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IN THE PROVINCIAL COURT (CRIMINAL DIVISION)
JUDICIAL DISTRICT OF YORK REGION

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SHARON MEYER

(Appellant)

-and-

HER MAJESTY THE QUEEN

(Respondent)

BEFORE HIS HONOUR JUDGE H. E. ZIMMERMAN

P.O.A. Appeal

APPEARANCES: Crown Counsel: Mr. H. Dales
Defence Counsel: Mr. F. Streiman

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August 23rd, 1984

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S. Meyer
August 23, 1984

MR. DALES: DEaling with a Provincial Offences matter, if I could deal with the matter of Sharon Meyer. She appears on the list, 56.

5 COUNSEL: Good morning Your Honour, my name is Streiman, initial F. I appear on behalf of the appellant. The appellant is not here in person. I'll be speaking on his behalf and there's no other additional evidence that I'll be referring to aside from that which is contained in the transcript.

10 Your Honour there'll be a number of cases that I'll be referring to and I'm not certain whether my friend has those. They were provided to--I believe most of them were provided to the Crown and to the Court at the time of the HTA hearing, but in any event I have a set of those.

15 Yes, YOur Honour this is a simple matter of a speeding ticket, and quite frankly, the major thrust of the appeal is based on a technicality which, I would submit, is an important one, as this is a conviction which was registered largely on the basis of radar, the use of a radar device, and I'll be submitting that it's not particularly difficult for such a conviction to be obtained. A relatively minor amount
20 of evidence is necessary to be provided by the police officer, but that evidence was not provided by the officer in this particular matter.

25 Your Honour there are several ingredients which must be proved, namely date, place, etcetera, etcetera, and I would submit that all of those main factors indeed were shown. Nothing of any great importance was shown to dispute that. The only real issue is speed, how fast the individual was going. There is a factual matter that is contested. The officer indicated he is at one point and the two occupants of the car said that the officer no, was not there. Indeed, he was at a totally
30 different area. If Your Honour wishes me to cite the specific

place where that is indicated in the transcript---

THE COURT: No.

MR. STREIMAN: Suffice to say the officer said
5 he was at one point and the occupants of the motor vehicle say
he was at an entirely different point. The officer also felt
that certain things were provided to him by way of identification
immediately, and he said--the officer said 'no, no, no, we have
to go elsewhere, we have to call in at my home before I can
10 provide that.' I only point that out as to whether or not
the officer recalled totally exactly what happened at that
particular point in time.

We then turn to the area of speed. My argument
Your Honour deals with the admissibility of radar at that point
in time, and I'll take the point the radar is admissible, speed
as proven by radar is admissible, but before that evidence can
be admitted certain things must be indicated by the police
officer. Indeed, by the Crown Attorney. And the cases I've
provided Your Honour set out the six or seven points that the
officer briefly has to cover in his evidence, and that once that
evidence is in there's a prima facie case has been made as to
20 speed. Then of course it's up to the accused to indicate to the
contrary.

Now there is also some evidence by the driver,
saying, 'well, you know, I couldn't have been going that fast'
but there's nothing particularly important or impressive upon
which he relies upon. Just saying 'I was going around a corner
25 it was a two-seater sports car there was a dog in the car and I
couldn't have been going fast.' Says, 'if I did the dog would
have flown out of the car' or something to that effect. I leave
that to Your Honour as to whether on appeal that's sufficient
to overturn the reading on a radar device.

30 That's not what we're relying upon Your Honour.

We're relying upon the cases I've cited and what I would submit are required to be indicated before a radar device can be used. Your Honour, radar is something that is to a degree similar to a breathalyzer machine, if you like. It's a device used to obtain a technical reading. A breathalyzer machine, the reading from a breathalyzer machine once certain preconditions are proven, that reading is admissible, and the reason that that reading is admissible is because it's statutorily said to be admissible under the Criminal Code.

