

Case Name:
R. v. Persaud

Between
Her Majesty the Queen, and
Danny Persaud

[2011] O.J. No. 3312

Information No. 09-1596

Ontario Court of Justice
Kitchener, Ontario

M.F. Woolcott J.

Heard: January 13, 2011.
Oral judgment: January 13, 2011.

(22 paras.)

Counsel:

D. Dyer: Counsel for the Region of Waterloo.

A. Brohman: Counsel for Danny Persaud.

REASONS FOR JUDGMENT

1 M.F. WOOLCOTT J. (orally):-- Mr. Danny Davindra Persaud appeals against his conviction on a charge of speeding contrary to section 128 of The Highway Traffic Act. Did you want to say something, Mr. Brohman, or are you going to sit down?

2 MR. BROHMAN: No. I will sit down. I was more out of respect, Your Honour.

3 THE COURT: Okay. This matter was the subject matter of a trial before Justice of the Peace Legate-Exon on August the 20th, 2010. At that time the accused was represented by Mr. Brohman as his agent. He is again represented by Mr. Brohman on this appeal. After listening to the evidence of Ontario Provincial Police Constable Egberts, the Justice of the Peace convicted the appellant of

this offence. I have the advantage of a transcript of these proceedings.

4 The basis for the appeal is that the Justice of the Peace relied on the evidence of the officer when that evidence was given with reference to a template on which the witness had set out the outline of the offence of speeding and had then taken that template with him to the location where he was using radar to detect speeding vehicles. The witness then filled in particulars of the investigation which had brought him to court. For example, he may have filled in the name and the rates of speed and the location. It was argued that parts of the evidence had been created prior to the officer ever commencing the investigation.

5 Although the defendant might have originally approached the case on the basis that there might be an issue with respect to the use of the radar device, this issue had been entirely abandoned by the time of the appeal.

6 Provincial Constable Egberts had been an officer for nine years at the time of the trial. He had gone to a pre-set location to set up what is commonly known as a radar trap. With him he took a template that he had created and on which he had made pen written entries. The template apparently had the basic information and he filled in the particulars of what had happened in the incident.

7 It was his evidence, not contradicted, that he had an independent recollection of the events as well. He indicated that he had created the notes for the purpose of refreshing his memory when he reviewed them and to provide disclosure. He indicated that he would have left a few things out of his notes, that is to say that he had left a few things out of his notes but that he had these as part of his independent recollection or that some of his evidence might be triggered by reference to the ticket that he had written.

8 At trial he was questioned as to the template. He agreed that part of the template says "MV appeared to be above posted speed limited" and that he had nowhere in his notes nor on the template made an estimate of the speed at which the motor vehicle was travelling when he decided to lock on to it. That ultimately, I think, did not become such a point of reference with respect to the use of the radar but it was, I think, one of the points that the appellant was relying on to suggest that there were not things in his notes that might have been there.

9 The appellant relies on R. v. Murphy, a case decided by Mr. Justice D.C. Downie sitting in appeal under the P.O.A. on December the 16th, 2004. He relies on that case for the proposition that the Justice of the Peace should not have relied on the officer's evidence insofar as it was part of a template. Mr. Justice Downie in the Murphy case found that the prosecution's case was not founded on original evidence when the evidence from the officer appeared to be his reading into the record from his notes which were based on a template which was rife with acronyms which the court in that case could not decipher.

10 His Honour, in light of that, that is to say that the evidence appeared to be strictly a reading of the notes, that it was difficult to decipher what it meant based on the acronyms as well as a couple of things, allowed the appeal and sent the matter back for trial.

11 The Murphy case is the bedrock of Mr. Persaud's appeal. If it is applicable to this case then the Justice of the Peace would have been bound by the Murphy case. In my view the Murphy case is

distinguishable from the present case. I would remark in passing that even if I did not think it was distinguishable I very probably would not agree with the analysis in that case.

12 The law in practice appears to be clear that a witness is entitled to use properly qualified notes or memoranda to refresh his or her memory in giving evidence at a trial. While at one time it may have been thought that contemporaneity in the making of the note or memorandum was crucial to its use, it is now accepted that this only goes to weight.

