1991 C.Y. No. 5894

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

ROGER J. LONGMIRE

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

HEARD: By briefs

BEFORE: The Honourable Judge Charles E. Haliburton, J.C.C.

CHARGE: Section 96(2) of the Motor Vehicle Act

DECISION: The 24th day of March, A.D. 1992

COUNSEL: Curtis C. Palmer, Esq., for the Appellant

Robert M. J. Prince, Esq., for the Respondent

D E C I S I O N O N A P P E A L

HALIBURTON, J.C.C.

The Appellant was convicted after trial before James D. Reardon, J.P.C., on the offence that

> At or near #101, Wellington, Yarmouth County, Nova Scotia on or about the 8th day of August, 1989, (he) did unlawfully commit the offence of driving in excess of 100 kilometres per hour contrary to Section 96(2) of the Motor Vehicle Act.

At the time of the alleged offence, Mr. Longmire was issued a summary offence ticket by Constable Maillet of the R.C.M.P. It was the information portion of this S.O.T. ticket which became the formal information before the Court on the trial.

The evidence disclosed that on the day in question, Constable Maillet was on duty performing highway patrol near the Town of Yarmouth on Highway #101. He observed a half-ton "Chev product" motor vehicle approaching from the opposite direction which seemed "to be well over the speed limit".

> (Page 25)
> ...at that point the radar was activated...to operational and got a reading on the radar.
>
> QUESTION: And what reading did you obtain?
>
> ANSWER: I obtained a reading 126, one-hundred and twenty six kilometres per hour.
>
> (Page 27)
> QUESTION: Now, the area that we're referring to, on the 101 highway, what is the speed zone on that highway?
>
> ANSWER: It's a 100 series highway and the speed limit is 100 kilometres per hour.
>
> QUESTION: Okay, and how is that indicated along this highway?

ANSWER: On signs erected by the Department of Highway, signs are off-white with black numbers.

QUESTION: What do they say?

ANSWER: Maximum 100.

In the course of cross-examination, Counsel for the Defendant drew the attention of the police officer to the fact that the summons portion of the summary offence ticket, when compared with the information portion, suggested that Constable Maillet had, in fact, signed the information on the highway before giving the summons to the Accused. The police officer had no recollection of when he had signed the information which was before the Court. He agreed with the suggestion that the document had not been signed twice. The following relevant exchange sums up the situation arising from this evidence:

(Page 31)
QUESTION: Do you remember actually going before Justice of the Peace, Crosby and swearing out this particular SOT?

ANSWER: No, I don't.

QUESTION: I put it to you Constable that looking at the original and looking at exhibit D-1 it's a possible interpretation that you signed the original, gave exhibit D-1 to Mr. Longmire and that later on at some time Justice of the Peace, Crosby, affixed his signature to the SOT not* in your absence. That's a possible interpretation looking at those documents, isn't it?

ANSWER: Yes.

QUESTION: And you can't remember for sure how it was that this particular SOT was sworn out?

ANSWER: No, I do not.

(*It is clear that "not" was inadvertently included in this phrase, either by Counsel or in transcription.)

All the evidence before the Court was in the form of Constable Maillet's testimony. The Accused himself gave no evidence.

THE ISSUES

The Appellant raises the following issues:

1. That His Honour Judge James D. Reardon erred in his interpretation and application of Section 88(5) of the Motor Vehicle Act, R.S.N.S., 1989, Chapter 293 as amended [formerly Section 79(5)] as it applies to section 106(2) [formerly Section 96(2)] of the Motor Vehicle Act.

2. That His Honour Judge James D. Reardon erred in ruling that the Summary Offence ticket was properly sworn and was therefore not a nullity.

3. That His Honour Judge James D. Reardon erred in ruling that the Appellant was not entitled to a copy of the Radar Operation Manual and that the Crown's refusal to provide the Appellant with a copy of the said Radar Operation Manual did not violate the Appellant's rights under Sections 7 and 11(b) of the Canadian Charter of Rights and Freedoms.

THE CHARTER ARGUMENT

Issue No. 3 arises from a fairly lengthy argument which had been made before Judge Reardon. The Defence contended that the right to make full answer and defence was impaired by the refusal of the Crown to produce a copy of the Radar Operation Manual for the particular radar equipment being used on that day. As both Counsel are aware, I considered that proposition in the earlier case of William G. Wilson v. Her

Majesty The Queen, C.W. No. 3894, a decision which was delivered on the 31st of July, 1991. In reaching the conclusion that full disclosure did not require the Crown to deliver the radar manual, I made the following comments which I continue to consider valid:

> (From page 9)
> Clearly, it is the modern day thinking that any information which may be in the possession of the Crown which could reasonably assist the Defence in preparing either a substantive defence or preparing for cross-examination and evaluating the evidence should be made available. **There must, however, be some reason to think that the information sought could realistically be expected to advance the position of the Accused at his trial.**
>
> ...In this case, the Crown intended to produce Constable MacLellan who had been trained and qualified to "operate" the particular radar machine. The Crown was obliged to disclose all the evidence relating to his activities vis-à-vis the machine, and the results generated. In the same manner as a technician may testify as to comparisons of ballistics, D.N.A. materials, or sampling for air quality, the means by which various machines make these analyses or comparisons is not evidence in the normal sense. Such matters can obviously become the subject of argument if put in doubt by scientific evidence. It has not been illustrated in this case that the Defence was in any way impaired or limited in its ability to challenge the capacity of the radar machine, when operating properly, to record speeds of oncoming vehicles by reason of the reluctance of the Crown to "disclose" or produce the operating manual.