No such statutory basis exists for radar device, and as such the Crown has to prove that, well, radar can do certain things. And one of the important things that I submit the Crown has to prove, is that radar is a device which is capable of accurately assessing the rate of speed of a vehicle. That's one of the things I submit the Crown must prove that. And all the Crown has to do, and I submit that is clearly indicated in the cases I have provided to Your Honour, say through the radar technician 'I'm an experienced radar technician, I've used this device for however long and I took an approved course for it, and in my view it's a device which can accurately assess the rate of speed of a vehicle.' Doesn't have to be an expert, doesn't have to have a doctorate or any particular scientific degree, but he's got to at least put that bit of evidence before the Court before the Court can admit the evidence of a radar device.

I would submit that the Court cannot simply just take judicial notice of the fact that a radar device can do that.

Your Honour if I could briefly go through the cases that I've provided Your Honour.

THE COURT: Well just stop there for a moment. Supposing that a police officer does come in and testifies for the prosecution that he's been trained to use that machine and

it accurately reflects the speed of a motor vehicle as it crosses the full range of the radar. How is that going to--if I accept your argument at all, how is that going to prove the case for speeding? Because what he's doing is parroting, in the vernacular expression, things that he's been told are true, which I suppose you could call hearsay. So are you really suggesting that in order to prove that the radar accurately reflects the speed of a motor vehicle across the full range of the radar that in fact the Crown has to go further than that?

MR. STREIMAN: No, no I'm not, and I would submit that the cases as I've indicated do not say that. Do not say you have to bring an expert, but you've got to at least indicate that a person who is trained in using that device--he doesn't have to know how it works on the interior, but a person trained in the use of that device and by reason of his experience in using that device is of the belief that it accurately assesses the rate of speed of a vehicle. Otherwise Your Honour, if you don't have any information that radar can indeed accurately assess the rate of speed of a vehicle, you're going to have something--if I could make a ridiculous parody of it--you're going to have something like 'well, I held out my radar gun and it gave me a reading of 77 kilometres an hour'. Well how is that any more significant than say saying I held up a pinwheel and it turned 66 times when a person went by. I would submit that it's in essence no different.

Speeding has on occasion been proven by way of a speedometer, and no argument need be and no proving of the accuracy of the speedometer such as indeed were it a timepiece, because a speedometer is designed to be and the case law has held that because that's what a speedometer is for. Therefore you don't have to prove it's accurate or whatever, but radar is not--is a--I believe, and I'm not an expert, I believe it's just

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a scientific principle dealing with the amount of time it takes
for a wave to go from point A to point B and back. I don't know,
I'm not an expert and I don't think the Court can take judicial
notice of something as semi-complicated as that.

5 In other words Your Honour I'm saying that fine,
if the police want to prove speeding in that fashion, fine. But
I would submit that the cases hold that they've got to at least
put some evidence in that that's what a radar can be used for.
10 And if you're going to use the radar device there are just a
few points, six or seven points, that have to be covered, and
generally are covered, but were not covered in this particular
matter.

THE COURT: Well, how does the case of Werenka
support your proposition? Because it says in the headnote--and
I've not gone further into it, but it would indicate:

15 "Here the conviction had to be upheld because:
(1) the constable was a qualified operator for
the device; (2) the radar machine was tested
and accurately measured the speed of the appellant's
vehicle; (3) the uncontradicted evidence of the
20 officer was prima facie evidence of the speed
given by the officer notwithstanding that he did
not have a detailed knowledge of the working of
the radar set."

MR. STREIMAN: Yes, yes, yes Your Honour. If
Your Honour understands about that part three about not having
25 a detailed knowledge of the workings of the radar, that is what
I should say is something along the lines of what I said before:
he doesn't have to be a scientific expert and explain exactly
the scientific principle upon which it operates, but, I refer to
--if I could refer specifically where that was in the case, it's
at the bottom of page 281,

"The constable gave evidence that the radar set was working and that in accordance with the training that he had taken, the radar was capable of accurately measuring speed."

