

IN PROVINCIAL OFFENCES COURT'

HER MAJESTY THE QUEEN

against

MOHAMMED MUSLEH

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

BEFORE JUDGE WHITE, on Friday, January 12, 1990,
Court Room No. 140, Old City Hall, Toronto,
Ontario.

OFFENCE: Speeding

APPEARANCES:

Ms. K. Walker

Prosecutor for the Crown

Ms. D. Dugan

Agent for Musleh

5 MS. DUGAN: I am appearing as agent for that matter, as well, Mohammed Musleh; D-U-G-A-N.

THE COURT: Where is the error in law?

10 MS. DUGAN: Yes, Your Honour, the error that I'm respectfully submitting is the same argument that was put before the presiding trial court justice on Page 11 and 12 of the transcript. It is a simple speeding charge. The officer gave his evidence using his notes to refresh his memory. Certainly there is no problem with that; the notes were qualified by the Crown prosecutor. It would be my submission that the officer then gave his evidence with respect to different elements of the Crown's case which were required to be proven pursuant to case law; things like the speed limit, the fact that radar is a speed measuring device and the tests, etcetera, that he performed. Again, no problem with the evidence up until this point. On cross-examination, the officer indicated that his only independent recollection of this incident was with respect to the gentleman and the vehicle and it was a very vague recollection at that, and that was his only recollection and it would be my submission that he then must use his notes to refresh his memory with respect to the rest of the evidence, then he is only permitted to give evidence that is contained in his notebook. Now, he indicated further on in cross-examination ---

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THE COURT: I don't have any problem with that. I will hear from the Crown. It sounds like it's fairly serious to me;
MS. WALKER: I have no comments, Your Honour.
THE COURT: I think there should have been a reasonable doubt in this case and the conviction and sentence are set aside and enter an acquittal to the accused.

I hereby certify the foregoing to be a true and accurate transcript of my recordings, to the best of my skill and ability.

Warren T. Reinhardt, Court Reporter.

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IN THE PROVINCIAL OFFENCES COURT

HER MAJESTY THE QUEEN

against

MOHAMMED MUSLEH

* * *

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

BEFORE HIS WORSHIP JUSTICE OF THE
PEACE V. BROWN on February 6, 1989
at Toronto, Ontario

OFFENCE: Speeding HTA S. 109

* * *

APPEARANCES:

MS. Z. TROFIMENKO

Provincial prosecutor

MS. D. DUGAN

Agent for the defendant

7:00 p.m.
Room 135

HER MAJESTY THE QUEEN
against
MOHAMMED MUSLEH

* * *

INDEX OF WITNESSES:

KIS, P.C. ANDREW #4799

Examination-in-chief
Cross-examination

Page 3
Page 6

Toronto, Ontario
Room 135
Old City Hall
7:00 p.m.
February 6, 1989

- 3 -

MS. TROFIMENKO: Your Worship, the next matter I would call is number 23 on Your Worship's docket, Mohammed Musleh. The Crown is ready to proceed.

MS. DUGAN: Good evening, Your Worship. My name is Dugan, initial D, appearing as agent for Mr. Musleh.

I don't believe he will be here today. I'm acting as agent on his behalf and I'm ready to proceed.

THE COURT: Very well.

CLERK: Mohammed Musleh is charged on the 7th day of May, 1988, at 7:33 a.m. did commit the offence of speeding 91 kilometers per hour in a 60 kilometer per hour zone - that's going eastbound on Lakeshore Boulevard West, in the Municipality of Toronto.

How do you plead on his behalf, guilty or not guilty?

MS. DUGAN: Not guilty, Your Worship.

MS. TROFIMENKO: The Crown calls Officer 4799.

CLERK: State your name, please, officer.

P.C. ANDREW KIS #4799 SWORN

EXAMINATION-IN-CHIEF BY MS. TROFIMENKO

Q. Officer, you are a member of the Metropolitan Toronto Police Force?

A. That's correct, I am.

Q. And you were acting in that capacity on the 7th of May of last year?

A. I was.

Q. You had occasion to investigate the matter before the court this evening?

- 4 -

Kis, in-ch

A. Yes, I did.

Q. You took notes of your investigations at that time?

A. Yes, I did.

Q. Have you made any additions, changes or deletions to your notes since that time?

A. No, I have not.

Q. Would you be using those notes here in court this evening?

A. Yes, I would like to refresh my memory.

MS. TROFIMENKO: Asking the court's permission, Your Worship.

