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R. v. Gagliano

Between
Her Majesty the Queen, and
Gaetano C. Gagliano

[1996] O.J. No. 5409

Ontario Court of Justice (Provincial Division)
Barrie, Ontario
Payne Prov. J.

March 8, 1996.
(91 paras.)

Charge: S. 128, Highway Traffic Act

Counsel:

M. Rumble, prosecutor for the Crown.
G. Parker, agent for the defendant.

¶ 1 **PAYNE PROV. J.**:— So that gets up back Gagliano. Mr. Parker then.

¶ 2 MR. PARKER: The court's indulgence for just one second.

¶ 3 MS RUMBLE: Your Honour, perhaps I could just speak to this matter and try to shorten it.

¶ 4 **THE COURT**: Well, I was going to tell you what was bothering me about it but let's see if we are on the same track.

¶ 5 MS RUMBLE: Okay. I will just say what the crown is prepared to argue on this. I understand that basically it's an argument based on section 7 of the Charter indicating that the non disclosure violated section 7.

¶ 6 **THE COURT**: Right.

¶ 7 MS RUMBLE: What the crown is prepared to argue today are ... first of all, I would like the court to entertain argument based on whether section 7 even applies here. So I would like to ...

¶ 8 **THE COURT**: Well, it is the right to make full answer and defence. See, that's what the ....

¶ 9 MS RUMBLE: Yes, I know that that's the issue but I don't know if the right to life, liberty or security of the person is in issue in a Highway Traffic matter. Sometimes yes, but in a speeding case, more

specifically, I'd like to make that argument.

¶ 10 If Your Honour decides on that preliminary issue that one of those interests are affected ...

¶ 11 **THE COURT**: I would rather maybe before we get too involved in the legal aspect ...

¶ 12 MS RUMBLE: Yes.

¶ 13 **THE COURT**: Why doesn't the prosecution produce the test that you are asked for?

¶ 14 MS RUMBLE: Okay, I'll tell Your Honour why. The reason ...

¶ 15 **THE COURT**: It is not clear on the record.

¶ 16 MS RUMBLE: Okay.

¶ 17 **THE COURT**: There's some record to copyright and I do not know what that means but there was no factual basis put before the justice of the peace. There just seemed to be an assumption that the manufacturer had some control over this manual. There should have been, I thought, some factual basis for not producing it. Rather than just say I'm not going to produce it, the crown, I think in fairness, and even as a matter of courtesy, should have said, we have this manual, we are using it, you are entitled to see it. The reasons why we can't release it to you are the following. Let somebody rule on it rather than just arbitrarily saying, we're not going to give it to you, because you bring this up in the course of your prosecution. Everyone of these radar officer said, I tested this machine, according to manufacturers' specifications.

¶ 18 MS RUMBLE: Right.

¶ 19 **THE COURT**: And there is no, quite obviously, once that statement is made or however it comes out, the defence is entitled to then say, well, fine, what are the manufacturer's ... let me see them and let's see what you did. So how can the crown say, you can't see them?

¶ 20 MS RUMBLE: The crown said you can't have copies of them, okay. The request was for a copy of the radar manual.

¶ 21 **THE COURT**: Yes, well that is a little too broad.

¶ 22 MS RUMBLE: Right. An the crown in this case said, no, you can't have copies and I will concede that there was no other mode of providing disclosure. I can indicate to the court that our revised policy now ....

¶ 23 **THE COURT**: Enlightened I hope.

¶ 24 MS RUMBLE: I hope that Your Honour will find that and it tries to take into account the copyright issue.

¶ 25 **THE COURT**: What is the copyright issue?

¶ 26 MS RUMBLE: I could just hand this up to the court. It's just an example ....

¶ 27 **THE COURT**: I don't want to go to jail for looking at this.

¶ 28 MS RUMBLE: No, Your Honour, this is a copy of a manual and just inside here has this little copyright disclaimer.

¶ 29 **THE COURT**: Well, no, copyright is used. It doesn't mean that someone can't .... What is the use of printing a book if no one can read it?

