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R. v. Vancrey

Between
Kelly Vancrey, appellant, and
Her Majesty the Queen, respondent

[2000] O.J. No. 3033
Docket No. C32715

Ontario Court of Appeal
Toronto, Ontario
Laskin, Feldman and O'Connor JJ.A.

Heard: June 27, 2000.
Judgment: August 18, 2000.
(26 paras.)

On appeal from the judgment of Menzies J. dated April 23, 1999, upholding the conviction and sentence imposed on September 17, 1998 by Justice of the Peace R. Trachy.

Counsel:

David Stoesser, for the appellant.
Grace Choi, for the respondent.

The judgment of the Court was delivered by

¶ 1 **FELDMAN J.A.**:— The appellant appeals her conviction for speeding, contrary to s. 128 of the Highway Traffic Act, R.S.O. 1990, c. H.8. The Crown consented to leave being granted, as the issue raised by the appeal was one of public importance. The appellant's speed was measured by an L.T.I. 20-20 Marksman Laser Speed Detection Device. The issue before the court is the adequacy of the evidence presented by the Crown of the accuracy and reliability of the device to measure the speed of the appellant's vehicle on the date of the offence.

FACTS

¶ 2 The state of the record is not in dispute. There were two witnesses called by the Crown, O.P.P. Officer Gillies who identified the appellant's vehicle as speeding, and O.P.P. Officer Ormsby who stopped the vehicle and issued the ticket.

¶ 3 Officer Gillies was operating an L.T.I. 20-20 Marksman Laser Speed Detection Device, serial number 011307, on February 22, 1998 on Highway 402 in Adelaide Township. Officer Gillies was a qualified laser

operator. He had been trained in June 1997 by a representative of the manufacturer and had used the laser since that time. On February 22, he tested the device twice, once at 7:55 a.m. and again at 4:37 p.m.. The test consists of four parts as suggested by the manufacturer for the purposes of confirming that the device is working accurately.

¶ 4 The first part is a "self-test" conducted internally by the device when it is turned on and shows a blank screen. The second part is a "display test" which, upon activating a button, lights up all the lights on the instrument, displaying four 8's and four dots beside them. The third part is a "scope test" which focuses the red beam on an object. A tone emitted by the device changes when the beam strikes the object, indicating that the beam is hitting the object on which it is focused. Officer Gillies performed this test first by pointing the laser into the sky, then moving it first horizontally until it reached the side of a hydro pole and changed tone, and then vertically until the beam hit the crossbar of the hydro pole and again changed tone.

¶ 5 The fourth test is the "distance-velocity" test, and is the one about which, without expert scientific evidence, courts have expressed skepticism as to its relevance to the ability of the laser to determine the velocity of a moving object as opposed to a stationary one. The laser was pointed at a wall over a measured distance of 19.8 meters. It recorded the distance accurately, and also gave a velocity reading of 0 km/hr.

¶ 6 Officer Gillies obtained the same results from the four-part test both in the morning and in the afternoon, and concluded that the device was working accurately on that day.

¶ 7 Officer Gillies had also performed another test on this particular unit in either late January or early February of 1998, where he compared the results of the laser with the results of a radar device. He conducted this comparison on his own initiative as a result of hearing of a court decision from Alberta dealing with the laser device. Officer Gillies first tested the radar device in accordance with the manufacturer's recommendations to ensure that it was working accurately, and as well, he performed the four-part test on the laser to confirm that the laser was also working accurately that day. He then took both the laser device and the radar unit out to Highway 402, positioned his vehicle where he could target an individual vehicle coming on the highway, then he operated both instruments pointing them out of the window of his vehicle and took readings of the speed of individual targeted vehicles by both instruments at the same time. He did this over a 30 - 45 minute period on at least 6 individual vehicles. He noted that in each case, the speeds recorded by the two instruments were identical.

