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PROVINCIAL OFFENCES COURT

HER MAJESTY THE QUEEN

against

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FERNANDO MILELLI

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BEFORE HIS HONOUR JUDGE R.T. WESELOH
on DECEMBER 28, 1988, at BRAMPTON, Ontario

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A P P E A L P R O C E E D I N G S

P.O.A. PART ONE

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APPEARANCES:

D. Quick, Esq.

Counsel for the Crown

G. Parker, Esq.

Agent for the Defendant

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DECEMBER 28, 1988:

MR. QUICK: I wonder if we might also deal with a Mr. Fernando Milelli at this time. Fernando Milelli.

MR. PARKER: Yes, appearing again, Your Honour, for Mr. Milelli, the appellant.

THE COURT: Just a moment, please, while I get the background.

MR. PARKER: Yes.

THE COURT: Yes.

MR. PARKER: I guess, Your Honour, to begin, in his evidence in-chief, the officer stated that he tested his radar, according to manufacturer's specifications. I am just trying to find that actual location.

On page four, Your Worship, on line 19:

"The machine was tested by me at the start of my shift, the completion tour of my duties and periodically through the shift, according to manufacturer's specifications. It was found to be reading accurately and correctly."

Turn to page six, line 11; cross-examination by myself. I asked:

"Yes, officer, are you a qualified radar technician?

The answer was: I'm an operator, not a technician. I can't repair the machine."

That was established.

On page seven, line 18, question by me:

"Did you ever work out the range of
your beam that day?

Answer: I am sorry?"

Line 20.

"Question: Did you work out
mathematically the range of your beam
that day?

Answer was: No."

Turn to page nine, line 29. I introduced a
manual. It was not as an exhibit but to
refresh the officer's memory and I asked him
if he had seen it before. Continuing on
page ten, the top of the page. He answered,
"Yes, I have." and I asked him to read all
the instructions that were written in the
manual.

Do you wish me to read over what was stated?

THE COURT: If you wish.

MR. PARKER: I asked him to read it and the
officer continues.

"It says Appendix C, Muni-Quip MDR 1,
Track Radar Operating Instructions."
And that was the type of radar that the
officer was using that day.

"Number one, system setup. A) Connect
antenna and power cable to read out
console.

B) Mount read out console on
dashboard.

C) Place switches in stationary and on

standby.

D) Turn power switch on and observe that both readouts show 3/8th for about one second and then display the number selected on the thumb wheel dial. Number two. Perform check, performance check.

A) Set thumb wheel to 000 and then switch to operate.

B) Turn audio to one half and range control fully up and listen to the audio sound. With the cruiser off and the antenna aimed to the sky, only a hiss should be audible.

C) Turn the cruiser engine off. Only a slight noise from the cruiser's ignition system should be audible.

D) Aim the antenna towards the dashboard and locate possible sources of interference.

E) Mount the antenna in a location free from interference and where good ground reflections made be obtained for the self speed process. Aim the antenna down the road and listen for the doppler sound (clean whistle) and moving targets."

I asked a question:

"To carry on further through this manual which reads 'Muni-Quip MDR 1 Track Radar Operating Instructions' and read paragraph two, 'Beam Length and

Range', perhaps you could read the paragraph?"

The officer continues:

"Page six, section two, "Beam Length and Range" which is underlined. Length of the radar beam is infinite unless stopped by an opaque surface larger than the beam. This factor is not controlled by the operator. The range of the radar beam is definite and can be controlled by the operator. The size of the vehicle determines how far away on the antenna that it can be detected.

The range that is determined by the operator should be sufficient to detect and identify the violator and start apprehension proceeding."

The following is highlighted:

"It is important to know how far the beam range extends for proper traffic surveillance. To determine the beam range, test of single vehicle at a steady speed by timing it from the instant you obtain speed reading and knowing how many seconds it takes to pass your position. Also note some landmark at the point where the vehicle first gave you a reading. Range is determined by the formula: indicated speed in kilometers times the time in seconds divided by 3.6 metres."

I continued the questioning:

"Thank you, officer. So it is important to know how far the beam range extends, is that right?

Answer: That's correct.

You did not perform those tests and you did not work out the range of your beam, in fact?

No. My...of that is to give you sufficient time to apprehend the vehicle."

