

Case Name:
R. v. Guglietti

Between
Her Majesty the Queen, Respondent, and
John Guglietti, Appellant

[2004] O.J. No. 6218

Ontario Court of Justice
Burlington, Ontario

F.L. Forsyth J.

Oral judgment: December 3, 2004.

(38 paras.)

Counsel:

Mr. D. Fox, Prosecutor.

Mr. P. **Alexiu**, Agent on behalf of the Appellant.

REASONS FOR JUDGMENT

1 F.L. FORSYTH J. (orally):-- The appellant, John Guglietti, was charged that on the 1st day of March, 2003 on Highway 407 westbound, west of Derry Road, in the Town of Milton, he did commit the offence of speeding at 138 kilometres in a 100 kilometre zone, contrary to the Highway Traffic Act, section 128.

2 A plea of not guilty was entered on his behalf. I do not think he attended, did he, at the trial, just his agent?

3 MR. FOX: Yes.

4 THE COURT: Right. He appeared by agent, Mr. A. Alesandro, on November 26, 2003 in front of Justice of the Peace P. Bonas in the Milton Provincial Offences Court. His trial was conducted and the evidence called by the prosecution at that time was from Officer Ian Michel. Office Michel testified in-chief that he had been with the Ontario Provincial Police, Port Credit Detachment since April 21, 2001. Then he gave evidence about what had happened on the 1st of March, 2003. I quote from page three of the transcript, line eight:

On Saturday, the 1st of March, 2003, at approximately 10:19 a.m. I was operating a handheld Genesis VP Radar, number 01058 for the purposes of accurately measuring the speed of moving motor vehicles

5 Then he described the location. Later in that same paragraph he said:

... the Genesis VP radar I was using was tested before use at 6:00 o'clock a.m., as well as at 9:40 a.m. when I set up the speed enforcement location. And it was tested after use at approximately 10:30 a.m. before its next use on another vehicle. The tests were done as per manufacturer's specifications and instructions and it was found to be in good working order at that time.

6 He then gave his evidence about detecting the speed of the appellant, Mr. Guglietti, at the alleged speed of 138 kilometres per hour using this particular radar device. on page four of the transcript, Ms. Sullivan, the prosecutor, asked the officer, at line 16:

QUESTION: What can you tell me about your qualifications?

ANSWER: I've been trained as a radar operator with the Ontario Provincial Police, both at the Ontario Provincial Police Academy in Orillia, as well as at the Detachment level in Port Credit.

QUESTION: Officer, what can you tell me about radar and its purpose?

ANSWER: Radar is a device which is used to accurately measure the speed of moving motor vehicles as defined under the Highway Traffic Act.

That was the end of the questions in-chief.

7 Mr. Alesandro, as agent, had no questions for the officer in cross-examination. He then made a motion for non-suit and he referred to the evidence of the officer in relation to the use of the radar unit and the testing. He began to say in cross-examination and the Court, Justice of the Peace Bonas, reminded him that there was no cross-examination. But Mr. Alesandro said, no, not in cross,

on page five, line 11:

Through questions from the prosecution to the officer, she asked the officer's qualifications and he said he was trained for "the use of this radar unit". At no time did the officer say he was qualified to operate this radar unit. He was trained for the use of the radar unit. That would be my motion for non-suit.

8 Interestingly enough Mr. Alesandro, I think, has misstated the evidence when he made that submission to the Justice of the Peace in the sense that I do not see any evidence that said that Officer Michel was trained for use of this radar unit, meaning the radar unit he described as a Genesis VP Radar. The evidence as Justice of the Peace Bonas said, was simply that he had been trained as a radar operator.

9 It is trite to say that there are various models of radar units and different types of radar units that are used by police. By that I mean, there are handheld units as apparently this Genesis model was, and there are also units that are not handheld, that are mobile units. There are units that can be set up in a stationary fashion on a tripod by the side of the road. I do not think you have to be a motorist for too long in the province before you might see one of those.

10 But what I am trying to say here is that Mr. Alesandro actually gave the prosecution's case more credit than really the evidence did. Regardless of whether he made that submission, Justice of the Peace Bonas, of course, had to deal with the evidence. However, the remainder of the submission by Mr. Alesandro dealt with the fact that at no time did the officer say that he was qualified to operate that particular unit. So while he made the submission he was trained on let us say the Genesis VP handheld unit, he did not give the evidence he was qualified. Without finishing his thought process the way Mr. Alexiu today, acting for the appellant has done, Mr. Alesandro seemed to be implying that there were two separate procedures or at least that training precedes qualification and the qualification is the requirement that the Court should have to be satisfied that the operator of a unit has in the training and qualification.

11 So I remain constant in what I said. As I see it the evidence of Justice of the Peace Bonas was simply not that the officer was trained on the Genesis VP unit but simply was trained in the use of radar generically. So Mr. Alesandro, I think, was in error when he said that the officer said he was trained for the use of that particular unit. However, he was correct when he said that the officer at no time said he was qualified to operate that particular Genesis unit.

