Case Name:

R. v. Le

Between
Her Majesty the Queen, respondent, and
Huu-Hat Le, appellant

[2002] O.J. No. 894
Court File No. Toronto, P.O.A. 4812999005608713500

Ontario Court of Justice
Provincial Offences Appeal Court
Fairgrieve J.

Heard: February 25, 2002.
Judgment: March 4, 2002.
(16 paras.)

Counsel:

A. Smith, for the Attorney General of Ontario, respondent.
S. Palaccia, for the appellant.

¶ 1 **FAIRGRIEVE J.**:— The appellant appeals against his conviction for speeding, 74 km/h in a 50 km/h zone, contrary to s. 128 of the Highway Traffic Act, R.S.O. 1990, c. H.8. The only ground of appeal advanced by the appellant concerned the sufficiency of the evidence that the laser device used by the police officer to measure the speed of his vehicle provided accurate and reliable proof of the offence.

¶ 2 Constable D'Agostino, an officer with Toronto Police Services, was the only witness to testify at the trial. His testimony concerning his use of the laser device was as follows:

> At this time I was operating a Laser Tech Marksman 2020 speed measuring device. This device is capable of accurately measuring the speed of moving motor vehicles. On this particular date, Your Worship, the device was being operated on a tripod. This particular device, Your Worship, has a scope on the top. The scope is magnified and there is a red dot in the centre of the scope. This red dot is placed on the front of the target motor vehicle and the device is activated and a speed reading is received.
> At approximately 1:42 p.m. I observed a motor vehicle. This motor vehicle was northbound on Islington Avenue in the passing lane and appeared to be speeding. I pointed the previously mentioned speed measuring device directly at the motor vehicle, placing the red dot on the front of the motor vehicle, activated the speed measuring device and received a speed of 74 kilometres per hour.
>
> ...

> I am a qualified laser operator. I had tested the device prior to setting it up on that date and after taking it down and found it to be in proper working order. These tests were conducted in accordance with manufacturer's specifications.

The agent for the appellant did not cross-examine the officer, nor did he call any evidence for the defence.

¶ 3 In his reasons for judgment, after the justice of the peace noted that there were conflicting decisions with respect to the evidence necessary to establish the reliability of the laser device, he simply stated his conclusion in the following terms:

> In my opinion, it comes down to whether or not I am satisfied, and I am satisfied that this individual's motor vehicle was speeding. I am satisfied that the laser was accurate, and I find him guilty as charged and register a conviction.

¶ 4 Mr. Pellacia, on behalf of the appellant, submitted that the justice had erred because the Ontario Court of Appeal in R. v. Vancrey (2000), 147 C.C.C. (3d) 546, had held that it was necessary for the prosecution to lead evidence that readings from the laser device had been recently compared with those of an accurate radar unit, before a court could be satisfied that the laser instrument was reliable on the occasion in question. In R. v. Bourne, [2001] O.J. No. 2869, (Ont. C.J., June 15, 2001) Karswick J. interpreted Vancrey as imposing that requirement. At para. 35 of his reasons, Karswick J. stated that "[t]he Ontario Court of Appeal decision in Vancrey clearly holds that there must be such an independent test [as against a conventional radar device] within some reasonable period of time prior to the use of the instrument".

¶ 5 With respect, I do not read Vancrey in the same way. The Court of Appeal framed the issue there in terms of the adequacy of the evidence that had been presented at trial to establish the accuracy and reliability of the laser device. It is true that the evidence in that case included a description of the four-part test suggested by the manufacturer to confirm that the device was working accurately (including a questionable "distance-velocity" test using only a stationary object), and it also included evidence that the device in question had been compared with an accurate radar unit by a qualified laser and radar operator three or four weeks earlier. Feldman J.A., for the Court, at p. 554 (paras. 23 and 25), accepted that this evidence was "satisfactory to establish a prima facie case" which, with no evidence to the contrary, justified the conviction. In my view, however, she did not state that the evidence called in that case was always required, nor did the Court purport to make a pronouncement of general application as to what evidence would suffice.

