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R. v. Oliver

Between
Her Majesty the Queen, and
Patrick Oliver

[1993] O.J. No. 4464

Ontario Court of Justice (Provincial Division)
Scarborough, Ontario
Jogendra J.P.

November 24, 1993.
(32 paras.)

Charge: Speeding - Highway Traffic Act Section 128

Counsel:

A. Scott, Provincial Prosecutor.
A. Thompson, agent for the defendant.

¶ 1 **JOGENDRA J.P.**:— The Defendant Patrick Oliver is charged that he did on the 18th day of April, 1993 at 10.56 A.M. at West Bound Steels Avenue in the Municipality of Scarborough, commit the offence of speeding 89 kilometers per hour in a 60 kilometers an hour zone contrary to section 128 of the Highway Traffic Act.

¶ 2 Mr. A. Scott, Provincial Prosecutor appeared for the Prosecution, while Mr. Anthony Thompson appeared for the Defendant (who was not present) as Agent for the Defendant as provided for under section 50 read with section 82 of the Provincial Offences Act.

¶ 3 Mr. Thompson stated that he had instructions from the Defendant to carry on with the case in his absence and was ready to proceed.

¶ 4 Mr. Scott stated that the Crown was also ready to proceed. On the Defendant being arraigned, Mr. Thompson pleaded "not guilty" on behalf of the Defendant and the trial commenced.

¶ 5 Mr.Scott for the Crown called Mr. Scott Kerr P.C.#5907 (hereinafter referred to as the Officer) as the witness for the Prosecution who gave evidence under oath.

¶ 6 The Prosecution sought permission of Court for the Officer to utilize his notes to refresh his memory at which point Mr. Thompson posed one question to the Officer as to whether he had an independent recollection of the event to which the Officer replied that he had some stated that he had no objection to the recollection. Mr. Thompson then stated that he had no objection to the Officer using his notes.

¶ 7 Then the permission sought for by was allowed by Court.

¶ 8 The Officer proceeded to give his as follows the Prosecution to use the notes evidence which may be summarized as follows:

> On 18th April, 1993 at approximately 10.56 A.M. he was operating marked Police Motor Vehicle. This vehicle was equipped with a Mobile Digital Radar (M.D.R) a speed measuring device which is capable of accurately measuring the speed of a moving object from his moving Police Vehicle. He tested the radar device in accordance with the Manufacturer's specifications at the start of his shift, and again at the end of his shift. At both times he found the device to be operating properly. He is trained and qualified in this type of radar speed measuring device. At this time when he was travelling East bound on Steels Avenue in the Municipality of Scarborough, he observed a brown Volkswagen Gold Motor Vehicle travelling West bound. It was the lone Motor Vehicle on the road and the vehicle appeared to be speeding. He activated the radar set and obtained a reading of this vehicle of 94 kilometers per hour in a posted 60 kilometer an hour zone. He made a "U" turn behind the vehicle activating his lights stopping it, at which time the driver of the vehicle identified himself to him with a valid Ontario Driver's licence as a Patrick H. Oliver of a Pickering address to wit 829, Regal Crescent in Pickering and he was satisfied with his identification.

¶ 9 On being further examined by Mr. Scott for the Crown, the Officer stated that:

> Steels Avenue East is a clearly posted 60 kilometer per hour zone and the speed reading he received 94 kilometers per hour did corroborate with his personal visual estimation of the speed of the vehicle. There were no other vehicles on the road other the two vehicles.

¶ 10 The Officer on being cross-examined by Mr. Thompson, Agent for the Defendant whether he had actually read the Manufacturer's specification or just read the Police Manual, he stated that he has read the Police Manual and that was what he was taught when he was taught how to operate the radar set. When it was suggested to the Officer that he was not sure that those are Manufacturer's specifications and whether he tested it according to Metropolitan Toronto Police Procedure, not necessarily the Manufacturer's specifications, the Officer stated that he tested it in accordance with the way he was taught to test it.

