** Unedited **

Indexed as:

R. v. Lounsbury

Between:
Her Majesty The Queen, and
Tom Lounsbury, Appellant (Accused)

[1993] M.J. No. 510
DRS 94-02546
Suit No. CR 93-01-13603

Manitoba Court of Queen's Bench
Jewers J.

October 21, 1993.
(3 pp.)

Motor vehicles — Regulation of vehicles and traffic — Rate of speed, evidence and proof — Radar equipment — Proof that radar device in good working condition — Burden of proof — Proof beyond reasonable doubt required — Evidence of usual practice of testing device not sufficient.

Appeal from summary conviction of speeding. The officer testified as to his usual practice of checking to make sure the radar device was in good working condition both before and after operating it. He could not say precisely whether these tests were performed in respect of the appellant's particular radar operation.

HELD: Appeal allowed and conviction quashed. The officer's usual practice was not proof beyond reasonable doubt that the device was, in fact, tested and working at the time of the alleged offence.

STATUTES, REGULATIONS AND RULES CITED:

Highway Traffic Act, S.M. 1985-86, c. 3, H60.

T. MacKean, for the Crown.
S. Bodnar, for the Appellant (Accused).

¶ 1 **JEWERS J.**:— This is a summary conviction appeal from a speeding conviction under The Highway Traffic Act, S.M. 1985-86, c. 3 - Cap. H60. The accused was clocked on radar and the Act provides that the court must be satisfied that the radar device was in good working order at the time. The issue here is whether that was proved beyond a reasonable doubt.

¶ 2 The radar operator testified at the trial. In his direct testimony, he said that he had done tests on the device both before and after issuing the offence notice. However, in cross-examination, he acknowledged that he had no independent recollection of performing the tests. He did say that prior to operating any radar unit he conducts a test to see if it is in working order and after issuing of an offence notice he rechecks to make sure that the machine is still in working order. I take that to be evidence as to his usual practice. He also said that, in this case, he made a note in his notebook that he had performed a test or tests but he did not note the time of the test or tests. (I say test or tests, because the transcript does not make it clear whether the notes indicated the making

of one test or more than one test. At one point the operator agreed that there were no indications in his notes of how many times the radar was tested, but just the results of a test.)

¶ 3 Evidence as to a particular practice or a standard practice is not proof beyond a reasonable doubt. See the decisions of Kroft J. (as he then was) in the cases of R. v. Jabs (November 19, 1991) (Man. Q.B.) (unreported) and R. v. Wolf (December 8, 1992) (Man. Q.B.) (unreported) and the decision of Beard J. in R. v. Kraemer (February 17, 1993) (Man. Q.B.) (unreported). In Wolf, Kroft J. stated in part:

> "Nonetheless, if we have a situation where testing is a prerequisite, and if the officer, and only witness, obviously cannot say any more than what his common practice is, I cannot take that as a proof of testing. ..."

¶ 4 In the instant case there is something more than the evidence of the operator's usual practice: There is an indication in his notes that he did, in fact, perform a test or tests, although the time or times of the tests were not noted and are not known.

¶ 5 In my opinion, all that can be safely inferred from the evidence is that the officer did test the radar device and found it to be in good working order at some point or points during the relevant shift. In my opinion that is not enough proof to demonstrate beyond a reasonable doubt that the device was working at the time of the alleged offence.

¶ 6 Some cases have suggested that there must be evidence that the radar device was tested and found to be in good working order, both prior to and after an alleged offence. See R. v. Lennon (April 6, 1992) (Man. Q.B.) (unreported), a decision of Darichuk J. and R. v. Kraemer (supra). These decisions are certainly consistent with the standard practice of the operator here, which was indeed to check both before and after using the device. There might be situations where the court could be satisfied of the accuracy of the device where the test was done, either immediately before or immediately after its use, but I need not decide this. In this case, there was no evidence as to when the checks were done -- that is to say whether they were done both prior to and after the alleged speeding or whether they were done before or whether they were done after. There was no evidence as to when they were done in relation to the alleged offence. They might as easily have been done at the very beginning of the operator's shift and long before the alleged offence, with the result that there would not have been a sufficiently reasonable assurance that the unit was still working properly at the critical moment.

¶ 7 In the result, the appeal is allowed and the conviction is quashed.

JEWERS J.

DRS/DRS/DRS