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R. v. Henuset

[1983] M.J. No. 26

Manitoba County Court
Brandon, Manitoba
Ferg Co. Ct. J.

March 22, 1983.

Counsel:

J. Thornborough, for the appellant.
L. MacInnes, for the Crown.

¶ 1 **FERG CO. CT. J.**:— The accused was convicted in Brandon Provincial Judge's Court on September 23, 1982 on a charge under s. 185(3) of the Highway Traffic Act, R.S.M. 1970, c. H-60; C.C.S.M. c. R-60. He was fined $75.00 and the "device" confiscated.

¶ 2 He appeals.

¶ 3 At the outset, the court confirms that the information laid, notes in the Offence Commit portion of the gist of the charge as follows:

> did unlawfully have a radar detector in a motor vehicle

which wording would appear to relate directly to s. 185(3)(b), as opposed to subs. (a) and (c).

¶ 4 This section reads as follows:

> Radar detection devices.
>
> 185(3) No person shall
>
> (a) drive a motor vehicle that is equipped or equip a motor vehicle, with a device for detecting radar speed determination equipment; or
> (b) have possession of a device for detecting radar speed determination equipment, in a motor vehicle; or
> (c) permit a motor vehicle of which he is the registered owner to become or to remain equipped with a device for detecting radar speed testing equipment.

¶ 5 The facts are not in dispute and in summary, the trial transcript reveals that on March 31, 1982, R.C.M.P. Constable Chisolm was on a "running moving radar" patrol on Highway 1A. He was travelling west and at a point just east of Kemnay he noticed at some distance not estimated, a vehicle approaching from the west. The Constable in an unmarked patrol car, immediately turned on his radar set and a reading of 107 kilometers was observed. Immediately, the speed just noted, suddenly dropped to 85 kilometers and was locked in at that.

¶ 6 The Constable, "suspicious with the sudden drop of speed", turned and stopped the vehicle, owned and driven by the accused. Particulars were obtained, and nothing was said concerning the "sudden drop of speed" but the Constable checked the front of the accused's vehicle and noticed a small box protruding from underneath the front bumper on the passenger side. The accused, upon request opened the hood, and the Constable followed wires that led into the front interior of the vehicle and which were attached to another small box. Both boxes were removed from the vehicle, and placed as exhibit No. 1 at trial, the device seized being noted on the information as,

1 - Fox - radar detector and control head

¶ 7 Later on, at some different place other than the seizure area, after re-attaching the wires that had been cut, in order to allow removal the Constable plugged in the device in a police vehicle equipped with a cigarette lighter, and turned on the police vehicle radar set. Immediately a warning sound emitted from the control head and a red light flashed on, the Constable's description of the test in his own words - at Page 9 of the Transcript:

BY MR. MACINNES:

Q Did you have occasion to test that device?

A Yes, I did. What I did, I plugged it into a cigarette lighter in one of our police vehicles which also is equipped with a radar set. At that time when I turned the radar set on, the instrument right there (indicating) produced a warning sound. There's a switch on the small, little box, I turned the switch over. I shut the radar set off, lights went off and the sound stopped and when I turned the switch on, again, it showed a light and when I shut the radar set off, the lights went out and I did this a number of times, then I moved it away from as far as possible I could move from the radar set and it still reacted the same way.

MR. MACINNES: Thank you, those we all the questions I have of the witness.

¶ 8 The Crown argument is that while a shotgun or a screwdriver can be used for legal or criminal purposes, and proof of criminal use must be proved beyond doubt on a charge involving such articles, a radar detector has one sole purpose, an illegal one, namely that of detecting radar, and under the Act, whether it works or not, whether it is connected or not, whether it's in the trunk of a vehicle, on the roof, back-seat floor or strapped to a bumper, whether the wires be cut and rewired rendering the device perhaps a different operating mechanism makes no difference, the facts are that when tested as outlined, the device reacted to the police radar set, it did in fact detect radar and thus the charge is proved beyond any doubt that the device seized is a device for detecting radar speed determination equipment.

¶ 9 The accused's counsel in argument makes two points:

(1) That the Constable's evidence alone, and his description of his test, is not evidence that the device seized is in fact one "for detecting radar speed determination equipment" and,
(2) Conceding even if it is, there is no evidence that the equipment it was designed to detect in this case, (police radar), was in fact a "speed-timing device".

¶ 10 Dealing first, with the second argument, counsel submits that the Crown must prove that the police patrol car "speed-timing device is of a type that has been approved by the Attorney General" and relies on s. 231(1) as follows:

Evidence from speed-timing devices.

231(1) Where

(a) any person is charged with committing an offence under this Act by reason of driving a motor vehicle on a highway at any time at a speed that, at that time and on that highway, was unlawful under this Act;
(b) the speed at which the person was driving the motor vehicle, at the time and place charged, was determined by speed-timing device; and
(c) evidence of that speed is tendered to the judge or justice by way of the production of a recording made by the speed-timing device, or by the oral evidence of the peace officer operating the speed-timing device at the time the alleged offence was committed;

if the speed-timing device is of a type that has been approved by the Attorney General as being suitable for determining the speed at which motor vehicles on the highway are travelling, and the judge or justice is satisfied that it was in good working order at the time that the recording was made, he may accept the recording or the testimony of the peace officer as evidence without requiring expert evidence respecting the functions and operation of the speed-timing device or of its efficiency for the purpose of determining the speed at which motor vehicles are being driven on highways.

