Case Name:

R. v. Odusanya

Between
Her Majesty the Queen, respondent, and
Babajide Odusanya, appellant

[2002] O.J. No. 3209

Ontario Court of Justice
Provincial Offences Appeal Court - Toronto, Ontario
Lane J.

Oral judgment: June 17, 2002.
(50 paras.)

Counsel:

A. Gunness, agent for the Attorney General of Ontario, for the Crown.
T. Brown, for the defence.

¶ 1 **LANE J.** (orally):— This issue fundamentally involves a conflict of jurisprudence with respect to the requirements necessary for proof of speeding when the device that is used is a laser speed device.

¶ 2 The evidence in this case from P.C. Johnston is that he was a fully-qualified laser speed device operator and instructor. He was qualified to operate a Marksman L-T-I 20-20 ultra-light long ranger model. It was his evidence that this device is capable of measuring speed and distance of both stationary and moving motor vehicles accurately.

¶ 3 He testified that on the relevant date, January 25th, 2001, he tested this laser device with the serial number U-X-0-0-3-1-5 according to manufacturer's specifications at 8:12 a.m. and at 1:10 p.m. and on both occasions, the device was working properly.

¶ 4 At 9:15 on that same date, he was located in the City of Toronto with his partner P.C. Bernard and he observed a Honda Civic motor vehicle travelling towards him in Lane 1. He put the red dot of the device on the front centre of the vehicle and he activated the laser by pulling a trigger.

¶ 5 He received a return speed of 140 kilometers an hour in a posted 100 kilometer per hour zone. He said that this speed was consistent with his visual observations. He also testified that the car was at a distance of 157.2 meters away from where he was standing. That again was consistent with his visual observations. He also testified that this motor vehicle was the fastest motor vehicle in his sight.

¶ 6 At the time, the road conditions were dry, it was sunny, the traffic was moderate. He said he had no obstructions; he never lost sight of the motor vehicle.

¶ 7 He advised his partner who was down the road of the Honda Civic moving at high speed and P.C. Bernard also observed the Honda Civic. He stopped the vehicle and he said that the speed was consistent with his visual observations as well.

¶ 8 There was no evidence called by the Defence at the trial and the only issue is whether the Crown has met its onus of proving that a laser accurately measures speed of vehicles when it is operated correctly, and that this particular laser device was in good working order at the time of the offence.

¶ 9 The argument is that because this instrument is not an approved instrument by statute or regulation the onus is on the Crown to prove both of these factors. The appellant relies on the 2000 decision of the Ontario Court of Appeal in R. v. Vancrey, [2000] O.J. No. 3033. In that decision, there was an analysis of the two conflicting lines of cases that had evolved up to that point in time and the Court of Appeal found that the evidence called against Mr. Vancrey was sufficient to establish a prima facie case, and, with no evidence to the contrary, the convictions were upheld.

¶ 10 The Court of Appeal referred to a variety of cases with respect to radar technology when it was in its early stages. In all of the cases that were cited: (R. v. Grainger, 120 C.C.C. 321, R. v. Bland, 6 OR (2d) 54, R. v. Chow, 68 C.C.C. (3d) 190, and D'Astous v. Baie Comeau, 74 C.C.C. (3d) 73) it was held that:

> "... where the operator of the radar was qualified to operate such a device, where the device was tested before and after the operation and was found to be accurate as verified by the tests ...".

that that was prima facie evidence of the speed and was admissible and sufficient to base a conviction where there was no evidence to the contrary. It was found in those cases that the evidence provided tests of circumstantial guarantees of worthiness and accuracy.

¶ 11 The Court of Appeal indicated that the laser began to be used in 1993, and reviewed the jurisprudence which has said that in every instance there must be independent proof that it is an accurate and reliable device. The Court cited certain cases which had held that to be the case: R. v. Sutherland, [1993] A.J. No. 561, R. v. Aladira, 4 M.V.R. (3d) 180, R. v. Tumalito, 35 M.V.R. (3d) 249, R. v. Tamen. The Court of Appeal also pointed out that:

> "It was not argued before us that the Court could, at this point in the history of use of the laser device take judicial notice of the laser as reliable for speed detection device of vehicles."

¶ 12 The Court of Appeal did not address that issue and left it open.

¶ 13 The position of the Crown in the Vancrey case was that there was prima facie evidence at trial of the accuracy and reliability of the particular laser unit, and that consisted of performance of the manufacturer's tests and an earlier verification of accuracy of the laser unit for measuring velocity of motor vehicles on the highway when compared with an accurate radar unit by a qualified laser and radar operator.

¶ 14 That is the key point on which the appellant hangs his hat. Because in the Vancrey case there was a verification at some prior time of a comparison velocity test, a dynamic comparison test done between the laser and a radar test, the appellant considers that to be an essential prerequisite for the Crown's proof of conviction in this case.

