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R. v. Chamberlain

Between
Regina, and
Selwyn Chamberlain

[1996] B.C.J. No. 1562
DRS 97-02287
Vancouver Registry No. C072490

British Columbia Provincial Court
Vancouver, British Columbia
MacKenzie Prov. Ct. J.

Judgment: January 30, 1996.
(7 pp.)

Motor vehicles — Regulation of vehicles and traffic — Rate of speed, evidence and proof — By radar equipment or other speed detection device.

This was a trial on a charge of speeding. The defence challenged the reliability of the reading of speed given by the LTI 20/20 Laser Instrument. The argument was that the laser instrument was new technology, so there should be an independent scientific test to verify the defendant's speed. Since there was no comparison or testing of the laser instrument with a radar instrument or by other means, a reasonable doubt existed as to the speed of the vehicle.

HELD: The defendant was found guilty. This was not a case where a precise speed had to be measured. The issue was whether it had been proven that the accused's speed was in excess of 50 kilometres per hour. The police constable's evidence of his visual estimate of speed was persuasive, and certainly supported the speed reading given by the laser instrument. This evidence was unchallenged. On the facts, there was no requirement for independent scientific proof of the technology. The evidence established that the instrument enjoyed a circumstantial guarantee of trustworthiness.

Counsel:

D. Lawrence, for the Crown.
D. Kaufman, for the defence.

¶ 1 **MacKENZIE PROV. CT. J.**:— The defendant is charged with speeding contrary to section 151(1) of the Motor Vehicle Act. The Crown's case depended on the evidence of Constable Lemke of the Vancouver Police Department. He both visually estimated the speed of the defendant's van and used the LTI 20/20 Laser Instrument to measure its speed. The defendant did not testify or call other evidence.

¶ 2 Defence counsel challenges the reliability of the reading of speed given by the LTI 20/20 Laser Instrument, relying on R. v. Sutherland, (1993), 47 M.V.R. (2d) 254, a decision of the Alberta Provincial Court which was upheld by the Alberta Court of Queen's Bench at 1994 Alberta Judgments No. 316 to argue that the

technology of the Laser LTI 20/20 is new, so there should be an independent scientific test to verify the defendant's speed.

¶ 3 Since there was no comparison or testing here of the laser instrument with a radar instrument or by other means, a reasonable doubt exists as to the speed of the vehicle, according to the defence. Defence counsel urges it would not have taken much time and it would not have been onerous to calibrate an LTI 20/20. This could have been done simply by driving a car or a motor cycle and comparing its speedometer reading to that of the laser instrument, or comparing the laser with a radar reading.

¶ 4 These are the facts. Constable Lemke's ten or eleven years with the Vancouver Police Department included five years in the traffic section. He described his training and experience with laser speed detection equipment. In April of 1994 he completed a course on the LTI 20/20 Laser Instrument. He testified it is capable of accurately measuring speed.

¶ 5 Constable Lemke was operating it May 4, 1994, the date of this incident. He described the LTI 20/20 Laser Instrument as being target specific with a site on the top similar to that of a rifle. After setting up the instrument and performing the manufacturer's recommended tests which he described in cross-examination the operator looks down the site, sees a dot of red light. This dot is aligned with the particular vehicle the operator intends to monitor. The operator then pulls the trigger on the laser instrument and instantly receives a speed reading of the target vehicle. The instrument cannot register the speed of any other vehicle, so on the evidence of Constable Lemke, there can be no mistake.

¶ 6 Constable Lemke also described his training and experience in visually estimating the speed of moving vehicles. He completed courses in speed estimation in 1989 and 1985. He has compared his estimates of speed to radar, laser and photo radar speeds on tens of thousands of moving vehicles. He testified his accuracy is within plus or minus 10 kilometres, though usually on the low side which benefits the driver.

¶ 7 On May 4, 1994 he participated in a laser call setup and monitored the speed of northbound traffic in the 7900 block of Knight Street in Vancouver. He operated the laser instrument. Several other officers a block or so north of him were what he referred to as "pick-up" officers. He would monitor the speeds of vehicles. He would use the police radio to inform the "pick-up" officers of his target vehicles, and radio those which he found were speeding. From his position, he was able to see the officers pull over his targeted vehicles. On this occasion, Constable Lemke even confirmed the licence plate number of the vehicle.