¶ 11 On further questioning he said that he had not noted the times he tested the set and found to be working, but he was working the day shift starting at 6.00 in the morning and ending at 4.00 in the afternoon. He usually goes on the road approximately 6.30 A.M. The set would have been tested.

¶ 12 At that time and again when he comes at the end of his shift. Each time he goes out in the vehicle it is equipped with radar set and he does test it. It was standard practice for him to test it every time he gets into the car and comes at the end of the shift, whether he was going to use the radar set or not.

¶ 13 Mr. Thompson concluded his cross-examination of the Officer at this point. At the end of this, Mr. Thompson, upon inquiry by Court whether he was calling any witnesses, he informed Court that he was not calling any evidence for the defence, nor - did he apply for an adjournment for him to call any witnesses for the defence, at any later date.

¶ 14 Then Mr. Scott for the Crown submitted as follows:

> No evidence had been called by the Defence. The Officer testified that the machine was working properly. In law, the defence cannot raise a reasonable doubt on evidence through cross-examination alone. If Mr. Thompson wished to allege that the radar device was not working properly, he must lead evidence to show or raise the possibility that the machine was not working properly. There are several cases right on point. He was fully prepared to adjourn this matter and provide them to Court. He further said that the uncontradicted evidence before Court was that the machine was working properly. The speed of 94 kilometers that the Officer estimated the vehicle was travelling was the recorded reading obtained and there was that corroboration. The only uncontradicted evidence was that of the Officer and therefore there must be a conviction. He was fully prepared to present Appeal Court decisions to support this contention.

¶ 15 Mr. Thompson, on behalf of the Defendant submitted in response that:

> It was Mr. Scott, the Crown Prosecutor who led the evidence, and the Officer did not give the evidence that the vehicle was travelling at 94 kilometers and that the radar confirmed it and that the Officer did not introduce that evidence. Those were Mr. Scott's (Prosecutor's) words and he believes the Officer's response was "yes."
> His position is as in Regina v. Zierra Provincial Appeal Court in Sudbury 1987 which was that the times the set was tested by the Officer had to be noted and he thinks that it is quite specific in that particular case and that there are numerous cases that the set must be tested according to Manufacturer's specifications, and of which there is no evidence at all. The Officer first said it was tested according to Manufacturer's specifications, but in fact he admitted that he does not know what they are the Manufacturer's specifications.
> In numerous cases, Granger, O'Riley, Wolf, Milelli, Brown, Biklowski all state that its imperative that the set be tested according to Manufacturer's specifications.
> Specially because the Officer is not a radar technician. He is a radar operator. He further said the Officer Mr. Kerr, most assuredly established and there is no question is a qualified radar operator but not a technician. And the Officer admits that what he had followed was a training precis prepared by Metropolitan Toronto and there was no corroboration that they are all Manufacturer's specifications.
> He then sought to submit certain other matters from his personal knowledge in his previous calling to substantiate this. Thereafter, by agreement of both parties the matter was adjourned to 24-11-1993 for judgment and enabling in the meantime for both parties to make their written submissions, together with copies of the various precedents and decided cases they are relying on for their submissions.
> Both parties have already forwarded their respective submissions wit notice to each other and the matter comes up today (24-11-1993) for judgment.

¶ 16 Mr. Scott on behalf of the Crown, while re-iterating his earlier submission states that in the absence of any evidence by the defence, the radar machine is deemed to be properly working and registering speed, as stated in the Crown's case and such evidence as to Defendant's speed is uncontradicted and the Court can come to no other conclusion other than that the Defendant was speeding.

¶ 17 He has annexed copies of the following decided cases:

1. Regina v. Granger On. Ct.of Appeal (May 15, 1958);
2. Regina v. Werenka (Alberta Ct. Queens Bench) (August 27, 1981);
3. Her Majesty the Queen against John Sissaris Before Judge W. Bate Febry. 22, 1990 at Toronto.

