

Case Name:
R. v. Kololgi

Between
Her Majesty the Queen, and
Shilpa Kololgi

[2009] O.J. No. 5742

Ontario Court of Justice
Newmarket, Ontario

A. Hourigan J.

Oral judgment: December 14, 2009.

(24 paras.)

Charges: Stunt Driving s. 172(1) Highway Traffic Act

Counsel:

R. Levan, Counsel for the Crown.

V. Manoukian, Agent for the Accused.

REASONS FOR JUDGMENT

1 A. HOURIGAN J. (orally):-- In this matter, the Appellant was found guilty after trial of the offence of performing a stunt, to wit speeding at 106 kilometres per hour in a posted 60 kilometre zone, contrary s. 172(1) of the Highway Traffic Act.

2 On this appeal the Appellant submits that her conviction should be set aside and an acquittal should be entered. The Appellant submits that the learned Justice of the Peace erred in coming to a factual conclusion as to her speed. It is the position of the Appellant that the evidence before the trial Court

on the issue of speed should have raised a reasonable doubt in the mind of the learned Justice of the Peace and, therefore, the resulting verdict of guilt was unreasonable and could not be supported by the evidence.

THE EVIDENCE AT TRIAL:

3 Constable Roman Santos who was a qualified radar operator testified that on January 12, 2009, he observed the Appellant travelling at a high rate of speed. Using his mobile radar he testified that he obtained readings of her speed to be 106 kilometres per hour in a posted 60 kilometre per hour zone. Constable Santos testified that he tested his radar device both at the beginning and at the end of his shift and found it to be in proper working order. He indicated that he had read the manual for this device and agreed on cross examination that the manufacturer's directions for radar usage should be followed.

4 Section 9.1 of the Manual for the Genesis 2 Radar Device was read into the record by Constable Santos. That section provides in part that for each enforcement action taken by a police officer, a tracking history must be compiled which includes among other things, a visual observation of the vehicle in question and an estimation by the officer of the speed of the motor vehicle. The officer should also, this section indicates, correlate the patrol speed of his vehicle and the patrol speed displayed on the radar unit. The section goes on to provide that if any of the required tracking history components are not compiled with then no enforcement action shall be undertaken by the officer.

5 The Appellant testified that she did not know the speed of her vehicle at the time that she was observed by the officer, however, she said that she was confident that it was not more than 50 kilometres per hour as she kept her eye on the speedometer. In cross examination she acknowledged that she was not aware of her actual specific speed.

6 In his evidence, Constable Santos testified that he made no estimate of the Appellant's speed other than his observation, that she was travelling at high rate of speed, higher than the posted speed. Further, Constable Santos testified that he did not correlate the patrolled speed of the police vehicle to the patrol speed displayed on the radar unit. Accordingly, the Appellant submits that because the officer did not comply with these two components of the tracking history he should have not engaged in speed enforcement, as per the manufacturer's directions.

7 In his evidence, Constable Santos acknowledged that the manufacturer's directions should be followed to ensure that the device is in proper working order. However, in terms of usage of the equipment he was of the opinion that the police can follow their own policies.

8 The Appellant submits that because we are dealing with one of the most serious charges under the Highway Traffic Act with severe consequences upon conviction, police need to ensure that there has been full and strict compliance with the manufacturer's instructions before there can be enforcement. This is so because the definition of this offence turns on a numerical reading of speed,

the offence of stunt driving being made out if the vehicle is travelling at a speed of over 49 kilometres per hour over the limit.

9 This Court has been referred to a number of authorities. In the case of *R. v. Cormier*, [2008] O.J. No. 4964, my brother Justice Griffin of this Court set aside the conviction for speeding and dismissed the charge where there had not been full compliance with the testing and the operation procedures of the radar device used by the police officer.

10 In that case, as in the case at bar, the officer had failed to correlate the patrol speed of his vehicle to the speed displayed on the radar device at the relevant time, as required by Section 9.3 of the User and Installation Manual for the Genesis 2 Device. These facts are similar to the case at bar in that the officer had tested the device twice during his shift. The officer testified, however, as here that he did not determine the correlation between the patrol speed of the police vehicle and the patrol speed displayed on the radar unit at the time of the infraction. Justice Griffin found that there was not full compliance with the testing and operational process and, therefore, there should have not been enforcement.

11 In reaching this conclusion, Justice Griffin relied on Justice Schnall's comments in *R. v. Niewiadomski*, [2004] O.J. No. 478 where she commented as follows at paragraph 29 of her judgment quote:

"It can be assumed that the absence of full compliance with the testing and operational proceed should make the reading suspect. There could be no reason for the device manufacture to set out specifications and directions if it mattered not whether they were complied with".

12 In the case of *R. v. Wilkins*, (2006) 42 M.V.R (5th) 316 Justice Klein of this Court held on appeal that because there was no compliance with the manufacturer's specifications and directions, a reasonable doubt should have been raised in the mind of the learned Justice of the Peace when determining whether the offence of speeding would have been established.