¶ 30 MS RUMBLE: Exactly. So the crown's policy now, Your Honour is that no, we won't photocopy the manual being given to you.

¶ 31 **THE COURT**: No, I don't think you should, no.

¶ 32 MS RUMBLE: Exactly. But if you'd like, we'll set up a meeting, you can come in and look at the manual and we can do it that way. We don't want to give you a copy but you can surely look at it. That wasn't done in this case but I ...

¶ 33 **THE COURT**: Is there any problem of just simply transposing the test procedure out? I do not suppose on a speeding case even an agent wants to know the electronics internally or whether they would understand any more than I would. But is it so secretive that the test procedure that they give orally in the witness box of what they did and all the defence is asking is, well, let's see what this is and then I can decide or the court can decide have you followed it or not. Obviously if the question is put to the officer and said, well, did you do this, and he says no, then it may very well, the justice of the peace may say this isn't an accurate reading. It's like the issue of smoking before you take your breathalyzer test or blow into the ... weather it affects the machine or not is another matter. But the manual says, don't smoke before you blow and so it's a legitimate question. If you don't have that test sheet, and they are provided automatically with respect to a radar (sic) check sheet. I don't know why a check sheet is made up for -- rather a breathalyser machine, a breath tech's machine is produced routinely. I don't understand why this was not produced.

¶ 34 MS RUMBLE: Well, my understanding is ....

¶ 35 **THE COURT**: Or made available. I think if it's a serious ... There may be something as between the manufacturer and something that I do not know about and that is not, as I do not want to rule on that. I am simply saying if that is true, then they should be suing as to whether they are entitled to keep that procedure or that copyright protection in the face of the rules of court.

¶ 36 MS RUMBLE: Well that ...

¶ 37 **THE COURT**: It may very well be that the manufacturer should have been subpoenaed to court and required to bring this manual and let him read it -- if they want to do it that way and I don't suppose they do.

¶ 38 MS RUMBLE: What might ...

¶ 39 **THE COURT**: But somebody standing on -- I keep interrupting you ....

¶ 40 MS RUMBLE: Sorry, Your Honour.

¶ 41 **THE COURT**: But just simply saying there is a copyright and I am not going to produce it, without any more than that, it isn't enough for me.

¶ 42 MS RUMBLE: Would it be enough ... Well, would it be enough for Your Honour to know that -- I'm not talking about this specific case but to know that there is now disclosure where defence counsel comes and looks at it. I understand Stinchcombe and other cases to say that yes, you have to provide full disclosure. But there are also cases that say the mode of disclosure is in the discretion of the crown and I think, you know, within reasonable limits that doing as we do now and providing defence counsel with the opportunity to come and look at the manual is reasonable.

¶ 43 **THE COURT**: Well, I think first of all, the crown should have produced, by way of a witness or an affidavit what the problem is with disclosing it so that everybody can look at it and say, well, okay, you have some limitations here and you don't want to, by complying with Stinchcombe leaving yourself open for a civil suit or some other charge by a third party. So I think it is a matter of being reasonable, but you cannot be reasonable if you do not know what all the facts are and this is what troubled me about this case as to why the prosecution was not producing, if not ... I don't ... They asked for the whole manual but I do not think they needed. But the test procedure, it is probably only one page in it, and why you couldn't produce that, I don't understand it.

¶ 44 MS RUMBLE: Your Honour has just put your finger on an important issue also. You are indicating that, the only thing that is really very important are the test procedures and my understanding is that when defence agent Parker make this request, and he's made it on more than one occasion, his request specifically is for the entire manual.

¶ 45 **THE COURT**: No, and you can give him a response. We don't think you need the whole manual. If you would like to give us some justification for all of it, we will consider it, but in the meantime, we will give you page 101 which is the test procedure which I assume that is what you are looking for. It inquires an enlightened response and an enlightened request, that's all.

¶ 46 So where are we now as far as your disclosure? a) You are prepared to allow Mr. Parker to come and look at your manual.

¶ 47 MS RUMBLE: Yes, we are.

