Regina v. Amyot

[1968] 2 O.R. 626-634

ONTARIO
[SIMCOE COUNTY COURT]
CLARE, CO.CT.J.

10th JANUARY 1968.

Evidence — Charge of speeding — Stop-watch reading between markings on highway by police in aeroplane as evidence of speed — Whether reading sufficient evidence in absence of proof of accuracy of stop-watch.

Evidence of a police officer that he clocked the accused by means of a stop-watch from an aeroplane at speeds of 78 and 80 m.p.h. in a 60 m.p.h. traffic zone, by recording the time required for the accused's vehicle to travel between markings on the highway known to be 1,320 ft. apart, if accepted, is sufficient evidence to support a conviction for speeding, and it is not necessary that the accuracy of the stop-watch be proved to justify such conviction. A mechanical device such as a stop-watch is prima facie evidence of the time recorded, notwithstanding that no evidence is adduced as to the accuracy of the device.

[R. v. Wilson, [1964] 1 C.C.C. 176, 41 C.R. 89; R. ex rel. House v. MacDonald (1955), 112 C.C.C. 377, 22 C.R. 328, 37 M.P.R. 182 sub nom. R. v. MacDonald, *distd*; R. v. Dennis, [1960] S.C.R. 286, 125 C.C.C. 321, 32 C.R. 310, 30 W.W.R. 545; Harris v. D.P.P., [1952] A.C. 694, *refd to*]

Criminal law — Appeal — Trial de novo — Notice of appeal not setting out return date or place — Clerk of County Court posting list of cases in office and mailing copy to respondent — Posted notice failing to indicate time when appeal against respondent to be heard — County Court Judge without jurisdiction to hear appeal.

[R. ex rel. Neely v. Tait, [1965] 1 C.C.C. 16; Nicholas v. Penny, [1950] 2 K.B. 466, *apld*; Re Regina v. Thibodeau (1964), 7 Crim. L.Q. 498, *not folld*]

APPEAL by the Crown by way of trial de novo from the acquittal of the accused by W.R. Kennedy, Magistrate, on a charge of speeding.

E.C. Wildman, for the Crown, appellant.

No one for accused, respondent.

CLARE, CO.CT.J.:— This appeal by way of trial de novo, came on before me on November 27, 1967, in the absence of the respondent. I reserved on the question as to whether or not the conditions precedent to a valid hearing and determination of the appeal had been met, and proceeded to hear the evidence submitted on behalf of the appellant.

The original hearing had been before W.R. Kennedy, Magistrate, on September 7, 1967, and the defendant had not appeared. Magistrate Kennedy then directed that a plea of not guilty be entered, and after hearing the evidence, reserved his decision, and on September 14, 1967, dismissed the charge. As set out above, the Crown appealed the decision, and the notice of appeal was served on the respondent Amyot on October 7, 1967. It is noted that the notice of appeal sets out that the appellant appeals "to the County Court of the County of Simcoe at its next sittings of competent jurisdiction". From the form of this notice of appeal, the respondent, who may be someone with no knowledge of Court procedure, would have little guidance as to when the appeal might be heard or, in fact, where the appeal would be heard. His original trial was held at the Town of Bradford, and he might even not know that the City of Barrie is the county town for the County of Simcoe. It seems probable to me that a citizen served with such a notice might expect to receive some further notification as to the exact place and date for the new trial before he was again placed upon his peril. He may still be waiting for such a notice, for there is no evidence of the receipt by Amyot of any such information. It should be pointed out that the procedure followed, and the form of the notice of appeal is in conformity with the procedure as set out in the Criminal Code. Subsequently, A.M. Carter, Co.Ct.J., set the appeal down for hearing for the sittings of the County Court commencing on Monday, November 27, 1967. The Clerk of the County Court of the County of Simcoe is then required, as set out under s. 723 of the Criminal Code, to post in a conspicious place in his office, a notice of every appeal that has been set down for hearing and notice of the time when it will be heard. In this case, the Clerk did not post a separate notice in regard to the appeal, but instead posted a list which was entered as an exhibit. The list is headed:

> List of cases set down for hearing at the General Sessions of the Peace for the County of Simcoe, commencing Monday, the 27th Day of November A.D., at 10:00 o'clock in the forenoon.

The first page of the list then goes on to state that:

> All counsel represenging parties in all cases on this list are requested to be present or represented at the opening of Court commencing at 10:00 o'clock in the forenoon,

and that

> Counsel are requested to be ready for trial as of the first day of sittings,

and that

> In the event of jury trials proceed, the list will be disposed of in order in the absence of any agreement between counsel as to the hearing of cases. On p. 4 of the said list is a heading "APPEALS", and the fifth case on p. 4 simply sets out:
> Michael J. Ragot vs Theodore Amyot H.T.A. -- Speeding

The Clerk of the County Court of the County of Simcoe was called to give evidence, and testified as to posting the list in question, and further testified that he caused a copy of the list to be mailed by ordinary post to the respondent.