¶ 15 The Court of Appeal found that the Crown was correct in that case, and it found that there had been a radar comparison test done three to four weeks earlier that was sufficiently proximate to provide prima facie evidence of reliability of the instrument. It held that the two tests together do provide circumstantial guarantees of accuracy and there was no evidence to the contrary. It also held that it would be very helpful for the Court to receive expert evidence to explain the methodology and provide expert opinion as to the accuracy and reliability. The Court of Appeal said it would avoid the need for officers verifying in each independent case. The Court of Appeal went on to say that,

> "Here the evidence of the comparison with the radar was satisfactory to establish a prima facie case and with no evidence to the contrary, conviction must stand."

¶ 16 It would appear from that decision that there must be some evidence of a comparison test with a radar device. At least, that is how the appellant urges me to interpret the Vancrey decision. I have had the benefit, however, of reading the other decisions which were not before the Court of Appeal and which, in my view, shed some light on how Vancrey can be interpreted.

¶ 17 I have looked first at the Wong decision, [2000] O.J. No. 1442, which was decided in February of 2000 by my brother Justice O'Hara in Newmarket. He had the benefit of several pieces of what would be considered expert evidence. He heard the viva voce evidence of Professor Wyatt Kilgallon as to the scientific reliability of laser technology in the scientific community. He also had the expert evidence of Sergeant Lannigan who had done a large number of comparisons between laser devices to measure speed and radar.

¶ 18 Justice O'Hara felt that this was scientific evidence on which he could rely. He also had before him a reference case from the Superior Court of New Jersey with respect to the matter of the admissibility of motor vehicle speed readings produced by the L-T-I Marksman 2020 Laser Speed Detection system. There is no date on that, but it is clear that he quoted at length from the decision of Mr. Justice Reginald Stanton of the New Jersey Superior Court. He also had before him two manuals with respect to the existence, technology and testing of L-T-I 2020 technology.

¶ 19 Justice O'Hara's conclusions are of considerable interest. He said:

> "It was generally conceded by the respondent that the technology was adequate generally for the purpose of detecting the speed of moving motor vehicles in a law enforcement setting."

¶ 20 And Mr. Justice O'Hara says he is prepared to find without reservation that it does. He also noted that the New Jersey tests adopted by the Superior Court Justice Stanton concluded that,

> "The evidence of speed of motor vehicle produced by laser speed technology should be received as evidence without need for expert technology."

¶ 21 And he ruled,

> "On all the evidence before me, that the L-T-I 2020 Laser instrument was adequate and accurate enough to be relied on by the courts for this purpose."

¶ 22 So, having reviewed all of that expert material, that was the general finding of Mr. Justice O'Hara.

¶ 23 In my view, if his analysis had stopped there, then clearly there would not be any basis for this appeal. However, Mr. Justice O'Hara went on to make the observation that he cannot accept that:

> "... an additional verification is not required to make sure that the instruments are operating enough on a day-to-day basis that the courts can rely on their operational level of accuracy."

¶ 24 He said, "It's not unreasonable to demand a dynamic test as part of the indicia or reliability to a court."

¶ 25 He said that, "That way, there will be a continuous check that a particular instrument is fulfilling the error-trapping capabilities relied upon." And he suggested that,

> "There ought to be a dynamic comparison test between the radar and the laser on a moving object on a schedule of approximately every thirty days."

¶ 26 With due respect to Mr. Justice O'Hara, I do not understand how he came to that conclusion. He had evidence which he was prepared to accept concluded that the laser technology was generally accurate and could be relied upon. In fact, Mr. Justice Stanton of the New Jersey Superior Court made reference to the test of which he had received evidence in which,

> "... where there were radar comparison tests made between the test laser and the radar in which there was only 0.8% of instances in which the laser device produced a result that exceeded the measure produced by the radar by more than one mile per hour."

¶ 27 And he said this was only sixteen cases out of one thousand, nine hundred and eight. That was the basis on which Mr. Justice Stanton of the New Jersey Court of Appeal was prepared to accept this as an accurate device.

¶ 28 Yet, my colleague, Mr. Justice O'Hara in Newmarket, found that there ought to be radar comparison tests on some sort of schedule (once every thirty days approximately). Quite frankly, I do not know on what basis he made that observation and whether Mr. Justice O'Hara has any kind of expertise on which that could be based. Clearly, that was not a recommendation which came from the two experts that testified before him on that case.

¶ 29 In short, I have considered the Wong decision of Mr. Justice O'Hara, but I do not accept his specific conclusion that he ultimately came to. I note that his decision was not before the Ontario Court of Appeal in Vancrey, and that the Ontario Court of Appeal in Vancrey made no comment with respect to the Wong decision or the evidence that was heard on that application.

¶ 30 I do not know whether Wong is under appeal. Do you know, sir, whether Wong was ever appealed?

