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R. v. Lende

Between
Her Majesty the Queen, and
Michael N.J. Lende

[1999] O.J. No. 4880

Ontario Court of Justice
North York, Ontario
Rotman J.P.

August 31, 1999.
(113 paras.)

Charge: s. 128 - Highway Traffic Act - Speeding

Counsel:

N. Cassano, for the Crown.
J. Alessandro, for the defendant.

¶ 1 **ROTMAN J.P.**:— This matter was adjourned from the 26th of August for the Crown to have an opportunity to obtain some case law on the issue of the laser radar.

¶ 2 MR. ALESSANDRO: That's correct.

¶ 3 **THE COURT**: Ms. Cassano, are you ...

¶ 4 MS. CASSANO: Yes, thank you Your Worship. First of all, I'd just like to begin by saying that my friend has raised three objections with respect to the case that the Crown presented and I'd like to address those objections narrowly. There are three of them and I'd like to state them for the record and I think I've written them down verbatim.

¶ 5 The first one is that the police officer failed to specify the time he tested the laser and the second ground is that the police officer did not specify the date he tested the laser unit before and after and the third ground is that the officer failed to indicate that he had made a comparison test through a measuring device approved by the Courts, namely radar. Now with respect to the first ground that the police officer did not specify the time or the date he tested the laser, we should go back to the evidence of the officer. Now I've apprised my friend that I do have a transcript of that proceeding and I did offer to show it to him before Court but I'd like to refer back to the officer's evidence if I may. The officer started giving his evidence by saying that "Your Worship, on February 9, 1999 at 12:45 p.m. I was located on Bathurst Street," and so forth. And then he goes on, page three approximately line 28, the last paragraph, he says, "I did check the speed measuring device before and after use at this particular time according to the manufacturer's specifications and on both occasions found that the device was working correctly. Now the particular time he refers to is the date and time he gave, February 9, 12:45. Now Mr. Alessandro, I would invite him to show or point out to the Court where there's any case law, where there's any legal ground that the officer is required to do more than that. Now on cross-examination, my friend did not ask any further questions with respect to exactly where he - what date and time and he didn't raise those issues. I would think those issues are disposed of in that he didn't bring those issues up in cross-examination and the officer gave sufficient evidence.

¶ 6 Now the third objection is the one that I'd like to deal with as narrowly as possible. The third ground again is that the officer failed to indicate that he made a comparison test through a measuring device approved by the Courts, specifically laser. And in support of this objection he referred to one case, Marshall, [1995] O.J. No. 4476. Now since that time my friend has given me other cases and I believe those cases are Tayman, if I'm not mistaken and the most recent case we have from the Appeal Court for Highway Traffic matters: That case is Cannon. That was a case which was ...

¶ 7 **THE COURT**: Well Cannon is an extension. That was argued by Brian MacLeod.

¶ 8 MR. ALESSANDRO: That's correct, Your Worship.

¶ 9 **THE COURT**: That case was an extension if you will, of the Tayman case and it dealt with the time frame in which it should be tested and I think Judge Bogusky came to the conclusion that ...

¶ 10 MR. ALESSANDRO: 30 days.

¶ 11 **THE COURT**: Bear with me ...

¶ 12 MR. ALESSANDRO: Sorry.

¶ 13 **THE COURT**: It's been a long day.

¶ 14 MR. ALESSANDRO: Sorry, Your Worship.

¶ 15 **THE COURT**: Came to the conclusion based on a previous decision by a Justice of the Peace in the same area because he had some expertise in mechanics and came to the conclusion that 30 days was a reasonable ...

¶ 16 MS. CASSANO: 30 days ...

¶ 17 **THE COURT**: 30 days in order to test - within a 30 day time frame to test that particular laser device. In other words, it should be tested no later than every 30 days. That's really what that Cannon decision was all about.

¶ 18 MS. CASSANO: Again, Your ...

¶ 19 **THE COURT**: Sorry, I didn't want to interject, I just wanted to assist you there on that.

¶ 20 MS. CASSANO: Thank you for that and I'm glad you're aware of that. I could refer to the passage that you're referring to, I don't know if you have that case before you?

¶ 21 **THE COURT**: Which?

¶ 22 MS. CASSANO: Cannon? Cannon case?

¶ 23 **THE COURT**: I do have, yes.

¶ 24 MS. CASSANO: But in terms of time frame, this case although a judicial decision, I don't think is of great assistance to the Court in setting down guidelines for the Court. The Court refers to the Section that you're referring to on page nine at approximately line 24. And what it asks you to note about this is that it really is a little bit vague. The Court says, "So if anything came out of my decision, it's this: That the police departments are in fact using this laser machine with radar but they're doing it quite infrequently. I see, so that the J.P. notes that both machines, the laser that the police were using that particular day had been tested on an earlier date with radar and had been tested with radar on a later date." Here's a passage which I don't think is of great assistance to the Court and I'll read it, "But as you say, a half year before and a quarter of a year after." So he's referring to something that's been said already. But I guess the question that arises, what's the point of saying this, what can

we deduce from the report having said this and my submission is, not a great deal because it's set in the guideline. Now he goes on and he refers to his friend - Court's indulgence - yes, I'm looking at the last page of the decision where he's talking about the time that the machine should be tested. But first of all, he doesn't say what he's referring to. At line - for example, page 10, line 26, he refers to the machine. We're not sure if he's talking about a radar laser comparison that this type of comparison has to be done. We don't know if he's talking about the testing of the laser itself, he just refers to a machine. So there's no clear reference what he's referring to and he goes on to say - and I'm reading about line 26 on page 10. This is a vague section but this is what we have to rely on. "All indicate what the Court has to be satisfied with is the correctness of the readings. That is to say the machine has to be operating correctly. I think it's trite to say that if the proof involved saying to me, `Well we tested it six months before and three months after and it was okay,' I don't believe that would satisfy me as to their proving that the machine," - again, what's he referring to - "Was operating correctly." Now here is what he does say and this offers no precedent for the Court. "But here again, I will say this, J.P. Bob Leggatt." - and this is the authority he's referring to ...

