Case Name:

R. v. Vanier

IN THE MATTER OF an appeal under subsection 135(1) of the Provincial Offences Act, R.S.O. 1990, c. P.33, as amended

Between
Her Majesty the Queen, respondent, and
Robert Vanier, appellant

[2005] O.J. No. 5466
2005 ONCJ 318
Court File No. 00-78620694-00

Ontario Court of Justice
B.G. Thomas J.

Heard: December 1, 2005.
Judgment: December 20, 2005.
(34 paras.)

Criminal law — Procedure — Crown's duties — Disclosure — Information or indictment — Amendment — Driver convicted of speeding granted new trial where Crown refused to provide disclosure regarding functioning of radar unit, judge failed to consider prejudice to driver in amending certificate at trial to reflect higher speed of driver as recounted by police officer — Provincial Offences Act, ss. 29, 34.

Transportation law — Motor vehicles — Offences — Speeding — Defences — Necessity — Driver's request for information on functioning of radar unit reasonable where information relevant and fundamental to Crown's case.

Officer used radar unit to determine Vanier driving at 147 km/ hour — Officer followed Vanier, observed further aggressive driving, paced Vanier at average speed of 145 km/hour — Officer stopped Vanier when vehicles arrived in safe area — Officer charged Vanier with speeding at 134 km/hour Vanier hired counsel to defend speeding charge, requested disclosure regarding accuracy and reliability of radar unit readings, and officer's credibility — Prosecutor responded requests largely irrelevant, refused to provide documentation without reasons for demands — Prosecutor provided details of officer's training using radar unit — Vanier applied for stay of charge due to lack of disclosure — Filed two affidavits, from Vanier and passenger, detailing officer's alleged dangerous tailgating, requiring Vanier to increase speed — Prosecutor indicated no intention of providing further disclosure, advised responding materials would be provided at trial — Application dismissed because judge found no air of reality to any necessity defence — Judge felt prosecutor had discretion to provide disclosure that was relevant and available, and Vanier needed to give reasons why more disclosure required — Trial proceeded — Justice agreed to Crown's request to amend certificate of offence at trial to reflect speed of 147 km/ hour, to accord with testimony of officer — Vanier convicted of offence — Vanier appealed from conviction — Appeal allowed — Information Vanier requested about functioning of radar unit relevant and fundamental to Crown's case, should have been disclosed — Justice's reasons did not demonstrate she considered prejudice to Vanier in amending certificate at trial, constituting error of law — Vanier's conviction set aside, new trial ordered, and prosecution directed to use best efforts to satisfy Vanier's disclosure requests regarding functioning of radar unit.

Statutes, Regulations and Rules Cited:

Criminal Code s. 601

Provincial Offences Act, R.S.O. 1990, c. P.33 s. 29(1), s. 29(2), s. 29(2)(a), s. 29(2)(b), s. 34, s. 34(2), s. 34(4), s. 34(5)

Appeal From:

On appeal from a conviction and sentence by Her Worship Justice of the Peace E. Babcock, on May 24, 2005.

Counsel:

James Boonstra Crown Attorney for the Respondent

Jonathan B. Pitblado Counsel for the Appellant, Robert Vanier

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B.G. THOMAS J.:—

Facts

¶ 1 The appellant, Robert Vanier, has been convicted of speeding. The evidence was that he was operating a Porsche Cayenne motor vehicle on 401 Highway at approximately 8:43 p.m. on January 18, 2005. At that time, he came upon Provincial Constable McGregor, who was operating a Genesis II radar unit, in an unmarked police vehicle stopped in the highway's median. While the vehicle was 500 metres away, the officer obtained a target vehicle speed of 147 km/hour from the Vanier vehicle. Constable McGregor pursued the appellant Vanier at a high rate of speed, and while witnessing what the officer felt was further aggressive driving, paced Vanier at an average speed of 145 km/hour.

¶ 2 The officer continued to follow the appellant some distance, until she said she was in a safe area to stop this vehicle and then proceeded to pull the vehicle over. Despite the speed previously noted, the officer chose to charge Vanier with speeding 134 km/hour in a 100 km/hour zone. It was the officer's evidence that the radar unit functioned properly, consistent with the results of her previous testing of the unit.

Appeal Grounds

¶ 3 The appellant Vanier appeals from conviction and raises the following grounds:

1. That despite requests he was denied full disclosure and that, as argued at trial, he is entitled to a stay or at least an order compelling the Crown to disclose the material sought.

2. That the certificate of offence should not have been amended to allege a higher speed.

3. That there is no evidence that the appellant's vehicle was in the Municipality where he was charged and ultimately tried.

4. That the actions of the prosecutor throughout, amounted to an abuse of process.

1 - Disclosure

(a) Disclosure Requests

¶ 4 After being charged, the appellant Vanier retained counsel J. Pitblado, to defend the speeding charge and Mr. Pitblado sent a detailed disclosure request to the provincial offence prosecutor, S. Bauman. The defence requested 21 separate items.

¶ 5 The requests can be categorized into two distinct areas, information that related to the accuracy and reliability of the readings received by the radar unit, and information related to the officer's credibility.

