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PROVINCIAL OFFENCES APPEAL COURT

PROVINCE OF ONTARIO

HER MAJESTY THE QUEEN

against

MAJID A. ZIARA

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BEFORE HIS HONOUR JUDGE G. E. MICHEL,
on November 24, 1987, at Sudbury,
Ontario.

CHARGE: S.109 H.T.A. SPEEDING

SUBMISSIONS AND REASONS FOR JUDGMENT

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APPEARANCES:

W. Gervais, Esq. Counsel for the Crown

J. Burd, Esq. Counsel for the Accused

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MR. GERVAIS: The next matter is that of Mr. Ziara
I hope I am pronouncing the name right.

MR. BURD: That's right.

THE COURT: You are Majid Ziara?

MR. BURD: No, Your Honour. I am appearing on his
behalf on this matter.

Your Honour, it is a simple matter of speeding 130
kilometers per hour in a 90 per hour kilometer zone.

THE COURT: Are you Mr. John Burd?

MR. BURD: That's correct, Your Honour.

I don't know, does Your Honour have a transcript of
the...

THE COURT: I have the transcript available, but I
have not read it; I just got the file awhile ago.

MR. BURD: Your Honour, I have here the matters I
will be referring to, and I have a transcript, and
the points I would say are in contention, I have
highlighted them for Your Honour, if you care to use
this copy.

THE COURT: Maybe we can just go through them, you
can go through them and I will mark them on my copy.

MR. BURD: Do you want this?

THE COURT: No. You can use it to highlight for
yourself. You just tell me which pages.

MR. BURD: Your Honour, we entered this appeal for
three reasons.

For the first one, that the evidence presented by the
crown was no prima facie evidence, let alone proof
beyond a reasonable doubt.

Secondly, the learned J.P.'s findings are not based
on the evidence adduced by the crown.

5 And, thirdly, the accused did not receive a fair trial in that his own evidence, as to his speed, was not shaken by the crown in cross-examination.

10 Your Honour, unlike a breathalyzer unit a radar unit is not given any statutory recognition in law, and since the court may not take judicial notice of the radar unit, therefore the use of radar evidence must first be qualified by the crown or his witnesses.

If appropriately qualified radar evidence is not conclusive evidence, Your Honour, but prima facie only, subject to rebuttal.

15 In the matter before the court on the date, I believe it was September 8th, the crown witness, Morris, Constable Morris, failed to qualify the use of radar three different times.

The first time, Your Honour, on page seven, line 13, the officer states:

20 'The radar I was using was checked prior to the clock and after the clock, and found to be working properly'.

25 I would refer Your Honour to the appeal court decision in Regina vs. Furlong, and the judgment delivered at that time by Provincial Judge Palmer of Provincial Court in Barrie, Ontario - this is October 24th, 1985.

And basically, Your Honour, the essence of his judgment was that the officer may not state 'the radar was checked'; he must state 'I checked the radar'.

30 It is a very technical point, Your Honour, but there is an appeal matter, and the appeal was allowed.

Also, Your Honour, at page seven, line 28, the crown

5 asks the witness if the radar is capable of clocking moving vehicles and the witness agrees with him, that it is.

10 At that point, Your Honour, I strenuously objected to the crown's leading of the witness. It was my feeling, at the time, Your Honour, that the crown was supplying the evidence, and just getting the witness to agree with him.

15 I have submitted to the crown and Your Honour excerpts from Kenny's Outlines of Criminal Law dealing with leading questions. The general rule is that they are not allowed. There are five exceptions to that general rule, but in the matter on September 8th I didn't feel at least that Mr. Gervais' questions fell under any of those five exceptions.

20 THE COURT: Well how do you bring the witness to that point then?

25 MR. BURD: Rather than ask the witness if the radar is capable of clocking moving vehicles, Your Honour, I would ask what are the assigned capabilities of the radar unit you are using, and let the witness furnish his own response, not put words in his mouth.

30 THE COURT: I think that is very technical, it doesn't bother me much.

MR. BURD: In any event, Your Honour, at that time I believe the crown is attempting to have the officer's evidence conform to the appeal case of Regina vs. Sharon Meyer, which was heard by Provincial Judge Zimmerman in Newmarket, August 23rd, 1984, which you have before you as well.

I would submit, Your Honour, that in order to conform

5 to Judge Zimmerman's ruling, the officer must speak freely without benefit of leading question; 'after completing the tests on the radar unit I came to the conclusion that it was in proper working order and capable of accurately measuring the speed of a moving motor vehicle'.

10 The third point where the appellant feels the use of radar wasn't qualified, Your Honour, was on page nine of the transcript, at line 12. It's our feeling that the crown was once again attempting to put words in the mouth of the witness at this point.