¶ 25 **THE COURT**: That's what I pointed out to you.

¶ 26 MS. CASSANO: Yes, I know but what I'd like to qualify that he's simply - he's not setting this down as any kind of guideline. He refers to Bob Leggatt and says, "He has some ex naval training things. He's a bit of a machine buff and a mechanical buff and he enjoys things like these laser machines. If he says it should be done every thirty days I could live with that." Now the fact that he could live with Bob Leggatt saying it should be done every 30 days, that's not a judicial announcement setting down a guideline for the Court. And again, what are we talking about? Are we talking about the radar laser comparison? Are we talking about that the laser should be checked before and after to indicate that it's in working order. There's no guideline here, and so to rely on this case as saying anything with authority with respect to when the laser should be tested or whether it's saying the radar and the laser should be tested, there's nothing here. There can't be anything here.

¶ 27 **THE COURT**: Well this is why I used the term "An extension of the Tayman case," because I think both His Honour Judge Bogusky and Brian McLeod at that time who was defending Mr. Cannon, knew about the Tayman decision and this was basically an extension of it. Because in the Tayman decision they talked about - Mr. Dullege was the counsel that argued this and there was great discussion with respect to the laser detecting device and it dealt with comparative testing and other issues, primarily - they also dealt in that case - I just want to point this out. You see initially the Justice of the Peace dealt with this matter, the Tayman matter and this is an appeal from that decision ...

¶ 28 MS. CASSANO: Right. Right.

¶ 29 **THE COURT**: She dismissed it, based on very much the same argument. When Mr. Dullege had argued this particular case he went on at great lengths to argue, whether the internal testing of the laser, as sole evidence for liability was not sufficient and there are other arguments there as well. And Judge Bogusky took the position, from what I understand that this was new technology, and - just bear with me for a minute here. There was also an argument, if I recall this correctly, that the laser machine did not measure speed in the same manner as the conventional radar machine. That you point the machine at a wall, there's nothing moving and you get a velocity speed etcetera etcetera and at that point the laser machine can test whether it's working or not on a non-movable object and if it comes back reading a certain way then of course it shows that the machine is working properly. So that's basically - I didn't want to interject in your argument here but that's basically the decision in the Tayman matter and then of course Mr. McLeod argued the extension which was "Well when should it be tested?" And that's where that came about. Go ahead?

¶ 30 MS. CASSANO: In the most recent decision of Cannon, His Honour Bogusky does refer to Tayman at line five and tells us what he thinks of Tayman. He says at Page Five, line seven: "I hope I'm," - the transcript says, "I hope I'm not gulling up any case law." I think that should be "I hope I'm not building up any case law as a result of that Tayman decision." So he seems not to - now Tayman is a decision that he dealt with himself and as I understand that case as well dealt with lasers and new technology that requires comparison with radar, the old technology. He seems to be abandoning Tayman and as well if we look at his comments about Tayman on page eight of Cannon - now I'm looking at about line five or six and he says, "I thought that the decision I had

come down with," - and he's referring to Tayman - "With a sort of a temporary thing. I can't recall when that radar or when the laser thing came into existence. I thought the material that was given to me that it was about 1994, somewhere around there." So he himself indicates that Tayman was a temporary decision. And again, he alludes to the time the laser came out in '94. Now it's telling that in Cannon, if we look again on page eight, the last paragraph where the Court is speaking at about line 28, the Court says ...

¶ 31 **THE COURT**: You're talking about which, the Cannon decision now or are you talking about the Tayman decision?

¶ 32 MS. CASSANO: I'm just referring to different passages in the Cannon decision. The last passage I dealt with the Court was referring to Tayman and I'm just going to refer to Cannon once more where - this is page eight, last paragraph. Do you see that where it says, "The Court?"

¶ 33 **THE COURT**: Of what page?

¶ 34 MS. CASSANO: Of page eight.

¶ 35 **THE COURT**: All right, I'm here now.

¶ 36 MS. CASSANO: And it says that - this is the Court's position with respect to radar and laser and I'll have a few more submissions. He says, "But I think that would, now that I think about it, that's a bit ludicrous too because why would you use something old to test something new. Or have every police cruiser all loaded up with equipment because one will be testing another and another and another."

¶ 37 **THE COURT**: Okay, but if that's - that's the comment that Judge Bogusky made, is that what you're saying?

¶ 38 MS. CASSANO: Yes.

¶ 39 **THE COURT**: Okay, well if that's the rationale then in the Tayman decision, what were the reasons for dismissal? Why did he dismiss the appeal? I would suggest to you that the reason he did that and I'm just basically extending my understanding of it, was the fact that it was the comparative testing, that it was basically a situation whereby he could not determine just how this laser machine worked when you compare it to conventional radar. You're not arriving at a speed by a moving vehicle, you're arriving at a speed, I take it from an internal testing of a machine, from a wall that's stationary. And I take it when he reviewed the arguments that were made by Mr. Dullege he came to that conclusion and basically upheld the Justice of the Peace on that decision. Go ahead.

