Case Name:

R. v. Kleiner

IN THE MATTER OF an appeal under Section 135 of the Provincial Offences Act, R.S.O. 1990, c. P.33, as amended
Between
Her Majesty the Queen, Respondent, and
Luisa Kleiner, Appellant

[2008] O.J. No. 1310

2008 ONCJ 159

67 R.F.L. (6th) 232

2009 CarswellOnt 2215

76 W.C.B. (2d) 766

York Region (Newmarket) Court File No. 4911-83997368

Ontario Court of Justice
Newmarket, Ontario

V.A. Lampkin J.

March 13, 2008.

(40 paras.)

Transportation law -- Motor vehicles -- Offences -- Speeding -- Appeal by accused from conviction for speeding -- Appellant argued Justice of Peace erred in finding officer had proper qualifications to use radar, relied on unreliable evidence and gave inadequate reasons -- Appeal dismissed -- Officer trained on device used -- Justice of Peace did not consider officer's evidence that appellant was on cell phone prior to being stopped -- Reasons were adequate.

Appeal by accused from conviction for speeding. Police used a hand held radar and obtained a reading of 83 kmph in a 40 kmph zone. Appellant argued that the Justice of the Peace erred by finding that the officer's qualification for operation of the radar were satisfactory, by relying on the officer's testimony and by giving insufficient reasons.

HELD: Appeal dismissed. The officer's testimony established that the speed detection device used was the device he was trained on and that he had tested the device according to the manufacturer's instructions on the date of the offence. There was no evidence that cast doubt on the qualification of the officer as a qualified radar operator. Although there was no reliable evidence that appellant was on her cellphone prior to being stopped, the Justice of the Peace did not take this evidence from the officer into consideration in making his finding of guilt. Although the reasons were short, they were adequate and left no doubt why he accepted the evidence of the prosecution.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, s. 128

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 135

Appeal From:

On appeal from the conviction by Justice of the Peace His Worship L. Wichman on the 16th day of November, 2006.

Counsel:

Hans Saamen, for the Respondent.

Ms. Helena K. West, the Appellant.

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1 **V.A. LAMPKIN J.**:-- The Appellant Luisa Kleiner appeals against the conviction following a trial on a charge of speeding in which she was found guilty of speeding at 83 kilometres per hour in a 40 kilometre per hour zone.

FACTUAL BACKGROUND

2 The Appellant was charged that on October 27th, 2005, at 12:48 p.m. at eastbound Brookside Road, in the Town of Richmond Hill, she committed the offence of speeding at 83 kilometres per hour in a 40 kilometre per hour zone, contrary to s. 128 of the *Highway Traffic Act*.

3 She duly applied for a trial and the matter came on for trial before His Worship L. Wichman on the 16th day of November, 2006 following which she was found guilty of the offence and fined the sum of $258.00.

4 Constable Steven Marsh testified that he was trained and qualified as an operator of radar in 1989 and was trained and certified as an instructor in 2002. In order to earn his certification as an instructor, he attended the Ontario Provincial Police Academy in Orillia on a five day course and had to write an exam.

5 On the 27th day of October 2005 he was parked on Chantilly Crescent at Brookside Road in the Town of Richmond Hill for the purpose of enforcing the posted 40 kilometre per hour speed limit. Brookside Road at that location is a two lane highway, one lane eastbound and the other westbound. It is

a posted 40 kilometre per hour speed limit zone. Chantilly Crescent forms a 'T' intersection with Brookside Road. There is a stop sign for northbound Chantilly Crescent but no stop signs for east and westbound Brookside Road. He was facing north and had a clear and unobstructed view of eastbound and westbound traffic. The weather was overcast. It was cool, clear and dry.

6 He was using a hand-held K-Band radar, the Muni-Quip Tribar. He tested the device at 10:07 a.m. according to the manufacturer's instructions and found it to be functioning properly. He tested it again at 1:20 p.m. according to the manufacturer's instructions and found it again to be functioning properly. Radar is used to measure accurately the speed of a moving motor vehicle.