¶ 6 It seems to me that the closest Feldman J.A. came to declaring a "need" for independent testing of laser devices was at p. 554 (para. 24) of her reasons, where she made the following statement:

> Clearly it would be most helpful for the court to receive expert evidence to explain the methodology of the laser technology and to provide an expert opinion as to its accuracy and reliability, where the legislature has not specifically approved the technology within the Highway Traffic Act itself. Such evidence would avoid the need for officers using the equipment to have to verify its accuracy independently in each case on an ongoing basis.

While it is not entirely clear, I assume that "the court" which would receive such expert evidence was intended by Feldman J.A. to be a reference to the Court of Appeal, since it seems impractical to suggest that such expert evidence would be available in each provincial offences court trying speeding charges where laser speed measuring devices had been used. The implication seems to be that such evidence would be admitted as fresh evidence on an appeal, or that the Court of Appeal would give its stamp of approval to a

trial court's acceptance of such evidence, presumably with the intention that their recognition of the reliability of the laser device could thereafter be relied on by trial courts, and it would no longer be necessary for the prosecution to call either expert evidence or police evidence of independent testing. The premise seems to be that once a factual finding has been made by the Court of Appeal based on evidence before it, other courts, bound by their decisions, could take judicial notice of that fact without having to hear evidence themselves on the point. Feldman J.A. herself, then, envisaged a situation where evidence of independent testing would not be necessary.

¶ 7 The question then arises as to whether the acceptance by courts other than the Ontario Court of Appeal of the reliability of laser speed measuring devices, subject obviously to evidence that a particular instrument was not working accurately or that the officer did not use it properly on the occasion in question, can be relied on by courts in Ontario to dispense with the necessity of either expert evidence or evidence that the accuracy of the particular instrument was verified by independent testing.

¶ 8 In R. v. Koh, Lu and Lim (1998), 131 C.C.C. (3d) 257 (Ont. C.A.), Finlayson J.A. stated at p. 270:

> Judicial notice may be taken of two kinds of fact: facts which are so notorious as not to be the subject of dispute amongst reasonable persons; and facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy: see Sopinka, Lederman and Bryant, The Law of Evidence in Canada, (Markham, Ont.: Butterworths, 1992) at 976. Furthermore, judicial notice is permissible where previous courts have proven a certain fact. As stated by McLachlin J. [in R. v. Williams (1998), 124 C.C.C. (3d) 481 (S.C.C.)]at 502, "[w]idespread racial prejudice, as a characteristic of the community, may ... sometimes be the subject of judicial notice. Moreover, once a finding of fact of widespread racial prejudice in the community is made on evidence ... judges in subsequent cases may be able to take judicial notice of the fact."

¶ 9 In City of Joliette v. Delangis (1999), 141 C.C.C. (3d) 445, the Quebec Court of Appeal provided its answer to the question posed by Gendreau J.A. in the first sentence of the Court's judgment: "Can a court take judicial notice of the fact that a device using a laser beam can measure the speed of a motor vehicle?" Although the case was decided nine months prior to Vancrey, and although Feldman J.A. referred to a number of other authorities, including a 1992 Quebec Court of Appeal judgment dealing with radar devices, it appears that Delangis had not been brought to the Court's attention.

¶ 10 In Delangis, the evidence before the trial court was essentially identical to the evidence in the case at bar. At p. 446, Gendreau J.A. summarized it as follows:

> Before the Municipal Court, uncontradicted evidence established that the police officer who arrested the respondent used a speed detector equipped with a laser beam, that he was instructed in the use of the equipment and that tests carried out before and after its use demonstrated that it was in good working order.

In allowing an appeal from the speeding conviction, a Superior Court judge had held that he could not take judicial notice of the fact that a laser device, which in that application relied upon "relatively recent technology", can be used for accurately measuring the speed of motor vehicles. Gendreau J.A., at p. 447, stated that he did not agree with this conclusion.