¶ 31 MR. GUNNESS: Not to my knowledge, Your Honour.

¶ 32 **THE COURT**: So, it is unfortunate, the Wong case was never appealed. And therefore, we do not have the Court of Appeal's word on whether Wong was accurately decided by Mr. Justice O'Hara.

¶ 33 Just before I go on, I want to note in Vancrey that there is a footnote provided by the Ontario Court of Appeal which makes reference to the fact that the Manitoba Cabinet, in Manitoba Regulation 135/95:

> "The Minister of Justice in Manitoba approved the use of the L-T-I 2020 Marksman Laser Speed Meter for the purposes of S. 255(1) of the Manitoba Highway Traffic Act," which refers to speed timing devices.

¶ 34 There is one example in Canada where a Minister of Justice has specifically provided authorization and approval to this particular device. I add that to the authority provided by the New Jersey Superior Court by Mr. Justice Stanton.

¶ 35 I now turn to a decision of my brother Judge Fairgrieve in R. v. Le, [2002] O.J. No. 894. I note that in R. v. Le, the evidence before that Court was essentially the same as the evidence before me in the case at bar. The operator was a qualified laser operator. He had tested the device prior to setting it up and after taking it down. He had found it in proper working order and the tests were conducted in accordance with the manufacturer's specifications. In Le, as in the case at bar, there was no evidence to the contrary or any evidence provided by the Defence.

¶ 36 In the Le decision the appellant raised the Vancrey case to support his position and Mr. Justice Fairgrieve disagreed. Mr. Justice Fairgrieve said, "With respect, I do not read Vancrey in the same way. I quote from Paragraph 5:

> "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 ... (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 previously."

¶ 37 He quotes Justice Feldman as accepting that evidence as satisfactory to establish a prima facie case, which (with no evidence to the contrary) justified the conviction.

¶ 38 He says, however:

> "In my view, 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."

¶ 39 He goes on to quote: "Clearly, it would be most helpful it the Court could receive expert evidence." And Mr. Justice Fairgrieve goes on to say:

> "While it's not entirely clear that the Court which would receive such evidence need be the Court of Appeal, the premise seems to be that once the 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 herself then envisages the situation where evidence of independent testing would not be necessary."

¶ 40 Then Mr. Justice Fairgrieve says:

> "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."

¶ 41 He then quotes the case of R. v. Koh, Lu and Lim, 42 O.R. (3d) 668, a 1998 decision of the Ontario Court of Appeal with respect to judicial notice, and he says: "Judicial notice is permissible when previous courts have proven a certain fact."

¶ 42 He then goes on to quote City of Joliette v. Delangis (1999), 141 C.C.C. (3d) 445, a decision of the Quebec Court of Appeal dealing directly with the question: Can a court take judicial notice of the fact that a device using a laser beam can measure the speed of a motor vehicle. And Mr. Justice Fairgrieve notes that:

> "Although the case was decided nine months prior to Vancrey, and although Feldman, J.A. referred to a number of other authorities, it appears that Delangis was not brought to the Court's attention."

¶ 43 Mr. Justice Fairgrieve notes that, "In Delangis the evidence before the trial court was essentially identical to the evidence in the case at bar."

¶ 44 He then goes on to quote from Mr. Justice Gendreau, a justice of the Court of Appeal 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 a dictionary of a particular use of technique or technology does not mean that it is unknown and must be proven.
> In summary, it seems to me 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 kilometers 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 and that the operator was not competent ... This means in the result that a laser-measuring device is a device which is generally known and used."

¶ 45 He then goes on to make comments about the odometer and how it's no longer necessary to have proof that an odometer is correct.

¶ 46 Anyway, the Court of Appeal in Quebec 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.

¶ 47 He then quotes from a similar conclusion reached by our colleague Mr. Justice Pockele in R. v. Mukasa; R. v. Spinosa; and R. v. O'Brien at [2001] O.J. No. 262 (QL). Mr. Justice Pockele's decision was that:

> "I find as a fact that a Laser Speed Detection Device, 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 based on 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."

¶ 48 In any event, Mr. Justice Fairgrieve states in Paragraph 14:

> "In my opinion, regardless of whether the reliability of laser devices to measure the speed of vehicles is regarded as so 'notorious' that it cannot be disputed by reasonable people, or whether one accepts the judgment 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."

¶ 49 And Justice Fairgrieve upheld the conviction. I adopt his reasoning and in my view there is sufficient judicial authority, both from the Ontario Court of Appeal, from the New Jersey Supreme Court, from the Manitoba Regulation that one can take judicial notice that such devices are accurate without any independent comparison testing. That where there is no evidence raising any doubt or suggesting that the device was not operating properly according to manufacturer's specifications or had not been tested on the day in question, then its results ought to be accepted.

¶ 50 As there is no other evidence in this matter, the conviction will be upheld.

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