¶ 6 To understand the background of the inquiries related to Cst. McGregor, it must be noted that Mr. Pitblado's letter prefaced his requests with the suggestion that the officer was in fact dangerously tailgating his client Vanier and that Vanier had only sped up to move a safe distance from the officer. The defence was, therefore, requesting the driving and discipline record of the officer.

¶ 7 Requests related to the use of the radar unit included details of the officer's training on the unit, a copy of any training video, the radar manual and the date of purchase of the radar unit along with its repair history.

¶ 8 The prosecutor responded that many of the requests were deemed irrelevant, and that no documentation would be produced unless the defence provided reasons for the demands.

¶ 9 Details of the officer's training in the use of radar were provided, as were the pages of the radar manual related to the testing of the unit. The prosecutor advised that defence counsel could review the entire manual at her office located in the Provincial Offences Courthouse in Chatham.

¶ 10 As part of her reply, Ms. Bauman indicated that the purchase date, repair history of the unit and any post-purchase repair directions were irrelevant as the unit was working properly on the date in question.

¶ 11 As a result of the response received, the defence brought a motion returnable on the trial date requesting a stay of the charge due to a lack of the requested disclosure. As part of the motion material, the defence filed two affidavits from Robert Vanier and his passenger, which detail the officer's alleged dangerous tailgating, requiring Vanier to increase speed.

¶ 12 The prosecutor, upon receipt of the motion, indicated she had no intention of providing further disclosure without more details as to its relevance, and advised that her responding material would be provided at trial.

(b) Disclosure Ruling

¶ 13 At trial, defence counsel argued that he was clearly pursuing a defence of necessity and as such, the information requested about the officer was crucial. Further, he suggested that although he was requesting a stay for the failure to disclose, he was as well entitled to that relief for the high-handed tactics of the prosecution in providing him with responding materials on the day of the trial. He suggested that overall the actions of the prosecution amounted to an abuse of process.

¶ 14 The trial justice dismissed the defence motion. In her reasons, it is clear that she found no air of reality in the materials suggesting a defence of necessity, and as to the response of the prosecution, the Justice of the Peace said the following:

> "The disclosure that has been requested has been deemed irrelevant by the prosecution. There is no evidence that is provided for the prosecution of why any other further disclosure is required, and I would concur with the prosecutor's opinion of the various pieces of disclosure requested, that they were not relevant. It is not up to the Crown to justify the disclosure that is

> provided. She provides what is available, and is reasonable for the case before her. If there is other disclosure that is required by defence then defence must request that, and give reasons why it is required."

(c) Analysis of Disclosure Ground

¶ 15 Clearly, the prosecution in the proceedings has a duty to disclose relevant information to the defence, to enable full answer and defence. While there is no duty to produce the irrelevant, the prosecution must err on the side of inclusion and produce all information that has a reasonable possibility of assisting the defence (R. v. Chaplin (1995), 96 C.C.C. (3d) 225 (S.C.C.)).

¶ 16 I agree there was no air of reality to the necessity defence suggested by the appellant and therefore, the personal information requested about the officer was entirely irrelevant. The information requested about the radar unit itself was, however, another matter. It was obvious that the use and accuracy of the instrument was fundamental to the Crown's case. The photocopying of a portion of the unit manual and the offer of access to the balance was enough to minimally satisfy the prosecution obligation regarding the manual disclosure. To contend that a request for repair records was irrelevant because the officer's evidence would be that it was operating properly, was clearly wrong.

¶ 17 The defence was entitled to the results of a prosecution search for that material and should have been provided at trial with an order to that effect, as well as an adjournment.

2 - Certificate Amendment

¶ 18 At the commencement of the trial the prosecutor advised that if, as anticipated, the court received evidence from Constable McGregor that the speed of the vehicle was greater than the speed charged, she would be asking the Justice to amend the certificate to reflect the higher speed. The implication was, of course, that this was the last opportunity for Vanier to enter a guilty plea for the reduced speed. Ms. Bauman for the prosecution, made it quite clear that she harboured no malice for this particular defendant, but that on every occasion where she received evidence of a greater speed, she applied for a similar amendment. Here, the trial proceeded.

¶ 19 After receiving the expected evidence from the officer, the Crown moved pursuant to s. 34 of the Provincial Offences Act, to amend the certificate of offence to 147 km/hour, from the 134 km/hour charged. After hearing argument, the Justice of the Peace ruled in the following manner:

> "And, based on the facts of the case, and certainly after reviewing Antunes in particular, I am going to make her - I will amend the certificate of offence to reflect an amended offence of 147 kilometres per hour in a posted 100 kilometre per hour speed one based on the request of the prosecution, and evidence that has come out in court."

¶ 20 The defence argued at trial, and again on appeal, that the prosecution's practice was unfair and abusive, and that it was a blatant attempt to coerce pleas from defendants who might otherwise desire a trial. It was also suggested that some notice of the amendment should have been given to the defendant before the trial date.

