Case Name:
R. v. Antunes

Between
Nelson Antunes, appellant, and
Her Majesty the Queen, respondent

[2004] O.J. No. 4898

2004 ONCJ 352

63 W.C.B. (2d) 319

Court File No. 2860 999 00 72261154

Ontario Court of Justice
Oshawa, Ontario

Halikowski J.

Oral judgment: October 27, 2004.

(11 paras.)

Charge: S. 128 Highway Traffic Act.

Counsel:

T. Armstrong Municipal Prosecutor

H. Marschler Agent for Mr. Antunes

REASONS FOR JUDGMENT

1 HALIKOWSKI J. (orally):-- This is a judgment on appeal from the decision of His Worship Justice of the Peace J. Dogbe, the net effect of which was to find the accused, Nelson Antunes, guilty of the offence of speeding 130 kilometres per hour in a 100 per hour zone contrary to s. 128 of the Highway Traffic Act.

2 There is no dispute on the evidence. The applicant was seen on Highway 401 on the 15th of June, of 2003. He was westbound in the vicinity of the Town of Clarington when he was stopped by a police constable named, Jason Diminie, and he was then charged with the offence of speeding 115 kilometres per hour in a 100 kilometre zone. The trial on this charge took place on November 13th, of 2003, before the learned justice of the peace, and the accepted evidence can be highlighted as follows: The police constable testified that on that date at approximately ten o'clock in the morning he noticed the accused's vehicle approaching his cruiser from behind. The cruiser was travelling at approximately 130 to 135 kilometres per hour and the accused was maintaining a gap of about three to four car lengths behind the officer at that speed for about two kilometres. The officer stopped the accused and exercised his discretion thereafter by laying a charge of only 115 in a 100 kilometre zone. Police Constable Diminie testified that his speedometer was in good working order and that his visual estimates of the speed of various vehicles corresponded with the speed registered on his speedometer. This officer stated that he drew on his past experience of nine years as a police officer to estimate the general speed of the other vehicles on the roadway and it was his experience that initially drew his attention to the accused's vehicle and his conclusion that it was moving at a high rate of speed. His general experience was also the source of his being able to say with some confidence that his vehicle speed and that of the accused was being accurately reflected in the readings showing on his speedometer. The officer was very clear that no other measuring device had been used to gauge the accuracy of the speedometer, and put succinctly the police speedometer was viewed as accurate because the officer believed it to be so based on his visual sense of the speeds of the various vehicles on the highway that day.

3 The accused was not present for his trial. His having authorized an agent to appear on his behalf, so the defence called no evidence, and prior to the Crown closing its case a request for an amendment to the information was made pursuant to s. 34(2) of the Provincial Offences Act and Justice of the Peace Dogbe granted the amendment now charging the appellant with the offence of speeding 130 kilometres per hour in a 100 kilometre per hour zone to comply with the evidence that he had heard as the trier of fact on the trial. The defence objected to this submission for the amendment and the justice of the peace made this order, and I quote him completely:

> "The ruling of this court is that the amendment stands, so instead of 115, it is now 130 kilometres an hour in a posted 100 kilometres an hour zone, contrary to the Highway Traffic Act s. 128."

4 There were no other reasons given.

5 At the conclusion of the trial the defence argued that there had been no objective means whereby the officer could have had confidence in the accuracy of his cruiser's speedometer. The defence indicating that the officer was essentially bootstrapping his argument. The officer felt that the speed was accurate because other vehicles travelling at speeds in excess of the speed limit could be determined by comparing their speed against the speedometer, and on that basis the defence argued that there had to be reasonable doubt concerning the accuracy of the officer's speedometer and an acquittal ought to have been entered. The court did not accept that submission indicating that once an officer indicates in testimony that his speedometer was working properly, in his view, that provides prima facie proof of its accuracy barring any evidence elicited by the defence to challenge that inference.