It continues on line 24:

"My interpretation which I use.", the officer says.

My answer: "But that is not according to the manufacturer's instructions, is it? If you read that it says 'apprehension procedures', sir.

I (sic) answered, "That's right."

It continues:

"If it's too close, I won't apprehend the vehicle. My prime concern is myself and the motorist and other vehic...and other traffic. If it's too close, I just simply won't do it."

But I continue, the bottom of the page:

"Okay, the manufacturer's instructions say it is important to know how far the beam range extends, does it not?

Answer: Sure, that's correct."

I continue my questioning:

"All right. Now, you also read page one, 'Performance Check' about aiming the antenna at the sky and around the inside of your cruiser. Did you do that?

Answer: That's the way it's setup in the cruiser all the time.

Did you perform those tests when you got into the car?

He states: When the vehicle (sic) was turned on and I do hear it clearly whistle and show 888 when the unit is turned on, when I switch the thumb wheels, I hear the same clear whistle. Specifically those tests...."

I interrupt and he continues: "But those tests are not necessarily performed every day. It's the accuracy of the tests I'm concerned with."

And I had misheard what he had said. I thought he had said it wasn't necessary to perform those tests. I misheard that.

On page 13, line four, the constable continues:

"My interpretation.... You may have misunderstood me, but my interpretation of that formula would give me an idea of what the range is, okay? Now, my personal feeling is, if the vehicle's in range, I have a good visual contact of it."

So clearly, he did not perform the range

equation.

On line 26 or 27:

"Question: So when you get into the car you don't bother taking down the antenna as it states in the manufacturer's instructions to move around the car or aim it up to the sky or turn the range control to hear the sound?

His answer: Not every day, sir."

Then on page 17, Your Honour, on line 26, I made a motion of non-suit. Would you like me to review that, as well?

THE COURT: Very well. What page?

MR. PARKER: Page 17, line 26.

"Yes, Your Worship, I'll reserve my right to call defence. I would like, at this time, at this point, to make a motion of non-suit.

You have heard from the officer himself that he has not performed all the tests because he did not feel they were necessary.

The officer has admitted that he is not a technician but he is an operator. The officer is not a technician, Your Worship, and he is not qualified to decide if only some of the tests should be performed. He has to abide by all the instructions written by the manufacturer.

5 He has admitted that he has not done
so, because he doesn't feel he needs
to. He gets into the car, everything
is already setup to go from him. The
instructions specifically say the
antenna should be moved around the
vehicle very time, and it was not done
so.

10 Simply based on that, Your Worship, the
fact that the officer has, and there
has been admitted, he did not adhere to
the manufacturer's instructions, I
would respectfully submit that the
15 radar cannot be qualified."

And the Provincial Prosecutor, Mr. Nevins,
had no submissions on that.

20 With that concept in mind, Your Honour, I
would ask you to find that the officer says
he has conducted the tests according to the
manufacturer's specifications and it was
brought out in cross-examination that he has
not done so. And in a couple of points he
has not adhered to the manufacturer's
25 specifications.

Again, with the radar not being recognized
in law that by not abiding with the
manufacturer's specifications, then the
radar simply cannot be qualified.

30 Now, His Learned Justice states that.... I
will continue on page 18, line 21:

"No matter what the book says, one must

5 always accede to the fact that when a
person is in a particular profession,
one through vast years of experience
learns many things, you do not always
agree with the book."

10 To make reference to the same as a
breathalyzer technician not doing his tests,
the breathalyzer is recognized in law and
still, the operator must abide with every
single test that was written by the
manufacturer. If he does not do so, the
breathalyzer evidence could not be admitted.

15 The same, I would respectfully submit, Your
Honour, would apply to a radar unit.

20 The officer may have many years of
experience and may not always do things by
the book, but the officer, with great
respect, Your Honour, is not the
manufacturer. He simply has to abide with
what the manufacturer has told him how to
operate the machine.

25 He may have been doing it this way for many
years, but who is to say he is doing it
right?

With that in mind, Your Honour, I would ask
you to grant the appeal.

30 THE COURT: Thank you. I am going to take
the morning recess, actually, at this time.
We will resume in about 15 minutes.

