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R. v. Bourne

Between
Tracy Bourne, appellant, and
Her Majesty the Queen, respondent

[2001] O.J. No. 2869

Ontario Court of Justice
Hamilton, Ontario
Karswick J.

Heard: March 20, 2001.
Judgment: June 15, 2001.
(36 paras.)

Statutes and Regulations cited:

Highway Traffic Act, R.S.O. 1990, c. H-8, section 128.

Cases cited:

R. v. Mukasa; R. v. Spinosa; R. v. O'Brien (2001), 48 W.C.B. (2d) 456, [2001] O.J. No. 262 (Ont. C.J.).
R. v. Vancrey (2000), 135 O.A.C. 89, 147 C.C.C. (3d) 546, 5 M.V.R. (4th) 302, [2000] O.J. No. 3033 (Ont. C.A.).
R. v. Wong, [2000] O.J. No. 1442 (Ont. C.J.).

Counsel:

Michael McGregor, for the appellant.
Michael Keith, for the Crown.

¶ 1 **KARSWICK J.**:— This is an appeal by Tracy Bourne from the conviction for speeding, contrary to section 128 of the Highway Traffic Act, R.S.O. 1990, c. H-8.

¶ 2 The appellant's speed was measured by an L.T.I. 20-20 Marksman Laser Speed Detection Device (L.S.D.D.).

¶ 3 The issue before the court is the adequacy of the evidence presented by the Crown of the accuracy and reliability of the device used to measure the speed of the appellant's driving.

¶ 4 It is submitted by both parties that the L.S.D.D. was in the hands of a properly qualified laser operator

and that, prior to its use on this occasion, this device had been properly tested in accordance with the manufacturer's instructions for the purposes of confirming that the device is working accurately.

¶ 5 There are four tests to be completed according to the manufacturer's recommendations. These tests are described as the "self-test", "display test", "scope test" and "distance-velocity test".

¶ 6 However, the operator did not perform a further independent test by comparing the results of the L.S.D.D. with the results of a conventional radar device.

¶ 7 This further test could have been accomplished by taking both the L.S.D.D. and a conventional radar device to a highway where the operator could target a moving vehicle with both devices and then compare their readings to determine whether they were the same.

¶ 8 The issue on this appeal has been addressed previously by a number of judges of the Ontario Court of Justice and by courts of other provinces. For the purposes of this proceeding, only three cases need be referred to, namely:

* R. v. Vancrey (2000), 135 O.A.C. 89, 147 C.C.C. (3d) 546, 5 M.V.R. (4th) 302, [2000] O.J. No. 3033 (Ont. C.A.).
* R. v. Wong, [2000] O.J. No. 1442 (Ont. C.J.), per Justice Terence G. O'Hara.
* R. v. Mukasa; R. v. Spinosa; R. v. O'Brien (2001), 48 W.C.B. (2d) 456, [2001] O.J. No. 262 (Ont. C.J.), per Justice Gregory A. Pockele.

¶ 9 In R. v. Vancrey, the appellant appealed her conviction for speeding contrary to section 128 of the Highway Traffic Act. The speed of her motor vehicle had been measured by an L.S.D.D.

¶ 10 This device was operated by a properly qualified operator who had performed the four tests recommended by the manufacturer. These tests were performed on the day in question, both in the morning and the afternoon, and the operator had concluded that the device was working accurately on that day.

¶ 11 Further, the operator also performed another independent test on that unit two or three weeks prior to its use on the day when the offence was committed.

¶ 12 On that earlier occasion, the officer had targeted moving vehicles with both the L.S.D.D. and a conventional radar device. He then compared the readings of the two instruments and found them to be identical.