¶ 40 MS. CASSANO: Your Worship if I could just refer again to - and I thank you for your comments - to the Cannon decision at line ten. This is page 10.

¶ 41 **THE COURT**: This is the Cannon decision?

¶ 42 MS. CASSANO: Yes.

¶ 43 **THE COURT**: Yes?

¶ 44 MS. CASSANO: At approximately line 24 where he refers to "Well my old case," the old case being Tayman I imagine. "My old case plus this case plus other cases cited all indicate that what the Court has to be satisfied with is the correctness of the readings. That is to say the machine has to be operating correctly." And that's what we're left at. Now Mr. Alessandro's comments or his objections, are quite narrow with respect to the third point and that is ...

¶ 45 MR. ALESSANDRO: Your Worship, can I stop for a second? My friend is making a quote from page 10 to line 23 but she's stopping ...

¶ 46 **THE COURT**: Are you talking about Cannon?

¶ 47 MR. ALESSANDRO: Yes, Your Worship. She's indicating ...

¶ 48 **THE COURT**: Page 23?

¶ 49 MR. ALESSANDRO: No, page 10.

¶ 50 **THE COURT**: Page 10?

¶ 51 MR. ALESSANDRO: Line 23 is where she was making a comment what the Court was indicating as part of the judgment. She's stopping - and part of what he's indicating, she should read out the whole thing from where he starts to where he finishes. She's only reading half of what he's saying. If she's going to quote what the Court is indicating she should indicate the whole passage of what he's indicating.

¶ 52 MS. CASSANO: Well with respect Mr. Alessandro ...

¶ 53 MR. ALESSANDRO: She only stopped halfway.

¶ 54 MS. CASSANO: With respect Mr. Alessandro, after I finish my submissions you can certainly bring that point to the Court. I haven't finished my submissions, Sir.

¶ 55 MR. ALESSANDRO: Okay, but it' s not proper. If you're going to make ...

¶ 56 **THE COURT**: Well you can bring that to the attention of the Court.

¶ 57 MR. ALESSANDRO: Okay.

¶ 58 MS. CASSANO: For the record Your Worship, I have read out that whole paragraph. This is Bob Lichtman (phon.) scenario, the ex-naval training. Perhaps there's one or two lines I've missed. Now today the question before the Court is not whether laser is a mechanism that is capable of accurately measuring the speed of a moving vehicle because that is not the issue that Mr. Alessandro has put before the Court. I think something should be said about it. Unless - if you look at the transcript of what Mr. Alessandro has said, it's exactly and I'll quote him. Referring to - and I'm looking now page seven of the transcript. This is about line 7. This is his third objection to the police officer's testimony and I quote: "He also did not indicate that he did comparison test through a measuring device that is approved by the Courts and that being through a radar unit." So the only issue we have for the court that Mr. Alessandro has raised, is that no comparison was done. And he refers to Marshall. Now I've looked at the Marshall decision in detail and I see absolutely no authority that Mr. Alessandro can rely on. In fact it seems to say the opposite to Mr. Alessandro's position. Now what we should take into account is that the Marshall case was decided in 1994 at a time when the Judge even noted that the laser was brand new technology in Ontario.

¶ 59 **THE COURT**: December 22nd, 1995 in Brampton.

¶ 60 MS. CASSANO: '95, pardon me. Since this early case laser has been in use in Ontario for approximately five years and laser technology is no longer new.

¶ 61 MR. ALESSANDRO: Which page is this, sorry?

¶ 62 MS. CASSANO: I'm just giving submissions, Sir. Now there is no legal authority in that case or any other case that I can find, no clear authority that laser has to be tested against radar and that's not what Marshall says.

¶ 63 **THE COURT**: All right, correct me if I'm wrong but my understanding of Marshall, there was a comment by His Honour Judge Weagant at that particular time that he had difficulty with two areas. One, - this is strictly by memory but one area was that the officer had come to the conclusion through his experience and

looking at this particular vehicle that the vehicle was in fact speeding. I don't think Judge Weagant had any difficulty with that. Where he had the difficulty was the speed of 99. How did the officer obtain that speed of 99. When he went into the actual working of the laser machine as to whether that was a reliable way of detecting the actual speed of 99. He acknowledged the fact that there was enough evidence, there was a prima facie case that the driver of the vehicle was in fact speeding, but to break it down to the actual speed - now I suppose had he wanted to, he could have convicted the defendant of speeding. The charge that was laid was 99 I believe in either a 50 or 60 zone and he had difficulty determining whether or not the crown had in fact established a prima facie case with respect to the actual speed, based on the workings of a laser.

¶ 64 MS. CASSANO: Yes.

¶ 65 **THE COURT**: That's basically the thrust of it, if I get it.

¶ 66 MS. CASSANO: Yes. Now there were some problems ...

¶ 67 **THE COURT**: Well let me finish that.

¶ 68 MS. CASSANO: Yes, certainly Your Worship, thank you.

¶ 69 **THE COURT**: There was reference made there to the Alberta case law which was - and I take it from what I'm gathering here that the leading authority there was the Sutherland case. It was suggested there that if the police officer had tested the laser machine sometime, by means of a radar machine, that perhaps could have been evidence that was much stronger. However I don't think that laid down the law that each officer should carry both radar and laser in order to test the laser. It was just a comment - if I understand it correctly it was a comment he made that perhaps if he had had that type of evidence it would have been different. Are you of the same opinion?