13 In this case, the witness sought and was granted permission to refer to his notes. These notes were partly a prepared template which one assumes he used to remind him of the essential aspects of the investigation since he had them with him when he was in his cruiser and these essential aspects would logically also be what was required to be given in evidence.

14 On its face this would appear to be the action of a prudent officer who is engaged in a large number of cases as in this case and who needs to have individualized notes but where large portions of the notes are going to cover exactly the same areas of evidence. For example, each day the officer is going to get into a particular cruiser; he is going to take a particular radar device; he is going to go to a particular location; he is going to be looking for particular things; and those things are all exactly the same every time he goes. The differences will be the particular speed at which he logs a motor vehicle; the particular individual who is operating the motor vehicle; and whatever interaction he may have had with that individual.

15 On its face, as I say, this would appear to be a prudent action on the officer's part. In this case it was clear that the officer was dealing with the case as a particular case and that he did have an independent recollection of the events. Even if he had not had an independent recollection, his notes might still have been admissible as past recollection recorded but we do not go into that although that might be another area in which this kind of evidence could be used.

16 The process of cross-examination is designed to catch the officer out or the witness out where the witness has no recollection or where his notes fail to properly describe what has happened. In this case, cross-examination was permitted without limitation as far as the transcript goes. It is not the case that the witness must have everything recorded in his notes although a failure to record something may lead to an adverse inference depending on the particular circumstances of the case.

17 It may be that deficient notes, especially if they are deficient deliberately to thwart the purposes of disclosure, may lead to repercussions in terms of the prosecution's success, however, there is no suggestion of that in this case.

18 The notes were disclosed. They were sufficient to give adequate and fair disclosure of the prosecution's case. In the elements of the offence which were particular to Mr. Persaud's case they were prepared in a timely and appropriate fashion. I would not necessarily agree that such notes would not be accepted in a Criminal Code case. As Madam Justice Gartner said in *Antoniak*, "each case is decided on its own merits".

19 I can agree with Mr. Brohman that a checklist might be a better way of creating a template because it would then be the case that the witness had shown that he had at least adverted to each aspect of the case but just because it might be a better way is not to say that it is the only way.

Having said that, I find no fault with the Justice of the Peace's judgment. If there is a misstatement with respect to the officer having said that the defendant was driving at a high rate of speed rather than over the posted limit, and I am not certain that, it is an entirely fair characterization of the statement, it does not in my view mean that the Justice of the Peace has significantly misapprehended the evidence.

20 When the Justice of the Peace indicated that she did not much care for the term "canned" I would not find that she indicated a predisposition not to consider the Murphy case. The statement, it seems to me, is one that could be made quite legitimately. Canned is a term of art that was apparently coined by Justice Downie as he listened to the case on appeal before him. It is a term that does not describe well or accurately what occurred in the instant case and I am not persuaded that it is a term that I would use to describe what the evidence was necessarily in the Murphy case either. It is something that was very particular to Justice Downie.

21 I find that the Justice of the Peace properly weighed and relied on the evidence of Provincial Constable Egberts and that based on this evidence she arrived at the appropriate conclusion in this case. I would therefore dismiss the appeal.

22 I would note that the cases considered with respect to this matter were R. v. Patrick Murphy, decided December the 16th, 2004 by Justice D.C. Downie at the Kitchener Court; R. v. Hayes, H-A-Y-E-S from the Ontario Court of Justice in Newmarket, Ontario, [2005] O.J. No. 5057; R. v. Thompson [2001] O.J. No. 449 from the Ontario Court of Appeal; R. v. K.G.B. from the Ontario Court of Appeal 125 C.C.C. (3d) 61; R. v. Antoniuk, A-N-T-O-N-I-A-K, [2007] O.J. No. 4816 (Ont. S.C.J.); R. v. Golubentsev, G-O-L-U-B-E-N-T-S-E-V, [2007] O.J. No. 4608 OCJ. The Murphy case should be marked as on appeal.

qp/s/qlrxg/qljxr