¶ 18 Mr. Thompson on behalf of the Defendant while disagreeing with the submissions of Mr. Scott had forwarded copies of the following cases:

1. H.M.Q v. Fernando Milelli	Judge R.T. Weseloh December 28, 1988 Brampton, Ontario
2. H.M.Q. v. David Joseph Brown	Judge K.P. LANGDON April 10, 1990
3. H.M.Q. v. Richard Biklowski	Judge G.F.W. INRIG at Lindsay, Ontario Febry 21, 1991.
4. Regina v. Wolfe	British Columbia County Ct.

Arkell Co. Ct. J.
June 7, 1929

5. H.M.Q v. Majid A. Ziara — Judge G.E. Michel at Sudbury November 24, 1987.

¶ 19 I have carefully reviewed and considered the various authorities, precedents and submissions made by the Prosecution and the Defence in the light of the evidence led in this case and the law applicable. I would deal primarily with the submissions of Mr. Thompson on behalf of

1. His first contention is that it was Mr. Scott the Crown Prosecutor who led the evidence and, that the Officer did not give the evidence that Mr. Scott gave that evidence and the Officer corroborated it, that the vehicle was travelling at 94 klm and the radar confirmed it and the Officer did not introduce that evidence.

   I have examined the transcript of the proceedings and find that it is not so. Therefore his first contention fails.

2. His second contention is that in Regina v. Zierra Provincial Appeal Court in Sudbury 1987, it was held that the times that the set was tested by the Officer had to be noted and he thinks that it is quit, specific.

   I have examined the judgment of His Honour Judge G.E.Michel dated 24-11-87 and find that what he had said is quite different from what had been contended. He says: "I have read the full transcript of the evidence before the Court,and there is not evidence to state when the tests were conducted on the radar machine. It says "before" and "after"; there should be some evidence as to whether it is the week before or the week, after, or immediately before, immediately after or even that day would be adequate, as long as one knew." This he had said having regard to facts of that case. The facts in the case at bar are quite different and the Officer had said here quite categorically that he tested the device that day at start of his shift at 6.00 or 6.30 A.M. and at the end of his shift which was around 4.00 in the afternoon and at both times he found the device operating properly. Although he said under cross-examination that he had not noted the times that he tested the set he had said earlier that he had some independent recollection of the event in relation to his notes. In view of this, I am satisfied he had done so. Thus this contention of Mr.Thompson would also fail.

3. His third contention was that the Officer first said (in examination in-thief) that the device was tested according to Manufacturer's specifications, but in fact he admitted under cross-examination that it was according to the Metropolitan Toronto Police procedures in the way he was taught to test it. Mr.Thompson sought to rely upon what he knew personally (in his previous calling) to demonstrate that the Manufacturer's specifications and the Metropolitan Toronto Police procedures are not identical and it could only be a precis. I am unable to accept transposition of Mr. Thompson because no evidence was called or led on this matter by him and in any event, he could not give evidence while making submissions. I would quote with approval what His Honour Judge G.E. Michel had said to Mr. Burd, Counsel for the Appellant at page 13 of his judgment in the case of H.M.Q a gainst Majid A. Ziara (one of the cases cited by Mr.Thompson himself) if you are not permitted to give evidence like you gave. You told me of your experience and what not. That just went there and out there because it is worthless. If you want to give me your experience you take the stand under oath and do the same thing." Moreover there is no evidence before Court to show that the Metropolitan Toronto Police Manual is basically or in substance different from the

> Manufacturer's specifications. The presumption being in favour of regularity and legality; and everything is presumed to have been done lawfully until some evidence to the contrary is adduced, as stated in the Latin maxim "OMNIA PRAESUQUNTUR RITE ESSE ACTA". It is important in practically every branch of law, for it saves the expense of calling witnesses to prove a number of facts and prevents unmeritorious submissions of no case to answer (Cross on Evidence - 4th Edition at pages. 43 and 44), Cross-examination, ordinarily cannot create new evidence for the Defence or affect the prima facie case put, but may only affect the weight of evidence. It has not happened in the present case. Hence, I am of the considered view that this contention of Mr. Thompson will also fail.