5 and it follows on over to the top of page 282, and then the Court talks about various things that must be indicated, and the Court talks about them in the middle of page 282, and says

"I am satisfied that he had sufficient knowledge of the operation of the radar set to give evidence with respect to the speed.."

10 that they did not have to--and I jump back, he's

"not familiar with the operating principles of radar.."

15 so I'm not asking--an unmanageable burden be placed upon the Crown Attorney to have to be asked to bring a radar expert each and every time they wanted to use radar, I'm not saying that at all, but as specifically pointed out in this case of Werenka, and as the Court in that particular case points out, and it follows on, referring to the case of the Queen and O'Reilly, which is also amongst the cases I've provided Your Honour, and if I could turn to (a)--(a) and (b):

20 "The instrument must be operated by someone trained in its operation. He need not have knowledge of electronics or mechanism of the device but must be thoroughly familiar with its use."

25 Fine.

"(b) The operator must give evidence that at the time in question he conducted an approved test of the instrument, and.."

I submit

..and that tests satisfied him that the

instrument was operating properly and was capable of accurately registering speeds."

(reporter requests citation)

5 MR. STREIMAN: This is the case of the Queen and Werenka Your Honour, reported 11 Motor Vehicle Reports, Alberta Court of Queen's Bench. This is a recent decision Your Honour. This is 1981. Not something that happened years ago. And Your Honour it's not a Provincial Court matter and I don't mean to say that it's binding upon this Court being from
10 a different jurisdiction, but it's from the Queen's Bench.

Your Honour I'd like to turn to the next case, of the Queen and O'Reilly. That again is something along the same lines, and again the Court refers in this particular decision, referred to yet another decision, and I assume approving it, at the bottom of page 281, paragraph (b):

15 "the operator must give evidence that at the time in question he conducted an approved test of the instrument..."

and that to the best of my recollection, nowhere in the evidence at all at trial was there any evidence at all the tests that
20 were used on the radar machine were approved for that machine. And I believe another page, eight, question two, line two, the Crown Attorney at that particular time admitted that indeed, no evidence was ever given that the tests that were used were approved for that machine. That's another point that I would be relying upon in this particular matter.

25 THE COURT: Except in the record. Except in the record where in a reply to a question put by the prosecutor the police officer said tests showed that the set was working accurately.

MR. STREIMAN: Yeah.

30 THE COURT: In those circumstances, surely it can

be reasonably inferred that he made tests of the radar device which indicated it was working correctly. In other words, he doesn't have to say, in my view necessarily, as long as he puts an answer such as that on the record, he doesn't have to say that the tests he took were for a specific type of machine, approved for a specific type of machine. 'I was using a specific type of machine and the tests indicated that the machine was working accurately.'

MR. STREIMAN: With the greatest respect Your Honour, I would disagree. He may say that, 'I used a--I tested the machine and in my view it was working accurately', but I would submit and it's indicated in the cases I'm talking about, referring again to the bottom of page 231,

"..must give evidence that at the time in question he conducted an approved test of the instrument.."

I'm looking at the bottom of page 231 of O'Reilly. And, it's conjunctive.

"..and that the tests satisfied him that the instrument was operating properly and was capable of accurately registering speeds."

There's not hours and hours of testimony. 'I used a radar device, I've been trained to use that radar device, I tested it before and after using it with a test that was approved for that machine, and in my view and my experience the radar device is one which can accurately assess the rate of speed of a vehicle. I pointed it at this vehicle and I got a reading of X.' That is, to a large degree, all that has to be said and we're talking about thirty or forty seconds of evidence Your Honour, and I would submit that there are specific technical requirements that have to be met. It's a technical device. To a degree similar with the breathalyzer machine, and certain things have

5 to be indicated. Just because the officer says 'well, like, I thought it was working accurately. I tested it and thought it was working accurately.' Does that necessarily mean he was using the right test? Perhaps he was using the wrong test. One doesn't know, and all the officer had to say was he was using the test approved for that particular device, and I submit that's hardly an unbearable burden for the officer to state that.