¶ 8 On his arrival at this location, he had set up the instrument on the east side of Knight Street at the north end of the 7800 block. Knight Street is three lanes north and three south here. It is a 50 kilometre per hour zone. Significantly, in my view, on his arrival there, Constable Lemke performed the manufacturer's recommended tests on the laser instrument. He did those tests again before leaving. Both times he found the instrument on the test to be correct. He was therefore satisfied the instrument was operating properly and accurately.

¶ 9 Two blocks south of his position on the east side of Knight Street there is a speed zone sign erected on a pole eight feet in the air. It faces southbound for northbound traffic. It is a standard international speed zone sign. It has a white background with large black letters, numbers 50, and below in black letters, kph. South of the sign is a 60 kilometre per hour zone, but as soon as the northbound vehicles pass the sign, the speed limit becomes 50 kilometres per hour.

¶ 10 Constable Lemke used the laser instrument to measure the distance from himself to the sign by putting the red dot on the back of the sign and pulling the trigger of the laser instrument. Looking at the distance setting, it read 169 meters. So the sign was 169 meters from his location in plain view of the northbound traffic.

¶ 11 He had set up at approximately 1:00 p.m. May 4, 1994 and at approximately 1:45 he saw the blue Ford van travelling northbound toward him in the centre lane of the three northbound lanes. It is common ground it was driven by the defendant. As it travelled toward him he noted it in the middle of a group of others. He visually estimated the speed to be in excess of 70 kilometres per hour. He watched as the Ford van passed the 50 kilometre per hour sign. Its speed appeared to be the same visually and he pointed the laser instrument at the

Ford van, looked down the sight, put the red dot on the grillwork of the vehicle, pulled the trigger on the instrument and received a reading of 73 kilometres per hour in the 50 kilometre zone. The instrument also gave him a reading of 155 meters which was the distance the van was away from him when he received the speed reading. That meant the vehicle was 14 meters inside the 50 kilometre zone when he received the reading.

¶ 12 He then made the radio broadcast to the "pick-up" officers, described the vehicle, its speed and verbally gave them the licence. He watched them pull it over. Constable Lemke said, after five years in traffic enforcement and monitoring tens of thousands of vehicles for speed violations, and through his training, there was no doubt the laser instrument he was operating was operating correctly and the Ford van was exceeding the 50 kilometre per hour speed limit in the area.

¶ 13 In cross examination Constable Lemke said he had been using the laser LTI 20/20 Instrument approximately a week before this incident. He described the approved manufacturer's test. First there's a distance test done before leaving the police station. He described it. He had been, a few days before, to the location on Knight Street, and measured 169 meters with the instrument.

¶ 14 The instrument also does a self-test. This is an internal diagnostic test. When the instrument is first turned on, four number "eights" appear on the screen and stay a few seconds. This means the instrument is operating correctly. The instrument would not disclose this result unless everything inside was working properly. A segment test is to push and hold the test button. The four eights show up as lit up. If any segment is burnt out, one would not use the instrument. He said that he never tests a vehicle that he estimates is going 50 kilometres per hour. Besides the self-test Constable Lemke said his testing of the accuracy of the laser instrument is his own visual test or estimate of speed of the target vehicle. He's used these instruments, he referred to them as, hundreds of times and had only one problem with a Decatur hand-held radar unit which he put away after discovering the problem.

¶ 15 Turning to the argument, apart from the decision in Sutherland as upheld by the Alberta Court of Queen's Bench the defence relies on R. v. Shaw, [1994] A.J. No. 960 rendered December 6, 1994. In that case the evidence consisted of testimony about the accuracy of this laser model. The constable testified he performed a number of tests to verify its accuracy but he had included a comparison test with the old radar machine. The Court reviewed the cases, and I note on the facts of the Shaw case, the constable operating the machines did not testify as to his personal opinion of the speed of the vehicle of the accused at the relevant time.

¶ 16 In any event, defence counsel emphasises page 6 of 8, paragraph 7, that the Court observed that the constable had provided evidence of the tests he performed with the laser machine, but also provided evidence of the tests he conducted with the tuning forks and the radar machine against which the laser machine was tested on the day in question. The evidence was not contradicted or questioned. The Court points out that evidence was what provided the link missing in R. v. Kolthammer and R. v. Sutherland, the other two cases defence relies on.

