Regina v. Bland

(1975), 6 O.R. (2d) 54

ONTARIO
COURT OF APPEAL

JESSUP, ARNUP and DUBIN, JJ.A.

20TH DECEMBER 1974

Motor vehicles -- Speeding -- Proof of offence -- Evidence of speed based on police vehicle speedometer -- Whether evidence of speedometer's accuracy required -- Highway Traffic Act, s. 83(16).

Motor vehicles -- Speeding -- Proof of speed limit on highway -- Limit contained in Regulation -- Regulation not produced at trial -- Whether speed limit must be judicially noted -- Highway Traffic Act, s. 82(16), (17), (1)(f), (11) -- Regulations Act, ss. 5(1), 10(2).

Evidence -- Judicial notice -- Charge of speeding -- Proof of speed limit on highway -- Limit contained in Regulation -- Regulation not produced at trial -- Whether speed limit must be judicially noted -- Highway Traffic Act, s. 82(16), (17), (1)(f), (11) -- Regulations Act. ss. 5(1), 10(2).

The accused was charged with driving 90 m.p.h. in a 60-m.p.h. zone and was convicted. At trial, evidence of the accused's speed was given based upon the police car speedometer and the police constable was not asked what the speed limit was on that part of the highway where the accused was driving. The accused's appeal by way of stated case was dismissed and, on further appeal to the Court of Appeal for Ontario, held, the appeal should be dismissed.

Where evidence is given that over a measured level distance the police officer's speedometer recorded steadily at the speed alleged, this is prima facie evidence that the accused was driving at that speed, in the absence of some evidence, elicited either on cross-examination or by defence witnesses, which would suggest that the police speedometer was inaccurate. While there was no oral evidence of the speed limit, and the fact that the accused was charged with speeding in a "60 m.p.h. zone" could not be any evidence, such evidence was not necessary since the speed limit was contained in a Regulation (R.R.O. 1970, Reg. 429) made by the Lieutenant-Governor in Council pursuant to s. 82(11) of the Highway Traffic Act, R.S.O. 1970, c. 202, and under ss. 5 and 10(2) of the Regulations Act, R.S.O. 1970, c. 410, the trial Judge was bound to take judicial notice thereof, notwithstanding that the Regulation was not produced to him at trial.

[Nicholas v. Penny, [1950] 2 K.B. 466; R. v. Grainger, [1958] O.W.N. 311, 120 C.C.C. 321, 28 C.R. 84; R. v. Clark (1974), 3 O.R. (2d) 716, 18 C.C.C. (2d) 52; R. v. The Vessel "Besseggen" (1973), 12 C.C.C.

(2d) 185, [1973] 5 W.W.R. 514, distd; R. v. Waschuk (1970), 1 C.C.C. (2d) 463; Melhuish v. Morris, [1938] 4 All E.R. 98; R. ex rel. Neely v. Tait, [1965] 1 C.C.C. 16; R. v. Amyot, [1968] 2 O.R. 626, [1968] 4 C.C.C. 58; R. v. Hodgins, [1971] 3 O.R. 403, 4 C.C.C. (2d) 87, refd to; R. v. Thibodeau (1964), 7 Crim. L.Q. 498, overd]

APPEAL by the accused from his conviction by Callon, J., 19 C.C.C. (2d) 121, for speeding.

Michael J. Moldaver, for appellant.

Archie Campbell, for the Crown, respondent.

The judgment of the Court was delivered by

ARNUP J.A.:-- This appeal raises two questions of evidence with respect to the prosecution's case against the appellant on a charge of speeding. The case has reached us mainly because the prosecutor at the trial omitted to ask the only witness, a police constable, what the speed limit was on that part of Highway 7 where the appellant is alleged to have been driving at 95 m.p.h.

The appellant was actually charged with driving 90 m.p.h. in a 60-m.p.h. zone and was convicted by a Justice of the Peace in the Provincial Court at Lindsay on June 15, 1973. The Justice of the Peace was requested to state a case, which he did, and the appeal by way of stated case was dismissed by Callon, J., on July 9, 1974. The motion for leave to appeal and the appeal itself were argued before us for more than two hours and judgment was reserved. Obviously, leave to appeal should be granted.