7 At 12:48 p.m. he observed a motor vehicle travelling eastbound on Brookside Road. It appeared to be speeding. He activated the radar device and obtained a speed reading of 83 kilometres per hour. He stopped the motor vehicle at his location and served a Provincial Offences Notice for speeding on the driver who identified herself with a valid Ontario Driver's Licence as Luisa Kleiner, the Appellant. At no time did he lose sight of the vehicle. She was shown the reading on the radar. The traffic was light but her vehicle was the only vehicle in the radar beam when he activated the radar.

GROUNDS OF APPEAL

8 The amended grounds of appeal are:

(1) that the Justice of the Peace erred in law by ruling that the officer's qualification for operation of the speed measuring device was satisfactory;
(2) that the Justice of the Peace erred in law by relying on fact or evidence that was not conclusive in the officer's testimony; and
(3) that the Justice of the Peace erred in law by failing to provide reasons why he relied on the Officer's evidence over that of the Appellant.

9 The Respondent contends that the Justice of the Peace did not err as submitted by the Appellant.

10 Both parties have relied on a number of authorities.

11 With respect to the qualification of the officer the Appellant points to a particular section of the cross-examination of the officer. However in order to understand the officer's evidence the whole section must be examined. The following questions were asked and the following answers given:

> **Q.** It says 2002, have there been any changes in the - in this particular type of equipment?
>
> **A.** The hand-held radar that I was using we no longer use. We've gone to a different model.
>
> **Q.** And when did you go to a different model?
>
> **A.** It was over the process of a couple of years I believe. I wasn't involved in the changeover.
>
> **Q.** Okay. So in the last two years there's now a newer model of this particular type of radar?

A. No. It's a different model altogether. We don't use the Muni-Quip Tribar anymore.

Q. Okay. And this offence date occurred on October 27th, 2005?

A. That's correct.

Q. So if you say today's date is 2006 - of November 2006, this occurred just slightly over one year ago and you're indicating then that the equipment changed two years ago, is that correct?

A. It was over a two year period.

Q. Okay. So I'm accurate ...

A. And I'm just guessing on that date ...

Q. Okay.

A. ... because I wasn't involved in the changeover.

Q. Okay. So it is fair to say then that the equipment that you were trained on in 1989 and certified as an instructor in 2002 is no longer the equipment that now is being used in 2000 or would have been used in 2005?

A. That's correct.

12 The Appellant relies on ***R. v. Vancrey*** (2000) 147 C.C.C. (3d) 546 (Ont. C.A.). In that case the appellant appealed against her conviction for speeding in which the speed was measured by an L.T.I. 20-20 Marksman Laser Speed Detection Device. The issue before the court was 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.

13 In the course of her judgment delivered on behalf of the court, Madam Justice Feldman examined two lines of cases, 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 the speedometer, neither of which are specifically approved by statute, and some recent cases from different levels of courts which deal with the laser device.

14 One of the cases she referred to was ***D'Astous v. Baie-Comeau (Ville)*** (1992), 74 C.C.C. (3d) 73. In reference to that case this is what she said in para. 18:

> In ***D'Astous v. Baie-Comeau (Ville)***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.

15 It does not appear from the judgment that Madam Justice Feldman approved the approach of the Quebec Court of Appeal. She referred to the judgment as one of the judgments which together with two judgments from the Ontario Court of Appeal and one from the Alberta Court of Appeal that addressed the issue of the evidentiary basis for a conviction for speeding based on the radar device.

16 It is questionable whether in Ontario there is any necessity for the operator to pass an exam. Nor does there appear to be any necessity for the Crown to prove that the accuracy was verified by a test and that the tuning fork was accurate. All are requirements called for in ***D'Astous.***

17 In paras. 14 and 15 of her judgment she said:

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.

