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R. v. Goutam

Between
Her Majesty the Queen, and
Phulmattie R. Goutam

[1998] O.J. No. 6327

Ontario Court of Justice (Provincial Division)
Toronto, Ontario
Jogendra J.P.

June 16, 1998.
(26 paras.)

Charge: Speeding - Section 128 of the Highway Traffic Act

Counsel:

Lorinda Angus, for Her Majesty the Queen.
Rupert Bryan, for the defendant.

¶ 1 **JOGENDRA J.P.**:— Phulmattie R. Goutam, the Defendant (hereinafter called the "Defendant") is charged that she being the driver of Motor Vehicle bearing registration # 899 PFJ at South bound Markham Road in the City of Scarborough, did on the 6th day of May, 1997 at about 11:30 p.m. commit the offence of speeding 93 kilometres per hour in a 60 kilometre zone contrary to section 128 of the Highway Traffic Act.

¶ 2 On the 6th of April, 1998, when this matter came up for trial, P.C. Lent Badge # 4052, who gave evidence for the prosecution, on being examined by Ms. Lorinda Angus, Provincial Prosecutor, inter alia, stated that on the day at the material time he was travelling North bound on Markham Road in the City of Scarborough when he observed the vehicle driven by the Defendant, which he identified by the relevant plate number travelling South bound on Markham Road in the passing lane which appeared to be speeding. He was operating a "mun-equipt MDR" radar which he activated and recorded a speed of 93 kilometres per hour and that Markham Road at this location was a posted 60 kilometre zone.

¶ 3 He further attested to the fact that he was a trained a qualified operator in the use of the radar and the set he was using at the time was tested by him internally; and externally by "tuning fork" and found to be working properly. He subsequently issued a Provincial Offences ticket to the Defendant charging her with the offence of speeding 93 kilometres per hour in a posted 60 kilometres zone, after she had identified herself.

¶ 4 In cross-examining P.C. Lent Mr. Rupert Bryan, Agent for the Defendant, asked several questions from him, but suffice it to refer and focus the question of the accuracy of the "tuning fork" as this was the most important point that the Agent for the Defendant relied upon, if not the only point, for the defence.

¶ 5 P.C. Lent under cross-examination stated that he did not check to see whether the "tuning fork" by which he tested the radar set externally, was itself working accurately.

¶ 6 The Defendant giving evidence, did not deny that on the day and time in question she was travelling South bound on Markham Road, but stated that she was doing between 55 and 58 kilometres per hour. She knew

this as she had checked her speedometer.

¶ 7 In cross-examination by the Provincial Prosecutor, she was not asked whether her speedometer was working properly nor was the accuracy thereof attacked.

¶ 8 At the end of the trial both the Provincial Prosecutor and the Agent for the Defendant have filed their respective written submissions and also made oral submissions.

¶ 9 The Provincial Prosecutor has cited two cases, Viz:

(a) R. v. Werenka (Alta Q.B.) (1981), 11 M.V.R. 280 where Cawsey J held inter alia that:

> "The Crown only had to prove a prima facie case. The Crown is not obligated to demonstrate that the instrument was capable of accurately registering speeds over the entire range of the instrument where there was no evidence to throw doubt on the officer's evidence."

(b) R. v. Rubinoff (POA Appeal) Unreported decided on February 14, 1991 at Barrie. - where Judge Robert P. Main had stated, inter alia, that:

> "To have a reasonable doubt, based on the evidence at this trial, there would have had to have been some correlation between the performance check and the accuracy of the instrument ..."

¶ 10 The Agent for the Defendant had cited the case of:

R. v. Bourque (1985), 38 M.V.R. 110 (Alta Q.B.) where Moshansky J. had inter alia, held that:

> "When the Crown seeks to rely on electronic devices for convictions, then it must be prepared to establish beyond a reasonable doubt that such devices are operating properly, and are capable of performing the functions for which they are used. In the present case, both proof of the accuracy of the tuning fork and proof that the machine was capable of accurately registering the speed of the accused's vehicle was essential"

¶ 11 Court now proposes to consider each of the three cases in their respective order concerning its applicability to the case at bar.