¶ 8 On February 22 at 2:30 p.m. Officer Gillies observed the appellant's vehicle and concluded that it was exceeding the speed limit. He took a reading with the laser device, which recorded the appellant's speed at 136 km/hr. in a 100 km/hr zone. By radio he then alerted Officer Ormsby who was positioned up ahead, that the appellant's vehicle was speeding. Officer Ormsby stopped the appellant and issued a ticket.

¶ 9 The appellant called no evidence at her trial.

¶ 10 In his reasons for conviction, the justice of the peace concluded that in order to accept the Crown evidence of the speed of the appellant's vehicle, "there must be some sufficient guarantee of the trustworthiness of the laser unit". He agreed with the appellant that the fourth part of the manufacturer's test of the laser unit, the "distance-velocity test", which was supposed to prove that the laser accurately measured both the distance to the target object and its velocity, did not, by measuring the speed of a wall at 0 km./hr., establish the ability of the laser device to accurately measure the speed of a moving object. He found, however, that the comparison of the laser unit with conventional radar could provide the necessary guarantee if both the laser and the radar devices were being tested by a trained and qualified operator of both devices

and if both were in good working order.

¶ 11 He held that the comparison test performed by Officer Gillies in this case met these criteria and demonstrated the accuracy of the laser. He also held that the timing of the comparison test in late January or early February of 1998 was "in the ballpark" in terms of proximity to the date of the offence, to satisfy the Crown's burden of demonstrating that the laser device was trustworthy on February 22, 1998. He noted that no defence evidence was called to challenge the evidence of trustworthiness called by the Crown. On appeal to the Provincial Court, the reasons and conclusions of the justice of the peace were confirmed.

ANALYSIS

¶ 12 The appellant's position on the appeal is that because the laser device is not authorized by statute or regulation as an approved device for measuring the speed of vehicles [See Note 1 below], the onus is on the Crown to prove both 1) the laser instrument accurately measures the speed of vehicles when it is operating correctly, and 2) the particular laser device was in good working order at the time of the offence. The appellant submits that the evidence led by the Crown was insufficient to satisfy the onus because there was no expert evidence supplied to the court as to the scientific basis for the laser's measurement of the speed of a moving vehicle, nor for the value of the manufacturer's tests.

Note 1: Certain named breathalyzer devices are examples of devices whose use for the purpose of proving the commission of an offence are specifically authorized by statute. See for example s. 254(1) of the Criminal Code and S.O.R./85-201, Can. Gaz. Part II, 27/11/85, p. 4692, which authorizes the use of the: Breathalyzer, Models 800, 900, and 900A; Intoximeter Mark IV; Acolmeter AE-D1; and Intoxilyzer 4011AS.

In Manitoba, the L.T.I. 20-20 Marksman Laser Speed Meter, the device in issue in this case, has been approved for the purpose of proving the commission of the offence of speeding under s. 255(1) of the Highway Traffic Act, S.M. 1985-86, c. 3; C.C.S.M., c. H60, which provides:

> 255(1) Where, (a) any person is charged with committing an offence under this Act by reason of driving a motor vehicle on a highway at any time at a speed that, at that time and on that highway, was unlawful under this Act;
>
> (b) the speed at which the person was driving the motor vehicle, at the time and place charged, was determined by speed-timing device; and
>
> (c) evidence of that speed is tendered to the judge or justice by way of the production of a recording made by the speed-timing device, or by the oral evidence of the peace officer operating the speed-timing device at the time of the alleged offence was committed;

if the speed-timing device is of a type that has been approved by the Minister of Justice as being suitable for determining the speed at which motor vehicles on the highway are travelling, and the judge or justice is satisfied that it was in good working order at the time that the recording was made, he may accept the recording or the testimony of the peace officer as evidence without requiring expert evidence respecting the functions and operation of the speed timing device or of its efficiency for the purpose of determining the speed at which motor vehicles are being driven on highways. By Man. Reg. 135/95, the Minister of Justice approved the use of the L.T.I. 20-20 Marksman Laser Speed Meter for the purpose of s. 255(1).

