

HER MAJESTY THE QUEEN

- and

LARRY C. PROCTOR

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

BEFORE HIS HONOUR JUDGE H.E. ZIMMERMAN  
on February 6, 1997, at NEWMARKET, Ontario

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CHARGES: s. 128 H.T.A. - Speeding

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APPEARANCES:

S. Forget, Ms.

Prosecutor for the Crown

R. Dullege, Esq.

Counsel for the Accused

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MS. FORGET: Your Honour, if we could deal with the Larry Proctor matter? It's number 17 on the docket. It's Mr. Dullege's matter.

CLERK OF THE COURT: 17 - 17 is Ian Gallagher.

MS. FORGET: Oh, sorry. That was probably from the prior date.

CLERK OF THE COURT: 26?

THE COURT: 26. Larry Proctor.

MS. FORGET: Yes, I apologize.

MR. DULLEGE: Yes, good day, Your Honour. Dullege, initial "R".

THE COURT: Yes.

MR. DULLEGE: I appear as agent for Mr. Proctor. There are two short transcripts on this matter. I see Your Honour looking...

THE COURT: I've just got one.

MR. DULLEGE: Well, apparently that - some of us have one and some of us have two.

THE COURT: I just have the...

MR. DULLEGE: Do you have proceedings at trial or submissions on proceedings?

THE COURT: Submissions on proceedings, I - I - it would appear that's all.

MS. FORGET: That was the only one that I had as well, but...

MR. DULLEGE: Oh, okay.

MS. FORGET: ...I - I had a chance to look at a copy of Mr. Dullege's.

THE COURT: But if your point is the same point as in the other one...

MR. DULLEGE: Yes.

THE COURT: Well, I better have a look, though.

MR. DULLEGE: I can give you this. It's only a few pages. And - and it is important on - on a couple of - for a couple of reasons.

MS. FORGET: And I can indicate to Your Honour that my friend and I have had some discussions, and I am in agreement with him on - on the issue of whether or not the Justice of the Peace should have considered the case he mentions.

THE COURT: Well, I'd...

MS. FORGET: I'll let him...

THE COURT: ...like to see the case...

MS. FORGET: ...further explain.

THE COURT: ...because I'm not so sure.

MR. DULLEGE: I'll give you a copy of the case as well.

THE COURT: Let me just take a few minutes here, Mr. Dullege...

MR. DULLEGE: Sure.

THE COURT: ...to look for the - what I believe I'm supposed to be looking for.

MS. FORGET: I believe, Your Honour - Mr. Dullege pointed out to me, on page one of the submissions of proceedings at trial, I believe the first paragraph was of particular concern there, and I believe it was the last page of the - the one that he just handed - the transcript he just handed up to you in the reasons for judgment - that he referred me to. I think it's at the top of the page.

THE COURT: Okay, Mr. Dullege, I've now - yes.

MR. DULLEGE: Yes, Your Honour, it's really two two issues wrapped into the same, really, element

One is the issue, that's raised at trial, and argued, that when the officer says, "I tested it before and after the incident", there has to be some evidence as to when. Is it approximate to the time of the event? Is it - was it the same day, or the same week? Was it the same month? When did he do it? In my respectful submission, that's what Ziara stands for, the proposition that there has to be some proximity, not simply before and after the incident. And whether he said, "I tested it before and after the event" - before and after - there has to be something in terms of, "I tested it this day" or "I tested it at this time". And there's nothing there in that transcript, in my respectful submission, other than if you wanted to make a leap and say, "Well, if he said before and after the incident, he must've meant some time around there." But in my respectful submission, Ziara says let's give - let's get that evidence in. Let's get the evidence as to when the radar was tested. The other element that's raised as a result of this, of course, is I say to Her Worship, "Your Worship, I've argued Ziara before you before", and it had - it was actually quite recent to this event, and that's on - on the top of page - or on page one of the submissions made at - at proceedings. And I say, "Specifically, in relation to this event, Your Worship, I've argued Ziara before you - before in the past, which is an appeal case, which says you must be satisfied there's some reasonable proximity to the testing." And Her Worship then, as you can see by the

5 judgment - and - and I don't have the copy. You have the copy. But it says something along the lines - at the top of the last page of her judgment - the Ziara case, "I don't know it." Now that's after I've made submissions, sat down, and now she's going to give judgment. In my respectful submission - first of all, at the time, she's bound by Ziara. At the time, she has to consider it.

