

IN THE PROVINCIAL COURT (CRIMINAL DIVISION)

HER MAJESTY THE QUEEN

versus

MICHAEL G. HANCIN

JUDGEMENT ON APPEAL

BEFORE HIS HONOUR JUDGE H.E. ZIMMERMAN
on August 18, 1988.

APPEARANCES:

Counsel for the Crown
Counsel for the Accused

Mr. J. Neander
Mr. R. Dullego

At: Newmarket Courthouse
50 Eagle Street West
Newmarket, Ontario
Judicial District of York
Region

Regina v. Mancin
Newmarket P.C.C.D.
P.O.A. Appeals
August 18, 1988

JUDGMENT-H.E. ZIMMERMAN, PROVINCIAL COURT JUDGE (ORALLY)

I am going to reserve on this until after the recess, because I want to read those; I think it would be quicker if I did that at the recess, rather than taking the time to read it now. I will say preliminarily, the ground of appeal relating to unreasonable search and seizure and whether or not the police officer had a right to search the vehicle; that ground, will fail. I cannot accept that the learned Justice of the Peace made an error in making the finding that he did and there wouldn't have been any unreasonable search or seizure in the circumstances--whether he searched the car. And, in the circumstances as revealed by the transcript, he did not find it necessary to search the gentleman in person; he voluntarily coughed-up the machine.

The other issue as to whether or not the Crown has, in the circumstances as revealed by the transcri

proved that this is a motor vehicle. It is a matter that I will have to look at.. So, I will come back to it later.

R E C E S S

U P O N R E S U M I N G

Michael Hancin has appealed his convictions for speeding (121 km/hr in an 80 km/hr zone) and operating a motor vehicle with a radar warning device contained within the vehicle. There are three grounds of appeal which were raised. Although one of those grounds of appeal (in my recollection) was not argued, I am going to deal with it in any event. I will deal with the grounds of appeal in reverse order that they appear on the endorsement attached to the Notice of Appeal. The last of those grounds of appeal relates to the issue of whether or not there was an unreasonable search and seizure. Now, as I said preliminarily before we rose for the recess, it is my view that the learned Justice of the Peace made a finding of fact based on the evidence. Although, there may have been an unfortunate

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use of words, I think that he gave that finding of fact; that, the police officer had reasonable grounds to believe that there was a radar warning device in the vehicle. Therefore, he was authorized pursuant to the section, to make a search of the vehicle for that device. Subsequently, having found evidence that there was a radar warning device in the vehicle, the officer confronted the Accused and asked the Accused to produce the device, which he could, I think, suspect that he saw in the vest pocket of the Accused's coat; whereupon, the Accused did, in fact, produce the device. I do not think that in the circumstances, there was any breach of the Accused's rights under The Charter of Rights, relating to production and seizure of that radar warning device or any search that was made by the police officer of the Accused's vehicle. Therefore, that ground of appeal would fail.

With respect to the ground of appeal which relates to the officer's qualifications as a radar operator I am of the opinion, with respect to this matter, that the transcript of the evidence at the trial, CLEARLY indicates that this police officer gave CLEAR and I think FULL evidence as to the manner

of his training; that, he had worked with a more senior officer for six months with respect to his training on the radar operation; that, he had not once, but on several occasions, read the manufacturer's manual and in this particular case, very recently to the date of the alleged offence. On the basis of that evidence, the only reason one might have to question his qualifications was a question that was put to him relating to how far the tuning fork should be held from the radar; and although he could not be specific on that, he thought it was four inches, which might lead the Justice of the Peace to perhaps question whether or not the man was telling the truth when he said that he had read the manual not once, but on several occasions. However, I think that the evidence--other than that one point--would CLEARLY indicate that this police officer was, I think, by virtue of the six months of training and his experience with the use of the machine and the fact that he testified he read the manufacturer's manual with respect to the machine on several occasions, and the fact that he tested it, both before and after the particular incident alleged, by means of the tests recommended

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in the manufacturer's manual, that it was evidence that the learned Justice of the Peace could accept with respect to the qualifications of the police officer as a radar operator. So, that ground of appeal will fail as well.