¶ 70 MS. CASSANO: I tend to agree but if I could just go a little bit further.

¶ 71 **THE COURT**: All right.

¶ 72 MS. CASSANO: Mr. Alessandro is using Marshall as a legal authority that requires that laser be used against radar and my position is, Your Worship that this case doesn't stand for that. It appears to stand for the opposite. Now the issue in Marshall, there is the issue that you've raised about the speed, whether it could be determined to be 39 but the issue that Mr. Alessandro is relying upon and that the Court addressed is whether laser is capable of measuring the speed of a moving vehicle. The context of this is 1995 when laser is still new. Now what's curious about that case is the officer in that case gave evidence that she tested laser against radar. This is found, if anyone is looking for it on page 23 at line 30 and 31. So the officer does say in that case, "Yes, I did test the laser against radar." The Court acknowledged that she said that.

¶ 73 **THE COURT**: Mm - mm.

¶ 74 MS. CASSANO: Now what the Court was interested in was that the Crown had not asked questions about the relationship. "The relative importance," I think were the words the Crown used - or the Court used. The Crown failed to ask questions about the relationship of radar and laser. Now at page 23, on line 25, the Court refers to this omission. Now the reason the Court is referring to this omission is because it's given a conclusion in that case that the defendant was speeding but the Crown did not set out for the Court in the context of this new technology how it got to its conclusion and that's what concerns the Court. Now at page 23, line 25 the Court says, "No evidence was given as to why certain tests have to be performed and what the consequences of those tests are or the relative importance of each test to the other." He quite clearly here is talking about radar and laser. Now the Court was also concerned in Marshall that the Crown had failed to qualify the officer was trained in radar and the Court found this omission to be fatal. But what this is all about Your Worship is that we have a conclusion - and the principle of Marshall, if there is to be a principle in this regard, is that the Court can not accept a conclusion. It could not do that in 1995, that the laser is capable of accurately measuring the speed of a moving motor vehicle without first comparing it to the technology which was then known and that because

of that, the Court could only find laser to be reliable if certain things were established. The comparison between the tests, the consequences of the test, the relative importance of one test to another and also the qualification of the officer to give laser and radar. That's spelled out in the section I just referred to. Now the Court said quite clearly that it didn't have this evidence. The Crown did not set out - in a way the court is objecting to a conclusion without a foundation being established. A so logistic type of logic which would lay down each point and which would logically reach a conclusion. The Court is saying I have a conclusion but I don't know how you got there. The technology is new, I can't accept a conclusion. Now the Court said it didn't have any of this evidence that it needed. Now this is important because this is a passage that Mr. Alessandro refers to as being some kind of legal authority when it quite clearly is the opposite. The Court said that ...

¶ 75 MR. ALESSANDRO: Which page, sorry?

¶ 76 MS. CASSANO: I'm not referring to it yet, I'm just summarizing. Now the passage that Mr. Alessandro refers to in the transcript is an acknowledgement by the Court that the crucial evidence, the crucial foundation it needs to consider is missing. And that it hypothesizes that - Court's indulgence. Not having this evidence, the Court states as a hypothetical - and you can see that in the language that the Court uses, what it would need to prove - what it would think it would need to prove that the laser is a mechanism capable of accurately measuring the speed of a moving motor vehicle. And I believe this is found - Court's indulgence. It's found on page 24 and this was exactly the passage that Mr. Alessandro read into Court as authority for his position and given the lack of evidence - it's found on Page 24, I'm reading at about line 10. "Given the lack of evidence," that paragraph starts okay, and the Court has previously said everything that's missing that the Crown didn't adduce. "Given the lack of evidence on the relative importance of the test," and what he's talking about, the only thing he can be talking about, the comparison between radar and laser. "Given the lack of evidence on the relative importance of the test, it very well may, and I emphasize `May,' may be that testing the laser against the traditional radar set is the all important test for determination that the laser is capable of measuring the speed of a moving vehicle. If, - excuse me raising my voice - but if that is the case, I would think that proper evidence would have to be called in order to establish beyond reasonable doubt that the radar was in working order and that the police officer using it," and so on.

¶ 77 **THE COURT**: That's exactly my point.

¶ 78 MS. CASSANO: Well perhaps I've missed it but Mr. Alessandro is saying "Here's a case, Marshall, and it stands for the proposition that this is the test that the Court accepts." And the Court is not saying that at all. The Court is saying "You've given me a conclusion and I don't have any evidence leading up to that conclusion, I don't accept your conclusion." But then it talks about hypotheticals. It wants to know about the relationship, why those tests would be conducted, what the relationship of one test is to another and why the Court should know about that and what it means. And maybe on the basis of that, that's probably the type of evidence that should be raised. Now Mr. Alessandro referring to that as legal authority, it simply isn't, it's a hypothetical. It's stated as a hypothetical. The words, "If," "Would," suggests it's a hypothetical. It's obiter at best. There's no judicial foundation for - there's no test in the Marshall and looking at the case law I can't find any other as well.