18 In ***Grainger*** there is no evidence that the officer had to pass an exam. He spent two weeks observing the operation of the machines which were very simple to operate. There is no suggestion that the Crown had to prove that the accuracy of the machine was verified by a test nor that the tuning fork

was accurate.

19 The Appellant submits that the cross-examination shows that the device Constable Marsh used was not the device he was trained on in 1989 and qualified as an instructor in 2002. But one has to look at the whole of his evidence. His evidence both in chief and under cross-examination on the issue of his qualification is set out in detail above. I am afraid that the Appellant has misconstrued his evidence.

20 His evidence in chief is that on the day in question he was using a hand-held K-Band radar device, the Muni-Quip Tribar. His evidence under cross-examination is that they no longer use the Muni-Quip Tribar. There was a changeover during a period of two years - of which he was not sure because he was not involved in the changeover. It is clear from his evidence that the changeover was gradual over a period of time. But on the day in question he was not yet using the new device on which he was not trained. He was still using the hand-held K-Band Muni-Quip Tribar device.

21 He testified that he tested the device at 10:07 a.m. according to the manufacturer's instructions and again at 1:20 p.m. according to the manufacturer's instructions and found on each occasion that it was functioning properly. There was no challenge with respect to the accuracy of the tests.

22 The issue of the operator's qualification came before me here in Newmarket in 1988. In ***R. v. Brewer***, [1988] O.J. No. 2531, May 19, 1988, (digested 5 W.C.B. (2d) 58), the officer testified that he was a "qualified radar operator". He admitted that he had not in fact received any information from the manufacturer as to the operation of the radar device and could not confirm that the tuning fork used to test the machine was activated by use of an appropriate surface. This is what I had to say:

> I agree that if the evidence had stayed simply as it had been given in chief that "I am a qualified radar operator," that he had some basic training by an experienced officer, that would have been sufficient. But his qualification was seriously questioned and attacked under cross-examination. He had read absolutely nothing at all from the manufacturer. He couldn't even say whether the person who trained him had read anything from the manufacturer. He couldn't really confirm that the tuning fork was activated by the use of an appropriate surface. He said he used the steering wheel, but he couldn't confirm that that was an appropriate method by which to activate it. He really could not confirm that what he did to use that radar unit was according to the manufacturer's specifications.
>
> I agree with the defence, indeed, that when attacked in that fashion, the police officer could not have been regarded as a "qualified radar operator" and therefore a *prima facie* case was not made out. The appeal will be allowed, the conviction will be set aside and any fine paid will be ordered to be remitted.

23 In reviewing that judgment in The Law On Speeding And Speed Detection Devices by A. Shakoor Manraj, Q.C., and Paul D. Haines (Third Edition, 2007) the authors said at p. 54:

> It is respectfully submitted that His Honour, Judge Lampkin, has, in this decision, correctly stated the relevant essential ingredients that must be established by the Crown in so far as the radar operator is concerned.

24 In the case under appeal there is no evidence that cast doubt on the qualification of Constable

Marsh as a qualified radar operator. I would not give effect to the first ground of appeal.

25 With respect to the second ground of appeal the Appellant points to the following comment of the Justice of the Peace in his judgment:

> He observed the defendant travelling eastbound in a vehicle that appeared that she may have been using a cell phone and obviously her attention was not drawn to the speed.

26 The Appellant submits that there is no firm evidence that she was on her cell phone and she is correct. Constable Marsh was asked the following question in chief and gave the following answer:

> **Q.** Could you see any reason why - I withdraw that part of my question. Did you make any observations regarding what the driver could have or could have not been doing as she was approaching your location?
>
> **A.** I did make a notation. When I was stopping her it appeared that she had been talking on her cell phone.

27 There is indeed no reliable evidence that the Appellant was on her cell phone. However when one reads the whole of the judgment it does not appear that the Justice of the Peace took that into consideration in making his finding of guilt. I would not give effect to this ground of appeal.