¶ 13 In upholding the conviction, Appeals Justice Kathryn N. Feldman made the following observations:

> [22] ... The court received evidence that the officer who operated the laser device was trained and experienced and that he tested the device both before and after its use in accordance with the manufacturer's instructions to ensure that it was operating properly on the date in question. The court also received evidence of the accuracy of the device for measuring the speed of vehicles on a highway by comparing its readings with those of an accurate radar unit. The radar test provides the independent guarantee of the accuracy of the particular laser unit to measure the speed of a moving vehicle.
> [23] The only question left is whether the radar test, done some three to four weeks before the date of the offence, continued to serve the evidentiary purpose. In my view, when

> coupled with the fact that the unit was tested to be in good working order on the date of the offence, the radar test was sufficiently proximate in time to provide prima facie evidence of the reliability of the instrument on that date. Together, the two tests provide the circumstantial guarantee that the unit would still provide the accurate readings it did when compared to the radar device.

¶ 14 Further in her decision, the following is noted at paragraph [25]:

> ... I agree with the conclusion reached by the justice of the peace, that in this case the evidence of the comparison with the radar instrument was satisfactory to establish a prima facie case and, with no evidence to the contrary, the conviction must stand.

¶ 15 In R. v. Wong, the Crown appealed the acquittal of the respondent on a charge of speeding, based on the justice of the peace's view that comparison tests between the laser device and the older technology were not done in a timely fashion.

¶ 16 On the consent of the parties, fresh evidence was introduced before Justice O'Hara, who was then required to substitute his own findings and conclusions for that of the justice of the peace.

¶ 17 Professor Wyatt Killgallin gave evidence with respect to the reputation of this type of technology in the scientific community.

¶ 18 Sergeant Lannigan gave evidence based on the large number of comparison testing that he had done involving the laser device and the older technology, to measure speed in law enforcement.

¶ 19 Further, the following reference materials were introduced as evidence in the proceeding before Justice O'Hara:

* A case from the Superior Court of New Jersey, entitled "The Matter of Admissibility of Motor Vehicle Speed Readings Produced by the LTI Marksman 20-20 Laser Speed Detection System".
* A manual entitled "Operational Instructions Manual for the LTI 20-20 Laser Speed Detection System" published by Laser Technology Incorporated at 7070 South Tucson Way, Englewood, Colorado.
* A further manual entitled "The Marksman LTI 20.20 Laser Speed Detection System Operator's Manual", same publisher.

¶ 20 Justice O'Hara very carefully analyzed the evidence presented and then reached the following conclusion at paragraphs [17] and [18] of his judgment:

> [17] I was unable to find any evidence before me that those features of the machine - and they are what I believe that the New Jersey Court is referring to, among others, when it describes the error trapping programs and mechanisms built into the detector which the New Jersey Court found were "fully adequate to prevent unreliable speed measurements when used for law enforcement purposes" were in any way tested by the Self-Test, Display Test, or Fixed Distance, Zero Velocity Check recommended by the manufacturer and pronounced upon by Professor Killgallin as being adequate, at least in the sense that he said he could not see how a comparison with radar against a moving object would assist in

> assessing the reliability of the instrument.
> [18] I find on the evidence before me that there is no adequate testing of the error trapping mechanisms without a dynamic test being done on the instrument.

At page 9, His Honour made the following observations and findings:

> [19] If additional verification is desired, before describing a mobile test against a calibrated speedometer, which could in my view just as easily and in fact more accurately be done by radar mounted in a cruiser, as I understand is common with respect to police cruisers in the jurisdiction of Ontario. I cannot reconcile the plain words of the manual with Professor Killgallin's evidence that it wouldn't add anything to it. The word, "additional", seems to me to very clearly suggest that that manufacturer feels there is an additional verification possible by this test.
> [20] Professor Killgallin's experience with this particular machine is, in my view, totally based on the manufacturer's material and his explorations of the use of the machine are totally dependent on the manufacturer's engineering and it being demonstrated to them by the manufacturer.
> [21] I cannot accept that an additional verification is not required. ...

And further in the same paragraph, the following observations are made:

> In my view, it is not unreasonable to demand a dynamic test as part of the indicia or reliability to a court.

¶ 21 In R. v. Mukasa; R. v. Spinosa; R. v. O'Brien, there were three different matters where three different appeals were taken from three different trial decisions made by a justice of the peace relating to charges under section 128 of the Highway Traffic Act. All three decisions were dependent upon rulings made regarding the admissibility of evidence of rate of speed obtained by laser speed detection devices. R. v. Mukasa and R. v. Spinosa were Crown appeals of acquittals, while R. v. O'Brien was a defence appeal of a conviction.

