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R. v. Shannon (Ont. C.A.)

Between
Her Majesty The Queen, and
Maureen Shannon

[1992] O.J. No. 2652
Action No. C6821

Ontario Court of Appeal
Toronto, Ontario
Houlden, Arbour and Weiler JJ.A.

Heard: December 9, 1992
Judgment: December 11, 1992
(4 pp.)

Scott Hutchison, for the Appellant.

David Zuber, for the Respondent.

The following judgment was delivered by

THE COURT (endorsement, allowing the appeal):— The respondent was charged with driving a motor vehicle with a radar warning device, contrary to s. 61(2) of the Highway Traffic Act, R.S.O. 1980, c. 198 [now s. 79(2) of R.S.O. 1990, c. H-8]. She brought an application for an order prohibiting the Ontario Court (Provincial Division) from proceeding with the trial until she obtained proper disclosure from the prosecution. The application was adjourned to permit the Crown to provide the required disclosure. Although there is normally no disclosure provided in these types of minor offences, because no Crown brief is prepared ahead of the trial, the Crown provided counsel for the defense with the will-say statement of the arresting officer.

That statement contained the following information:

that on November 18, 1990, the accused's vehicle passed a marked police cruiser operated by P.C. Fleisham and as it did the VG2 interceptor in the cruiser was activated. The officer turned the cruiser around and after determining that it was the accused's vehicle that had activated the VG2, he stopped the accused and confiscated a UNIDEN radar detector from her car.

Upon the return of the application for prohibition, the defence obtained an order prohibiting the holding of the trial until disclosure was made by the Crown to the defence of a copy of either the Operator's Handbook or the Service Manual for the VG2 interceptor.

It is common ground that the manufacturer of the VG2 interceptor will not voluntarily supply that information to the defence as it supplies its products exclusively to law enforcement agencies.

In our opinion, the motions court judge erred in compelling pre-trial disclosure as he did. The matter should have been left for the trial judge. There are only two bases upon which the technical information about the VG2 can be relevant to the conduct of the defence. The first is if the Crown were to rely on the interception made by

the VG2 to prove that the device seized in the respondent's car was a radar detector. Crown counsel, Mr. Hutchison, is correct in conceding that the Crown could not rely on the VG2 at trial in that fashion without disclosing the manual. If the VG2 interceptor, sometimes called the "detector's detector" is used testimonially, the defence is entitled to have an opportunity to challenge its capacity, its functioning and its accuracy. However, the Crown is entitled to attempt to prove that the device seized in the respondent's car was a radar detector without the assistance of the VG2. Should it fail, the respondent would be entitled to an acquittal. Mr. Hutchison assured the court that the Crown would not be using the VG2 device to prove an element of the offence. If the Crown does not rely on the VG2 to prove its case at trial, it's technical specifications are irrelevant to the conduct of the defence.

The functioning of the VG2 could also be relevant to a defence motion for exclusion of evidence on the basis that the seizure of the device found in the appellant's car, and the consequential arrest of the respondent, were made without reasonable and probable grounds. No such motion has been made to date and, should it be made at trial, the trial judge would be in the best position to determine whether the technical disclosure should be made, having regard to the factual circumstances as well as the specificity of the grounds upon which such motion would be advanced. The order of disclosure made in this case could not be justified on this basis of relevance in the absence of any indication that such a motion would be forthcoming, let alone what its proper scope would be. At the present time, any such motion is premature.

For these reasons, the appeal must be allowed, the order of prohibition set aside and the matter remitted to the Ontario Court (Provincial Division) for trial.

Mr. Hutchison candidly admitted that the Crown had an interest in having this matter dealt with at an appellate level, despite the fact that the charge was rather minor, and that the appeal was, in a modest way, somewhat of a test case. Mr. Zuber has been most co-operative with the Crown and his request for costs was not opposed. The respondent will therefore have her costs of the appeal, including the proceedings in the lower courts, fixed at $1,000.

HOULDEN J.A.
ARBOUR J.A.
WEILER J.A.