Line 28, page nine, the crown asks the officer:

15 "Are those the prescribed tests for that radar machine?"

And the officer replies:

"Yes, they are"

20 Well, Your Honour, I would submit that even if the witness and not the crown had supplied that bit of evidence, it still would not conform to His Honour Judge August's ruling - that was in the Regina vs. Windrem matter heard May 27th, 1986, at the Brampton Court of Appeal.

25 I would further submit, Your Honour, the officer would have to state, without prompting, 'I checked the radar unit by the accepted manufacturer's technique, in accordance with the manufacturer's manual of operating instructions, or words to that effect, Your Honour.

30 Also Your Honour, I don't know if you've had a chance to puruse the original manuscript of this trial on

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September 8th of this year, but the accepted manufacturer's technique requires that the radar unit be checked 15 minutes before and after the offence.

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The officer indicates that the radar was checked before and after the offence, but he doesn't indicate if it was a week before the offence, or a month after the offence, and the manufacturer's required technique, requires that these times be recorded and presented as the times of the checks on the unit, that they be recorded and presented as court evidence.

15
The last part of the submission on the appeal, Your Honour, is that defendant, the matter of whether or not if the defendant received a fair trial.

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On my initial submission to a motion of a prima facie case has not been presented by the crown I offered the Justice of the Peace, a Mrs. Blais, and to the Provincial Prosecutor, my friend, Mr. Gervais, offered them both a copy of the Regina vs. Windrem transcript and neither party accepted the transcript, and the court made the ruling against my motion without ruling on the reason for the motion.

25
Your Honour, the defendant had travelled from Toronto to Sudbury for this court appearance, but the court did not give consideration to the evidence presented, being at that time, the transcript of Regina vs. Windrem. Pertinent areas of the Windrem transcript were highlighted, and it would not have been necessary to read the entire case.

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In closing, Your Honour, the defendant took the stand

5 and gave reasonable contradictory evidence to refute the radar evidence, and that was evidence regarding a cruise control that was operating at the time.

10 Upon cross-examination the crown was unable to shake the credibility of the witness, and since radar evidence is subject to rebuttal, the defendant's rebuttal evidence should have been given more consideration by the court.

Those would be my submissions.

THE COURT: You are not suggesting that it is not the court's responsibility to either accept or reject evidence, that the evidence is rejected...

15 MR. BURD: No, no, Your Honour.

20 It seems that there is a feeling, I have appeared in most judicial districts in Ontario regarding radar, I was a qualified radar operator, myself, I was with the Ontario Provincial Police and Metro Toronto Police as a radar operator, and there seems to be a feeling among the courts, among the general public, that radar is some wonderful, accurate instrument, and Your Honour, it isn't, it really isn't. I've got readings of 260 kilometers an hour from a bicycle, you know. Like it's not really what I think the general public and the courts believe it to be, it really isn't. So it must be properly qualified. And when it is properly qualified it is only prima facie evidence, it is subject to rebuttal.

25 And in this case I believe that my client gave a reasonable alternative that the court could have accepted.

30 THE COURT: I know, I agree, but if the court does not

5 accept it, which is the court's right, to not accept
the witness' evidence, it is as if there is no
evidence at all, isn't it. What you are saying if
the accused gets on and perjures himself the court
is bound by it; that is not so. The court hears the
witnesses and determines whether the witness is
credible or not credible; if the witness is not
10 credible I can't tell you what the findings, if any
findings in that regard were, but if the court found
that the defence witness was not a credible witness,
then it is as if you had not given any evidence at all.
MR. BURD: I would think if the police officer in this
matter had given really good radar evidence, that
15 qualified properly, then I can see Her Worship at that
time, you know, maybe not leaning too far towards putt-
ing too much weight in my client's testimony, however,
Your Honour, the evidence given by the O.P.P. Officer,
and I am not downgrading that particular officer in
any way, Your Honour, he obviously isn't aware of what
20 is required to qualify radar, so I don't blame him, but
it wasn't, it was by far not the best evidence, not the
best radar evidence.

Most of the stuff that did come in evidence, it had to
be almost pulled out of him by the crown with leading
25 questions. There was nothing from his own - he seemed
very weak. That's all, Your Honour.

THE COURT: Mr. Gervais.

MR. GERVAIS: My friend has presented you cases. I
may stand corrected, but they seem to be from Provincia
Offences Act Appeals, sittings somewhat to the nature c
30 what we are here to-day.

THE COURT: That is correct.

5 MR. GERVAIS: They may be persuasive, of assistance to you in determining cases, but brother judges accept on the facts of those relevant cases, as how they were presented, how evidence was introduced, what was said, the circumstances of that individual charge.

