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R. v. Smith

Between
Her Majesty the Queen, appellant, and
Matthew Smith, respondent

[1997] O.J. No. 2615
File No. 23627622

Ontario Court of Justice (Provincial Division)
Libman Prov. J.

June 18, 1997.
(4 pp.)

Criminal law — Appeals, indictable offences — Grounds of appeal — Verdict unreasonable or unsupported by evidence.

Appeal from acquittal. The respondent was charged with speeding. A police officer saw him operating a motor vehicle at a "visually high rate of speed". The officer's cruiser was equipped with a radar device. Upon activating the front antenna of his radar, the officer received three readings of 134, 131 and 128 kilometres per hour. He stopped the vehicle and issued a ticket to the respondent driver, for speeding 128 kilometres per hour in an 80 kilometre zone. The officer was trained and qualified to test and operate this device. On the date in question, he had tested the radar twice and had found it to be working accurately. Notwithstanding the absence of any evidence suggesting that the officer's radar device was experiencing "unacceptable interference", the justice of the peace proceeded to fashion an acquittal on the basis that the respondent's evidence created a reasonable doubt with respect to the accuracy of the radar reading. The appellant contended on appeal that the justice of the peace erred by making findings of fact which were not supported by the evidence.

HELD: Appeal allowed. The verdict of acquittal was unsupported by the uncontradicted evidence respecting the operation and accuracy of the radar device. The justice of the peace erred by requiring the Crown to negative every possible conjecture, no matter how irrational, which might be consistent with the innocence of the respondent.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, s. 128.

Counsel:

A. Barkin, for the appellant.
P. Lindsay, for the respondent.

¶ 1 **LIBMAN PROV. J.** (endorsement):— The respondent was charged with speeding on 13 August 1996 in the Town of Innisfil. His trial was held on 3 February 1997. The respondent acted on his own behalf.

¶ 2 Constable McLaughlin, a radar operator since December, 1990, was the Crown's sole witness. His cruiser was equipped with a Custom Signals Hawk Moving Radar device. The officer observed a motor vehicle at approximately 12:38 p.m. travelling southbound on Highway 27 near County Road 21 at a "visually high rate of

speed". Upon activating the front antenna of his radar he received three readings of 134, 131 and 128 kilometres per hour. The distance between the officer and this vehicle was about 50 metres. He subsequently stopped the vehicle and issued a ticket to the driver, the respondent, for speeding 128 kilometres per hour in a posted 80 kilometre zone, contrary to s. 128 of the Highway Traffic Act.

¶ 3 According to the officer, he was trained and qualified by the Ontario Provincial Police to operate Custom Signals Hawk Radar; he was also trained and qualified by the Ontario Provincial Police to test this device. He tested the radar at 10:20 a.m. and 12:50 p.m. At both times he found it to be "working accurately as per the manufacturer's test procedures for a police officer". The officer had been operating this particular model of radar since August, 1994.

¶ 4 The respondent, a licensed mechanic, testified on his own behalf. He stated that he was "road testing" a customer's pick-up truck with a diesel engine in it at the time in question. This vehicle had apparently been having problems relating to "stalling, lack of power". As a result, he had several diagnostic tools on it, including a scan tool. He maintained that this vehicle could not have reached a speed of 128 kilometres per hour. However, he did "floor" the truck for a moment to put a full load on the engine to test the fuel pressure.

¶ 5 During the course of his testimony, the respondent admitted that he did not know much about radar but read into the record a statement on the back of his scan tool:

> This tool complies with the requirement in Part 15 of F.S.C. rules for Class A computing noise. Operation of this equipment in a residential area may cause unacceptable interference to radio and T.V. reception, requiring the operator to take whatever steps necessary to correct the interference. [emphasis added]

¶ 6 The respondent proceeded to state that the only explanation he could make was that "somehow the radar waves got distorted" as he was not speeding "to the extent of that ticket".