10 Your Honour, again another decision from another jurisdiction saying exactly the same thing, I would submit is the Wolfe case, British Columbia County Court, and that case refers to the Waschuk case, and I'm looking at page 146, bottom of the page:

15 "...and in that decision it was held that it was not appropriate for a Judge or in this case a justice of the peace to take judicial notice as to the operation of a radar gun or radar equipment."

Continues on:

20 "It was held that while it was not necessary for a radar operator to give scientific explanation as to the machine's operation however, the operator should be able to give some evidence as to whether the machine is in good working order, and..."

may I stress Your Honour,

25 "...and, capable of recording the speed of the vehicle that was being tested."

and as a result of that and this also Your Honour is not a decision from forty years ago. It's a decision of 1979.

THE COURT: Okay Mr. Dale, you got any comments?

30 MR. DALE: Well first of all, I'd like to thank my friend for giving me what feels like about half a pound of

cases, and I appreciate him giving them to me, and of course he must have realized I wasn't about to start reading them, you know, ten minutes when he come in, it's just submissions, so I'm afraid I haven't had the opportunity to read what he just gave to me. If I can make these brief observations from having perused the transcript, the officer indicates that he's got seven years of experience as an operator on this piece of equipment; he's qualified; he indicates that he tested the equipment before and tested the equipment after; and that it was in proper working condition. Now I didn't read the transcript at great length, but he gives this evidence. I assume, and please correct me if I am wrong, I assume that there has been no cross-examination on that point. I would therefore assume that therefore his evidence, being unchallenged in fact is sufficient to meet a prima facie case that in fact the tests were appropriate before and after the radar unit was used.

As Your Honour has indicated, the man indicates that he has used the piece of equipment for seven years; that he tested it before and after and it was operating appropriately. Now I would suggest that there in fact is a prima facie case. That one therefore looks at the defence to see whether, in fact there is any evidence to contradict the findings of the officer or the evidence of the officer. I would suggest that there isn't, or there certainly isn't any evidence that's worthy of credibility, if that can be inferred by the decision of the justice of the peace, and that the test of whether the dog slips going around the corner on a slippery bench seat perhaps may not be an accurate test for the speed of a car, and that is the defence, that is, that's the theory of the defence. So that there is, I would suggest number one, a prima facie case; and number two, no evidence to contradict the evidence of the officer.

Without having read the case law that my friend

has just supplied, I can't put it into context with the case law, but trying to apply common sense, which may or may not be appropriate---

5 MR. STREIMAN: I just briefly want to indicate Your Honour that if my friend wishes an opportunity to read I have no objection to the matter being held down.

MR. DALES: Counsel was here from--what time? Ten o'clock this morning?

10 MR. STREIMAN: No, I'm afraid I arrived at 11:30. I was told these cases were provided the Crown at the trial.

15 MR. DALES: Yes, I noticed that they were provided to the Crown at the trial at the same time, if I can read the transcript, they were given to the Crown - here I am and here's my argument. It doesn't leave very much time, and if the courtesy of cases are to be provided to the prosecutor then if the courtesy is a true courtesy they should be provided in sufficient time for the prosecutor to read them, and that means getting here a half an hour ahead, or a day ahead or a week ahead. Then the courtesy is a true courtesy.

20 THE COURT: Anything further?

25 MR. STREIMAN: Well, I don't know your Honour if my friend is asking this matter be held down so that he can have an opportunity to fully review the cases I have no objection to that whatsoever. Your Honour, if Your Honour recalls I was here approximately a month ago, or three weeks ago on this very same matter; waited the entire day and attempted to provide the Crown at that time with some cases. No Crown was willing to talk to me about the particular matter at that time. Your Honour I advised also at that time I had another trial and would not be able to appear until approximately 11:30. I don't mean to take my friend by any means by surprise or a disadvantage. If he wishes this matter be held down till this afternoon I have no

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objection.