10 The leading case that I can find, so be it, maybe if you refer to it as an old case, that's Regina vs. Grainger from the Ontario Court of Appeal, dated May 14th of 1958. I believe I gave my friend a copy of that; I present to you a copy of that case.

15 That case is referred to in at least one of the cases that my friend has presented to you, I apologize, I forget which one, I did see it in one of the cases - I think it was the case on Windrem, John Windrem, a matter that came out of Brampton. It is referred to in His Honour's judgment in that particular case.

20 In reviewing the evidence, Your Honour, of the officer, and again it starts as my friend has indicated, the transcript at page seven at the top, he starts to describe the nature of the offence he sees, tells us of the speed, at lines one and two, and it is at line four of that page, it states:

25 "At that time I observed a lone vehicle proceeding northbound on Highway 69, which was south of Highway 64. I could see the vehicle approaching at a high rate of speed. And the radar confirmed that speed."

30 Confirmed his suspicion - "I clocked that same vehicle", and he tells us about it. He then goes on down further, approximately line 13/14, tells us about the type of radar, indicated he had checked it prior to the clock, and after the clock, and

had found it to be working properly.

He goes on, down further, to about line 21, tells us the description of this motor vehicle, that being an '80 Chev, four-door.

He then goes down further, indicating about line 26, indicating, 'Yes, he has had training and has had training back in April, 1986, at Sudbury DHQ, in relation to this specific radar machine'.

He also indicates at approximately line 30, that the radar is capable of clocking moving motor vehicles.

He then talks on page nine of the tuning forks, by checking the radar machine by the tuning forks at approximately line nine. He tells us of the external checks, the internal checks, and the figures that are displayed.

The very end, towards that page are those prescribed tests and for that radar machine, yes, they are.

"As a result of performing those tests, how was your radar machine working?

The radar machine was found to be working properly at that time."

That was basically the crown's case. I suggest to you that it was at least the prima facie case, and at least the justice of the peace thought so. My friend had a chance to cross-examine the officer on that, and he does that at page ten, and it goes on to page 11. And his cross-examination is very short, it consists of a couple of questions. Starts at about line 20: "Officer, how long"...

THE COURT: Which page?

MR. GERVAIS: I am sorry, page ten, Your Honour.

THE COURT: Thank you.

MR. GERVAIS: He indicates at line 20:

"Officer, how long have you been a radar operator?"

Answer:

"Since the first time I've gotten in the cruiser which has almost been two and a half years, two years, eight months."

Question:

"Two years? Two and a half years? What was the make of the radar unit?"

And he describes that to the court. He then asked the question where he tells us of our experiences, and possible interference, possible innuendos which could happen. He asks the officer that question, in a very long question at the end of page ten, it goes on to page 11, and the officer adamantly admits that has occurred in the past, yes, and thank you, officer, no further questions.

Well, if and I say 'if' there was something wrong with the radar and that was one of his arguments he more or less put a smoke screen up, but didn't bring it back to the relevant situation of the day and occurrence of when his client was clocked.

Was there any interference at that point, whether it be motor vehicles, hydro wires, other objects, or whatever. You can't leave that criteria suspended in animation or in the air, because the officer has indicated way back, whenever referred to, that this was the lone vehicle, it was a lone vehicle coming towards him; uses the words in his mind it appeared to be speeding, or whatever terminology he used, the

radar confirmed his suspicion.

Now bearing in mind the Grainger decision, bearing in mind the cases that are before the courts in Southern Ontario, in the technical aspects that are there, the defendant then took the stand and gave his explanation, and I presume, after reviewing all the evidence that she, the justice of the peace, on that particular day, was satisfied that the crown proved the prima facie case, that the case of speeding had been met, and that she, unfortunately for my friend, did not accept the evidence as provided by his client.

She, at least, reviewed that evidence in her own mind, as she has indicated in her own mind, as she has indicated in her reasons as listed on pages 20 and 21, when she gives her summation of the evidence.

She was satisfied the radar was working properly, and that the officer never lost sight of the vehicle. She accepted the evidence of the officer, which is the court's determination, not only as she hears the evidence, but as it is related by the witnesses in person before her. The demeanour of the witnesses, however, they testify, that is something for the trier of fact to judge. I suppose if she was satisfied on the credibility issue unfortunately it is not for this appeal court to decide on that specific nature. So bearing in mind the situation before you I suggest that the conviction was proper and that the appeal should not be allowed.

THE COURT: Do you wish to reply?

MR. BURD: Yes, Your Honour. I was not disputing with Mr. Gervais at all, the evidence that his witness,

at that time, the police officer gave, regarding the actual factual evidence of what occurred.