Finally, we come to the ground of appeal which was argued this morning by Mr. Dullege and by Mr. Neander (on behalf of the Crown), relating to whether or not the Crown must prove beyond a reasonable doubt that the vehicle operated by Mr. Mancin was, indeed, a motor vehicle. It was argued that the sections relating to the speeding and radar device in The Highway Traffic Act, clearly specify that the vehicle involved must be a motor vehicle that is being operated by the Accused. Unlike some other sections of The Highway Traffic Act, those two sections (among the very few in the act) specify 'motor vehicle'. Indeed, when one looks at the interpretation section of The Highway Traffic Act, there IS a distinction drawn between 'vehicle' and 'motor vehicle'. While the definition of 'vehicle' would include a motor vehicle, it is argued that you cannot draw the conclusion that when a police officer, in his evidence, testifies as to the

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VEHICLE driven by Mr. Hancin, that he necessarily was driving a MOTOR VEHICLE. Now, I think that the argument has great merit. In fact, I took the opportunity to read the material filed by Mr. Dullege this morning, with a Court relating to a case of Marco Desenoni (ph) and Her Majesty the Queen. It is a case out of the Judicial District of Halton. It fleshes out, in effect, the argument made by Mr. Dullege relating to the specific sections of The Highway Traffic Act--section 2 of the definition sections. We are dealing with the definitions of 'vehicle' and 'motor vehicle'. It points out that there are a number of sections of The Highway Traffic Act, of course, dealing with the operation of vehicles on a highway--on the public roads--governed by The Highway Traffic Act; but, there are only a few sections which refer to specifically, 'motor vehicles'; two of those sections are, of course, the sections on speeding and radar devices--there is a third one relating to racing on a highway. All of these, specifically, refer to 'motor vehicles'. In light of that, it is clear that The Highway Traffic Act, clearly makes it obvious that with respect to sections such as those, the Crown is obliged to prove beyond a reasonable

doubt, that the vehicle operated by the Accused is a motor vehicle. Now, I read the transcript again this morning, with a view to seeing whether or not there was ANY place where the police officer may have used the words 'motor vehicle' or 'car' or something else that would identify more clearly what he was talking about as being the vehicle operated by Mr. Hancin. In fact, through-out the whole of the evidence, the police officer consistently referred to the vehicle operated by Mr. Hancin simply as 'vehicle'. I also examined the transcript to see whether or not either Mr. Nelson (on behalf of the prosecution) or Mr. Greenwood, on cross-examination, ever asked the police officer whether or not the MOTOR VEHICLE operated by Mr. Hancin-- to which, the police officer would make a response-- whether that might have been the case. Now, whether it was by accident or deliberate questioning in the case of Mr. Greenwood, certainly, there is not one occasion when ANY question was put to the officer where the expression 'motor vehicle' or 'car' or some other expression was used, clearly identifying the vehicle operated by Mr. Hancin was a motor vehicle-- not once was that the case. So accordingly, my

conclusion is that, while it is very clear from the evidence that Mr. Hancin was operating a vehicle on this particular day of the alleged offence, there is room for doubt as to the nature of the vehicle, even though Mr. Neander says clearly that it stretches the credulity of anyone to suggest that it was other than a motor vehicle that was going at the speed that was alleged to have been the speed used by Mr. Hancin on this particular occasion. It is unlikely, for instance, that you would find a soap box type of vehicle, unless he was going down a forty five degree slope and had a long time to put up the speed,--it is unlikely that that kind of vehicle could reach that kind of speed or any vehicle operated on a highway purely by muscular power could reach that kind of speed. So that, one has to say, as I say, stretch the credulity, to come up with any manner of doubt. The fact is, the Crown has not proved beyond a reasonable doubt in these two instances, that the vehicle operated by Mr. Hancin was, indeed, a motor vehicle. While it may appear to be a technicality, I think that it is a valid ground of appeal, and I am going to allow both appeals on that ground; that,

the Accused was not proven to be operating a motor vehicle.

MR. DULLEGE: Thank you, very much, Your Honour.

MR. NEANDER: In each case, is the conviction quashed?

THE COURT: Yes. The conviction is quashed.

It may have been paid. Mr. Hancin should be, in the circumstances, refunded payment.

THIS IS TO CERTIFY THAT,
the foregoing is a true
and accurate transcript
of my recordings, to the
best of my skills and
abilities.

Marianne Dunsford
.....
Marianne Dunsford
Court Reporter
Freelance.

NOTE: If an original signature is not contained on this ,
certification page, then this is NOT a certified copy.

TRANSCRIPT COMPLETED: OCTOBER 19, 1988.