THE COURT: Very well, officer, you may use your notes.

THE WITNESS: Thank you, Your Worship.

Your Worship, on Saturday, the 7th of May, 1988, I was on duty, in uniform, operating an unmarked radar car. I was working the dayshift.

Slightly after the start of shift I was located on the south side of Lakeshore Boulevard West at Ontario Drive, which would be the entrance to Ontario Place, the Exhibition grounds. I was there for the purpose of enforcing the posted speed limit on Lakeshore Boulevard West, which at this location is a posted 60 kilometer per hour zone. Signs are properly erected indicating that.

I was on the south side facing westbound, monitoring eastbound traffic as it flowed towards me. This location, Your Worship, is a straight and level configuration, six lanes wide - three eastbound lanes and three westbound lanes and approximately 7:33 a.m. - I'm sorry, I was there operating a stationary radar speed-measuring device which is capable of accurately measuring the speed of moving vehicles.

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At approximately 7:33 a.m. I observed two vehicles travelling towards me. The lead of these two vehicles was in the passing lane, and appeared to be exceeding the speed limit.

I activated the radar unit and obtained a reading of 91, indicating 91 kilometers per hour.

As this vehicle passed me I followed after it and stopped it a short distance from my location. There was two occupants in the vehicle I spoke to, he was the driver. He identified himself to me with a valid Ontario driver's licence as Mohammed Musleh, address of 3381 Hargrove Road in Mississauga.

For the record, his driver's licence number was M-Mother 9447 56004 70614.

After advising the offence he had committed, I issued an offence notice for the offence of speeding 91 kilometers per hour in a 60 kilometer per hour zone. I issued an offence notice for that offence.

When offered the opportunity to sign the certificate of offence, he did so in my presence.

I am a qualified radar operator, Your Worship. I tested the radar unit before and after usage that day at that location, myself. It was found to be in proper working order according to manufacturer's specifications.

And the weather on this day was sunny and mild, and the driver did request to see the reading on the radar unit, and he did.

Q. When you - did you - sorry. When you tested the radar unit did you also find it to be working accurately?

A. Yes, it was.

Q. And what types of tests did you do?

A. Using internal and external methods, making sure that the internal components were working properly and

- 6 -

Kis, in-ch

the actual readout, LED readout was working properly.

Q. And you indicated that you had seen two vehicles approaching you head westbound, and one was the lead vehicle in the passing lane, but I believe you said there were three lanes westbound at...

A. There are three lanes. These vehicles were travelling towards me eastbound.

Q. I'm sorry.

A. They were coming from the west. The lead of the two vehicles - I don't recall which other lane the other vehicle was, but the vehicle that I observed in the passing lane, the vehicle I obtained a reading on, was passing me. It was in front of this vehicle and moving away from it, quite heavily, because it was travelling at quite a greater speed than the other vehicle.

Q. And when you say the passing lane, would that be the lane closest to the center line?

A. That's correct.

Q. Okay. And all this took place in what municipality?

A. Municipality of Toronto.

MS. TROFIMENKO: I don't have any further questions of the officer, Your Worship.

THE COURT: Miss Dugan, questions?

CROSS-EXAMINATION BY MS. DUGAN

Q. Officer, do you have any independent recollection of this incident?

A. Yes, I do.

Q. And with respect to what elements of the case?

A. As to the vehicle that was being operated and the gentleman I spoke to - just very vaguely I recall the

incident because I don't get that many people travelling in excess of 30 kilometers per hour on the Lakeshore Boulevard. This one stands out in my mind a little.

5 Q. With respect to the evidence that you gave about the tests that you performed, do you have that written in your notebook?

A. No, I do not.

10 Q. And can you tell the court when you performed those tests that day?

A. As I arrive on scene I turn the radar unit on, and then I perform the tests.

Q. Okay. What time would that have been?

A. The first ticket I issued was at 7:25 a.m. - possibly 7:20 a.m.

15 Q. Possibly? You're not sure of the time that you might have performed the test?

A. It would have been within five minutes of the first ticket - within five or ten minutes of the first ticket. It would be just before, as I set up radar there.

