

IN THE ONTARIO COURT (PROVINCIAL DIVISION)

HER MAJESTY THE QUEEN

against

JAMES TROY

REASONS FOR JUDGMENT

By The Honourable Judge J. D. Wake

APPEARANCES:

Ms. A. Hamilton

G. Parker, Esq.

For the Crown

Agent for the Appellant

The appellant was convicted by Her Worship Justice of the Peace Walton of speeding, 80 kilometres per hour in a posted 60 kilometres per hour zone, contrary to section 128 of The Highway Traffic Act, R.S.O. 1990, c. H-8.

am able to discern two grounds of appeal. The first put forward is the assertion that the Justice of the Peace erred by improperly curtailing the appellant's agent in his cross-examination of the police officer. The second is based on the Justice of the Peace's refusal to order the Crown to produce the manual for the radar device used in the instant case.

1 Cross - Examination

The Crown called Constable O'Connor as its only witness who testified that he was using M.D.R. 1 radar to assist him in looking for speeders in a particular area in the City of Mississauga. He further testified that he had been a qualified radar operator since 1989 and that radar was used to assist him with visual observations, being a device that is used to measure accurately the speed of motor vehicles upon a highway. Prior to using the device Constable O'Connor tested the M.D.R. radar according to the manufacturer's instructions and found the unit to be in proper working order.

In cross-examination it was determined that the officer's qualifications were founded

on a one day training session given in 1989 and another in the spring of 1994 by an officer in charge of training. The officer confirmed that "we went over some manuals. We went over literature." Tests were taken but no one from the manufacturer was present. The officer responded in detail as to what the manufacturer's tests were. He was then asked about the possibility of obtaining false readings from the radar and how these might be occasioned which led to a series of questions concerning the beam range of the instrument and the difference between a radar device in the moving mode and in the stationary mode.

At this point the Crown interjected to object that the officer had given evidence that he was a qualified operator and had "been cross-examined on that." The Justice of the Peace was prepared to allow questions with respect to the filter on the stationary mode of the device and would not permit further questions "unless you are intending to call evidence to contradict the operation of this device."

Shortly thereafter the appellant's agent asked this question

Officer, when you were trained to become qualified as a radar operator, again you were shown some manuals. Were you taught in fact, how to work out the radar range?

to which the Crown objected again on the ground that it went to the officer's

qualifications and that this had been covered previously. The appellant's agent stated that his intention in submitting material before the officer was to determine whether it coincided with the information with which he had been taught so as to adopt it as his own evidence. The Justice of the Peace ruled that the manuals and written material could not be produced to the witness unless the author was present to be cross-examined by the Crown. The Justice of the Peace also confirmed his earlier ruling that absent an undertaking to "call someone to question or place into evidence some opposing view of the officer's evidence that he has given on the radar unit" no further questions could be asked in cross-examination because the officer had already "given specific detail as to the tests on the radar unit".

With respect I find that the Justice of the Peace erred in the law. While it is true that the officer did give evidence in detail as to the tests he conducted this would not foreclose any further cross-examination on the propriety or efficacy of the tests performed. In fact, the very detail given by the officer lent itself to a lengthier cross-examination than might be the case with more perfunctory proof.

The trial judge has a discretion to prevent repetitive questioning which is harassing in nature or designed to extract a different answer than the response already given to the

same question. This is not what occurred in the instant case and accordingly I find that cross - examination was improperly curtailed.

The Justice of the Peace also appears to have laboured under a misunderstanding as to one of the accepted purposes of cross examination namely: "To support the party's own case through the testimony of the opponent's witness". Sopinka, Lederman, Bryant. The Law Of Evidence In Canada, (Toronto, Butterworths, 1992) p.857. Clearly it is open to a party cross-examining a witness to extract evidence favourable to that party from the other side's witnesses without any requirement that the cross-examining party be obligated to produce its own witness.