¶ 11 At pp. 447-8, Gendreau J.A. stated as follows:

> With the greatest of respect, it appears that this application of the laser beam is well-known in North America as much through newspaper and magazine articles as radio and television broadcasts. In addition, the absence of a description in the dictionary of a particular use of a technique or technology does not mean that it is unknown and must be proven ...
> In summary, it seems to me to be incontrovertible that it is possible to direct two or more laser beams onto an object in movement, such as an automobile, within a set period of time in order to establish its speed in kilometres per hour ... That does not mean that an automobile driver is deprived of any means of defence, quite the contrary, since he or she could still prove that the device was defective, that the operator was not competent, etc. ... This means in the result that a laser-measuring device is a device which is generally known and used.
> I allow myself one last comment: is it necessary to prove the type of technology used in a measuring device? The technology used by the odometer in a vehicle made in 1950 is certainly not the same in 1999 and yet no one would think to require proof as to the technology of the odometer used today. At its beginnings, the thermometer used a column of mercury; we speak now of an electronic device. Should one require a demonstration of the latter? Why would it be otherwise for a speed detector which uses the beam of a laser device rather than radar?

The Court of Appeal restored the conviction, finding that the offence had been made out by the uncontradicted evidence that the device had been in good working order, that the operator was competent, and that the officer had made a visual assessment that the vehicle was speeding.

¶ 12 The same conclusion was reached by my colleague, Pockele J., in three appeals decided by him a year and a half ago, R. v. Mukasa; R. v. Spinosa; R. v. O'Brien, [2001] O.J. No. 262 (Quicklaw). In his oral reasons, which I find persuasive, Justice Pockele made the following observations at para. 8:

> I find as a fact that Laser Speed Detection Devices, while once a new and novel technology, is no longer so on today's date. ... We are dealing with Laser Speed Device Technology that 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. ... 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 ... In every case extract provided to me, each trial court and appeal court has commented that no evidence was presented to contradict the accuracy of the LSDD. If no such evidence has come before the Court in the last eight years, it is time to accept that LSDD technology is so well established that there is no evidence to the contrary. On this issue, the courts need not assume the function as gatekeeper, protecting the citizenry from new, novel and unproven technology as evidence. LSDD technology is no longer new and novel, and it is proven.

¶ 13 In R. v. Vancrey, supra, Feldman J.A. expressly stated, at p. 553 (para. 20), that "[i]t was not argued before us that a court could at this point in the history of the use of the laser device, take judicial notice of the laser as reliable for use as a speed detection device for vehicles", the position taken by the prosecutor here. I do not think it can be assumed that if the Crown had advanced that position before the Court of Appeal, it

would necessarily have been rejected. While perhaps somewhat speculative, if the Crown in Vancrey had made that submission, supported by the judgment of the Quebec Court of Appeal in Delangis holding that such judicial notice can indeed be properly taken, I think that it is entirely likely that the Ontario Court of Appeal would have reached a similar conclusion. It would be more than slightly anomalous for a fact to be so notorious in one jurisdiction that judicial notice is to be taken of it, while next door, in a jurisdiction no less technologically advanced, the fact was to be doubted until it had been proved.

¶ 14 In my opinion, regardless of whether the reliability of laser devices to measure the speed of motor vehicles is regarded as so "notorious" that it cannot be disputed by reasonable people, or whether one accepts the judgments in Delangis and Mukasa as demonstrating prior judicial acceptance of the device's reliability, it is now appropriate for other courts to take judicial notice of that fact. Laser devices have been used for this purpose by law enforcement agencies for almost a decade, the evidence obtained through their use has been routinely admitted as reliable, and at least one provincial appellate court has held that their reliability is so well-known that it requires no evidence to establish it.

¶ 15 The justice of the peace did not err, in my view, in finding that the speed of the vehicle driven by the appellant had been sufficiently proved by the reading produced by the laser device.

¶ 16 The appeal is accordingly dismissed.

FAIRGRIEVE J.

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