¶ 13 There are two lines of case law which assist the court: an older line from the Ontario, Alberta and Quebec Courts of Appeal dealing with the radar speed measurement device and its reliability as well as with the speedometer, neither of which are devices specifically approved by statute; and some recent cases from different levels of courts which deal with the laser device.

¶ 14 The leading authority in Ontario on the radar device is R. v. Grainger (1958), 120 C.C.C. 321 (Ont.

C.A.). In that case the appellant argued, as in this case, that the Crown must first establish that the radar device was capable of measuring the speed of a vehicle on a highway and that the particular device was in good working condition at the time in question. The evidence of the police officer was that he recorded the appellant's speed using the radar speedmeter. The officer acknowledged that he was not an expert, but testified that the radar machines were well-maintained by police technicians and were very simple to operate. He had spent two weeks observing their operation in order to familiarize himself with their use. He had calibrated his machine on the morning in question using a tuning fork. He believed that the data furnished by his radar speedmeter was extremely accurate and that it was accurate for the appellant's vehicle.

¶ 15 This court was satisfied that the evidence led was sufficient to establish the two propositions identified by the appellant as necessary for a conviction. The court noted that, as in this case, the defence had presented no evidence to challenge the evidence of the reliability of the radar speedmeter device for identifying the speed of a vehicle on the highway. The court concluded that as there was evidence, the issue was only the weight to be given to it.

¶ 16 R. v. Bland (1974), 20 C.C.C. (2d) 332 was another decision of this court which upheld a conviction for speeding, in that case based on a car speedometer reading where the officer who clocked the appellant had the working order of the speedometer that day attested to by a certificate that it had been checked by radar that day and where the only evidence of its accuracy was its operation on that day. Arnup J.A., speaking for the court, concluded: "In short, I would hold that where evidence is given that over a measured level distance the speedometer recorded steadily at 95 m.p.h., this is prima facie evidence that the offence of driving at 90 m.p.h. was committed, in the absence of some evidence, elicited either on cross-examination or by defence witnesses, which would suggest that the speedometer on the police vehicle was inaccurate." (p. 338)

¶ 17 R. v. Chow (1991), 68 C.C.C. (3d) 190 is a decision of the Alberta Court of Appeal dealing with a device known as a Multinova, described as a "marriage between radar and photography." The challenge was to the radar component of the device, and in particular, to its accuracy and trustworthiness. The evidence led at trial on the issue was that the radar had earlier been tested and that its reliability could be confirmed inferentially from the fact that it had been operating accurately earlier that day. There was also evidence that the device had performed accurately and consistently in the past. The court concluded that the evidence met the test of demonstrating a circumstantial guarantee of trustworthiness and accuracy for the device, and that without any evidence to the contrary, the evidence was admissible and was entitled to weight.

¶ 18 In D'Astous v. Baie-Comeau (Ville) (1992), 74 C.C.C. (3d) 73 the Quebec Court of Appeal again addressed the issue of the evidentiary base necessary for a conviction for speeding based on a radar reading. In that case the court held that judicial notice could be taken of the fact that radar is used to measure the speed of automobiles and that the principle upon which it is based can be found in any encyclopedia. However, in each case, the crown must still prove that the particular radar device used was operated accurately at the time. To do that the Crown must show:

* The operator was qualified: he followed a course, he passed an exam, he has several months' experience;
* The device was tested before and after the operation;
* The device was accurate as verified by a test and that the tuning fork used was accurate. Once evidence is led to demonstrate those facts, then the radar reading becomes prima facie evidence of the speed of the vehicle, subject to evidence to the contrary, if any.

