

Case Name:

R. v. Potts

Between

**Regina, respondent, and
Randall Richard Potts, appellant**

[2006] B.C.J. No. 849

2006 BCSC 592

70 W.C.B. (2d) 428

Kamloops Registry No. 72623

British Columbia Supreme Court
Kamloops, British Columbia

D.M. Smith J.

Heard: April 3, 2006.

Judgment: April 13, 2006.

(35 paras.)

Transportation law -- Motor vehicles -- Offences -- Speeding -- Defences -- Accused's appeal from a speeding conviction allowed -- Arresting officer's evidence as to his standard practice was insufficient to prove that there was a speed limit sign posted on the portion of the highway where the accused was stopped for speeding.

Appeal by the accused from conviction for speeding -- The accused was clocked by radar as driving 141 kilometres per hour where the posted speed limit was 110 -- The trial judge found the Crown's evidence as to speed more credible than that of the accused -- The trial judge also accepted the arresting officer's evidence regarding his standard practice of ensuring that speed limit signage was in place and visible -- HELD: Appeal allowed -- There was no basis on which to challenge the trial judge's findings of fact on speed -- However, because the officer had no personal recollection of the incident and relied only on his standard practice, which he did not claim to undertake every time he set up radar, he failed to establish the existence of a highway sign -- The accused was acquitted.

Statutes, Regulations and Rules Cited:

Motor Vehicle Act, R.S.B.C. 1996, c. 318, s. 146(1), s. 146(3)

Counsel:

Counsel for the Appellant: L. Cruickshank

Counsel for the Respondent: A. Janse

1 D.M. SMITH J.:-- Randall Richard Potts appeals his conviction for speeding against a posted highway sign, contrary to s. 146(3) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the "*MVA*").

2 Section 146(3) of the *MVA* is distinguishable from s. 146(1), which establishes the offence of exceeding the presumptive speed limit of 50 km/h within a municipality or 80 km/h outside of a municipality.

3 The test on appeal is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. A verdict will be set aside if it is unreasonable or cannot be supported by the evidence. A verdict is unreasonable if the relevant legal principles were not correctly applied. A verdict will be set aside if it is based on a material misapprehension of the evidence that would give rise to a miscarriage of justice. See *R. v. Yebes*, [1987] 2 S.C.R. 168; and, *R. v. Biniaris*, [2000] 1 S.C.R. 381.

4 In assessing whether a verdict is unreasonable, an appellate court must be mindful of the comments in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at pp. 203-4:

Even if the passage set out above was ambiguous and could bear either the interpretation I place on it or the interpretation advanced on behalf of the appellant, I would adopt my interpretation. Trial judges are presumed to know the law: *R. v. Burns* (1994), 89 C.C.C. (3d) 193 at pp. 199-200, [1994] 1 S.C.R. 656, 29 C.R. (4th) 113 *sub nom.* *R. v. B.(R.H.)*. That presumption must apply with particular force to legal principles as elementary as the presumption of innocence. Where a phrase in a trial judge's reasons is open to two interpretations, the one which is consistent with the trial judge's presumed knowledge of the applicable law must be preferred over one which suggests an erroneous application of the law: *R. v. Smith* (1989), 95 A.R. 304 (C.A.) at pp. 312-13; affirmed [1990] 1 S.C.R. 991, 109 A.R. 160, 111 N.R. 144.

In any event, it is wrong to analyze a trial judge's reasons by dissecting them into small pieces and examining each piece in isolation as if it described, or was intended to describe, a legal principle applied by the trial judge. Reasons for judgment must be read as a whole. ...

5 *Biniaris* offers additional guidance on assessing whether a trier of fact has misapprehended the evidence, at [paragraph] 24:

Triers of fact, whether juries or judges, have considerable leeway in their appreciation of the evidence and the proper inferences to be drawn therefrom, in their assessment of the credibility of witnesses, and in their ultimate assessment of whether the Crown's case is made out, overall, beyond a reasonable doubt. Any judicial system must tolerate reasonable differences of opinion on factual issues. Consequently, all factual findings are open to the trier of fact, except unreasonable ones embodied in a legally binding conviction. Although reasonable people may disagree about their appreciation of the facts, a conviction, which conveys legality, authority and finality, is not something about which reasonable people may disagree. A conviction cannot be unreasonable, except as a matter of law, in which case it must be overturned.