28 The final ground of appeal is that the Justice of Appeal has given no reasons why he relied on the officer's evidence rather than the Appellant's. The Appellant relies on the well-known case of ***R. v. W. (D.)***, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397, 3 C.R. (4th) 302, where Mr. Justice Cory speaking for the majority of the Supreme Court of Canada set out the approach to the application of reasonable doubt to issues of credibility. At p. 409 (C.C.C.) he said:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

29 The Appellant also relies on ***R. v. Sheppard*** [2002] 1 S.C.R. 869, 162 C.C.C. (3d) 298, in which Mr. Justice Binnie gave the judgment of the Supreme Court of Canada dismissing the Crown's appeal on the ground that the trial judge erred in law in failing to provide reasons that were sufficiently intelligible to permit appellate review of the correctness of his decision. In that case the appellant had been convicted of possession of two casement windows having a value of $429.00. No stolen windows were ever found in his possession. The sum total of the trial judge's reasons consists of the following statement:

> Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be

assessed, I find the defendant guilty as charged.

30 In para. 55 of his judgment Mr. Justice Binnie set out ten propositions as to the present state of the law on the duty of a trial judge to give reasons, viewed in the context of appellate intervention in a criminal case, which are intended to be helpful rather than exhaustive. The present appeal deals not with a criminal case but a quasi-criminal case but the propositions are for the most part equally applicable and are worth repeating. They are as follows:

1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.
2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.
3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.
4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground for appeal.
5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the *Criminal Code*, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.
6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without it being articulated.
7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.
8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.
9. While it is presumed that judges know the law with which the work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to

have reviewed by the appellate court.

10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso.

31 In the case under appeal, at the close of the Crown's case the Appellant brought a motion for non-suit on the basis that the officer was not a qualified radar operator for the equipment that he had used. The motion was dismissed.

32 The Appellant testified that she was coming from her home using Shaftsbury Road and she got to the intersection of Brookside and Shaftsbury where she stopped before turning left onto Brookside. She submits in her factum that she was consistent in her testimony, that the Prosecutor and the Justice of the Peace agreed with her responses regarding distance and therefore it could be presumed that her responses regarding distance supports credibility and her evidence should receive weight. In fact the Prosecutor and the Justice of the Peace agreed with the Appellant with respect to the length of the court room in which she was testifying. The following questions were asked of her to which she gave the following answers:

> **THE COURT:** How long do you think this room is? How many metres? How long do you think this room is?
>
> **A.** This room is? Like 15 metres probably.
>
> **THE COURT:** Fifteen.
>
> **A.** Fifteen - 20. Fifteen - 18 maybe.
>
> **THE COURT:** Well, I would imagine it's somewhere around 15 - 15 to 17 metres. You're fairly close.
>
> **MS. THEROUX: Q.** Yes. Yes, I would agree. I was going to say 15.

33 The Appellant gave evidence of measurements she had taken the day after the incident on the advice of her lawyer. The following questions were put to her in her examination in chief to which she gave the following answers:

> **Q.** Okay. Very good. And you indicated you took some measurements. So we'll speak, first of all, about - about that because I think that's something you'd like to tell the Court about. You indicate that at the top of Brookside there is a flat area prior to the road ...
>
> **A.** Yes.
>
> **Q.** ... going to an incline. And what is the distance on that particular area do you know? Do you recall?

> **A.** Yeah, from the stop sign this is a flat top. It was approximately 14 metres which is not - it's short distance and so after that the road slides down, and when you slide down, yeah, I saw officer standing like down the hill before the stop sign - before the next stop sign which is like to the next street.
>
> **Q.** Okay. And do you know the distance? Now are you saying at the top of the - do you know the distance then from the top of the hill to where the officer was?
>
> **A.** Yes, so I measured it too. It was about 23 metres. So when the officer stopped me or when I passed him I was just going to stop to the next stop sign when he stopped - he stopped me. So he said - so I asked, "Like what's wrong I did"? And he said I was speeding. And that - so, but I knew I couldn't do that because that short distance, like 13.5 metres - 14 metres I couldn't do the speed for 83 kilometres an hour. You just - first, I won't do any - any way and the - the second, like, I think it's just not possible at all.