¶ 12 In R. v. Werenka (supra) Cawsey dismissed the appeal against the conviction on the basis "there was no evidence to throw doubt on the officer's evidence." At page 283, he referring to the case of R. v. Reilly (1979), 16 A.R. 369 states "R v Reilly can be distinguished on the basis that in the present case no defence evidence was called and therefore there was nothing to rebut the prima facie evidence adduced by the constable." But in the case at bar defence evidence was called, hence Werenka's case could be distinguished on that basis. Underlinings by Court.

¶ 13 In R. v. Rubinoff (supra) Judge Main states "to have a reasonable doubt, based at this trial, there would have had to have been some correlation between the performance check and the accuracy of the instrument." In the case at bar the correlation had been brought out by the officer's admission that the "tuning fork" by which he tested the performance check was itself not tested coupled with the evidence of the Defendant's denial of speeding and the decision in the case of R v Bourque re testing of "tuning fork." In the circumstances, the case of Rubinoff also could be distinguished from the case at bar on that basis. Underlinings by Court.

¶ 14 In R. v. Bourque (supra) Moshansky J, had held that "both proof of the accuracy of the "tuning fork" and the proof that the machine was capable of accurately registering the speed of the accused's vehicle was essential."

¶ 15 Bourque's case appears to approximate the case at bar on the aspect as admitted by the officer that he did not check the accuracy of the "tuning fork."

¶ 16 This is the pivotal and strongest point relied upon for the defence by the Agent for the Defendant. And no issue was taken as to whether the radar itself was a speed measuring device. Hence, the defence heavily relies in the decision in Bourque's case which however had neither been countered nor met by the prosecution. The cases cited and relied by the prosecution had also not directly met this aspect of the matter.

¶ 17 The issue has then to be determined whether the case of Bourque is last word on the matter or that it is final and conclusive so as to deem is as trite law.

¶ 18 Court having examined this question finds that Bourque's case had not made the matter the last word on it.

¶ 19 It is no doubt regrettable that neither the prosecution nor the defence had either wittingly or unwittingly brought this situation to Court's attention at any stage. Instead several adjournments were sought by them for submissions and counter-submissions without touching upon the concept of "stare decisis" on the basis of the "hierarchy" of the Courts.

¶ 20 Court finds the case of Bourque had been appealed to the Court of Appeal and the Court of Appeal had on April 16, 1986 in Doc. No. Calgary Appeal 17925 reversed the (1985), 38 M.V.R. 110 (Alta Q.B.) decision, and held that "The Crown is not required to prove the accuracy of the equipment or the "tuning fork."" Underlinings by Court.

¶ 21 The upshot of the Court of Appeal decision in Doc. No. Calgary Appeal 17925 (April 16, 1986) is that Crown is not required to prove the accuracy of the "tuning fork." (Vide 1997 H.T.A. Annotated Murray D. Segal p. 137.)

¶ 22 Had this fact been brought to the notice of Court much of the delay and adjournments occasioned in this case could have been avoided. Be that as it may, the resulting position is that the contention of the defence that the "tuning fork" was not tested for accuracy fails.

¶ 23 Based on the evidence before Court, Court is satisfied that the charge against the Defendant that she was speeding 93 kilometres per hour in a 60 kilometres zone has been established as required by law. Accordingly, a conviction will be registered. Sentence will be passed after hearing submissions from parties.

¶ 24 Court wishes to record its appreciation for whatever assistance had been provided to it by the Provincial Prosecutor Ms. Lorinda Angus and the Agent for the Defendant Mr. Rupert Bryan in this matter.

¶ 25 Court hereby directs that copy of this judgment be provided to both the Provincial Prosecutor and the Agent for the Defendant.

¶ 26 Judgment delivered in Open Court.

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