Background

6 On the evening of September 19, 2004, the vehicle in which Mr. Potts was a passenger with two other occupants was travelling northbound on the Coquihalla Highway en route to Kelowna, B.C. After passing through the toll booth Mr. Potts took over the driving. Shortly thereafter, a police officer facing southbound activated his radar gun and clocked Mr. Potts' speed at 141 km/h. Cst. Monson returned to his vehicle, made a U-turn, and about five minutes later stopped the offending vehicle. Mr. Potts was issued a violation ticket for speeding contrary to the posted highway speed of 110 km/h.

7 Mr. Potts filed a dispute to the violation ticket. By doing so he put the Crown on notice that it would be required to prove beyond a reasonable doubt each and every element of the alleged offence of speeding against a highway sign. This is a right of each accused person, including those charged with speeding.

8 Cst. Monson testified that on the date in question he was a qualified radar operator, had tested the radar gun used to clock Mr. Potts' vehicle both prior to and at the completion of his shift, and was satisfied that it was working properly at the material time. He said Mr. Potts was driving at 141 km/h contrary to the posted highway sign of 110 km/h. He said the posted highway signs were in place on the date in question.

9 In particular, he stated in examination-in-chief:

- A. This area is a posted hundred and ten kilometres and it has signs posted, erected and maintained by the Ministry of Transportation and I was satisfied that those signs were in place on this date. The first signs coming from - for this vehicle that was northbound would have been at the toll booth area, with further signage between myself and there.

[Transcript, p. 2, ll. 43-47; p. 3, ll.1-3.]

10 Cst. Monson was asked about the source of his statement that the highway signs were in place and unobstructed on the date of the offence. He replied that he had no personal recollection of the incident but that it was his general practice to ensure that the signage was in place and unobstructed. He said based on his experience and knowledge of the highway, a person driving north from the toll booth to the point on the highway where Mr. Potts' vehicle was clocked would have had to have passed two posted highway signs.

11 On cross-examination, he explained his general practice as follows:

- A. ... My standard practice is to continue on down to the toll booth and turn there and then head back and I have no notes exactly, uh, if I'd gone through the toll booth or exactly how far I'd gone. I have no recollection of that.
- Q. So, you don't have any specific recollection of where you might have been south of the area that you were monitoring traffic prior to - prior to taking up the location you did.
- A. No specific recollection, no.
- Q. Okay. And you said earlier that you were satisfied as to there being signs in place showing the posted speed limit to be a hundred and ten kilometres per hour. Again, though, that isn't based on any observations you recall having made that day.
- A. I haven't made specific notes, but that is my standard practice to ensure that the signage is in place and that there is no snow or slush covering the signage, which is typically the only reason that the signs wouldn't be there or not visible.
- Q. All right. But you don't have any specific evidence to offer Her Worship today as to having made those efforts on that day.
- A. Just my routine practice, Your Worship.

[Transcript, p. 6, ll. 42-47; p. 7, ll. 1-19.]

12 Mr. Potts and one of the passengers testified on behalf of the defence. Each stated that Mr. Potts was driving the posted speed limit and not speeding. Cross-examination, however, revealed several inconsistencies in their evidence. These inconsistencies persuaded the Justice of the Peace to find Cst. Monson's evidence regarding Mr. Potts' rate of speed more reliable than the defence

evidence.

13 On the issue of the signage, the Justice of the Peace relied on Cst. Monson's evidence as to his standard practice and concluded that based on that evidence she did not have a reasonable doubt that the highway signs were in place at the material time. In that regard she summarized the officer's evidence in chief as follows:

He testified that the signs were posted, maintained and erected by the Ministry of Transportation and he was satisfied they were in place on the date in question. I note that that's a conclusion and not evidence. [Emphasis added.] [Transcript, Reasons for Judgment, p. 33, ll. 1-5.]