¶ 79 Now in closing - thank you for the indulgence of listening to all that, but just in summary I think we should only deal with the issues that Mr. Alessandro has raised. We shouldn't get into what laser is capable of doing. The officer has given his evidence. There was no cross-examination, there was no defence that was led. He tested - he indicated that he was an instructor of laser and that he tested the laser unit to the manufacturer's specifications. There was no cross-examination on that. Now I would ask you to accept that the Crown has made its case on the basis of that information absent cross-examination, which was my friend's right, he declined to cross-examine and that if we look at all of the case law, most recently Cannon. Cannon indicates that radar technology - that the emphasis or the discussion of the comparison was important when this new technology was first introduced. We're four years later in Ontario, this technology is no longer new, it's used but more importantly is that the issue for the Court today. I don't think Mr. Alessandro has raised it. He's only the necessity of the test being done. There's no authority that I can find for that test being done. That's the issue that has to be answered today. Those are my respectful submissions subject to any questions.

¶ 80 **THE COURT**: Just for the record I just want to indicate that the Cannon decision was heard on the 18th of February of 1999 at Newmarket and was heard by Judge Bogusky. Did you want to say a anything further Mr. ...

¶ 81 MR. ALESSANDRO: Just very very quickly Your Worship. There's no duty on the defence to give up the theory or evidence it intends to rely on at trial. It's up to the defence if they want to present a defence at trial and my friend's submissions in reference that there's no legal authority in reference to these case laws and comments in reference to - she doesn't feel that these case laws are proper. Well Your Worship there is something called Stare Decisis and Stare Decisis indicates that judgments made by higher authority should be respected and bounded by and these are decisions made by three separate - sorry, by two separate provincial judges and their judgments should be respected. It should be bounded by and my friend is trying to - tried to interpret the judgments that are not interpreted by the way she is indicating in her submissions. It's quite clear Your Worship. There's two case laws on one point and that is a comparison test. As I indicated previously in my submissions it's indicated by two separate provincial judges. There should be a comparison test in order to corroborate trustworthy (sic) of the laser unit. It should be run through a radar unit and there's two provincial judges that make similar judgments in reference to that issue. In reference to the Cannon decision the reason why I introduced that is because the officer, in examination in-chief indicated that he conducted a test before and after and did not - and he indicated that the test was done at that particular time. Well he hasn't gone further. He hasn't gone further indicating what time are we specifying. He hasn't indicated on the date of the offence, he hasn't indicated a time and this is the reason why I introduced the case law because there's doubt as to what particular time were these tests conducted.

¶ 82 Those are my submissions Your Worship, subject to any questions you may have.

¶ 83 **THE COURT**: Well ...

¶ 84 MS. CASSANO: Your Worship, if I may have just a brief rebuttal. I do have a little bit of legal training, I am a lawyer and I would indicate that my friend's invitation to the Court to consider that these are Stare Decisis is completely wrong. There is no Stare Decisis here in that none of these cases set out a clear proposition for the Court. The remarks are at best obiter and they're subject to so many variables. The language of the decision itself: "If," "Would," and its reference to missing evidence, the newness of the technology, these are clearly obiter comments. There's nothing here for the Court to follow and to suggest that it's Stare Decisis would be to mislead this court. Those are my respectful submissions.

¶ 85 **THE COURT**: Well firstly what I want to do is go through this transcript and point out a couple of areas. The officer gave evidence at the time and his evidence was as follows: That on the 9th of February at 12:45 p.m. he was located on Bathurst Street just south of Heathdale Road in the City of Toronto. He was at this location for the purpose of monitoring the speed of motor vehicles, travelling southbound on Bathurst Street. Just have a seat Sir, I may be a while. The speed limit on Bathurst Street at this location is posted and the maximum allowed for motor vehicles is 50 kilometres. The officer also said in his evidence that he had in his possession at this time a laser speed measuring device. This is a device which is capable of accurately measuring the speed of a moving vehicle. The officer said that he was trained and he was qualified in the operation and testing of this particular device. At this time and at this location his attention was drawn to a motor vehicle which was a jeep. He observed this motor vehicle travelling southbound on Bathurst Street towards his location. It appears that he pinpointed the vehicle and indicated that it was in the left of the two southbound lanes and it was the lead motor vehicle. There was no motor vehicle in front of it and I can see quite clearly that it was travelling wildly in excess of the 50 kilometre per hour speed limit. Now I take that to mean that officer recognized the fact that this vehicle was travelling in excess of the 50 kilometre per hour speed limit and he came to that conclusion by seeing it. I take it that at that point, he never got an actual reading on it but was satisfied that the vehicle was in fact travelling in excess. Now keep in mind that that also is somewhat in line with the case that you presented to the Court Mr. Alessandro, that was decided by Judge Weagant. He activated - the officer goes on. He says he activated the laser device directly on his motor vehicle and from the device he received a reading of 85 kilometres per hour which corroborated his visual estimation of the speed of the motor vehicle. Without losing sight of the motor vehicle, I stopped it and spoke to the driver. He identified himself to me as Michele Lende, there is no issue with respect to driver's identification here and he identified himself with

an address. He advised the defendant that he had committed the offence of speeding and then issued him with an offence notice charging him with the offence. Now the officer goes on at this point and says, "I did check the speed measuring device before and after use at this particular time according to the manufacturer's specifications and on both occasions found that the device was working correctly. So the officer, it appears, at that time checked the machine according to manufacturer's specifications and on both occasions found that the device was working correctly. And that basically concluded his evidence. It's interesting to note that the questions that Mr. Alessandro asked did not address many of the arguments that have been presented here today. Mr. Alessandro asked very few questions, and one of the questions that was asked was with reference to identification. He identified himself by means of a passport and another question that was asked was the distance that the laser machine was able to detect the vehicle at this particular time and the officer in his evidence advised the Court that it was 163 meters north of the location where he was set up.