The first important point to be decided, therefore, is as to whether the posting of the whole list in the office of the County Court Clerk is a sufficient compliance with the provisions of s. 723(1) [rep. & sub. 1959 (Can.), c. 41, s. 36] of the Code. The Crown attorney asked leave to submit written argument in support of his contention that there had been compliance with the required procedure, and this written argument was

received on December 20, 1967. In substance, the argument of the Crown is that the provisions of s. 710(3) apply to a trial de novo by the operation of s. 727(1), and that therefore the appeal Court has the authority to proceed ex parte to hear and determine the proceedings in the absence of the accused. The Crown further pointed out that while the appeal proceedings for a summary conviction is designated as a trial de novo, it is really not a new trial in the full sense, but only a rehearing of the evidence, since the accused is not further arraigned nor required to plead: R. v. Dennis, [1960] S.C.R. 286 at p. 291, 125 C.C.C. 321 at p. 326, 32 C.R. 310. The Crown submitted that there was jurisdiction since there had been strict compliance with s. 722 [am. 1959, c. 41, s. 35] of the Criminal Code; and further that the proper Court officials, namely, the Clerk of the appeal Court, had complied with the terms of s. 723 of the Criminal Code. The procedure has been dealt with in the case of R. v. Wilson, [1964] 1 C.C.C. 176, 41 C.R. 89. In the case before the Court, as distinguished from the Wilson case, a Judge had set down the appeal for a regular sittings of the Court, and the Clerk had posted a notice in his office, and not as in the Wilson case, in a Court corridor. The Clerk had not only posted the notice, but had mailed a copy of the list to the respondent. It is argued by the Crown that the respondent had full notice of the sittings, and of the requirement of his presence at the first day of the sittings, and that a single notice containing a list of a number of appeal cases does not constitute a non-compliance with the requirements of s. 723, which does not say that separate and distinct notices are required for each appeal, nor is anything mentioned in the Wilson case, which has been referred to above, as to disapproval of the listing in one notice of several appeals.

I cannot agree that the procedure followed in this case is sufficient to allow the Court to proceed in absentia. It is trite law to say that care must be exercised before proceeding with any hearing in the absence of the accused, and in my opinion the procedure followed here is not sufficient to establish the constructive notice sufficient to allow the Court to proceed in absentia. The notice posted in this case does not say the time when the appeal will be heard, nor does either the notice of appeal or the notice posted in the Clerk's office set out the place where the appeal will be heard.

I have been referred to the case of R. ex rel. House v. MacDonald (1955), 112 C.C.C. 377, 22 C.R. 328, 37 M.P.R. 182 sub nom. R. v. MacDonald, an appeal heard by a Court composed of five Judges of the Nova Scotia Supreme Court. The Court unanimously found that the County Court Judge had jurisdiction, but there are important points of distinction in the case before this Court. In the House v. MacDonald case, the notice of appeal set out that the appeal was to the County Court for District 7 at Sydney, as opposed to the notice of appeal here, which is to the County Court of the County of Simcoe, at its next sittings of competent jurisdiction. In the House v. MacDonald case the order setting down the appeal set out the time and place when the appeal would be heard which was not done in the case before the Court and most important in the House v. MacDonald case, all parties were before the Court.

Section 726(2) of the Criminal Code provides:

> 726(2) An appeal shall not be dismissed by the appeal court by reason only that some person other than the appellant failed to comply with the provisions of this Part relating to appeals.

It might have been much perferable if, at the commencement of this appeal, assuming the Court had authority to do so, it had ajourned the hearing for personal service of a notice of an adjourned hearing to go out to the respondent. At the adjourned hearing there would have been no question in my mind as to the propriety of my proceeding as there would have been actual notice served upon the respondent of the time and place when his case would be heard. Since I did not take this action, and I may point out that I was not requested to do so by counsel, I reluctantly conclude that it is now too late to take this step, and may well have been too late at the outset of trial to do so. Accordingly, I have endorsed the record that "Jurisdiction not having been

established, and no request having been made by the Appellant to adjourn, in order to give the Respondent actual Notice, this Court does not have the power to hear and determine the Appeal." In my view, the duty upon this Court to hear and determine the appeal under s. 727 cannot arise until either the provisions of s. 723 have been fully observed, or actual notice to the respondent has been proven. I am strengthened in my opinion by the view of Viscount Simon who, in the House of Lords' decision in Harris v. D.P.P., [1952] A.C. 694 at p. 707, declared, it is "the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused". However, since this is a point upon which I have been unable to find direct authority, I think it is proper that I should proceed to consider herewith the appeal on its merits, in case I may be found to have been in error in my finding that this Court has no jurisdiction.