The stated case is as follows:

> (1) On the 22nd day of February, 1973, a uniform traffic ticket was issued by F.L. Prior, a police officer, charging that the said, Milton Bland, on the 22nd day of February, 1973, did operate vehicle registration number 54835C for Ontario, 1972, on Highway number 7 in Emily and Ops Townships, and did commit the offence of speeding to wit: ninety miles per hour in a sixty mile per hour zone, contrary to section 82 subsection 16 of The Highway Traffic Act.
>
> (2) On the 15th day of June, 1973, the Appellant appeared before me, was arraigned and pleaded not guilty to the said charge. On the 15th day of June, 1973, evidence was adduced before me with respect to the said charge; argument by Counsel for the Crown and Counsel for the accused was heard, and I convicted the Appellant of the said charge and passed sentence upon him.
>
> It was shown before me that:
>
> (1) On the 22nd day of February, 1973, the Appellant was travelling westbound along Highway number 7 passing through the Village of Omemee.
> (2) Police Constable F.L. Prior observed the Appellant leave the west end of the

Village of Omemee. Police Constable Prior followed the vehicle for approximately four and one-half miles at a high rate of speed in order to get close enough to the Appellant's vehicle to clock the speed of this vehicle.

(3) Police Constable Prior testified that from the hamlet of Reaboro to the 9th concession of Ops Township, a distance of seven tenths of a mile, he clocked the Appellant's vehicle at ninety-five miles per hour. Police Constable Prior was approximately three hunderd yards behind the Appellant's vehicle when clocking the speed of this vehicle.

(4) The Appellant's vehicle subsequently turned north on to Highway 36 and was stopped by Police Constable Prior. At this time the driver identified himself as Milton Bland of 3 Crestwood Avenue, Peterborough, Ontario.

(5) At no time did Police Constable Prior testify as to the speed limit on the portion of Highway number 7 in question nor did he refer to signs indicating the speed limit on the portion of Highway number 7 in question. No evidence was presented on the issue of the speed limit on the portion of Highway number 7 in question.

(6) Police Constable Prior testified that he had not personally checked the speedometer in his vehicle but that there was a card in the vehicle stating that the speedometer had been checked by means of radar that day. Police Constable Prior admitted that he had no persomal knowledge as to the accuracy of the speedometer in his vehicle.

(7) I found that in order to convict the Appellant upon the charge aforesaid, that a sign on the highway which says "sixty" means sixty miles per hour and that is the speed limit.

(8) I found that the evidence of Police Constable Prior wherein he indicated that the speedometer in his car had been checked that day and a card deposited in his car to this effect, was capable of establishing that the speedometer was in proper working order at the time in question.

(9) Accordingly, I convicted the Appellant upon the charge aforesaid.

(3) The Appellant, Milton Bland, desires to question the validity of such conviction on the ground that it is erroneous in point of law, the question submitted for the judgment of this Honourable Court being:

(1) Did I err in law in convicting the Appellant upon the charge, there being no evidence of the speed limit on the portion of Highway number 7 in question and no evidence as to signs indicating the speed limit on the portion of Highway number 7 in question.

(2) Did I err in law in holding that in order to support a conviction on the charge, the only evidence relating to the proper working order of the speedometer in Police Constable Prior's vehicle, being the evidence of Police Constable Prior that the speedometer had been checked that day by means of radar and that a card to this effect had been deposited in his vehicle, was any evidence on the issue of the proper working order of the speedometer in Police Constable Prior's vehicle.

It was agreed before us that para. (7) should not have been included in the stated case; it is clearly

irrelevant in view of para. (5).

Two grounds of appeal were argued before us:

(i) Where the evidence of speeding is sought to be proved by the use of the speedometer in the vehicle being driven by the officer who testifies as to speed, there must be some evidence of the accuracy of the speedometer in the vehicle being driven by the officer.

(ii) There was no evidence at the trial as to the speed limit on that portion of Highway 7 on which the offence is alleged to have occurred.