C O U R T R E C E S S E S

UPON RESUMING:

5 MR. QUICK: Your Honour, with respect to Mr. Milelli, the first comment that I would wish to make is that this appears to be a situation where the quantum of speed is the only real matter in issue because the accused, himself, at page 19 of the transcript does indicate, and this is reading at line 21:

"Is this car equipped with a cruiser control device?

Answer: Yes.

15 Question: Did you have it activated on this day?

Answer: Yes.

Question: Which speed did you have it activated to?"

20 THE COURT: Just a minute, please. What page are you....

MR. QUICK: I am sorry. Page 19, line 21

THE COURT: I was looking at page 21.

MR. QUICK: I beg your pardon.

25 THE COURT: Page 19, line 20. Yes.

MR. QUICK: Reading the question:

"Is this car equipped with a cruiser control device?

Answer: Yes.

30 Question: Did you have it activated on this day?

Answer: Yes.

Question: Which speed did you have it activated to?

Answer: Between 85 and 87 kilometers an hour.

Question: And what is the speed limit on that road?

Answer: It's an 80."

And even though this is an absolute liability offence, I respectfully submit the Ontario Court Appeal decision in HICKEY, the questioner goes further:

"Question: Are you aware of police presence on that road?

Answer: All the time; almost every night.

Question: Do you travel it frequently?

Answer: Every day."

So he would be aware of that, as well. He would be aware of the 80 limit and he admits speeding.

So any further question, I respectfully submit, simply goes to the quantum.

I would respectfully submit, Your Honour, that the manual was not tendered as evidence. It was simply tendered to cross examine the officer and although certain questions asked of him seemed to indicate that he did not do absolutely everything specified in the manual, that he was satisfied that he did have a radar device that was tested and it was readi

5 accurately and correctly. He was a
qualified radar operator and all that
evidence was tendered at page four.

10 And I would respectfully submit that that is
all the case law does require. That there
is no expert called with respect to the
manual; that all those things must be done
to have a radar device that is operating
correctly. And that in the absence of that
expert being called, that, in fact, the
operator was satisfied that it was working
correctly and that his evidence should be
relied upon.

15 Those are my respectful submissions.

RULING

WESELOH, P.C.J. (Orally):

20 This is an application for appeal. The
transcript indicates clearly that the
officer took shortcuts in the setup of the
radar unit. The manual was not followed,
particularly in determining the fundamental
procedure of setting up radar. The
25 procedure was not followed. The range of
the beam was not determined.

30 With greatest respect to the learned Justice
at trial the reasoning that vast years of
experience allowed Constable Angi to be
satisfied on his own that the machine was
working properly does not carry the day in
this case. Constable Angi has to follow

procedures and not introduce his own;
particularly when he follows shortcuts.

The only evidence of speed that the Court
consequently has is the accused's own and
the consequence is that the appeal is
allowed in part. The finding is reduced to
one of speeding 85 kilometers per hour in an
80 zone.

THE COURT: What fine is appropriate for
five kilometers over the limit?

MR. PARKER: I believe it is in the range of
eight to ten dollars, Your Honour. Fifteen
over is \$18.75.

MR. QUICK: May I just have your indulgence,
Your Honour, because I do not have a....

THE COURT: There is a per kilometre tariff
set out in the schedule, I believe.

MR. PARKER: That is correct

MR. QUICK: Your Honour, if you will bear
with me. Thank you for the assistance of
counsel. It is in the regulations, Your
Honour, and it is section 109(13) where it
is 20 kilometers per hour, it is a fine of
\$1.25 for each kilometre, which would be
\$6.25, I believe, Your Honour.

THE COURT: The fine imposed is \$6.25. What
time is required to pay?

MR. PARKER: Perhaps 15 days?

THE COURT: Fifteen days to pay.

MR. QUICK: Your Honour, may I please have your indulgence briefly. I apologise, but I just want to double check on the subsection. Thank you.

MR. PARKER: And one more thing, Your Honour; was there an order made regarding the penalty already paid?

THE COURT: Actually, if there is money on deposit and I expect there has been, you paid in---

MR. PARKER: That is correct

THE COURT: ---to have that appeal heard. Very well, the balance will be remitted to the applicant.

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

THIS IS TO CERTIFY that the foregoing is a true and accurate transcription from the record made by sound recording apparatus, to the best of my skill and ability.

Sandra Wells
Official Court Reporter