13 In *R. v. Martin* [2008] O.J. No. 1803 a decision of my brother Justice Wright from this jurisdiction, that Court held that the evidence of the officer should have raised a reasonable doubt in the mind of the trial Judge, that the device was accurate and reliable, where there was insufficient evidence that the officer received training in the use of the device and that he tested it before and after use.

14 In reaching this conclusion Justice Wright made the following comments at paragraph 23 of his Judgment,:

"Apart from stating that the device was set up correctly Officer Zarrello provided no specific evidence to support that statement. He could not recall the manufacturer's specification in the manual. He agreed that he did not use the

manufacturer's manual and only vaguely spoke of some elements of testing he preformed. In short, Officer Zarrello's evidence was more of his nature of his opinion, rather than any instructions that he followed from training or from a manual. It can be concluded that in the absence of full compliance with the testing and operation process of the laser device being complied with, the reading was obtained by Officer Zarrello of the speed of the Appellant's vehicle are highly suspect".

15 On appeal of this decision, Justice Blair of the Ontario Court of Appeal confirmed that the Crown's evidentiary burden in speeding cases is that of proof beyond a reasonable doubt.

16 Further, in the case of *R. v. Vancrey*, (2000) 147 C.C.C. (3d) 546 the Ontario Court of Appeal per Justice Feldman held that the Crown's onus is to establish that the laser device was operating properly on the day in question. The Court in that case held that the radar testing done 3 to 4 weeks before the date of the offence, together with the fact the unit was tested and found to be in good working order on the day of the offence, provided prima facie evidence of the reliability of the instrument on that date. Given the fact that no evidence to the contrary was adduced the Court then found that the conviction must stand. However, this case can be distinguished I find, from the case at bar where the Defendant did testify and indicated to the Court that although she was not aware of her exact speed, she knew that she was not speeding. This amounted to evidence on the essential issue of speed that was contrary to the evidence adduced by the Prosecution.

RESPONDENT'S POSITION

17 It is the Respondent's position that the manufacturer's directions regarding testing the accuracy of the device were complied with, and that the officer ensured that the device was in proper working order. The Respondent submits, however, that usage of the device is another matter and is not subject to the same requirements.

18 In short, the Respondent submits that the police are not legally required to follow all of these instructions.

19 The Respondent relies on the decision of *R. v. Volfson*, [2009] O.J. No. 1978 where Justice Klein of this Court dealt with the issue of how closely police should follow manufacturer's instructions. The Court in that case held that slavish adherence to the manufacturer's directions is not required and these directions must be examined in a purposeful and practical fashion. Justice Klein then went on to disagree with Justice Schnall's comments that there would be no reason for the manufacturer to set out directions if it mattered not that they were followed. I respectfully disagree with Justice Klein's decision in this matter. I agree that the direction must be read in a purposeful and practical fashion. However, I think if this is done the only logical result would be to conclude that the requirements must be complied with in order to establish the reliability and accuracy of a radar device reading beyond a reasonable doubt.

20 The Respondent submits that the police may omit certain requirements as set out by the manufacturer, when application of those requirements is redundant on a purposeful and practical approach. In this regard the Respondent relies on Constable Santos evidence at trial wherein he testified that the manufacturer's direction should be followed to ensure that the device is in proper working order, however, the police can set their own policies regarding the usage of the equipment.

21 I am in agreement with Justice Schall's comments and with the decisions rendered by Justice Wright and Justice Griffin in the case of Martin and Cormier respectively. The provision in the Manual I find must be complied with by an officer if there is to be enforcement. The officer cannot pick and choose which requirements he will adhere to and which requirements he will ignore. If this were so, there would be an uneven application of the law on this issue, subject to the individual discretion of an officer. There is a reason for the inclusion of all of these components in the manual. A conclusion as to the accuracy and reliability of the device is founded on compliance with these requirements. This is particularly essential in a case such as this where the entire prosecution is founded on the numerical reading obtained by the officer through the operation of the device. Compliance with the manufacturer's requirement for enforcement is an essential element because only with strict compliance to the manufacturer's mandatory specifications can the Court be assured of the reliability and the accuracy of reading obtained through operation of the device beyond a reasonable doubt.

22 In conclusion then, as confirmed by the Court of Appeal in the Martin case, the onus is on the Prosecution to establish this offence beyond a reasonable doubt. Keeping in mind this burden of proof, together with Constable Santos evidence of non-compliance with two of the required components of the User Manual, I have concluded that a reasonable doubt should have been raised in the mind of the Justice of the Peace as to the accuracy and reliability of the radar reading obtained by the officer and relied on by the Prosecution as the pivotal evidence against the Appellant.

23 Section 120(1)(a) of the Provincial Offences Act sets out the powers of this Court on appeal. That section clearly indicates that the Court may allow an appeal where it is of the opinion that the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence. I find here that the verdict reached by the learned Justice of the Peace was unreasonable and could not be supported by the evidence and, therefore, the conviction should be set aside. Further, in assessing the evidence on the record at trial in a manner most favourable to the Prosecution and at its highest, I find there exists no reasonable prospect of conviction on a retrial of this matter.

24 Accordingly, the conviction having been set aside I will find the Appellant not guilty and dismiss the charge against her. Thank You.

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