10 THE COURT: She's not bound by it necessarily, if it was a J.P.'s decision.

MR. DULLEGE: No, it's a provincial court judge on appeal.

THE COURT: Oh, okay.

15 MR. DULLEGE: So, she - she was bound by it at the time. And on the facts of this case, in my respectful submission, it clearly applies. Now having said that, we then look at the appearance of - of the trial and the Justice of the Peace, who says - because at - at worst case scenio, she - she should've stopped at that point and said, "Refresh my memory, Mr. Dullege", or "Mr. Dullege, can I have a copy", or, "You know, I don't recall this case from when you argued it a short time ago. Let me go get it." She doesn't do any of those things. After submissions are made, she then says, "Gee, I don't know that case, and your client's guilty." And in my respectful submission, that in itself is certainly enough to grant the appeal, but that in concert with the fact Ziara is out there and alive, and is quite on point, in my respectful submission, that you can't

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5 take notice of what before and after this incident means. She needs some evidence as to when those tests were done - affords the - the defendant, who had his trial, to an acquittal. That's where this - this should end, in my respectful submission.

10 The - the issue about her not considering the case, is - is - is really - it's a very important issue. It's an important legal issue. It becomes very important, because of her position of, "I don't know what the case is." And again, I - I don't have it in front of me, so I'm not giving it word for word. But I'm sure Your Honour can see at the top of her last statement, just before she convicts the defendant, she makes a comment along those lines, "I don't know the case", or something like that. With regards - for the - for the...

15 THE COURT: Just - just a minute, Mr. Dullege.

MR. DULLEGE: I'll just spell the name for the record, sir. Ziara is Z-I-A-R-A.

20 THE COURT: Okay, that's - have you - have you concluded your argument with respect to Proctor?

MR. DULLEGE: I'm sorry?

THE COURT: Have you concluded your argument with respect to Proctor?

25 MR. DULLEGE: I haven't started Proctor. But - this is - oh, I'm sorry - sorry. I'm confused. I've been looking at these cases - yes. Yes, I have concluded my argument with respect to Proctor. It's - it's the nutshell version. I've spoken to my friend about this often today. Those are the issues, sir.

30 THE COURT: All right, I - the evidence clearly -

in Proctor, the evidence of the - of the police officer, as indicated on page two...

5 MS. FORGET: Are you referring to the submissions, Your Honour - transcript - the submissions transcript?

THE COURT: Oh, all right - and did you want to make submissions?

MS. FORGET: I'm just asking if that's what you're referring to.

10 THE COURT: No. I'm - no, on the - on the trial itself. The evidence of the police officer. You haven't any further comment to make do you? Or...

MS. FORGET: Neither Mr. Dullege or I have before us the transcript you're referring to. So, that's...

15 THE COURT: Okay, well, I'll - I'll...

MS. FORGET: I just wanted to be...

THE COURT: ...just refer to it.

MS. FORGET: Okay. My - my response to Mr. Dullege's comment is only that I believe Justice of the Peace Romagnoli should have, as he indicated, either asked Mr. Dullege to refresh her memory or provide her with the case, and not simply say, "Well, I haven't heard of it, so therefore I'm not even going to consider it." However, my - my stance on the point is I do not believe that Ziara is on point, and therefore the Justice of the Peace was not in fact bound by it, because the fact scenario in Proctor is different from that in Ziara.

25 THE COURT: In what respect?

30 MS. FORGET: In Ziara - all that I have is what

5 you saw as well. It appears that there was no  
evidence of before or after when it was in a  
particular time - and I - I - I don't know what  
page it's on, but I recall reading it - that the  
officer indicated that he tested it before and  
after the incident. And he did say, "the  
incident." And I - I don't recall seeing a  
specific time. However, I also note in  
10 submissions, on page two, Mr. Woodford indicates,  
"The officer stated he set the radar at eight  
forty-seven in the morning. He said this  
incident, he tested the radar before and after the  
offence" - he didn't actually say - he said,  
"before and after the incident", if I recall the  
words correctly. "The offence that's present  
before the court happened at 1:05, so he set it up  
before and after". I'll have to rely on Your  
Honour...