¶ 22 The common issue with respect to all three appeals was the admissibility of L.S.D.D. readings as evidence of a motor vehicle's rate of speed.

¶ 23 Justice Pockele concluded that L.S.D.D. readings are admissible as reliable and trustworthy without the requirement for comparative testing with conventional radar technology. His Honour registered convictions in all three appeals.

¶ 24 At paragraph [8] of his decision, Justice Pockele reached the following conclusion:

> I find as fact that laser speed detection devices, while once a new and novel technology, is no longer so on today's date.

The judge's reasons for reaching such conclusion were as follows later in the same paragraph:

> We are dealing with laser speed device technology that has had eight years of history in this country. The principles of laser technology were developed after World War II and are based upon the immutable laws of physics relating to light energy. Lasers now have daily

> applications in virtually every home, industry and office. People use CD players, laser surgery, automobile assembly devices, and even the space shuttle can be docked using laser technology. One must be mindful, as we approach the year 2001, that in today's world, a child's video game has more computing power than the craft used in the Apollo moon missions and computers become obsolete every 24 months. I am concerned that a finding, or continuing to find, that LSDD technology is new or novel represents a mind set that is simply not representative of current scientific and technological thought and cannot be supported by the scientific and technical evidence tendered to the courts in all of the previous cases.

¶ 25 My reading of Justice Pockele's reasons for judgment lead me to conclude that there was no scientific or technological evidence presented to him in that proceeding and therefore, there was no evidentiary basis upon which such broad findings could be made with respect to the acceptability and reliability of laser technology.

¶ 26 Further, Justice Pockele carefully reviewed the findings of Justice O'Hara in R. v. Wong case and then rejected the findings and conclusions of Justice O'Hara by making the following observations at paragraph [9]:

> Nowhere in the evidence was it indicated that such additional verification was suggested, necessary, or even prudent. And in fact, the whole of the uncontradicted technical evidence was that such testing was in fact unnecessary. The imposition of a comparative testing regime in R. v. Wong imposes a technical check, a judicially imposed technical check, that flies in the face of any scientific or technical evidence before the court.

¶ 27 I am of the view that it is inappropriate for one judge of the Ontario Court of Justice to review the findings of another judge of the Ontario Court of Justice and then to make a different finding or conclusion.

¶ 28 In my view, that is an exercise that is in the sole purview of an appellate court.

¶ 29 Moreover, the findings and conclusions of Justice O'Hara remain more consistent with the principles enunciated by the Ontario Court of Appeal in the decision of R. v. Vancrey than the conclusions reached by Justice Pockele.

¶ 30 My reading of the judgment of Appeals Justice Feldman leads me to conclude that, at the very least, at this point of time, it is essential for there to be scientific and technological evidence presented to the trial justice that the L.S.D.D. was tested within some reasonable period of time against an independent and acceptable conventional speed measuring instrument, such as a radar device, and that the L.S.D.D. was found to be accurate.

¶ 31 Such evidence needs to be presented before each court each time there is a trial upon this issue and each justice must then reach his or her own conclusion based on that evidence.

¶ 32 Admittedly, this presents a time consuming and perhaps expensive exercise. This situation can be remedied if the Ontario Court of Appeal, upon a further review, delivers directions with respect to the reliability and trustworthiness of the laser device based on the experience of the courts up to this point of time. Alternatively, appropriate legislation could be promulgated declaring the circumstances and conditions under which the L.S.D.D. may be admissible in evidence.

¶ 33 In this case before me, it is conceded that the technician was properly qualified and that all four of the manufacturer's tests were complied with prior to the use of this device.

¶ 34 However, it is also stated, for the purposes of this proceeding, that there was no independent testing of this device as against a conventional radar device.

¶ 35 The Ontario Court of Appeal decision in R. v. Vancrey clearly held that there must be such an independent test conducted within some reasonable period of time prior to the use of the instrument.

¶ 36 The appeal is therefore allowed and the conviction is set aside.

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