¶ 86 MS. CASSANO: Your Worship, if I'm not mistaken it's the Crown asking those questions.

¶ 87 **THE COURT**: You're quite correct, I'm sorry. You're quite correct.

¶ 88 MR. ALESSANDRO: Your Worship, just for clarification.

¶ 89 **THE COURT**: It's all right, let me just finish. Yes, there were a couple of questions that I had asked at that particular time to get something clarified. The question I had asked, how long the officer had been on the force. His answer was 24 years. The question I asked again was whether he had had any previous experience with the conventional radar units and he said yes, he had been using radar since 1982. And he's compared radar and laser and operated and tested the speed of vehicles and he's found that by using radar and laser the same speed is obtained. I take that to mean that when he uses radar and gets the speed of a moving vehicle as opposed to the new laser detection device that they do detect speed of a vehicle although it appears that they do work somewhat separately. Now the questions that I was referring to - Mr. Alessandro, when I look at this on a transcript you have Cassano an Alessandro so I'm getting a little bit confused there but the question that Mr. Alessandro asked was which machine he was using and the answer was the LTI 2020 which is basically the same machine which is referred to in all of these cases. That was the only question and then Mr. Alessandro chose to call no defence. Basically that was the only cross-examination there was with respect to it and then at the end of his case he argues the case, suggesting that there's a lack of evidence on the relative importance of the test. It may very well be that by testing the laser against the traditional radar set is the all important test for the determination that the laser is capable of measuring the speed of a moving vehicle. If that is the case I would think that proper evidence would have to be called in order to establish beyond a reasonable doubt that the radar was in working order and that the police officer using it for the test purposes is qualified to do so. I would have thought that that might have been the subject of cross-examination at the time with respect to his qualifications. The officer never indicated in his evidence in-chief that he conducted a comparison test. Again that would have been subject I would think to cross-examination and perhaps the officer could have answered that but that wasn't done. He then goes on to argue that he didn't specify when the test took place. Well it appears that he did, looking at the transcript.

¶ 90 I'm going to refer to a number of cases that deal with laser radar. I have had arguments in the past with different agents with respect to the operation of laser and they've basically been echoing many of the decisions by the appeal courts. I'm going to basically refer to the Cannon case which Ms. Cassano refers to. I'm not going to read it but my understanding of that particular case was that it dealt primarily with the testing and the time frame of the testing of that particular laser detecting device. There is the Tayman decision which of course I suppose is at present shall we say the leading case, most recent case, dealing with laser radar? In that particular decision His Honour Judge Bogusky was given argument by Mr. Dullege at great lengths, on an appeal by the Crown and he basically came to the conclusion that they were dealing with new technology. I just want to point out here that laser radar has been in Ontario as far as I understand, somewhere around 1993. Judge Bogusky made this decision in 1998, made references to the Alberta decisions, which I have, some of them. He also made reference to the fact - and I think this is what disturbed him more than anything else, is the fact that the laser machine did not measure speed in the same manner as the conventional radar machine and there should be different types of tests given to determine whether or not the speed of the vehicle can be monitored by means of movement as opposed to the way a laser machine operates. The internal testing of the laser as sole evidence of

reliability, I take it was basically not sufficient, is what he's saying. His reasons for judgment were as follows: "There are various institutions in our society which actively avoid our human tendency to race ahead. The judicial system is one of them and the Courts have traditionally resisted change especially as the change relates to things mechanical. The Courts have had to be dragged reluctantly into the 20th Century and now into the 21st coming up. This is an unusual appeal in the sense that the real question I have to answer is whether a relatively new mechanical device can be used and relied upon by a Court where its testing is primarily done by itself as opposed to testing against machines which have become acceptable to the Court." So the appeal itself is not talking about the veracity of the particular machine in question it is talking about a principle of evidence or a principle of what has to be proved in the Court. The cases that come out of Alberta, they start in 1993 and looking at the resume of one case I think it was Sutherland, and this is what I referred to you prior Ms. Cassano, that the Sutherland case is one of the cases that His Honour was making reference to. It cites that the particular type of machine or laser machine has begun its life in Alberta in January or so of 1993 and Alberta seems to be consistent right on through, that the machine itself has to be tested, against an already recognized motion machine, is basically what he says. The only case that comes out of Ontario is 1995 and I take it what he's referring to here is the case that Mr. Alessandro has presented to the Court and that's Judge Weagant's decision in the Marshall case. He goes on to say, "We have the machine itself being before the Court started in 1993 in Alberta, 1995 in Ontario and now of course this is 1998. Now I think we all know and can see the writing on the wall. Ultimately the laser machines are going to be accepted on their own merit after the passage of time." I'm wondering - he doesn't seem to go on to explain, and I have difficulty with it because - only in this light, the fact that he's saying that the laser machines are going to be accepted on their own merit after the passage of time. What is going to change at the end of the passage of that time if lasers are accepted in the operation as they presently are. So he goes on: "The question is, has enough time gone by, and here again, because this appeal is primarily a question of proof as opposed to the veracity of the machine, I can only conclude that applying the traditional principle of reluctance to proceed I have to say in answer to the question, does a new machine have to be corroborated by an older recognized machine, and I have to answer `Yes.' But the machine has not been before the Courts long enough so that the decision probably reflects - I think it was either Coke or Bacon perhaps hundreds of years ago who said we must make haste slowly so the decision of the J.P. is upheld. Thank you Mr. Crown."