THE COURT: Well,...

MS. FORGET: ...to say...

2 THE COURT: ...Mr. Woodford...

MS. FORGET: ...if - if this submission reflects  
what's in the transcript.

THE COURT: Do you want to answer to that?

MR. DULLEGE: Other than he was wrong when he made  
the submission, in terms of...

25 THE COURT: Yes, he's wrong.

MS. FORGET: Yeah, I - I don't recall reading  
that. All I'm saying is all - I just noticed this  
afterwards.

THE COURT: The - the officer's evidence is, "I  
set up to do stationary radar on Highway 404

northbound at 8:47 a.m." It says nothing about what he did with respect to the radar machine itself.

MS. FORGET: Okay, I was just clarifying with Your Honour if that was in fact, because it was contrary to what I had recalled. That's why I was asking. I do recall the officer said he tested it before and after the incident.

THE COURT: That's right.

MS. FORGET: But he doesn't - I don't recall him saying any specific time.

THE COURT: No, he didn't.

MS. FORGET: The only reason why I'm saying that this is perhaps different from Ziara - and I don't have the exact fact scenario - is that this officer is referring - or appears to be referring to this particular stopping of the accused. And whether or not Your Honour thinks it's proper to draw that inference, I'll leave it with you. I acknowledge that he doesn't say a specific time.

THE COURT: Well, your argument, Mr. Dullege, is simply a repeat of what you said before, that before and after is - before and after the incident could embrace the morning of and the evening after the event, as well as when the thing was calibrated last, and when it was calibrated the next time, or whatever. Is that...

MR. DULLEGE: That's right.

THE COURT: ...essentially your point?

MR. DULLEGE: Exactly. My - my - my only argument to that is simply when, and nobody knows because the officer doesn't tell anybody.

THE COURT: Okay then.

MR. DULLEGE: In Ziara it's interesting because the accused gave evidence and says - I've read the full transcript - it says before and after. There should be some evidence as to whether it was a week before, a week after, immediately before, immediately after, or even that day, as long - would be adequate as long as one knew. I've read the defendant's evidence who - the defendant obviously admits to doing some speeding, and on page 15 of Ziara, "Because it is not known exactly when the tests were made on the radar machine to determine it's accuracy, it is admitted the accused was speeding at 100 kilometres per hour", and then the defendant is convicted of that speed versus the - the - the other speed. So, clearly there has to - it's not a difficult task for the officer to give the evidence as to when the radar was tested in proximity to when it was operated.

REASONS FOR JUDGMENT

ZIMMERMAN, Prov.Ct.J.: (orally)

I think on the evidence in this case, the Proctor case, that there is that element of doubt that has been pointed out, and that there is not the evidence that would be necessary to resolve that in the mind of the Justice of the Peace.

So, I think in this particular case, I am prepared to accede to Mr. Dullege's argument that one must provide evidence of the time of testing, so that the court is able to determine the proximity of

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the testing to the particular event, and it is not  
sufficient to make that quantum leap by simply  
stating that testing was done before and after the  
incident as being necessarily the incident before  
the court. Even if it was done, there is no  
evidence as to when the before and after was. So  
I think in this particular case, I am prepared to  
accede to Mr. Dullege's argument on the point,  
and...

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MS. FORGET: Yes, Your Honour. I would...

THE COURT: ...allow the appeal.

MS. FORGET: ...suggest perhaps entering an  
acquittal in this particular case...

THE COURT: Yes.

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MS. FORGET: ...rather than having the matter go  
back for trial.

THE COURT: Right. So the appeal will be allowed,  
and there'll be an acquittal entered.

MR. DULLEGE: Thank you.

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

.....  
Sandy Brown  
Court Reporter

10 **NOTE:** Photostatic copies of this transcript  
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