¶ 48 **THE COURT**: Okay.

¶ 49 MS RUMBLE: That's the crown's position today.

¶ 50 **THE COURT**: So the question is up until now, however, you have refused to produce anything and without producing an reason to anyone.

¶ 51 MS RUMBLE: No, I don't know if Mr. Parker ever received a letter from the crown indicating the reason for the refusal to disclose. I know that he was made aware in court by way of argument that we were relying on copyright and that was made before Justice of the Peace White and that argument was made, so Mr. Parker was aware ....

¶ 52 **THE COURT**: Well, you just sort of popped it out of the air there. Someone just said copyright. Well, a copyright has a particular limitation of reproduction and use and if I buy the machine as a police force and I get a manual with it, everybody on the police force reads it and they take that information away with them. Why can't the judge have it? I'm not going to put it in another book and sell it and that's where copyright comes from. It doesn't make any sense that I'm infringing copyright if I read the book and

remember what I read.

¶ 53 MS RUMBLE: No, and I would concede that the position that the crown took in so far as that is concerned on this trial was lacking. It didn't go far enough to satisfy the parameters of the Charter. I would stand by our position not to photocopy but I think that in this circumstance what the crown should have done is say, yes, come and have a look, read through the manual, have a look at it because we're not trying to hide anything. We're just trying to avoid not copying the material.

¶ 54 **THE COURT**: Well, okay. Now the other thing is we have to realize this case has been around for a very long time which is Mr. Parker's and this, is it Gagliano, and I pronouncing it correct?

¶ 55 MR. PARKER: Gagliano.

¶ 56 **THE COURT**: You ignore the "g", is that it?

¶ 57 MR. PARKER: That's right.

¶ 58 **THE COURT**: Mr. Gagliano indicated that obviously it was a great expense to him to have the case hanging over his head and having to keep coming back to the court, that there's been a very serious prejudice here by the delay. That is really what .... so it seems the crown is conceding that what they have done up to this point hasn't been quite fair, that's the mildest word I can say. What do we do about it? It's a speeding charge and simply, do you want to pay Mr. Gagliano's expenses up to n ow and his lost income or do you want to have the charge stayed and go your way and be much wiser? Those are about the two options I am giving.

¶ 59 MS RUMBLE: Well ....

¶ 60 **THE COURT**: If we grant an adjournment again for you to provide disclosure and put us back in the position where we should have been in the first place, Mr. Gagliano continues to be prejudiced by time and high priced help like Mr. Parker coming down here and so that if we pay all his expenses or give him the relief that the Charter provides for for non disclosure and stay the charge.

¶ 61 MR RUMBLE: Well, I, It's a little bizarre ...

¶ 62 **THE COURT**: I know it is contrary to your nature to want to consent to that.

¶ 63 MS RUMBLE: Well, it's a little weird to ask the crown to ask what Charter remedy should the defendant ask for.

¶ 64 **THE COURT**: No, I'm just saying what the options are.

¶ 65 MS RUMBLE: But I would much rather prefer a stay, Your Honour, if that's what you're asking.

¶ 66 **THE COURT**: Than pay the costs.

¶ 67 MS RUMBLE: Of course.

¶ 68 **THE COURT**: I would think so.

¶ 69 Well, I think that clearly it has been a bad policy adopted. I am not attributing it to the prosecutors who are here today. I know you are not employed at the policy making level -- neither am I. But the fact is this is a critical part of an investigation as it relates to speeding. The suggestion about copyright, I do not find is valid, that provision for providing copies of the material relating, either by having come and read the manual or it would seem to be a lot simpler to reproduce as a matter of information. No one else is going to be creating a book or using this for any profit and I don't think ti would infringe any copyright rules. I am not being an expert on it but it is a matter of common sense if that applies. So clearly, there has been an infringement here of the disclosure, serious prejudice to Mr. Gagliano in the delay and expense. For that reason, the crown acknowledging a change of policy to correct this bad judgment, the charge will be stayed.

¶ 70 MR. PARKER: Thank you, very much, Your Honour. The fine has been paid.