The case itself is one of particular interest, and deals with the use of aircraft to check upon vehicles exceeding the speed limit upon our highways. The first witness, Ontario Provincial Police Officer McCharles, gave evidence that he used an aeroplane to patrol highways and to check the speed of vehicles by a stop-watch reading in relation to specific markings on the highways. His evidence was that on Prov. Hwy 400, he had attended with a surveyor when markings were placed on the highway in the form of a "T", and that such markings were 1,320 ft. apart; in addition he had personally checked the 1,320-feet distance with a cyclometer, being a device whereby a wheel's revolutions measure a specific distance, and I am satisfied that the markings on the highway are 1,320 ft. apart. The officer then said that when the front bumper of a vehicle comes in line with the "T" marking on the highway, he activates his stop-watch, and then stops the watch when the front part of the vehicle comes to the next "T" marking upon the highway. While this is being done, the aircraft is kept in a position relatively parallel to the vehicle, and some 1,000 ft. to the side thereof. One June 12, 1967, Officer McCharles was on patrol on Hwy. 400, and checked a dark maroon passenger vehicle, and timed it between markers 3 and 4, and between markers 5 and 6, as painted upon the highway. His first reading been markers 3 and 4 showed that the vehicle took 11.5 seconds to cover the distance between the two markers, which gives a speed of 78 m.p.h. His second reading between markers 5 and 6 showed a reading of 11.2 seconds or a speed of 80 m.p.h. Upon taking the readings, Officer McCharles radioed to a police car located on the highway, and instructed the officer in the police car, being a Constable Ragot, to stop the dark maroon passenger vehicle, and he kept the vehicle under observation until it was stopped by Officer Ragot. It is noted that Officer McCharles had been engaged in aerial observation over a period of three years, to the extent of some 600 hours each summer season, and testified that from his experience he could tell from observation only, if a vehicle was travelling faster than other traffic, and could also tell from his experience if a vehicle was travelling over the speed limit to any considerable extent. He stated that his stop-watch was a special type in which the movement was in action at all times. He further testified, although I consider that this evidence is not admissible, that the watch had been certified by a master watchsmith to be correct and accurate, by tests taken in August, 1966, and was further certified to be accurate by a master watchsmith in August, 1967, that is both before and after the charging of the respondent in this case. In addition to the stop-watch reading, he was convinced that the Amyot vehicle was exceeding the posted speed limit of 60 m.p.h. It should be pointed out that an automobile driven at 60 m.p.h. would take 15 seconds to travel one-qarter of a mile, and with readings of 11.5 and 11.2 seconds, any error of over three seconds in the stop-watch would be almost inconceivable. Similarly, the officer could have had an error of over three seconds in his activating the watch, and the car would still have been exceeding the speed limit.

Constable Ragot was also called, and he testified that at the time and place in question, he had stopped a maroon vehicle and gave the licence number of the vehicle, and that the driver of the vehicle was one Theodore Amyot, who admitted his name and the fact that he was the driver and, in addition, the constable had actually seen the man later identified as Amyot, as he was operating the vehicle while it was being

brought to a stop by the officer. At this time, Constable Ragot testified, he charged the respondent Amyot with driving 78 m.p.h. in a 60 m.p.h. traffic zone. Constable Ragot also testified that he had checked with the aircraft after the car had been stopped, and before charging the driver, to ensure that he had stopped the right vehicle. He further testified that the speed limit in the area in question was 60 m.p.h., and that it was so posted.

The Crown's submission was that the stop-watch reading was prima facie evidence of the speed recorded. The Crown referred to the New Brunswick case of R. ex rel. Neely v. Tait, [1965] 1 C.C.C. 16, in which the County Court Judge hearing a similar appeal said at p. 18:

> The Magistrate apparently considered that evidence of the accuracy of the speedometer was necessary in order to justify a conviction and it was on this ground that he dismissed the information. In my opinion the evidence of Constable Barr, if believed by the Magistrate and in absence of evidence showing the speedometer to have been inaccurate or which raised a reasonable doubt as to its accuracy, was sufficient on which to convict.