THE COURT: I don't think it's necessary. I did peruse the transcript.

5 MR. STREIMAN: Your Honour, a couple of other points, if I could be permitted to review the remainder of the cases, but they all end basically with a case from Ontario, the Ontario Court of Appeal decision in Grainger. One of the things I would take issue to what my friend has just indicated, that the officer said he'd been using that device for seven years. 10 The officer never said that. The Justice of the Peace said the officer said that. The officer said "I've been using radar for seven years." He never said 'I've been using that device for seven years.'

15 Your Honour if I could be permitted to continue, again the case of the Queen and Waschuk, the very same thing as to whether or not the Court can take judicial notice that radar can accurately assess the speed of a vehicle, and that Court upholds, the Saskatchewan Queen's Bench, 1970, holds it cannot in that particular matter.

20 The Queen and Eagles Your Honour I provide, because that refers to what type of things the Court can take judicial notice of. The Court in that situation were not even permitted to take notice, judicial notice at least, shall I say, of where a particular point was within the city limits. Or was it without the city limits--because it forms rather, shall I say, 25 part of the prima facie aspect of the case.

Your Honour lastly, the case of the Queen and Grainger decision of the Ontario Court of Appeal which I referred to, and a number of the other decisions I've already indicated to Your Honour, and I'm looking at page 312---and the latter paragraph:

"It is possible for any machine to get out of

order. On the day in question, however, the officer calibrated this machine by the use of a tuning fork and he testified that by the use of that device he ascertained that the machine was in good working order. Although he did not give a scientific explanation of the operation, he stated that when the vibrations...(etcetera)of a tuning fork....in light of his experience the machine was in good working order and capable of recording the speed of a motor vehicle."

There's another case Your Honour I provide you, the Queen and LeHayne (phonetic) Alberta Court of Queen's Bench, holding exactly the same thing.

Your Honour it's not as if the point that I am making is a tricky little device in that it's never been judicially determined. In the past it's been determined a number of times. A number of times. Your Honour I've provided you also with a short synopsis from Canadian Criminal Evidence, a recent edition, 1984, Mr. McWilliams, and I adopt his comments regarding proof of speed, and he talks about radar equipment at page 630, exactly the same thing that I'm referring to here, talking about the Queen and Grainger and the Queen and Waschuk. So if I may say, even an author as learned as him is of the opinion that's what the law is.

There's zero evidence about that in the transcript. Also, in a number of cases, one of the things that are talked about, the radar device has to be tested that day before and after so the officer has some indication that it's working actually at that time. The officer indicated "I tested it before and after". If one wishes to draw a fine point on that, there's no indication that it was the same day. "Before" I gave the radar test could be any time, "after" could be any time, especially

used were the specific tests designed to prove or to show that a specific machine was working properly. Or, in other words, that he must identify in his evidence what is the name and the make of the machine and that the tests on the instructions that come with the machine were performed and he found that the machine was working properly. I don't think that's necessary. In any event he took the tests and he said that the tests showed that the radar set was working accurately. Whatever set it may have been.

But I do agree with the proposition that he's got to go further, and this is where the transcript indicates that there is no evidence, does not say anywhere in the evidence, ~~either~~ by way of direct testimony when asked to say what he had done, what his results were when he pointed the machine at the appellant's car, or even in examination in chief when the questions were put to him, he did not at any time say that having tested the machine and found it to be working accurately, he did not at any time say 'and that it was capable of measuring the speed of a vehicle across the full range of the set.'

In other words, he did not in effect qualify the machine in that sense, and I think that that is essential to-- for the Crown to show. It's a simple matter. It's a technical defence. I'm going to allow the appeal and quash the conviction, because it isn't there.

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Certified to be a true and accurate transcript of the evidence taken herein to the best of my skill and ability.

Diana L. Wilton, Court Reporter.