Accuracy of police speedometer

The officer driving the police vehicle had no personal knowledge as to the accuracy of the speedometer in his vehicle. There was a card in the vehicle when he commenced his tour of duty, which card stated that the speedometer had been checked by means of radar that same day. Counsel for the appellant drew to our attention the decision of Fraser, J., in R. v. Thibodeau (1964), 7 Crim. L.Q. 498, which citation reproduces only the formal order of Fraser, J. Counsel also furnished to us the stated case upon the basis of which Fraser, J., made his order. From that stated case it appears that the accused was charged with driving 90 m.p.h. on Highway 401 in a 60-m.p.h. zone. The investigating officer testified to following the accused's vehicle for a distance of two miles at a speed of 95 m.p.h. He also testified that the speedometer on the cruiser he was driving had been checked about two and a half months before, when it was new and its mileage was only 12 miles, and had been found to be accurate. At the time of the alleged offence the odometer read 17,439 miles. The only knowledge the officer had of the speedometer check was the certificate of a licensed mechanic placed in the vehicle certifying it to be accurate on March 11, 1964, with the mileage indicator reading 12 miles. The constable also testified that he had been patrolling Highway 401 for eight years and that it was obvious to him that the accused was exceeding the 60-m.p.h. limit, and that he relied on his speedometer merely to fix the exact rate of speed.

The trial Judge in Thibodeau expressed himself as satisfied that any error would not be to the extent of 20%. He made an allowance of 15 m.p.h. "possible error" on the officer's allegations of a speed of 95 m.p.h., thereby reducing it to 80 m.p.h., which was only five m.p.h. higher than the accused had said to the officer that he "might have been going". The trial Judge therefore ruled that a prima facie case had been established as to a speed of at least 80 m.p.h. After referring in his reasons for judgment to the impracticability of producing the certificate of speedometer inspection on every charge laid, because "the one certificate could not be retained by each of the several officers that drive the one cruiser", and each officer drives more than one cruiser during the period of a few weeks, the trial Judge ruled that "evidence of the existence and particulars of such a certificate, given by the officer under sworn testimony, is sufficient to establish in prima facie the accuracy of such speedometer".

Four questions were stated for the opinion of the Court:

(a) Was I right in admitting the evidence of Constable Sabo with respect to the certificate as to the accuracy of the speedometer?

(b) Was I right in relying on the testimony of Constable Sabo as to the existence of the Certificate?

(c) Was I right in refusing to require that the certificate referred to in the

testimony of Constable Sabo be brought into Court?

(d) Was I right in convicting at a speed of 80 m.p.h. on the strength of the evidence as set out above?

Fraser, J., answered Qq. (a), (b) and (d) "No", but answered "Yes" to Q. (c), with the comment: "It would have been of no value." The conviction was therefore quashed. It is obvious that the facts in Thibodeau are very similar to the facts in this case, and if Fraser, J., was right in quashing the Thibodeau conviction, the present appellant was wrongly convicted. We were told that the facts in Thibodeau and the decision thereon were put to Callon, J., but there is no reference to that case in his reasons for judgment.

Mr. Moldaver next referred to R. v. Grainger, [1958] O.W.N. 311, 120 C.C.C. 321, 28 C.R. 84. That was a case involving the use of a radar machine. I do not find it helpful. The officer using the machine testified that he himself had calibrated the machine on the morning in question by use of a tuning fork, testified to his knowledge that the radar machines were well maintained by the police technician and were very simple to operate, and finally expressed his belief that the data furnished by the machine was "extremely accurate and was accurate on the occasion in question". The Court of Appeal in a judgment given by Roach, J.A., affirmed the decision of Aylen, J., dismissing the appellant's appeal from his speeding conviction. In the course of doing so Roach, J.A., referred to the evidence I have mentioned and concluded at p. 312 O.W.N., p. 323 C.C.C.:

> If the machine was subject to all the weaknesses and inaccuracies which Mr. Ross enumerated in argument in this Court, the accused could have called evidence to show these facts. He did not. On the only evidence that was before the J.P. it was open to him to convict the accused.
>
> This was not a case of no evidence, but was a case in which the only question was the weight of the evidence.