¶ 71 **THE COURT**: His address is the same?

¶ 72 MR. PARKER: Yes.

¶ 73 **THE COURT**: I guess the endorsement here will be that the appeal will be allowed, not on acquittal, but charge stayed and a refund in the fine.

¶ 74 MS RUMBLE: Your Honour, just for the benefit of the prosecutors in these matters and just to avoid any further litigation on this point, I was wondering if Your Honour could perhaps provide some guidance in the way of what type of policy would be reasonable?

¶ 75 **THE COURT**: Well, I could do that better if I knew if the manufacturer has any objection whatsoever to having it photocopied, and I would be surprised if they did, the manufacturer did. They may. So it is difficult for me to say, well, do this or that because I really do not know what strings are attached to selling this instrument and the provision of the manual as between the manufacturer and the police force. There may be some very rules that I do not know anything about and I would like to know more about if there are restrictions, then why they are there and I may agree with them, they may be quite legitimate and I am creating a problem. But my difficulty is not knowing what the situation is.

¶ 76 MS RUMBLE: Well, I can indicate just for the record, obviously it's not evidence, but I can indicate that my understanding is that the manufacturer says, if you want copies of this manual, then you have to buy the radar device that goes along with it.

¶ 77 **THE COURT**: Well, that is fair enough but do they not have any allowance with respect to the police force who say, look, we are giving evidence everyday that our officers are trained by this manual and follow your procedure. Now do you object to us telling defence lawyers what the procedure is? I do not know how they can be offended at that. I think that is all you would have to ask I would think. But I couldn't give a direction without knowing more about what the problem is.

¶ 78 MR. PARKER: Of course, there is more than one manufacturer which caused the problem.

¶ 79 **THE COURT**: Well, likely but it seems once, you know, if I buy a Massey Harris and I get the little book for it, I own the book too and if I show my neighbour how to run that machine by using that book, I don't think I'm infringing anything in the mind of the manufacturer.

¶ 80 MR. PARKER: There's no enumeration, so ....

¶ 81 **THE COURT**: No, I do not think it infringes copyright, at all.

¶ 82 MS RUMBLE: I am going to try to get you to put some more statements on the record, please, Your Honour. Maybe just your reaction to the policy we have right now of showing the manual. Let's just assume for a moment that there is some valid concerns or a valid position taken by the manufacturer that they don't want copies made, assuming that, the policy we have right now, in Your Honour's opinion, would that be satisfactory?

¶ 83 **THE COURT**: Well, I think it's the least you can do.

¶ 84 MS RUMBLE: Yes.

¶ 85 **THE COURT**: And I don't think it's very satisfactory because you get people, particularly even this jurisdiction, where the people going up and down the 400 get snapped in our jurisdiction and get hauled in from Timbuktu to come back here for court and one trip ought to be plenty. To expect to pay an agent to come up from Toronto somewhere, go to a police force to look at page 101, I would move as strongly as possible to clear it with a manufacture that if you don't actually photocopy the page that you make a copy of it by simply typing it up and if the agents are satisfied that the Chief of Police or somebody certifies it as a true copy of the manual, it's the information they want. And they are only doing it because of the position that you are taking. You are creating a defence that they don't have. Most of it is just technical. He knows before he sees your book what that manual says but if you are going to sit on it, then you are giving him a defence that he doesn't have otherwise.

¶ 86 MR RUMBLE: And when you're talking about a photocopy, Your Honour, you're referring specifically to the testing procedure.

¶ 87 **THE COURT**: Yeah. No, to ask for a copy of the whole manual I think is unreasonable.

¶ 88 MS RUMBLE: Okay.

¶ 89 **THE COURT**: I think it has to be specific and basically, any of the ones I have seen, it is related to test procedures and I would hope that disclosure in these cases will automatically have a copy of the test procedure and it will not come up again. Mr. Parker and the others, they know damn well what the procedure is. You are giving them a defence and the are taking it and they should.

¶ 90 MR. PARKER: Thank you, sir.

¶ 91 MS RUMBLE: Thank you, Your Honour.

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