¶ 21 The prosecution relied upon the wording of s. 34 of the Provincial Offences Act, particularly s. 34(2) which states the following:

> "(2) Idem - The court may, during the trial, amend the information as may be necessary if the matters to be alleged in the proposed amendment are disclosed by the evidence taken at the trial."

¶ 22 It further relied upon several decisions of this court validating the practice. (See R. v. Antunes, [2004] O.J. No. 4898, and R. v. Wanamaker, [2005] O.J. No. 1581.) The argument being here, that Mr. Vanier was always defending a speeding charge, if advised before trial of the proposed amendment, how could he be prejudiced when the amendment was ultimately made?

¶ 23 Upon first considering this argument, it is easy to find this blanket prosecution practice repugnant. If the phrase "as is necessary" contained in s. 34(2) is to mean anything, surely it means as is necessary to allow for the case to be tried on its merits. The section, it seems, must be there only for remedial purposes.

¶ 24 Taking a contrary view are Justices Halikowski and Renaud in Antunes and Wanamaker respectively. They make a strong argument for the singular issue being prejudice to the defendant and note the mandatory criteria for judicial consideration contained in s. 34(4) set out below:

> (4) Considerations on amendment - The court shall, in considering whether or not an amendment should be made, consider,
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> (a) the evidence taken on the trial, if any;
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> (b) the circumstances of the case;
>
> (c) whether the defendant has been misled or prejudiced in the defendant's defence by a variance, error or omission; and
>
> (d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

¶ 25 Authority for their position is found in a decision of the Ontario Court of Appeal in R. v. Irwin (1998), 38 O.R. (3d) 689 (C.A.). There, Justice Doherty was considering the amendment powers contained in s. 601 of the Criminal Code (strikingly similar to s. 34 of the Provincial Offences Act).

¶ 26 Justice Doherty identified that there are two important goals to these amendment powers. Firstly, to promote the trial of matters on their merits as opposed to being defeated by technical defects. Second, to avoid a multiplicity of proceedings by allowing the trial to proceed after a charge has been amended to a more appropriate offence. While neither of these goals seem to be the end sought by the prosecution in this provincial offence trial, Justice Doherty goes on to say at page 698:

> "On a plain reading, the section contemplates any amendment which makes a charge conform to the evidence. The limits on that amending power are found, not in the nature of the change made to the charge by the amendment, but in the effect of the amendment on the proceedings, and particularly, on the accused's ability to meet the charge. The ultimate question is not what does the amendment do to the charge, but what effect does the amendment have on the accused?
>
> I see no useful purpose in absolutely foreclosing an amendment to make a charge conform to the evidence simply because the amendment will substitute one charge for another. As long as

> prejudice to the accused remains the litmus test against which all proposed amendments are judged, it seems unnecessary to characterize the effect of the amendment on the charge itself. If the accused is prejudiced, the amendment can not be made regardless of what it does to the charge. If no prejudice will result from the change, why should it matter how the change to the charge is described?"

¶ 27 I accept then, that the focus of the amendment analysis can only be the potential of prejudice or injustice to the defendant. The important role of the trial justice is obvious. The legislation directs the justice to consider the criteria set out in s. 34(4) of the Act. Clearly, each proposed amendment will be decided on the facts of that particular case. The concern for the prosecution's course of conduct in these matters must be addressed on a case by case basis.

¶ 28 Here, while alluding to Antunes, the Justice of the Peace provided no insight into her consideration of the s. 34(4) criteria. A failure to consider the criteria amounts to an error in law (see s. 34(5)). I am not in a position as a result of the limited reasons provided to find in fact that an error has not been made. The end result on this issue was not so obvious as to lessen the importance of the Justice's reasons.

3 - Jurisdiction

¶ 29 The appellant argues that although the police officer stated she was in the Municipality of Chatham-Kent while operating radar, there was no evidence the target vehicle was in the same Municipality when its speed was detected at a distance of 500 metres. The appellant relied upon s. 29(1) of the Provincial Offences Act.

¶ 30 I find that this ground is without merit. Section 29(2) of the Act is the complete answer to any concerns I might have, and the proceedings here satisfy both subsections (a) and (b) of that section.

4 - Actions of the Prosecution

¶ 31 This speeding offence was defended vigorously, and the demands of defence counsel were many. Unfortunately, it seems the prosecution from time to time, became caught in this partisan advocacy without fully reflecting on its unique role. That having been said, no actions here amount to an abuse of process, nor warrant any remedy beyond the results of this appeal.

Conclusion

¶ 32 For the reasons set out above, I will allow this appeal, set aside the conviction and remit the matter to the Provincial Offences Court, for a new trial, on a date to be set by the trial co-ordinator of that court.

¶ 33 I direct the prosecution to use its best efforts to satisfy disclosure request items 12, 13 and 14 contained in the letter of J. Pitblado dated February 7, 2005, and to report the results of its enquiries to the appellant.

¶ 34 The new trial will be conducted upon the certificate of offence originally completed by Constable McGregor, charging the offence of speeding 134 km/hour in a posted 100 km/hour zone.

B.G. THOMAS J.

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