Mr. Moldaver referred also to R. v. Waschuk (1970), 1 C.C.C. (2d) 463, a judgment of MacDonald, J., in the Saskatchewan Court of Queen's Bench. That was also a radar case in which the Magistrate stated seven questions, all of which raised the issue whether he had erred in law in taking judicial notice of a number of facts in connection with the operation of radar equipment. MacDonald, J., after referring to the duty of Judges to take judicial notice of "facts which are known to intelligent persons generally", expressed the view that "intelligent persons generally have no idea what makes the radar machine work and the evidence herein would be a complete mystery to most people" [p. 465]. He distinguished the decision of this Court in Grainger, supra, on the basis of the evidence given in that case by the operator of the machine.

Finally, Mr. Moldaver referred to the two decisions of the Divisional Court in England in Melhuish v. Morris, [1938] 4 All E.R. 98, and Nicholas v. Penny, [1950] 2 K.B. 466. While Melhuish is a speedometer case, the charge was laid under the Road Traffic Act, 1934 (U.K.), s. 2(3), which read [at pp. 98-9]:

> "A person prosecuted for driving a motor vehicle on a road at a speed exceeding a speed limit imposed by or under any enactment shall not be liable to be convicted solely on the evidence of one witness to the effect that in the opinion of the witness the person prosecuted was driving the vehicle at a speed exceeding that limit."

Here two police officers gave evidence as to the speed of the appellant's vehicle, but both based it on what the speedometer said. The true ratio of the case, as I see it, is that the section quoted was not complied with when two persons purported to give their opinion but both were basing it on the observation of "one and the same speedometer". It is to be observed that Macnaghten, J., dissented, albeit with "the greatest doubt". It is also to be observed that no counsel was heard for the prosecution, a fact which Lord Hewart, L.C.J., described as "unfortunate". Lord Hewart also pointed out that neither of the officers expressed any personal opinion, nor testified as to any personal experience of such matters. He was of the view that a mere recitation of what the speedometer said could not be regarded as the expression of an "opinion" as to the speed.

The decision in Melhuish v. Morris was not followed in Nicholas v. Penny. In that case a police constable, driving alone in a police car, followed the defendant's car at an even distance behind it and over a certain distance of four-tenths of a mile the speedometer in the police car showed an even speed of 40 m.p.h. Evidence was given of these facts at the trial, and in addition, evidence was given by the same constable of tests of the speedometer of the police car carried out by him in conjunction with a police sergeant and another police constable. The sergeant and the other constable were not called at the trial. It was held by a Divisional Court composed of Lord Goddard, L.C.J., Humphreys, and Morris, JJ., on appeal by way of stated case that the evidence of the constable as to the speedometer tests was inadmissible, since it substantially rested upon hearsay. However, the Court held unanimously that if the Justices at trial were satisfied that the defendant was travelling at a speed in excess of 30 miles an hour, no evidence was required as to the accuracy of the speedometer in order to establish a prima facie case. It was pointed out that such evidence as had been given might be shaken on cross-examination, or contrary evidence as to the speed might be given by the defendant. Lord Goddard, L.C.J., expressed the view that the judgment of Lord Hewart, L.C.J., in Melhuish had gone too far, and observed also that two pertinent cases which might have been cited to the Court in Melhuish were not cited, and would have had a considerable influence on that decision.

Lord Goddard held that if evidence is given that a mechanical device such as a watch or speedometer (he could see no difference in principle between them) recorded a particular time or a particular speed, which it is the purpose of that instrument to record, that can by itself be prima facie evidence, on which a Court can act, of that time or speed. He said that where a very small period of time, such as one-half a minute, was involved, the Court might well require evidence as to the accuracy of the clock in question. He also pointed out -- and this is highly relevant here, where the speedometer read 95 m.p.h. but the appellant was only charged with driving at 90 m.p.h. -- that the speedometer must have been very inaccurate if the offence was not committed.

I find the reasoning of the Court in Nicholas v. Penny highly persuasive and I am prepared to follow it. 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.

Nicholas v. Penny was followed by Judge Dickson in a County Court case in New Brunswick of R. ex rel. Neely v. Tait, [1965] 1 C.C.C. 16, and by His Honour Judge Clare in R. v. Amyot, [1968] 2 O.R. 626, [1968] 4 C.C.C. 58, in a case involving timing a motor-car by stop-watch from an airplane overhead. It must be said that Judge Clare's conclusion was obiter, since he had already found that he had no jurisdiction to hear the appeal.

