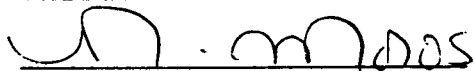
5 reasonable doubt is the machine was in proper
working order. The officer said it was,
"Checked by myself on that date before and
after the shift and found to be in proper
working order according to the manufacturer's
specifications.", and it appears that the
officer had no idea what the manufacturer's
specifications were, and in my view, I guess
10 I'm not bound by the Agnoletto case, but it's
of persuasive value and I think there should
have been a reasonable doubt as to whether it
was in proper working order and the appeal
will be allowed.

15 MR. HIGGINS: Thank you, Your Honour.

THE COURT: The charge will be dismissed.

MR. LEACOCK: Thank you very much.

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



Natasha Moros
Official Court Reporter