14 She further summarized the officer's evidence on cross-examination as follows:

I am going to deal, first of all, with the issue of the signage. The officer testified that it was his standard practice to travel up to the toll booth, ascertain that the signs were there for the vehicles he would be observing, prior to him setting up a specific location. [Emphasis added] [Transcript, Reasons for Judgment, p. 37, ll. 19-24.]

Issues on appeal

15 Mr. Potts raises two grounds of appeal:

- (a) That the learned Justice of the Peace erred in law in concluding the Crown had established beyond a reasonable doubt that Mr. Potts' vehicle was speeding; and,
- (b) That the learned Justice of the Peace erred in law in concluding the Crown had established beyond a reasonable doubt that the regulatory signs were in place and unobstructed.

Discussion

(a) Ground one of appeal

16 The defence called evidence regarding Mr. Potts' rate of speed which was contrary to the evidence of Cst. Monson. However, due to the inconsistencies in the defence witnesses' evidence the Justice of the Peace concluded that Cst. Monson's evidence was more reliable.

17 It is trite law that a trier of fact may accept all, part, or none of a witness' evidence. The Justice of the Peace did not misapprehend the evidence on this issue but rather accepted the Crown's evidence over that of the defence. She was entitled to do so and I find no basis upon which her findings of fact could successfully be challenged. Applying the principles set out in *Yebe* and *Biniaris* I would dismiss this ground of appeal.

(b) Ground two of appeal

18 The defence submits the Crown failed to establish beyond a reasonable doubt an essential element of the offence, namely that a highway sign limiting the rate of speed to 110 km/h was in place and unobstructed at the material time. Mr. Potts did not call any evidence to the contrary but relied upon the Crown to prove that element of the offence beyond a reasonable doubt. Unless that evidence meets the requisite standard of proof, the verdict is unreasonable.

19 At common law there is presumption of regularity. This maxim presumes compliance with a statutory requirement such as ensuring a highway sign is in place. However, as noted in Sopinka *et al*, *The Law of Evidence* 2nd ed., (Toronto: Butterworths, 1999), at p. 117, [paragraph] 4.53, "... the presumption may not be used to establish an ingredient of a crime in criminal proceedings if the regularity and the propriety of the matter in question are disputed at trial."

20 The "certificate" cases provide examples of how this element of the offence may be established through the filing of a certificate.

21 *R. v. Evans*, [1998] B.C.J. No. 872 (P.C.) was a photo radar-case where the language of a certificate filed in evidence pursuant to a statutory provision was deemed sufficient. The language in the certificate was quoted at [paragraph] 85 and included the following statement:

Throughout those hours of operation, on that date, there was a sign in place which the Minister of Transportation and Highways caused to be erected, pursuant to s. 151(3) of the *Motor Vehicle Act*, indicating a posted speed limit of 50 kilometres per hour (km/h) for all motor vehicles at that location travelling in that direction.

[Emphasis added.]

22 The accused in *Evans* did not challenge the existence of the sign by calling evidence to the contrary. Instead, she submitted the Crown had failed to prove this element of the offence beyond a reasonable doubt. The court held that the certificate was sufficient to establish the existence of the sign at the material time and the accused was convicted.

23 *R. v. Etherington*, [1997] B.C.J. No. 3042 (P.C.) was a case involving the use of a radar gun. The Crown filed a police officer's certificate containing a statement that the requisite highway signs were in place at the material time. The accused challenged the existence of the highway signs by calling evidence to the contrary. He testified that no highway signs were in place at the material time. The court commented that if the evidence of the police officer through the certificate had been uncontradicted, then the existence of a highway sign would have been established. However, as the certificate evidence was contradicted and the officer could not personally confirm its existence at the material time, there was a reasonable doubt the highway sign was in place at the material time.