¶ 20 Now dealing with the various cases cited by him, I find that the decision in the case of H.M.Q against Milelli and H.M.Q against Majid. A. Ziara have no application whatsoever, because in both these cases the Defendant had given evidence and in this case there is no evidence by the Defendant or on his behalf and therefore different considerations and consequences flow.

¶ 21 In respect of the other 3 cases, I find upon examination that the decisions there stand on a different footing as against the facts, evidence and material in the case at bar.

¶ 22 In the case of David Joseph Brown and Richard Bikowski, it is admitted in evidence that the Officer had adopted short cuts in relation to testing procedures and/or did not carry out certain tests and particularly in the case of Bikowski the Officer was shown to be incompetent and did not know even certain terms like "shadowing" and there was searching and exhaustive cross-examination of the Officer which revealed those situation.

¶ 23 In the case of Regina v. Wolfe, it was evident that the Officer was unqualified and unaware of the procedures.

¶ 24 Therefore, all these cases can be easily distinguished from the case at bar, since those infirmities are not present in this case.

¶ 25 As such, I am neither impressed nor persuaded to accept them as authorities to be applied to the fact this case which are basically different in all material particular. Hence, I am of the opinion that the various positions taken by the Defence in this case consequently fail.

¶ 26 All the cases cited by Mr. Scott for the Prosecution Viz: Regina v. Grainger; Regina v. Werenka and Regina v. Sissaris, are cases, I find, that the facts are similar, if not identical, in that, in these cases apart from they being cases of speeding and there was no evidence given by the Defendant or on his behalf as in this case, the Judges had proceeded to act upon the uncontradicted testimony of the Officer inter alia, that the device used was in good working order and properly used. The defence merely claiming, but not showing that the machine was subject to weakness. It was held that the convictions accordingly were proper on the weight of evidence. In the case of Regina v. John Sissaris, I find that the facts of this case seems very identical in addition to the fact that no evidence was called on behalf of the defence, and quite coincidently the Officer concerned had said almost exactly what the Officer in this case had said while being cross-examined at length and this is what His Honour Judge Babe W Provincial Court Judge says:

> Constable Clarke testified that he had tested the radar device that he was using. It was found to be working properly. He also testified that he was qualified to use the machine.
> He was cross-examined at length about that and he indicated-that he did not directly read the Manufacturer's specifications but he had tested it in accordance with the training he had received."
> The Justice of the Peace has accepted that at the conclusion of the case that he was qualified to operate the radar and accepted the reading and indeed there is absolutely no evidence in the transcript to the Court to the contrary.
> I see no error whatsoever in the case, and it will be dismissed."

¶ 27 On the basis of stare decicis, I am bound by this decision; and, therefore, I do adopt with approval this decision which is really on point and in all fours with the case at bar.

¶ 28 I also accept the submissions of Mr. Scott in this case as tenable and convincing. Having regard to all these and based upon the uncontradicted testimony of the Officer, which remains unassailed, I am satisfied that the case for the prosecution and the charge against the Defendant had been proved beyond reasonable doubt, and the defence taken by the defendant is not tenable both in law and on facts and does not stand the test of scrutiny.

¶ 29 Mr. Thompson had urged in his submissions that should I agree with the submissions of Mr. Scott, I have the option of ruling on the degree of speed (i.e 75 Klms. in a 60 Klms. zone as was done in Milelli) He states that this would preclude an appeal by the Prosecution and the Defence.

¶ 30 Firstly, as stated earlier by me, the case of Milelli has no application to the facts of this case.

¶ 31 Secondly, the criteria for the decision of the case is determined by the law applicable and the evidence adduced in the case and not the fact whether or not any party to the case may prefer an appeal or not against the decision.

¶ 32 Since neither the evidence adduced in this case nor the law applicable to it enables me to do this, I regret that I am unable to accede to the request of Mr. Thompson. In the result, I find the Defendant guilty as charged namely that the Defendant did commit the offence of speeding 89 kilometers per hour in a 60 kilometers per hour zone contrary to section 128 of the Highway Traffic Act and there will be 'a conviction registered.

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