20 And the last time I would test it would be after the last ticket, and I don't sit there longer than an hour, and I don't have any notation here because my notebook, ends at 7:45 a.m., as to how many other tickets I wrote. But the next time I would test the unit would be after the last - after I had left the scene.

25 Q. So you have no notation in your notebook of when you tested it when you left the scene?

A. No, I do not.

Q. Was there anyone in the police vehicle with you?

A. No, there was not.

30 Q. You said it was a posted 60 kilometer per

hour zone and the signs were properly erected. What steps did you take to determine that?

5 A. As I drive to the scene I make note of the signs. If they're not there, it's obvious to me.

Q. Did you make a notation of that in your notebook?

A. No, I did not.

10 Q. When you first observed the two vehicles approaching you, how far away from your vehicle would they have been.

15 A. As they come around the corner coming from the far west end of the Exhibition Grounds, about - I'd say almost three-quarters of a kilometer, possibly half a kilometer, and as they approach me I make a good visual estimate of their speed at approximately - oh, I don't know, 250 meters.

16 Q. And when you registered the reading on your radar what would the distance be from your vehicle?

17 A. I don't recall. It's usually about 100, 125 -
20 125 meters or so. Each case is different, but that's about the average. I don't have any direct recollection of where this vehicle was. Traffic was very light that morning, being a Saturday morning, and there were only the two vehicles on the roadway.

25 Q. From the time you first observed that vehicle until the time that you took a reading on your radar, around how many seconds would have passed?

A. I'm sorry?

Q. How many seconds would have passed from the time you first observed these vehicles to the time you took the reading?

30 A. When I first observed to when I first saw it I first activated the radar and got the reading?

Q. Yes.

A. Oh, I don't know. Four seconds.

Q. So your observations of that vehicle, you said it appeared to be in front and moving away, that would have been a four second observation?

A. Approximately.

Q. Approximately.

You said that this was a stationary speed measuring device that you were using. Do you have that written in your notebook?

A. No, I do not. It is evident, though, that I had marked in my notes here that I was using unmarked radar 12. It is only equipped with a stationary radar unit - not the handheld model. It's an on-dash, mounted model.

Q. When you first observed these two vehicles what would the distance be between those two vehicles?

A. I don't recall.

Q. And you can't say what lane the other vehicle was travelling in?

A. That's correct.

MS. DUGAN: Thank you. I have no further questions.

THE COURT: Thank you, officer.

---the witness retired

MS. TROFIMENKO: Thank you, Your Worship. That would be the case for the Crown.

MS. DUGAN: I'm not electing to call a defence, Your Worship.

THE COURT: Any witnesses you'd like to call, Miss Dugan?

MS. DUGAN: No, I'm not electing to call any witnesses, thank you.

THE COURT: Any final submissions to make to the court?

MS. TROFIMENKO: Your Worship, the evidence is before the court, of the police officer, that on that - on Saturday, the 7th of May, 1988 he was on the south side of Lakeshore Boulevard at Ontario Street, facing westbound in order to monitor traffic eastbound on the Lakeshore Boulevard, which is a clearly-posted 60 kilometer per hour zone at that location.

His radar set had been tested before set up, approximately ten to 15 minutes prior to him taking a reading of the defendant's vehicle. It had been found to be working properly and accurately.

He observed the defendant's vehicle and another vehicle as they approached his location, from approximately three-quarters to half a kilometer away from his location. They approached his location, he notices the defendant's vehicle, which was in the passing lane, was pulling away from the other vehicle and had passed the other vehicle, and at that time he also made a visual estimate of the defendant's vehicle speed at approximately 250 meters away - when it was approximately 250 meters away from his location. He then took a radar reading of the defendant's vehicle and found it to be travelling at 91 kilometers per hour, and at that time he then stopped the defendant's vehicle and the defendant identified himself to the officer's satisfaction as the defendant so-charged. Your Worship, I - those really are all the

MS. TROFIMENKO: facts that are before the court and - oh, and that the set was tested after set up, on the officer's evidence, and found also to be working properly and accurately then, and as I say, I believe all the evidence is before Your Worship.