¶ 7 In cross-examination, the respondent explained that his truck had lots of pulling power but very low acceleration rate. However, when he floored the truck he did not notice the reading on the speedometer; he was more concerned with the scan tool on the dash and the fuel pressure gauge. He described the scan tool as being hard wired into the on-board computer on the vehicle. It would record for about 15 seconds. The respondent had never noticed it cause a problem with an AM/FM radio.

¶ 8 Following the conclusion of the respondent's testimony, the learned justice of the peace asked to have Constable McLaughlin recalled to "clarify" his previous evidence. He asked the officer whether his training for the radar device included instruction on how it "can be interfered with by some means". The witness replied that this radar has been designed that if it receives interference, "the screens go blank and the F.A. come onto the screen. You will receive no readings until the interference has disappeared". Constable McLaughlin gave, as an example of such interference, a transmitter sending out a frequency close to the radar range that is interfering with the radar beams; conversely, the respondent's scan tool was just receiving a signal from the computer through its power boards. At no time did the officer get a blank screen and the letters F.A. on his radar when dealing with the respondent. Neither did his interceptor detect the presence of radar detector transmitters.

¶ 9 The respondent did not ask the officer any questions based on this further evidence.

¶ 10 Notwithstanding the absence of any evidence suggesting that the officer's radar device was experiencing "unacceptable interference", much less that the scan tool was being operated in a residential area, the justice of the peace proceeded to fashion an acquittal on the basis that the respondent's evidence created a reasonable doubt with respect to the accuracy of the radar reading. As he put it, "The doubt in my mind is raised by the evidence of the defendant where he indicated that the device he was using could interfere with other devices in that area and that's the doubt in my mind".

¶ 11 With deference to the experienced justice of the peace, the verdict of acquittal was, in the circumstances of this case, unsupported by the uncontradicted evidence respecting the operation and accuracy of the radar

device in question. The evidence of the radar operator indicated that the equipment was in good working order and was being properly used: R. v. Grainger, [1958] O.W.N. 311 (C.A.). Moreover, there was no evidence apart from the bald warning on the scan tool indicating the possibility of any interference. The evidence of the police officer was expressly to the contrary: at no time did he receive any indication of radar interference. Indeed, the respondent did not purport to testify that the scan tool had in fact interfered with the radar; his position was that this tool must provide the explanation for his speeding although he did not know much about radar and had not observed his actual speed at the time of being pulled over.

¶ 12 In my respectful opinion, the learned justice erred by, effectively, requiring the Crown to negative "every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the defendant": see R. v. Torrie, [1967] 3 C.C.C. 303 (Ont. C.A.) at 306. To put it another way, the justice erroneously acted on the respondent's bald assertion that "somehow the radar waves got distorted" which thereby accounted for the evidence of his excessive speeding.

¶ 13 Given the broad power of review pursuant to s. 136 of the Provincial Offences Act, I am satisfied that the error, as I have determined it, warrants appellate intervention. In my opinion, the findings of fact or inferences therefrom made by the trial judge are not supported by the evidence and cannot stand: R. v. Stephenson (1984), 13 C.C.C. (3d) 112 (Ont. C.A.); R. v. Anderson, 28 November 1985, Doc. 2716/85 (Ont. S.C.); R. v. Murray (1983), 22 M.V.R. 66 (Ont. H.C.). In the result, the appeal must be allowed and the acquittal set aside.

¶ 14 I note, however, that the Notice of Appeal filed by the Crown requests that a new trial be ordered, not that a conviction be entered in lieu of the verdict of acquittal. It also states that the justice of the peace relied on "inadmissible evidence" to find that the radar device was not working properly. No objection was taken by the prosecutor to this evidence at trial. I further observe that the respondent did not have the benefit of counsel at his trial; while he did raise the issue of the wording of the scan tool it was the justice who recalled the officer to give further evidence on this issue, without further questions by the defendant. The respondent has now appeared at two appeal hearings, with counsel filing written material on his behalf in addition to making oral submissions. In these circumstances, it is my strong recommendation that the Crown should consider whether the interests of justice require that it proceed with a new trial and thus subject the respondent to a fourth court appearance on this matter.

¶ 15 The appeal is allowed and the verdict of acquittal set aside.

LIBMAN PROV. J.

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