The Justice of the Peace's ruling with respect to the use of the proposed manuals and written material is somewhat more problematic. Cross-examination of a witness on a document that was written or prepared by another would still seem to be subject to the rule in Queen Caroline's Case (1820), 2 BROD. and B. 284, 129 E.R. 976 (H.L.) which stipulates that a witness cannot be cross - examined on a document unless it is first shown to that witness and the cross - examiner must first prove it in evidence or undertake to do so in due course. Hence the Justice of the Peace's requirement that the appellant's agent call the author of the manual and written material would appear,

at first, to be rooted in an existing legal principle. As an aside, one can only marvel at how the efforts of the Prince Regent, later King George IV, to divorce, in effect, his wife in one of the most tempestuous episodes of British history could be linked, through the Law, to an alleged motor vehicle speeding infraction in Mississauga. Nevertheless, the rule in The Queen's Case may be superseded where the witness being cross-examined is an expert. It is a well-settled law that text books, learned treatises and authoritative literature can be put to a witness to determine whether he accepts its authority. R v. Marquard (1993), 25 C.R. (4th), 85 C.C.C. (3d) 193 (S.C.C.). If so, the extracts put to him are confirmed by his own testimony and any variation between his earlier evidence as to his methods and techniques and those expressed in the work put to him in cross-examination will call for an explanation. If he denies the authority of the work or ignorance of it then no further use can be made of it without calling the author.

R v. Anderson (1914), 22 C.C.C. 455, 5 W.W.R. 1052, 16 D.L.R. 203 (Alta. C.A.)

There is little question that Constable O'Connor was called by the Crown as an expert, being a person qualified to operate a radar device. Recently in, R v. Redmond (1990), 54 C.C.C. (3d) 273 the Ontario Court of Appeal held that the evidence of a lab. technologist as to the general use and acceptability of the testing equipment was admissible as expert evidence even where the technologist could not explain how the machines in question functioned. The Court relied on its earlier decision in R v.

Grainger (1958), 120 C.C.C. 321 where a police officer who operated a radar device to detect speeding vehicles was found to be an expert in the operation of the device even if he could not explain the scientific basis for it. In both cases the evidence was admissible and the only question for the trier of fact was the weight to be given such evidence. Accordingly rule that the manuals and written material ought to have been placed before Constable O'Connor in cross-examination as a means of testing the weight to be given to his expertise and qualifications as an operator of a radar device.

The Supreme Court of Canada recently reaffirmed the importance of cross - examination in R v. Osolin (1994) 86 C.C.C. (3d) 481, where Cory, J. stated at p.517:

The opportunity to cross - examine witnesses is fundamental in providing a fair trial to an accused. This is an old and well established principle that is closely linked to the presumption of innocence... [The right to cross - examine] is now protected by sections 7 and 11(d) of the Charter. As a result it should be interpreted in the broad and generous manner befitting its constitutional status' - R v. Potvin [1989] 1 S.C.R. 525.

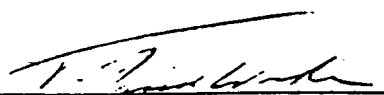
In the circumstances I would allow the appeal, set aside the conviction and order a new trial.

2. Disclosure of Operator's Manual

Having already allowed the appeal on the first ground above it is not necessary to make a ruling with respect to this ground however I will indicate that I am not satisfied that the appellant has met the onus on him of proving a violation of the Charter owing to the non-production by the Crown of the manual pertaining to the operation of the radar device in question.

I find that the reasoning of the Nova Scotia Supreme Court (Appeal Division) in R v. Longmire (1993), 42 M.V.R. (2d) 21 is persuasive. In that case the Crown's refusal to provide the accused with a copy of the radar manual was held not to infringe the Charter where the accused did not lay a rational basis or factual foundation for his request.

It is possible that the request could be renewed if the rational basis or factual foundation is established at trial however given the reasoning in R v. Grainger and R v. Redmond, supra it would seem that the rational basis or factual foundation would have to relate to the officer's actual operation of the device and not to his knowledge or awareness of the scientific explanation of its operation.



J. D. Wake, Provincial Court Judge

Released: April 25, 1995