It follows from what I have said that in my respectful view the case of R. v. Thibodeau, supra, was

wrongly decided. We do not know what cases were cited to Fraser, J., nor the grounds which led him to the conclusion that he reached.

No evidence of speed limit

There was no oral evidence whatever as to the speed limit on that section of Highway 7 with relation to which the charge was laid. The case therefore differs from that of R. v. Clark, 3 O.R. (2d) 716, 18 C.C.C. (2d) 52, decided by this Court on March 20, 1974, in which there was evidence of signs posted on the highway to indicate the speed limit. Callon, J., held that the evidence of the police constable that when he had stopped the appellant, he told him that he was charged with driving 90 m.p.h. in a 60-m.p.h. zone, was "some evidence" of the speed limit at the location in question. Mr. Campbell for the Crown took the same point before us. Apart altogether from the fact that this evidence does not appear in the stated case but is found in the transcript, and even there, not in very clear language, we were all of the view during the argument that evidence that a constable has charged a motorist with driving at a specified speed "in a 60 m.p.h. zone" is no evidence whatever that the speed limit is in fact 60 m.p.h. in that zone.

Mr. Campbell has submitted, however, that we are not only entitled but obliged to take judicial notice of the speed limit at the location in question. I accept this argument, which I now put in my own words.

Section 82(1)(f) of the Highway Traffic Act, R.S.O. 1970, c. 202, provides:

> 82(1) No person shall drive a motor vehicle at a greater rate of speed than,
>
> (f) the speed limit prescribed upon a highway in accordance with the provisions of subsections ... 11 ...

Subsection (11) provides that the Lieutenant-Governor in Council may make Regulations prescribing a higher or lower rate of speed than the rate of speed prescribed in the Act for any class or classes of motor vehicles upon the King's Highway or any part thereof. Subsection (16) provides that every person who contravenes any of the provisions of any Regulation made under s. 82 is guilty of an offence. The penalty varies according to the extent of the excess over the maximum speed limit.

The location of the measured distance of seven-tenths of a mile on Highway 7 is set out in the stated case. The westerly limit of that distance (approximately 3,700 ft.) is the Ninth Concession of Ops Township.

There is a Regulation of the Lieutenant-Governor in Council passed pursuant to s. 82(11), relevant to this location. It is R.R.O. 1970, Reg. 429, (Vol. 2, p. 1235). Section 1 of that Regulation provides that no person shall drive a motor vehicle upon those parts of the King's Highway described in Part 1 of each schedule at a greater rate of speed than 60 m.p.h. Section 3(b) provides that no person shall drive a motor vehicle upon those parts of the King's Highway described in Part 4 of each schedule at a greater rate of speed than 45 m.p.h. Highway 7 is dealt with in sch. 9 commencing at p. 1264. Part 1 of that schedule (the 60-m.p.h. zones) includes as item 9:

> 9. That part of the King's Highway known as No. 7 in the County of Victoria lying between a point situate 1500 feet measured easterly from its intersection with the boundary line between concessions 9 and 10 in the Township of Ops and a point situate at its intersection with the centre line of lot 4, Concession 4, in the Township

of Emily.

Part 4 (the 45-m.p.h. zones) includes as item 7:

> 7. That part of the King's Highway known as No. 7 in the Township of Ops in the County of Victoria commencing at a point situate 500 feet measured westerly from its intersection with the boundary line between concessions 9 and 10 and extending easterly therealong for a distance of 2000 feet.

In other words there is a 45-m.p.h. zone 2,000 ft. long, of which 1,500 ft. commences at the boundary line between Concessions 9 and 10 and extends easterly. Thereafter, proceeding easterly, the 60-m.p.h. zone resumes.

Reverting to the evidence, the measured distance over which the officer clocked the appellant at 95 m.p.h. is 3,700 ft. measured easterly from Concession 9. For the first 1,500 ft. of this distance, measuring easterly, the speed limit is 45 m.p.h. and for the remaining 2,200 ft. the speed limit is 60 m.p.h. It follows accordingly that over a distance of approximately 2,200 ft. the appellant was driving 95 m.p.h. in a 60-m.p.h. zone. He was charged with driving 90 m.p.h. in a 60-m.p.h. zone.