12 The non-suit motion was denied. Justice of the Peace Bonas gave his decision. I am not going to read it in its entirety, of course, but what I feel is important is on page six, where he said:

What Mr. Alesandro has brought up is really a bit of semantics and I certainly can take judicial notice of the fact that the word in and of itself "trained" does indicate or give some knowledge to the Court that the officer has been suitably trained in the operation of this unit which he was using.

13 With great respect to Justice of the Peace Bonas, I find that that particular statement was unfounded on the evidence that he had before him. I also find that he cannot take judicial notice of the fact that the word "trained" in and of itself can give some knowledge to the Court that the officer had been suitably trained in the operation of "this unit", meaning the Genesis VP, as he-says, which he was using.

14 I find that Justice of the Peace Bonas, on the evidence that he had, could only have concluded that the officer had been trained as a generic radar operator with the Ontario Provincial Police and at the Police Academy in Orillia and the Detachment level in Port Credit. There is just no evidentiary foundation as far as I am concerned for that particular conclusion of Justice of the Peace Bonas.

15 Moving on, Justice of the Peace Bonas said again:

It is a play upon words, in the Court's view, in the two words that are bandied about is trained and qualified.

16 I find that that language of Justice of the Peace Bonas suggests that the learned Justice of the Peace seemed to think that the attempt by Mr. Alesandro to distinguish between the concept of training and qualification was somewhat specious and certainly, perhaps, irrelevant. He goes on to make that clear in the next sentence.

17 By using the terms "bandied about" and "semantics", it is rather clear to this Court that Justice of the Peace Bonas did not think it was too important to consider the distinction between training and qualification. You know, whether or not that is the correct point of view is what this Court perhaps, to some extent, as part of its appeal, has to decide. But anyway, he goes on:

It is again - I reiterate, in the Court's view, there is some connection between the two words, although one applies some judicial notice and some semblance of normalcy and an interpretation to the two words. I find that they are interchangeable to some extent and accordingly the motion for non-suit fails.

18 Now, whatever Justice of the Peace Bonas was trying to say in that rather complex sentence, I can only say that it appears that he is trying to say that he feels that trained and qualified are connected, to use his word, to some extent, and he may well be correct when one looks at the dictionary definition of qualified. I think there is a dictionary definition in the case presented by Mr. Alexiu of R. v. Pavanchandran. At paragraph six, the Dictionary of Canadian Law (2nd Ed.) 1995, referred to by Justice of the Peace Keilty in February 2003, a "qualified person" was the definition term. One of the definitions given was "a person who because of knowledge, training (emphasis added) and experience is qualified to perform safely and properly a specified job".

19 So it may be from an English language standpoint that there is some connection between the two words, as Justice of the Peace Bonas says. But he then goes on to say "when one applies some judicial notice" and I guess I can only say he must be referring to the judicial notice he applied

earlier in that same paragraph, to the fact that the word training gives the Court knowledge that the officer had been suitably trained in the operation of the particular unit he was using. I have already commented on my view on that particular finding. Then he talks about some semblance of normalcy, whatever that may mean, and finds then that the words are interchangeable. Then he qualifies that interchangeability by saying "to some extent". So he is not even saying that the words are completely interchangeable. He says "to some extent".

20 On page seven, in his conclusion, he points out that the officer gave testimony that he conducted tests according to the manufacturer's instructions and found the unit was in good working order - found it to be working accurately. My comment on that is that evidence is only useful as far as I am concerned, in my view, if there is evidence upon which the learned Justice of the Peace could conclude that the officer was a trained and qualified operator of the Genesis VP handheld unit. I mean, if there is no evidence that he was trained and qualified on that unit, the mere fact that he conducted some tests according to manufacturer's instructions does not bestow, in my view, that training and qualification upon him. That would be the cart leading the horse.

21 On page eight, the learned Justice of the Peace, at line 24, refers to the motion brought by Mr. Alesandro again, and he says that he brought a motion of nonsuit based on one particular issue. The officer, not having used the word qualified as opposed to his viva voce evidence saying that he was trained in the use of the radar, the Court concluded that the words are somewhat interchangeable and took some judicial notice of the fact that it is a play upon words and the motion for non-suit was dismissed. And then he points out that since the Court had no evidence to the contrary, meaning that there was no evidence other than the case for the Crown or prosecution, then therefore the charge is made out on the essential elements and he found the appellant guilty.

22 In the case presented by the prosecutor/respondent in this case, Mr. Fox, R. v. He (2003), March 5, 2003 (Oshawa Provincial offences Appeal Court), Mr. Justice Bellefontaine - the headnote reads:

This was an appeal by the accused, He, from his conviction on a charge of speeding. There was evidence at the trial the officer did not have training on the radar device used to detect He's speed. The officer received training on a similar unit, was experienced in the use of radar devices generally.

23 Mr. He argued that the judge had erred in finding that the Crown had established beyond a reasonable doubt that the officer was trained and qualified in the operation of the device. Mr. Justice Bellefontaine held:

Appeal dismissed in the absence of statutory requirements, it was a factual issue for the judge to determine whether the officer was trained and qualified. There was a factual foundation upon which it was open to the judge to find that the officer was a trained and qualified operator of the radar device.