The accused was acquitted.

24 *R. v. Simpkin*, [1997] B.C.J. No. 3050 (P.C.) involved the use of photo-radar and the tendering of evidence to the contrary by the accused. The Crown filed a police officer's certificate which stated a highway sign was in place at the material time. The accused testified there was no posted highway sign on the date in question. There was also evidence that the highway signs in that area were frequently changed due to construction. The accused was acquitted.

25 The court in *Evans* disagreed with the proposition in *Etherington* that evidence must be led as to the actual physical location of the highway sign and that the police officer had to ensure the highway sign was in place and visible. However, both these cases involved the filing of a certificate which provides *prima facie* evidence that the highway sign is in place at the time of the offence. If there is evidence to the contrary which challenges the certificate's statement, *Etherington* and *Simpkin* would suggest the Crown must still be in a position to prove the approximate location of the highway sign and whether it was clear and unobstructed at the material time.

26 This case was not a "certificate" case. Nor was Cst. Monson able to personally confirm the existence of the highway sign at the material time because he had no specific recollection of the incident. Instead, he relied on his general practice of ensuring the highway signs were in place and unobstructed to drivers of the highway.

27 The Crown seeks to have the court make an analogy between the filing of a certificate that establishes the *prima facie* existence of a highway sign at the material time with Cst. Monson's evidence regarding his general practice. The Crown submits that in the absence of evidence to the contrary, Cst. Monson's evidence regarding his general practice is sufficient to establish that element of the offence.

28 I agree with that submission, namely that evidence of a police officer's general practice is sufficient to establish a *prima facie* case of the existence of a highway sign. To expect a police officer to remember the details of each incident involving the issuance of a traffic violation notice would be an impossible burden. To support a conviction, however, evidence of an officer's general practice must provide sufficient details to ensure that the only reasonable inference to be drawn from the evidence is that the highway signs were in place and unobstructed at the material time.

29 Cst. Monson's evidence of his general practice was that he travelled to the toll booth and back in order to ensure the highway signs were in place and unobstructed. He did not provide a time frame in which he undertook that general practice in relation to when he was operating stationary radar.

30 With respect, the Justice of the Peace's summary of his evidence, that he undertook his general practice before setting up at a specific location, was in error. At the outset of her Reasons, she correctly noted that this statement was merely a conclusion rather than evidence of a fact in issue.

31 Cst. Monson's conclusion was challenged on cross examination. At that time he advised that he had no personal recollection of the circumstances of the incident but was relying on his general practice when he gave his evidence in chief. When asked about the details of his general practice he did not state that he undertook that practice every time he set up stationary radar in a specific location. Instead, it was left open to the court to infer that detail. In my view that is not the only inference which might be drawn from his evidence.

32 Had Cst. Monson stated that his general practice was to ensure the highway signs were in place and unobstructed before each occasion that he operated stationary radar then, in my view, he would have met the burden of proof required by the Crown to establish this element of the offence. Instead, his evidence fell short on this issue and did not, in my view, establish a *prima facie* case. Nor was it analogous to the *prima facie* evidence established in the certificate cases where the police officer attested through a certificate that, "Throughout those hours of operation, on that date, there was a sign in place".

33 The Justice of the Peace also relied on a number of authorities involving the application of s. 146(1) of the *MVA* in finding the police officer's evidence on the signage issue met the requisite burden of proof. In those decisions, the existence of a highway sign was not an essential element of the offence and the court was able to rely on the presumptive speed limits in the absence of proof that a highway sign was in place. In s. 146(3), on the other hand, the existence of a highway sign limiting the rate of speed is an essential element of the offence.

34 In the result, I am of the view that the Justice of the Peace misapprehended the evidence on an essential element of the offence. Consequently, the evidence was insufficient to meet the requisite standard of proof to support a finding of guilt. The verdict is unreasonable and must be set aside.

35 A verdict of acquittal shall be entered.

D.M. SMITH J.

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