¶ 17 In Shaw the Court comments on R. v. Alladina, a decision relied upon by the Crown here. The citation for the Alladina case is (1994), 4 M.V.R. (3d) 180, a decision of the Alberta Court of Queen's Bench. The Court in Shaw points out that in R. v. Alladina where the Court held the radar comparison satisfied the circumstantial guarantee of trustworthiness referred to in earlier cases, that there was a radar test done. Sutherland, of course, is the case which holds that absent expert evidence, there should be some independent proof of the Laser LTI 20/20 technology. There was no such evidence in the Sutherland case and the charge was dismissed. That was upheld by the Alberta Court of Queen's Bench where the Court said, at page 3 of 8:

> The police officer testified he used two methods to determine the accused was speeding. First he was able to visually estimate the accused was travelling over the speed limit. Second, he used the LTI 20/20 Laser Device to measure the accused's speed and did so three times.
> He employed the full recommended tests of the manufacturer to determine the machine was operating correctly prior to using it.

¶ 18 After reviewing the cases, the Court dismisses the appeal of the Crown. With respect to its comments on the Alladina case (because Shaw was rendered after Alladina) the Court in Shaw notes that Alladina was

distinguishable because the machine in question was tested before and after against a radar unit that was properly working. The radar readings were found to be admissible. The Court in Alladina determined this procedure satisfied the circumstantial guarantees of trustworthiness. Here, the Court relies on Alladina in a passage that appears to have been overlooked by the Courts which discussed it, and I won't review the facts of Alladina, and the review of the case law in it, but at page 183, Justice Roslak at paragraph 12 states:

> Constable Van Beek gave evidence that he performed tests on the laser used by him in accordance with the training he had taken and that the laser worked properly and was capable of accurately measuring the speed of a moving vehicle. There was no other evidence to consider. On the basis of such evidence alone I would hold as was held in Werenka that the uncontradicted evidence of the constable is prima facie evidence of the speed given by the constable.

¶ 19 He then goes on to say there was the addition months later of the radar confirming and the visual estimations regarding the speed confirming the laser readings. So the radar test was done months later. The Judge in Alladina then in fact says that on the basis of Constable Van Beek's evidence that he performed the tests on the laser in accordance with the training he'd taken, and that it was working properly and was capable of accurately measuring the speed of a moving vehicle, he would have found that evidence prima facie evidence of the speed given by the constable,

¶ 20 I prefer the reasoning in Alladina in that paragraph to the reasoning in the other cases because there is more in the case before me. It is Constable Lemke's evidence of his visual estimate of speed. He said it was in excess of 70 kilometres per hour. This evidence was unchallenged in cross examination. Constable Lemke's evidence of his experience in visual estimates and his evidence of his own accuracy, plus or minus 10 kilometres per hour, was impressive. He has compared his own estimates to radar laser and photo laser speeds on tens of thousands of moving vehicles. His accuracy, within plus or minus 10 kilometres per hour, though usually on the low side benefitting the driver, means that even given his margin for error taken on the high side puts the defendant's van well in excess of the speed limit of 50 kilometres per hour.

¶ 21 This is not a case where a precise speed has to be measured. It's a case of whether it's been proven that the speed was in excess of the 50 kilometres per hour. Constable Lemke's evidence of his visual estimate of the speed is persuasive and certainly supports or confirms the speed reading given by the laser instrument.

¶ 22 The evidence of his unchallenged visual estimate taken together with the following: first, that the particular instrument was properly operated by a qualified person; two, the equipment function and accuracy was tested by Constable Lemke, performing the manufacturer's recommended tests both before and after the incident; three, those tests or procedures indicated the instrument was operating properly and the test revealed the equipment was capable of accurately measuring the speed of a moving vehicle, all compel the conclusion the Crown has proved its case beyond a reasonable doubt.

¶ 23 Constable Lemke is not an expert as to the theory by which this instrument operates, but he has sufficient technical expertise to understand how it operates so as to use it and to be able to follow the manufacturer's recommended tests, to operate it and confirm its accuracy by virtue of his own training and experience in visually estimating the speed of moving vehicles. There's no requirement on the facts before me for independent scientific proof of the technology. On the totality of the evidence the reliability of this instrument is established beyond a reasonable doubt. Or, to use the langauge in Sutherland taken from Professor Wigmore's phrase, the evidence before me establishes the instrument enjoys a circumstantial guarantee of trustworthiness. I find the defendant guilty of speeding as charged.

MacKENZIE PROV. CT. J.