¶ 19 The second line of cases suggests that the Laser device began to be used in Canada in 1993 and that because the device represented new technology, not specifically authorized by statute, courts would require some evidence of its accuracy and reliability before accepting it, such as testing its accuracy against that of a radar device: R. v. Sutherland (1993), 47 M.V.R. (2d) 254 (Alta. Prov. Ct.), R. v. Alladina (1994), 4 M.V.R. (3d) 180 (Alta. Q.B.), R. v. Tummillo (1998), 35 M.V.R. (3d) 249 (Man. C.A.), R. v. Taman, a judgment of the Ontario Provincial Court, delivered March 12, 1998. In R. v. Tummillo, supra, at 250-251, the Manitoba Court of Appeal had the same concern as the justice of the peace in this case with the fourth test prescribed by the manufacturer, the distance-velocity test. The court questioned whether it could adequately test the ability of the laser device to measure velocity:

> ... The operator points the laser at a wall or other stationary object from a pre-measured distance. Distance and velocity readings are then taken. The theory is that, if the distance reading equals the pre-measured distance and the velocity reading is zero, the device is in proper order to record the velocity of a moving object. The theory may be correct, but perhaps I, as a scientific layman, can be forgiven for wondering how a test of the device's ability to record a stationary object as one that is not moving proves it to be functioning properly when measuring the speed of a moving object. For the theory to be accepted, there must be, in my opinion, either evidence from an expert or admissible evidence that the tests are those approved by the manufacturer of the device for checking its condition.

¶ 20 It was not argued before us that a court could at this point in the history of the use of the laser device, take judicial notice of the laser as reliable for use as a speed detection device for vehicles. Crown counsel also conceded that there was no scientific evidence before the court that the four manufacturer's tests proved that the laser device could accurately measure the speed of a vehicle on a highway.

¶ 21 The Crown seeks to uphold the conviction on the basis that there was led at trial prima facie evidence of the accuracy and reliability of the particular laser unit, consisting of the performance of the manufacturer's tests for good working order both before and after the use of the device, together with the earlier verification of the accuracy of the laser unit for measuring the velocity of moving vehicles on a highway, when compared with an accurate radar unit by a qualified laser and radar operator.

¶ 22 In my view, the position of the Crown is correct. The court received evidence that the officer who operated the laser device was trained and experienced and that he tested the device both before and after its use in accordance with the manufacturer's instructions to ensure that it was operating properly on the date in question. The court also received evidence of the accuracy of the device for measuring the speed of vehicles on a highway by comparing its readings with those of an accurate radar unit. The radar test provides the independent guarantee of the accuracy of the particular laser unit to measure the speed of a moving vehicle.

¶ 23 The only question left is whether the radar test, done some three to four weeks before the date of the offence, continued to serve the evidentiary purpose. In my view, when coupled with the fact that the unit was tested to be in good working order on the date of the offence, the radar test was sufficiently proximate in time to provide prima facie evidence of the reliability of the instrument on that date. Together the two tests provide the circumstantial guarantee that the unit would still provide the accurate readings it did when compared to the radar device. Again here, as in the earlier cases on the radar and speedometer devices, no evidence to the contrary was presented.

¶ 24 Clearly it would be most helpful for the court to receive expert evidence to explain the methodology of the laser technology and to provide an expert opinion as to its accuracy and reliability, where the

legislature has not specifically approved the technology within the Highway Traffic Act itself. Such evidence would avoid the need for officers using the equipment to have to verify its accuracy independently in each case on an ongoing basis.

¶ 25 In this case the justice of the peace concluded that the fourth part of the manufacturer's test did not establish the ability of the laser device to measure the speed of a moving object. That conclusion goes too far. Without evidence, as the Crown conceded, we are not in a position to know whether the fourth part of the test can prove that the laser device, when in good working order, accurately measures the speed of a moving vehicle. However, I agree with the conclusion reached by the justice of the peace, that in this case the evidence of the comparison with the radar instrument was satisfactory to establish a prima facie case and, with no evidence to the contrary, the conviction must stand.

CONCLUSION

¶ 26 I would dismiss the appeal.

FELDMAN J.A.
LASKIN J.A. — I agree.
O'CONNOR J.A. -- I agree.

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