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R. v. Shaw

Between
Her Majesty the Queen, appellant, and
Darrell G. Shaw, respondent

[1994] A.J. No. 960
DRS 95-02648
Action No. 9412-0035SO

Alberta Court of Queen's Bench
Judicial District of Wetaskiwin
Wilson J.

Judgment: December 6, 1994. Filed: December 7, 1994.
(6 pp.)

Statutes, Regulations and Rules cited:

Highway Traffic Act, R.S.A, 1980, c. H-7, s. 173.

Motor vehicles — Regulation of vehicles and traffic — Offences — Rate of speed, evidence and proof — Radar equipment, reliability of Laser Model LTI 2020.

This was an appeal by the Crown from the respondent's acquittal for speeding. The evidence consisted of testimony regarding the accuracy of a Laser Model LTI 2020 reading. Part of that evidence was given by the Constable who operated the machine. He testified that he had performed a number of tests to verify its accuracy, including a comparison test with the old radar machine. The trial judge based her decision to acquit the respondent primarily on her interpretation of section 173 of the Highway Traffic Act. She held that the Act required the test to have been conducted by a tester appointed under the Act and the Constable was not such a tester.

HELD: The appeal was allowed. It was not necessary to rely on section 173 to validate the readings of the laser machine. Section 173 only allowed the Crown to establish a prima facie case in a given set of circumstances, but it was not the only manner of proof available. The evidence provided of the tests performed by the Constable in this case, especially the correlation with the older and well-tested radar machine, was sufficient to validate the readings of the machine.

Deborah J. Alford, for the crown.
Joseph A. Caruk, for the accused.

¶ 1 **WILSON J.**:— This is a Crown appeal from the acquittal of the accused. He was acquitted on a speeding summons before a provincial Court Judge. The evidence consisted of testimony about a Laser Model LTI 2020 reading and the evidence offered in support of its accuracy. The Constable who operated the machine testified about the four manufacturers' tests he did on the equipment and about his observations when he clocked the Respondent and of a comparison test done by him with a radar machine and a tuning fork. A certificate with

respect to the tuning fork was tendered and accepted in evidence under the Highway Traffic Act, R.S.A. 1980, c. H-7, Section 173, in proving the accuracy of the radar set. The Constable operating the machines did not testify as to his personal opinion of the speed of the vehicle of the accused at the relevant time. He did testify that he had tested the radar and the laser from his vehicle by pointing them at a large stationary sign on the highway as he drove past it, and confirmed that both of the machines gave the same speed reading. He then went to an overpass on a divided highway, and targeted the vehicle driven by the accused with the laser gun, obtaining a reading of 142 km/hr., which was in excess of the speed limit. The accused was stopped a short way down the road and ticketed.

¶ 2 The Provincial Court Judge acquitted the accused, saying that the issue was:

> "whether the instrument, the LTI-2020 Laser gun used by [the Constable] can legally be used to establish the speed of the motor vehicle."

¶ 3 In her reasons the Judge quoted a part of Section 173. She particularly made reference to that part of the Section that refers to "any other device identified in the Certificate and used for or in connection with establishing the speed of vehicles". She went on:

> "However he has admitted not to be a tester appointed under the Highway Traffic Act, and nor does his evidence take the form of a certificate as set out in 173(1). With respect to the further testing which he conducted upon the LTI-2020 by comparing its results to those of the previously tested Muniquip MDR1 radar gun, he was also not an independent tester nor were the test results set forth in a certificate."

¶ 4 She held:

> "However, it is not for the Judges in our province to create the law which would allow the use of the evidence created by the LTI2020 in a Court of law. My careful reading of Section 173 is that for any reading from an LTI-2020 in order to be used in a prosecution under the Highway Traffic Act, the LTI-2020 must be both tested by a tester appointed under the Act within thirty days before or after the offence and a certificate setting out the tests results signed by the tester must be produced as evidence."

¶ 5 She found that the laser results alone are "not sufficient evidence of the speed" of the vehicle of the accused, and held that as the Constable had not given in evidence his specific observations or opinion on the speed of the vehicle, the accused was acquitted.

¶ 6 In my opinion this reasoning misconstrues the meaning and intent and purpose of Section 173 of the Highway Traffic Act, and is a misunderstanding of a number of earlier cases on the subject of acceptable evidence in laser technology cases.

¶ 7 In my opinion it is not necessary for the Section to be used in order to validate the readings of the machine. Section 173 is a useful device and tool which allows the prosecution to establish a prima facie case in a given set of circumstances. if it is used, it establishes prima facie proof of the fact in issue in accordance with the terms of the Section. But it is not the only manner of proof available. In this case the Constable provided evidence of the tests he performed with the laser machine. He also provided evidence of the tests he conducted with the tuning forks and the radar machine against which the laser machine was tested on the day in question. That evidence was not contradicted or questioned. I agree that the four manufacturers' tests carried out that day, coupled with the moving test comparison of the laser to the radar as described by the witness, and the Certificate evidence of the tuning fork test by a qualified tester, did result in a moving test which effectively compares the old (radar) technology to the new (laser) technology. This is evidence which effectively provided the link that was missing in R. v Kolthammer (Edmonton 9303-0090-S6-0 1) and in R. v Kohut, Kolthammer, Zazula and others, and R. v Sutherland, [Digested 23 W.C.B. (2d) 349]. This is also the case that was presented to the Court in R. v Aladina, No. 9303-0465-53 (Alta Q.B.) where the Court held that the radar comparison satisfied the circumstantial guarantee of trustworthiness referred to in earlier cases.

¶ 8 I agree with that. I hold that this case is the same as the last case cited, and that the evidence did conclusively establish the offence charged. If it is necessary to do so I would distinguish R. v Feraco, No. 93040018-S4-01 on the facts.

¶ 9 The appeal is allowed, and a conviction is entered against the accused.

WILSON J.