Can we take judicial notice of these speed limits? Section 5 of the Regulations Act, R.S.O. 1970, c. 410, provides:

> 5(1) Every regulation shall be published in The Ontario Gazette within one month of its filing.
>
> (4) Publication of a regulation,
>
> (a) is prima facie proof of its text and of its making, its approval where required, and its filing; and
>
> (b) shall be deemed to be notice of its contents to every person subject to it or affected by it,
>
> and judicial notice shall be taken of it, of its contents and of its publication.
>
> Section 10(2) of the Regulations Act provides:
>
> 10(2) Publication of a regulation in a consolidation or codification or supplement thereto mentioned in clause d of subsection 1 shall be deemed publication within the meaning of this Act.

Since the Regulations I have quoted are now found in the Revised Regulations of 1970 (a "consolidation"), s. 5(4) applies to them. The quoted portions were in fact enacted by Regulations passed either in 1960 or 1961, as appears from the references beneath the text in the R.R.O. version of Reg. 429.

Section 5 of the Regulations Act is a particular or "special" statute, the application of which is confined first of all to "regulations" as defined by the Act, and secondly, to such Regulations that have been published. The words "judicial notice shall be taken of it, of its contents and of its publication"

mean just what they say and if any Court has its attention drawn to a published version of a relevant Regulation judicial notice must be taken of it. Accordingly, judicial notice must be taken of speed limits as provided in Regulations which have been duly filed and published.

The trial Judge in this case was not only entitled but bound to take judicial notice of the speed limit at the location in question. That speed limit was deemed to have been proved before him by the requirement that he take judicial notice of it. The published version was only prima facie proof, but there was no other evidence.

Mr. Moldaver urged us to follow the dissenting judgment of Branca, J.A., in R. v. The Vessel "Besseggen" (1973), 12 C.C.C. (2d) 185 at p. 190, [1973] 5 W.W.R. 514. In that judgment Branca, J.A., was not prepared to give full effect to the provisions of the Statutory Instruments Act, 1970-71-72 (Can.), c. 38, s. 23 of which requires that statutory instruments published in the Canada Gazette shall be judicially noticed. He took this view because of the long-standing provisions of s. 20 of the Canada Evidence Act. In the case before him there was no affirmative proof of publication of the relevant Regulation and a copy of it was not entered into evidence. Branca, J.A., declined to follow the judgment of the late King, J., in R. v. Hodgins, [1971] 3 O.R. 403, 4 C.C.C. (2d) 87, where King, J., had come to a different conclusion as to the taking of judicial notice of federal Regulations.

In the present case, the conflict would (if one were to follow the reasoning of Branca, J.A.) be between s. 27 of the Evidence Act, R.S.O. 1970, c. 151, and s. 5(4) of the Regulations Act, quoted above. Section 27 of the Evidence Act affects a much wider class of documents than those dealt with by the Regulations Act, and legislation to the same general effect as s. 27 has been in effect since at least 1897 (Ont.), c. 17, s. 3, whereas the provisions of s. 5(4) of the Regulations Act were first enacted in 1953, c. 92, s. 1. Further, the provisions of s. 27 are permissive ("prima facie evidence [of a regulation] ... may be given ..."). The taking of judicial notice of the category of Regulations covered by the Regulations Act is an exception to the usual mode of proof contemplated by s. 27 of the Evidence Act. I am not able to apply the reasoning of Branca, J.A., to the circumstances in issue in this case.

Conclusion

Turning to the questions asked in the stated case, I agree with Callon, J., that the answer to Q. (1) is ,"No". Complete absence of oral evidence as to the relevant speed limit did not preclude a conviction because as a matter of law the speed limit had been proved by the application of the doctrine of judicial notice. I would answer Q. (2) somewhat differently from Callon, J.'s, "Yes". I agree that the short answer to the question is "Yes" but I would add: "but in the circumstances of this case evidence relating to the proper working order of the speedometer was not required".

Callon, J., was right in dismissing the appeal to him and this appeal should likewise be dismissed.

Appeal dismissed.