6 The first ground of appeal is the accuracy of the officer's speedometer. The appellant's first ground centres on the justice's finding that the speedometer can be taken as accurate without independent evidence of its having been tested for accuracy beforehand. The Ontario Court of Appeal case cited as R. v. Bland, (1974), 20 C.C.C. (2d) 332, instruct on this issue. Justice of Appeals Arnup expressed the

court's ratio at page 338 as follows: Where evidence is given that over a measured level distance the speedometer recorded steadily a certain speed, this is prima facie evidence that the offence of driving at that speed 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.

7 The case at bar falls squarely within the parameters of that dictum. The officer's evidence was that he was satisfied based on nine years experience that his speedometer accurately reflected the speed he was experiencing over a two kilometre travelled zone. The defence was not able to challenge the officer's perception of his speedometers accuracy, the findings of the justice of the peace on that issue are supportable, and that ground of appeal fails.

8 The second and third grounds of appeal deal with a prejudicial amendment to the information that was made without effective reasons. The appellant contends that the learned justice of the peace erred in law by not considering and addressing the issue of prejudice or whether an injustice would be done by amending the certificate at the conclusion of the Crown's case. All pursuant to the provisions of s. 34 of the Provincial Offences Act. This is in response to the court's decision to allow an amendment to the charge essentially increasing the impugned speed from 115 to 130 kilometres per hour after the trial had taken place. Section 34 of the Provincial Offences Act deems this decision to amend in these circumstances to be a question of law, and the section reads in part as follows, and this is s. 34(2):

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

9 And ss. (4) of that section says:

> "The court shall, in considering whether or not an amendment should be made, consider the evidence taken on the trial; the circumstances of the case; whether the defendant had been misled or prejudiced in the defendant's defence by a variance error or omission; and whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done."

10 The reasons given by the justice of the peace amount to a ruling without reasons; however, the transcript of this trial reveals clearly that the direction being taken by the appellant during the trial, that this was a speeding charge being defended by an attack on the accuracy of the Crown's evidence. The thrust of this attack was against the accuracy of the officer's speedometer and the officer's perception of what speed the appellant was travelling in his motor vehicle at the time. That line of defence would have applied no matter what allegation of speed was made. Section 34 and the relevant case law explicitly highlights the importance of prejudice to the accused's conduct of his defence is a key element in determining whether an amendment ought to be granted in any given case of this nature. And Justice of Appeals Doherty, in a case cited as, R. v. Irwin (1998), 38 O.R. (3d) 689 p. 698, stated the law as follows:

> "Prejudice and present context speaks to the effect of amendment on an accused's ability and opportunity to meet the charge. In determining or deciding whether an amendment should be allowed, the court must consider whether the accused had a full opportunity to meet all issues raised by the charge as amended and whether the charge would have been - or the defence would have been conducted any way differently had the amended charge been before the

> trial court. If the accused had a full opportunity to meet the issues and the conduct of the defence would have been the same, then there can be no prejudice found."

11 Now, during submissions on this appeal the appellant raises the spectre of the defence's wishing to conduct its defence differently if it had known it would be facing a charge suggesting a higher speeding rate, a rate which would result in a more onerous repercussions if the defence was unsuccessful. This argument does not attract. From the outset, the charge was one of speeding based on the reading from officer's speedometer and his personal observation. The defence was fully aware of the issues that would have to be decided in its favour to defend against this charge. The likely penalties involved should not have affected the conduct of the appellant's defence. The decision to amend the certificate did not cause any prejudice to the defence, its having had the opportunity to meet the Crown's case whether the speed involved was 130 or 115 kilometres per hour. In the words of s. 34 of the Provincial Offences Act, the evidence taken at trial supported the amendment. The circumstances of the case did not militate against the amendment, there being no evidence that this accused had been misled by the officer at the scene as to the final disposition of the charge or that there had been any undertaking made by the officer in that regard. And finally, there is no evidence that the appellant had suffered any injustice by the amendments having been granted. Defence submissions that this amendment somehow results in a punishment being levied against an accused for his or her electing to have a trial is discernable only if one assumes that the defence is unaware of the law and the options available to the Crown under s. 34 of the Act. Each citizen is presumed to know the law, and in this case must be presumed to know the risks of going to trial in situations where evidence may be led that could result in an amendment to the charge as originally made. The court, therefore, dismisses this appeal on all grounds.

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