24 Now, later on in the case, in the analysis by Mr. Justice Bellefontaine, paragraph 93, he makes the following findings:

And with respect to the more substantive issue, which is the qualifications of the officer, and I certainly accept what appears to be the thread of the case law, that in order for the Crown to be successful in a case such as this there must be evidence to establish beyond a reasonable doubt that the officer was trained and qualified in the operation of the machine.

In paragraph 94 he says:

In my view, in the absence of some statutory requirement such as I have seen in the Criminal Code from breathalyzer technicians, where the term is defined in the Criminal Code and the qualification process or the qualification system is established that it is something that is approved by regulation as referred to in the Criminal Code, while there is nothing specific with respect to the qualifications, there is obviously procedures in place for statorially and by regulation determining who is a qualified individual.

Paragraph 95:

In my view, it then becomes a factual issue for the presiding Justice of the Peace to determine whether or not any given individual officer is, in fact, trained and qualified. In doing so, the training and qualification can be done in a number of ways, that is by education, training, that is on-the-job training, as opposed to any academic training and by experience. There was evidence before Her Worship that this individual had received on-the-job training, that is the one day training session in which she found to be a similar unit and also that he was an experienced officer in the use of these machines, having used not only the machine that was being used on this particular occasion but two other machines of different descriptions over the course of his - from the time of this two or three years of experience. In my view, there was factual foundation upon which it was open to Her Worship to find as she did, specifically factually find, that the officer was a trained and qualified officer.

25 Now, in conclusion, I find that training and qualification are not interchangeable with respect to the specific example of a qualified radar operator as a police officer. I find that Mr. Justice Bellefontaine has arrived at the same conclusion by his constant use of the terms "training" and "qualifications" in his rationale in the He case.

26 I also find that common sense suggests, as Mr. Alexiu submitted, that a person could receive training in anything without necessarily becoming qualified. It seems trite to say that a person could receive training and fail a test of qualification. A person could receive training and not yet arrive at

the point of qualification. A person could receive training and simply cease training before qualification. The point I am making is that these two concepts, in my view, cannot be simply interchangeably used as Justice of the Peace Bonas did and no judicial notice can be taken that evidence of training in the generic use or the use of generic radar somehow is evidence that that particular officer is trained on the use of the particular radar unit that he or she was operating.

27 I have no problem agreeing with the submission of Mr. Fox, again based on some of the submissions in the He case, and the findings of Mr. Justice Bellefontaine, that if there is evidence that an officer has been trained on a specific radar unit, to use his particular example, and the question was whether or not he was then using a unit that was different from the specific unit on which he had been trained unless there was some challenge taken to the idea that the unit which was being used by the officer was somehow significantly different requiring different training and qualifications, that the Prosecution should not have to establish in each and every case that the officer was specifically trained on any and all possible units. The analogy in the He case was to driving a different model car when you had been trained to drive on one particular model car.

28 But in this particular case of Guglietti, I find, and this is the important aspect of this appeal to me, the contrary to what Justice of the Peace Bonas found. There was no evidence before Justice of the Peace Bonas that P.C. Michel had received any training, whether it be on the job or at the Academy or at the police Detachment in Port Credit on any particular radar unit, let alone the particular handheld Genesis VP unit that was described by officer Michel in this case and used by that officer. There is just no evidence of that before Justice of the Peace Bonas.

29 There was also no evidence whatsoever that officer Michel was an experienced officer in the use of the type of unit that he was using on that day in question, the Genesis VP unit, or any other handheld unit over his two or three years of experience as a police officer. There was just no evidence, I find, at all, available to Justice of the Peace Bonas that would speak to the experience of the officer with respect to that unit.

30 Therefore, quite the contrary to the finding in the He case by Mr. Justice Bellefontaine, I find that there was no factual foundation, or at the very least an inadequate factual foundation, upon which Justice of the Peace Bonas could have concluded, as he did, that officer Michel was trained and qualified in the use of this particular Genesis VP unit.

31 I also find that the officer spoke only to his training. I have already pointed out that that training was in a generic sense with respect to radar and made no mention whatsoever of whether or not he had been qualified to operate any particular unit. And I do find that it is necessary, as Mr. Justice Bellefontaine said in paragraph 93 of He, to have evidence to establish beyond a reasonable doubt that the officer was trained and qualified in the operation of the particular radar unit or at least in a similar radar unit and there was not any evidence whatsoever before Justice of the Peace Bonas of that status.

32 Therefore, under s. 138 of the Provincial Offences Act appeals provision, I find that it is

necessary to allow this appeal and reverse the decision of Justice of the Peace Bonas and an acquittal is entered.

33 MR. ALEXIU: Thank you, Your Honour.

34 MR. FOX: Thank you, Your Honour.

35 THE COURT: Thank you. Thank you for the 20 minute case. Of course, counsel, I know when they estimate time, they are not including the time used by the Court in disposing of it. Anyway, thank you for your assistance both of you. Do you mind if I keep those two cases?

36 MR. ALEXIU: No.

37 MR. FOX: No.

38 MR. ALEXIU: Thank you, Your Honour.

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