MS. DUGAN: Your Worship, the officer has given his evidence today. He has given that evidence in reference to notes that he made at the time. He indicated before the court that the only independent recollection he had of this incident was of the person and of the vehicle that he saw approaching him, and he indicated that that was a vague recollection.

He has given evidence with respect to certain elements of the Crown's case that the Crown must be required to prove on a speeding offence, for example the 60 kilometer an hour zone, the fact that this is a speed-measuring device, the fact that he tested the device before and after set up and the tests indicated that the device appeared to be in good working order.

Those are all elements of the Crown's case that must be proven. Now, he has indicated that he has no notation in his notebook of either - of any one of those elements. He is putting that information before the court, he has indicated he doesn't have an independent recollection of that incident and that day with respect to anything else, and I would submit to the court that the one thing that must not be taken for granted in a case of this nature is the burden of proof upon the prosecution. The Crown must

5 MS. DUGAN: establish beyond a reasonable doubt every aspect of the case. It's not sufficient to recite the elements that are required as a matter of rote or routine repetition. They must be documented with respect to each and every case. The officer does many speeding cases over a period of time, and I would submit that that evidence must be documented on each and every certificate that comes before the court - or rather in the notes that the officer must refer to.

10 He was permitted to use his copy of the certificate - or his notebook in relation to this accused. It was made, I'm assuming, contemporaneous with the events.

15 Now, if there was evidence to put before the court with respect to the speed, with respect to the speed measuring device and the tests that he performed, then those notes should be written in his notebook contemporaneously with the events, and having not done so, I would submit that that evidence is not before the court and the matter should be dismissed.

20 MS. TROFIMENKO: May I reply, Your Worship?

THE COURT: Just one moment.

MS. TROFIMENKO: Sorry.

25 THE COURT: Rebuttal?

MS. TROFIMENKO: Your Worship, the officer's notebook hasn't been offered as an exhibit, it hasn't been offered as evidence. It's simply used to refresh the officer's memory on certain points in his evidence.

30 His evidence is what he says under oath in the stand.

MS. TROFIMENKO: He knows what he did that day. The notebook is there simply to refresh him on those points. It would be absurd to expect the officer to write down absolutely everything he did that day on every single ticket. They'd have to be five pages long to cover all the points. If my friend - as she submits - to cover what my friend submits, which would be that only what is on his ticket is evidence, and that's not what is evidence. The evidence is what the officer says under oath in the stand, and I believe that he has offered adequate evidence of the set up, of his practise, of his - when he tested the set that day, of the fact that it was working properly and accurately, and I would ask that Your Worship accept his evidence and not rely in some way on whether or not the officer wrote these matters down on the particular ticket issued to the defendant which the officer uses only to refresh his memory.

THE COURT: Thank you, Crown.

The matter pertaining to Musleh is properly - the certificate is properly before the court charging the defendant with speeding 91 kilometers in a 60 kilometer per hour zone.

The court has heard the evidence adduced by the Crown, and noted very carefully the necessary ingredients that the court feels is the grounds to having a prima facie case.

I do commend Miss Dugan, agent for the defendant, in being aware of the circumstances in a trial. However, I don't share her thoughts in the

THE COURT: matter pertaining to the tests of the vehicle & of the radar unit, I'm sorry. I noted that the tests were made properly. It was a unit set up for monitoring the speed of motor vehicles, which is essential to the Crown's case.

Tests were made by the officer before and after set up at the location, found to be working properly. He made note of the signs at this specific area of roadway prior to setting up. Referring to submissions made by defence, an independent recollection, recollection is not documented - I don't know of any case or any cases where an officer has to specifically document evidence other than that that is necessary for a Crown's case must be incorporated into the officer's notes. I don't agree with that. I feel that the officer incorporates into his notes what he feels is necessary. I do agree with the Crown that the notes in his notebook were not entered as an exhibit and cross-examined, and I also feel that for an officer from Central Traffic Unit to remember each and every incident, it's just impossible to comprehend that an officer would be aware of every little incident that happened, particularly when it happened back in May of last year.

So from the evidence that's before the court I find no problems, no improprieties in the officer's evidence, and evidence sufficient to warrant a conviction. The court finds the defendant guilty as charged.