¶ 91 Now I want to go a bit further than that because now I am faced with a very similar problem and that is - or basically the same argument. I'm going to make reference here to some other cases. The Sutherland case which was referred to in the Tayman case. There was an appeal by the Crown from acquittal of the accused on a charge of speeding. At issue was whether the 2020 laser which is the same machine here, was a dependable instrument for measuring the speed of a vehicle. When the appeal was dismissed, I believe this was an appeal by the Crown, this was the Alberta Court of Queen's bench was not an approved speed measuring device under the regulations of any Act and the Court agreed with the Crown counsel that it could take judicial notice of the speed of light but not that if this was applied to a particular test of the machine and showed no velocity that it meant that the machine must be working correctly for moving objects. I actually found this particular case - I just have a three page summary on it and I found it somewhat confusing but - and they're talking about an approved speed measuring device. I take it they're talking about under the regulations and I'm of the opinion that it does not have to approved by the regulations and I have other case law that echoes that. In any event that's the Sutherland case, it's an Alberta case and the reference to that was April 20th 1994 it was filed April 21st of 1994, Alberta Queen's Bench. And it shows here [1994] A.J. No. 316. We go further. There's a case again out of Alberta and that was a traffic division by Commissioner Gruman. That decision was rendered in November 7th of 1995 and that the Regina v. Halliday, [1995] A.J. No. 1201, matter. The accused was charged under the Highway Traffic Act with a speeding offence. He was clocked by a Multinova speed recording instrument driving at 88 kilometres per hour in a 60 kilometre zone. Held the accused was acquitted. The onus was on the Crown to prove that the Multinova was capable of accurately measuring the speed of the defendant's motor vehicle. The police officer had merely turned on the instrument and relied on it to test itself thus raised serious questions lacking any evidence of independent testing or even any evidence as to why this was not done. The Court had no evidence that the Multinova had been tested against any known constant and the Crown had not met the onus of establishing a prima facie case of speeding against the accused. Now that's somewhat different than this case but its an interesting case. Commissioner Gruman goes on to give his reasons as to why the defendant was acquitted. He goes on to say at the end there that "I'm not satisfied the Crown had met its onus of establishing a

prima facie case of speeding against the defendant. He accordingly dismissed the matter. There's another case called Chamberlain and that matter was the British Columbia Provincial Court in Vancouver. The citing on that was [1996] B.C.J. No. 1562 and that judgment was rendered January 30th 1996, so it's more recent. Now this is interesting because this was a trial on a charge of speeding. The defence challenged the reliability of the reading of speed given by the LTI 2020 laser which is the same that we're dealing with here in this case. 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. Now that's interesting because that basically does not agree with the Sutherland decision or the theory in the Sutherland decision and then it was 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 it certainly supported the speed reading given by the laser instrument. This evidence was unchallenged on the facts that there was no requirement for independent scientific proof of the technology. The evidence established that the instrument enjoyed a circumstantial guarantee of trustworthiness. And that's a very interesting case. In that case it was also - the Court talked about no requirement for scientific proof of technology. Constable Lemke which was the officer's name in that case, "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 test to operate it and confirm its accuracy by virtue of its' own training and experience as visually estimating the speed of moving vehicles. There's no requirement in the facts before me for independent scientific proof of technology. On the totality of the evidence the reliability of this instrument is established beyond a reasonable doubt or to use the language of Sutherland, taken from Professor Wigmore's phrase, the evidence before me establishes that the instrument enjoys a circumstantial guarantee of trustworthiness and I find the defendant guilty of speeding as charged." That was by Judge McKenzie. There's then the case of Regina v. Cox. Now that matter is an Alberta Court of Queen's Bench and that was the judicial district of Edmonton and that was filed January 26th of [1996], A.J. No. 57. Appeal from conviction, the appellant was convicted of speeding. The police officer obtained a laser reading of 66 kilometres per hour on the motor vehicle that was driven by the appellant. This was 16 kilometres in excess of the posed speed limit. The officer had visually estimated the speed of the vehicle at 66 kilometres per hour before he targeted the vehicle with a laser unit. The trial judge accepted the evidence of the officer and convicted the appellant. The appellant appealed his conviction on the basis that there was no approved test used to measure the reliability of the laser unit. The appeal was dismissed. The comparison of the laser unit to the radar equipment together with the visual estimate of speed of the motor vehicle satisfied the circumstantial guarantee of trustworthiness. The evidence of the officer that he had performed the tests on the unit in accordance with his training and that the laser was working properly and capable of measuring the speed of a moving vehicle in the absence of any other evidence was sufficient to establish a prima facie case. Then there's the case of Regina v. Aladina and that's an Alberta Court of Queen's Bench, judicial district of Edmonton and that's [1994] A.J. No. 1059 and that judgment was rendered March 14th 1994 filed March 15th, 1994. This was an appeal by an accused from her speeding conviction. She argued the Crown had not conducted a test to prove by some regulatory authority to measure the accuracy of the laser instrument used to check for speed. The office involved had done a comparison test with a radar device some time earlier. He had 500 hours of experience with a laser unit and had taken a course on its operation. Again in this case the appeal was dismissed. It was not necessary that the test be approved by the statutory authority and that was what I was referring to in that last case dealing with statutory authority of - in the course of its operation. Now, there are two other cases that I might just point out. That was a case which - I make note of this because in all these cases in Alberta, in Ontario, there were two cases that were never referred to. Now granted these cases did not deal with laser radar but what they did deal with was conventional radar. They are both Court of Appeal cases and one goes back to 1958 and I can tell you that in 1958 from my understanding of it, radar was a relatively new technology at that time. That was the Granger case. The citing on that was the Ontario Court of Appeal, Justice Porter, Justice Roach, Justice Gibson, three Judges, May 14, 1958. I'm not going to read the case to you but I'll read you the headnote. I've had a lot of opportunity to look at this case and I suggest that this case along with another case here are the leading cases on radar. It was a conviction for speeding based on a recording of a radar machine. The police officer testified that the machine was in good working order and properly used and extremely accurate under such conditions. The defence merely claiming but not showing that the machine was subject to weaknesses. That's basically what we have