And in this case the learned County Court Judge referred to the English case of Nicholas v. Penny, 1950 2 K.B. 466, where the judgment of the Court was delivered by Lord Goddard, C.J., and the headnote read that the constable's evidence was prima facie evidence on which the Justices could convict the defendant of driving in excess of 30 m.p.h., if they were in fact satisfied that he had so driven, notwithstanding that no admissible evidence had been given as to the accuracy of the speedometer. In his reasons for judgment, at p. 473, Lord Goddard said as follows:

> The question in the present case is whether, if evidence is given that a mechanical device such as a watch or speedometer -- and I cannot see any different in principle between a watch and a speedometer -- recorded a particular time or a particular speed, which is the purpose of that instrument to record, that can by itself be prima facie evidence, on which a court can act, of that time or speed. It might be that in a particular case the court would refuse to act on such evidence. For instance, if it were a question whether a man died before midnight on a certain day and one party alleged that he died half a minute before 12 o'clock and another party that he died half a minute after 12 o'clock, and the first party said, "It was half a minute before 12 because I observed the time by the clock," it might be that the court would say, "We will not find that as a fact unless we are satisfied as to the accuracy of the clock."
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> In the present case counsel for the prosecution called our attention to the fact that the speedometer must have been very inaccurate if the offence was not committed. The offence is driving at a speed exceeding 30 m.p.h., and the evidence is that the speedometer showed at the time in question that the defendant was exceeding 30 m.p.h. by no less than 10 miles an hour. It would be a considerable error in the speedometer if it were as much out as that.

Later in his judgment, at pp. 474-5, Lord Goddard, with whom the other two members of the Court concurred, said as follows:

> . . . it is admissible evidence for a police officer to say in such a case: "I followed this vehicle at an even distance from it and observed from my speedometer that I was progressing at the rate of 40 m.p.h., and, therefore, it must have been progressing 'at that rate.'" No one is saying that that is more than prima facie evidence: there may be cross-examination; there may be evidence given on the other side. The defendant may say: "that is all very well, but my own speedometer showed that I was only going 25 or 30 m.p.h., and it is accurate." The justices

> have then to make up their minds, and it may be that in such a case they might, having heard and seen the witnesses and considered their bearing in the witness-box, prefer the evidence given by the defendant to the evidence given by the police.
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> The question in the present case is whether or not, if a police officer says that he was following a vehicle at an even distance from it and the speedometer on his car showed that he was going not at 30.5 m.p.h., or at just over 30 m.p.h., but at 40 m.p.h., that is evidence on which the justices can act, although it is not strictly proved before them that the speedometer has been tested.
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> Therefore, we propose to remit the case to the justices and ask them whether, apart from the tests which were carried out, they would have held, on the evidence of the police constable and his observation of the driving, and of his speedometer, that they were satisfied that the defendant was travelling at a speed in excess of 30 miles an hour. That is what they have to be satisfied about, and they can be satisfied about it on the evidence which was given, apart from the tests. The evidence of those tests was strictly not admissible, but the justices must make up their minds whether they were satisfied, apart from the tests, that the car was being driven at a speed exceeding 30 miles an hour.

The point was also dealt with in the case of R. v. Purdy (1963), 6 Crim. L.Q. 510, where a very complete review of the law was given by Pottier, Co.Ct.J.

Now, in the case before me, there is no doubt in my mind as to the evidence of the police officer and as to the fact that the respondent was exceeding the speed limit.

It may be submitted, however, that I am bound by the case referred to by the learned Magistrate in his reasons for judgment of Re Regina v. Thibodeau (1964), 7 Crim. L.Q. 498, a decision of Fraser, J. This was an order made by Mr. Justice Fraser on a stated case, and the report is very brief, consisting only of the stated case and the answers to the questions submitted. It appears by inference, however, that the learned Judge, in making the order in question with reference to Q. 4 thereof, considered that a conviction should not be made without evidence of the accuracy of the police officer's speedometer. There is nothing in the report to show what the particular facts and evidence were, nor is there any indication as to the argument submitted before Mr. Justice Fraser, or the authorities quoted to him. It may be that the answer given to Q. 4 related to the conviction of driving at a stated speed, rather than a conviction of exceeding the speed limit, and perhaps there was absolutely no evidence of speeding, other than by way of the speedometer. After careful reading of the case as reported, I do not consider that it is a binding decision on the point at issue in the case now before the Court. Any contrary view would have to be taken by inference from the skeleton information reported.

We come now to the point as to whether the accused can be convicted of driving at a specific rate of speed. The only offence, as set out in the Highway Traffic Act, R.S.O. 1960, c. 172, is operating a motor vehicle at a greater speed than the existing speed limit. There is no offence of operating a motor vehicle at a speed greater than 10 miles above the speed limit, or 20 miles above the speed limit, and this apparently has come by implication from the point system for traffic offences set up in the Province of Ontario. In my opinion, I can acquit or convict of the offence of exceeding the speed limit. I accept the evidence of the police officer, but would not convict on an offence of driving a motor vehicle at 78 m.p.h. on the evidence that was before me. I am of the opinion that I am not required to make any such decision. I am satisfied on the evidence presented before me that the accused respondent was driving at a rate of speed in excess of the speed limit, and if I had jurisdiction would have so found.

Appeal dismissed.