The reason I didn't question his witness long in cross-examination was because his crown witness has not brought out the evidence that I anticipated he would have brought out, and I certainly wasn't going to go in any lengthy questions and bring it out for the crown.

If Your Honour requires maybe a short recess, or something to look over, read over those cases. They're very specific, they're very detailed, they're all based on cases from Canada; although those three you have are Ontario Appeal decisions, they're based on from the Queen's Bench in Saskatchewan, Alberta cases, it's basically just confirming other cases from all across the country, Your Honour.

I would state that at one time during the trial, I admit at the original trial, Your Honour, I was getting upset because the crown witness wasn't giving any evidence. Mr. Gervais was suggesting evidence to the crown witness, and the crown would say 'Yes, that's right', like Mr. Gervais was attempting to conform with that case law that you have before you, except the officer wasn't, so Mr. Gervais would suggest this was this and that, and that was that, and the crown witness 'Yes, that's right', like that is throughout the transcript.

And at one point Her Worship asked Mr. Gervais to please refrain from leading questions, from supplying the evidence, and Mr. Gervais asked if he was, in fact, asking leading questions, and she says well, 'The last couple were a bit leading, they were not seriously

leading, but they were leading questions', and those two are in relation to the radar machine on this day, is it capable of clocking moving motor vehicles.

Your Honour, that is a very, it's a very strong part, it's actually the main judgment of Regina vs. Sharon Meyer ruling, that the officer must state 'Checked the unit, found it to be working properly, came to the conclusion that it was capable of accurately measuring the speed of a moving motor vehicle. That is one of the strongest points that the police officer must make when he is qualifying his radar unit, and he didn't make it at all, but Mr. Gervais suggested some words to that effect to him.

THE COURT: He was doing like what you were doing through the trial, he was a police officer too. He was suggesting, he was putting his stories in like you did...

MR. BURD: But I am permitted that because it is cross-examination. In evidence in-chief you are not allowed to cross-examine your witnesses.

THE COURT: You are not permitted to give evidence like you gave. You told me of your experience and whatnot. That just went there and out there because it's worthless. If you want to give me your experience you take the stand under oath, and do the same thing.

MR. BURD: All right, maybe I was cheating a little, Your Honour, but in any event, Your Honour, if you want to recess for five minutes to read those matters, you can see that in way, shape or form did this trial, that was heard on September 8th, conform with any of the, or provide any of the qualifying that is required to qualify the unit.

5 THE COURT: I want to thank you for your permission to take a recess. It will be for half an hour because I cannot read all of that in five minutes.

R E C E S S

(2:40 p.m.)

U P O N

R E S U M I N G:

(3:15 p.m.)

10 THE COURT: I have now had occasion to read the full transcript of the evidence that was heard upon this trial by the Justice of the Peace, and as well the cases that have been cited to the court.

15 These cases are cited to the court, and are underlined in some aspects, but not in all the material aspects thereof, and are quite misleading in the way in which they are presented, in that it is clear from reading Judge August, and clear from reading Judge Zimmerman, that the decision was made on factual situations, and not on matters of law.

20 They found that the Justice could not make the findings as she or he did, based upon the evidence because they referred to evidence that did not exist in the case.

25 I have read the full transcript of the evidence before the court, and there is not evidence to state when the tests were conducted on the radar machine. It says 'before', 'after'; there should be some evidence as to whether it is the week before or the week after, or immediately before, immediately after, or even that day would be adequate, as long as one knew.

30 I have read the evidence of the defendant, and the height of his evidence is 'I am pretty sure that I wasn't going that speed because I put it on cruise control'.

There is no question that on the evidence before the

court, both that of the officer and the defendant,
the accused was speeding.

Because it is not known exactly when the tests were
made on the radar machine to determine its accuracy,
it is admitted that the accused was speeding at a
hundred kilometers an hour, and the conviction will
stand, the particular will be varied to read one
hundred kilometers an hour in a ninety kilometer
hour zone, and the penalty will be amended to 13.75.

MR. BURD: Thank you, Your Honour.

MR. GERVAIS: Thank you very much, Your Honour, for
your consideration, and I believe the fine has
already been paid.

THE COURT: The excess will be refunded.

MR. GERVAIS: Thank you.

THE COURT: The certificate of offence will be
amended by striking out the one hundred and thirty,
and inserting therein one hundred in order that the
appropriate record may be sent out to the Ministry.
Fine to be 13.75 and excess paid, if any, to be
returned.

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THIS IS TO CERTIFY that the foregoing
is a true and accurate transcription
of my recordings to the best of my
skill and ability.

.....*L. Dupuis*.....
L. Dupuis,
Court Reporter.