here when we refer to the laser. The defence has not shown that the machine is subject to weaknesses. They just basically presented a case that was decided out of the Brampton Court. They go on to talk about the evidence of the police officer was to the effect that the accused had driven through the beam of a radar speedometer at 45 miles an hour. Counsel for the accused made a preliminary objection for this kind of evidence being given unless the Crown was prepared to qualify the witness as an expert. On cross-examination the officer admitted freely that he was not an electronics expert. It goes on to talk about the machine which was subject to all the weaknesses and inaccuracies which Mr. Ross enumerated in argument to the Court. The accused could have called evidence to show these facts but he did not and the only evidence that was before the Justice of the Peace was it was open to him to convict the accused. Again there's again the Sim, [1988] O.J. No. 2250, case which presently I take it, is the leading case in addition to Granger. Dwight Donald Sim, (October 11, 1988, Court of Appeal). This case was rather involved and there were factums that were presented by both defence and Crown. That again was radar and very similar arguments were given at that time. I'm just going to read you the judgment of the appeal court. There was evidence of the police officer that he tested the radar unit both before and after it measured the respondent's speed and there was evidence from which it can be concluded that the police officer was familiar with the unit and the manner in which it was intended to be used. "We accordingly cannot find any error in law on part of the Justice of the Peace and the appeal will be dismissed." I'm just going to reiterate those three lines. "The respondent's speed and there was evidence from which it can be concluded that the police officer was familiar with the unit and the manner in which it was intended to be used. That's radar, and I think I can apply the same rationale to the laser detecting device as well. It seems reasonable to me that if the officer uses the speed measuring device according to the manufacturer's specifications coupled with his years of training as a police officer and also years of operation in radar would, in my opinion, give the officer a pretty reliable conclusion of speed. From a commonsensical approach, it seems logical that prior to these machines being put in use, there would have been an extensive period of testing, with cooperation of the police departments throughout the country. The case law seems to suggest that it is not necessary for the Crown to establish through expert evidence how the speed timing device works scientifically or is it necessary for the officer to be an electronics expert. But I am of the view that as long as the officer was sufficiently familiar with the manner in which the laser machine was intended to be used, is sufficient." I note with interest that in all these cases that were presented before the Courts both in Alberta and here in Ontario, again basically reiterating here, the Sim case and the Granger case, both Court of Appeal cases were never presented before the Courts and I'm of the opinion that had these two cases been presented - although dealing with radar, they would have been very helpful because using the rationale in those cases to the laser machine as we have today and within the last few years, they would have been very helpful indeed. That being said, I am of the view that there was a prima facie case made out in which the defence should have answered to. Mr. Alessandro chose not to call a defence and I rule that the Crown has proved its case beyond a reasonable doubt in my mind and there will be a conviction.

¶ 92 Does the Crown have any comments with respect to penalty here?

¶ 93 MS. CASSANO: No, there is none.

¶ 94 **THE COURT**: Defence?

¶ 95 MR. ALESSANDRO: No submissions on sentencing Your Worship.

¶ 96 **THE COURT**: There'll be a penalty of $215.00. Can that be paid today or does this gentleman require some time?

¶ 97 MS. CASSANO: I just want to put it on the record that I want to thank Your Worship for taking time and giving all those cases to us. I think it may be worthwhile to get a transcript of today's proceedings. It was a really nice comprehensive summary.

¶ 98 **THE COURT**: Thank you.

¶ 99 MS. CASSANO: And I certainly would appreciate having a transcript at some point.

¶ 100 **THE COURT**: Unfortunately I did not have the opportunity because of time restraints to write a judgment. I just basically delivered ...

¶ 101 MR. ALESSANDRO: Your Worship, The defendant is indicating 90 days.

¶ 102 **THE COURT**: I'm sorry, I can't hear you.

¶ 103 MR. ALESSANDRO: He's indicating 90 days for payment of the fine.

¶ 104 **THE COURT**: Is this gentleman working?

¶ 105 MR. ALESSANDRO: Are you working full time?

¶ 106 MR. LENDE: Yes.

¶ 107 **THE COURT**: 60 days should suffice. Same address?

¶ 108 MR. ALESSANDRO: Yes, Your Worship.

¶ 109 **THE COURT**: All right, a notice will be sent out. The address I take it Sir, is the same, 55 Corwin?

¶ 110 MR. LENDE: 53 Corwin.

¶ 111 **THE COURT**: All right 53 Corwin. All right, a notice will be sent there.

¶ 112 MS. CASSANO: Thank you Your Worship, thank you Madam Clerk, thank you my friend and thank you very much to the officer.

¶ 113 THE CLERK OF THE COURT: Thank you Your Worship, Court stands adjourned.

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