34 The officer had testified in chief that he could not indicate how far away from him the Appellant's vehicle was when he first saw it. He guessed that she was 100 to 200 metres away from him. He could see up to the bend approximately 300 metres away, a distance which he guessed because he had never measured it. He knew the area and sets up there quite frequently because it is a complaint area. After the bend there is a slight hill and it's straight and level. At the top of the hill Brookside continues further on to Shaftsbury Crescent. In his reasons the Justice of the Peace said:

> She gave some evidence that she pulled out of some street at 14 metres away which as far as I am concerned it would never happen. I cannot see how she could build up speed to what the officer has her at.

35 In her factum the Appellant submits that the reasons for judgment were very vague and left her questioning why she was convicted and asks why her evidence was not believed. She submits that the three tests outlined in ***W. (D.),*** *supra*, were not applied in weighing the evidence.

36 It is clear that the Justice of the Peace rejected her evidence that she had come from Shaftsbury Road which the officer guessed was at least 300 metres away and not 37 - 14 metres on the flat at the top of the hill and 23 metres downhill to where the officer was stationed according to her and accepted the evidence of the officer who knew the area and was there for the specific purpose of observing the traffic because it was a complaint area. It is well within the competence of a person of ordinary intelligence to give an opinion as to speed and distance: ***Graat v. The Queen***, [1982] 2 S.C.R. 819; 2 C.C.C. (3d) 365; 31 C.R. (3d) 289; ***R. v. German***, (1947), 89 C.C.C. 90 (Ont. C.A.).

37 The Respondent relies on a number of authorities that explain the principles spelled out in ***W. (D.)***. I need refer to a few only. In ***R. v. Boucher*** (2005) 202 C.C.C. (3d) 34, Madam Justice Deschamps in delivering the majority judgment of the Supreme Court of Canada, said at paras. 29 and 49:

> 29. The approach set out in ***W. (D.)*** is not a sacrosanct formula that serves as a straightjacket for trial courts. Trial judges deliver oral judgments every day and often limit their reasons to the essential points. It would be wrong to require them to explain in detail the process they followed to reach a verdict. They

need only give reasons that the parties can understand and that permit appellate review: ***R. v. Sheppard*****,** [2002] 1 S.C.R. 869, 2002 SCC 26, and ***R. v. Burns***, [1994] 1 S.C.R. 656. In the instant case, the judge, by stating that she did not believe Mr. Boucher, was implicitly addressing the first two steps in ***W. (D.).***

49. The Court's role is not to reassess the evidence but to determine whether the reasons given by the judge reveal errors of law that may have influenced her assessment of the evidence. I find that they reveal no such errors. The judge was in a position to assess the demeanour of the witness, the content of his testimony and what he omitted, and this is not a case in which a new trial should be ordered.

38 In ***R. v. Gagnon*** [2006] S.C.J. No. 17 Justices Bastarache and Abella in delivering the majority judgment of the Supreme Court of Canada, said at paras. 20 and 21:

20. Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in ***H.L. v. Attorney General for Canada***, [2005] 1 S.C.R. 401, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

21. This does not mean that a court of appeal can abdicate its responsibility for reviewing the record to see whether the findings of fact are reasonably available.

39 The case under appeal was a two witness case. At the end of submissions the justice of the Peace gave his reasons for judgment. Although the reasons were short they were adequate and left no doubt why he accepted the evidence of the prosecution. An accused is entitled to adequate reasons, not perfect reasons. ***R. v. Tzarfin***, [2005] O.J. No. 3531 (Ont. C. A.).

40 I find no palpable and overriding error in the reasons of the Justice of the Peace. In the circumstances the appeal is dismissed.

V.A. LAMPKIN J.