(emphasis mine)

¶ 11 It is noted that for some reason in s. 185(3) the equipment used to detect speed is referred to as "radar speed determination equipment" while in s. 231 what is presumably the same equipment is referred to as a "speed-timing device". Nothing turns however on this difference in describing what would appear to be the same thing.

¶ 12 A careful reading of this section satisfies the court that s. 231 authorizing admissible and prima facia evidence from a speed-timing device approved by the Attorney General applies only to speeding charges as clearly stated in subparagraphs (a)(b)(c). It follows then that in this court's opinion approval of the Attorney General for the police radar speed detector is not needed, when the charge is under s. 185(3), as is the case here. While it may seem facetious to say so, it is possible that the police could equip a vehicle with any sort of radar speed-timing equipment (and there my be many, not approved) for the sole purpose of ferreting out drivers who install a device for detecting radar speed-determination equipment, without the same having to be approved by anyone. The point being that here, the Constable's car had a radar set capable of detecting and recording motor vehicle speeds, the Constable's uncontradicted evidence being clear on that. Whether or not the Constable's equipment had been approved under s. 231 is neither here nor there as far as a charge under s. 185(3) is concerned and accordingly this argument fails.

¶ 13 Dealing with counsel's first submission then, that the Crown has failed to prove that the seized device was in fact a device to detect radar. Counsel refers to the Constable's evidence on Pages 6 - 17 inclusive, being mainly the cross-examination. This deals with the effect of the Constable having to cut the five thin wires in order to remove the device; his having to re-connect them hopefully in the same order; his not being able to say he put them back in the same order - "as best I could put it back to the exact same position, Yes" (Page 10); and further at Page 10 and 11:

Q Well, can you testify that that, in fact, is the case. then that this instrument was in the same operating condition, as it were, when you tested it as it was when it was in the vehicle?
A No, for the main reason because I had to cut the wires and putting the wires back together colour for colour . . . that I just followed what would be naturally colour for colour or what . . .

¶ 14 Further, the Constable testified he did not test the device in the same vehicle in which his radar was installed but in another police vehicle; that he was not an electronic expert although he had dabbled for some years with amateur radio; and that the Constable in no way examined the insides of either of the two small boxes to determine how they functioned or to determine what the device really was designed to do.

¶ 15 The most telling evidence is the candid admission of the Constable found on Pages 15 and 16 as follows:

Q Do you have any electronic credentials at all, I mean, I fix my toaster but that doesn't make me an expert.
A No, I never indicated I was an expert, just I know some knowledge of radios but I'm not -- I wouldn't even consider myself as an expert.
Q Well, if that's the case then, Constable, perhaps you can tell me whether or not it's true that the device that you hold in your hand could be, unless you saw the inside of it, could be almost anything couldn't it?

A That is correct, yes.

Q All right, and all that you know is that after you hooked it up with a piece of police equipment and plugged it into the cigarette lighter in your police car, that it reacted to your radar set?

A Exactly, yes, that's all I can say.
Q And that's all you know?

A Yes, and just the sudden drop in speed led me to believe that it might be an instrument capable of detecting radar in a vehicle.

Q That it might be?

A Because I was driving an unmarked police car and I was a fair distance away before it.
Q I see. Did you take it new a radar or a radio tower of any kind to see if it would react?

A This equipment?
Q Yes.
A No, I did not.

¶ 16 Further by analogy, counsel submits that in narcotic cases as one example as to the proof required, a substance seized may look like cannabis, smell like cannabis, feel like cannabis, and taste like cannabis but all that notwithstanding on a charge under the Narcotic Control Act the Crown must, have it expertly analysed and proved to be such at trial. And this, he says is the level of proof required here.

¶ 17 Thus, counsel finalized by pointing out the failure of the Crown to call evidence of an expert or present other perhaps documentary evidence to prove exactly what the device seized actually is and that the burden of proof being what it is, guilt cannot be determined an assumption, presumption, speculation or the simple belief of something being something.

¶ 18 While the court in this case is highly suspicious and suggests the accused is probably guilty of the offence charged because of the circumstances, in the absence of a definition, description or explanation or other absolute proof as to what this "device" actually is, those suspicions alone are not enough to warrant a conviction in the circumstances here, and the learned Provincial Judge erred in finding guilt, mainly it would seem on the basis of a "sudden speed drop" and a subsequent testing in a really non-scientific way.

¶ 19 In this day and in our push-button society when electronic sciences are such that even the experts find difficulty in keeping abreast, legislatures who pass laws authorizing the use of, and the prohibition of possession of certain types of electronic gadgets, must be prepared to provide the necessary resources to insure proper enforcement of such laws. This applies particularly to the increasing appearance in Manitoba of devices employed by those intent an circumventing the speed laws, namely the type of device similar to what was seized here and purporting to be a "device for detecting radar speed determination equipment" often commonly referred to as "Fuzz Busters", "Fox Hunters", "Bear Killers" and "Speed Smellers". There are States and Provinces of

course where such devices are not illegal but Manitoba as yet is not one of those and when a charge is laid the Crown must be prepared to prove its case beyond doubt.

¶ 20 It follows then that the appeal is allowed, the fine, if paid, refunded and the confiscated device returned to counsel for the accused to dispose of as he may determine!