I do not find that the Charter rights of Mr. Longmire have been infringed in this case by the refusal of the Crown to produce the Radar Operation Manual.

VALIDITY OF THE INFORMATION

The swearing of an information is a serious matter

which is entitled to serious treatment by both the informant and the official who receives the information. It is a step which places the Accused and his freedom in jeopardy. The simple act, however, of laying the information before a Justice of the Peace and swearing to the same is not an act of unusual importance or significance to this informant. Constable Maillet testified that he actually laid perhaps as many as 70 informations a month or 800 to 900 a year. The information in question was laid in August of 1989 and Constable Maillet was called to testify in this matter in October of 1991. It is obviously not surprising that he did not recall the specific circumstances of the laying of this particular summary offence information. He was able to testify only as to his "general practice" and to consider the actual condition of the information and summons which were before the Court and on which he was invited to comment.

There was no evidence that any irregularity occurred in the laying of the information.

The procedure specified in the Criminal Code, of course, applies to summary offence proceedings under provincial statutes. It is argued by the Appellant that s. 789(1)(a) of the Criminal Code requires by implication "the signing and swearing" of the document before the Justice of the Peace. The section says only:

> **789(1)** In proceedings to which this Part applies, the information
> (a) shall be in writing and under oath;

I would be prepared to accept that where there is reason to think that the Justice of the Peace has failed to take the "oath", that is, has failed to require the informant to swear, then the information would be a nullity. The evidence that was before the Court here, however, creates the inference that the police officer placed before the Justice of the Peace an information which the informant had previously signed and which he then proceeded to swear before the J.P. and upon which the J.P. affixed his signature and stamp of office. No authority has been cited for the proposition that the informant must sign in the presence of the J.P. It is my view that the laying of an information in the manner just described is regular.

It has been suggested that the "presumption of regularity" would apply in the circumstances. That presumption has no effect where the particular circumstances are established by the evidence and where inferences as to exactly what transpired may properly be drawn.

I find the information to be valid as laid.

FINAL ISSUE

The final issue raised on this appeal as argued by Counsel for the Appellant requires an interpretation of the specified statutory provisions of the Motor Vehicle Act. Mr. Longmire was charged under what is now s. 106(2). This latter section constitutes an exception to the general provision contained in subsection 1 of Section 106. For the sake of convenience, I set out the text of the various sections.

Discernible sign and when sign required
88(5) No provisions of this Act for which signs are authorized or required shall be enforced against an alleged violator if, at the time and place of the alleged violation, the sign therein authorized or required is not in proper position or not discernible by an ordinarily observant person, and whenever a particular Section does not state that signs are authorized or required, the Section shall be effective without signs being erected.

General maximum speed
106(1) Notwithstanding any other provision of this Act, but subject to subsection (2) and Section 109, no person shall drive a motor vehicle at a speed in excess of eighty kilometres per hour on any highway at any time.

Higher speed limit permitted and offence
106(2) The Minister or the Provincial Traffic Authority may fix rates of speed in excess of eighty kilometres per hour, but not in excess of one hundred kilometres per hour, for certain highways and may erect and maintain signs containing notification of such rate of speed, and the driver of a motor vehicle who exceeds the rate of speed so fixed shall be guilty of an offence.

Mr. Palmer, on behalf of the Appellant, has referred the Court to R. v. Vining (1977) 28 N.S.R. (2d) 630. This is the decision of the Appeal Division dealing with the earlier decision of County Court Judge McLellan. The case against Vining, like the present one, alleged an infraction of what is now s. 106(2). It is to be noted that Vining was convicted. The case is cited by reason of the following quotations:

> We have some difficulty in determining from the Learned Judge's decision whether he held that Section 79(5) of the Motor Vehicle Act, respecting the posting of signs, applied or did not apply to a charge under Section 96(2), such as that involved in the present case. We construe his decision, however, as applying Section 79(5) of such a charge and thus as requiring proof of the posting of a sign, as required by that section, and with that interpretation we respectfully agree.

It is to be noted that when Judge McLellan considered the matter, he noted that there was evidence before the Provincial Court Judge from the testimony of the police officers sufficient to establish on a **prima facie** basis that there was, in fact, a sign fixing a maximum speed of 65 miles per hour in that area. (The metric equivalent is the 100 kilometre per hour sign now current.)

In response, Mr. Prince, on behalf of the Crown, argues that whatever the decision in Vining may stand for, it does not create any greater burden on the Crown than that which is dealt with under s. 88(2). That provision is as follows:

> **Erection of sign is prima facie evidence**
> **88(2)** The fact that the sign or signal has been erected and maintained shall be **prima facie** evidence that the sign or signal is erected in compliance with this Act and that the matter stated or represented on the sign complies with that determined by the Minister.

Perhaps the time has come to revisit Vining if the ratio of that decision is that which is described by the Appellant here. In that regard, I prefer the argument advanced by the Crown in this case that Section 106, subsection (2) is "an exception, exemption, proviso, excuse or qualification" to the offence or the speed limit set out in subsection (1), and that the provisions contained in subsection (2) may afford a Defence in an appropriate case. The procedure is prescribed by s. 794 of the Criminal Code which provides:

> **794(2)** The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant...

Having made those observations, I should observe that it was not necessary to consider whether the comment from Vining is a binding one. A complete answer to the submission made on behalf of the Appellant with respect to the applicability of 88(5) is found in the decision of Judge Reardon. In giving his decision, he said:

> This court is satisfied that the crown (has) discharged the burden upon it under Section 88(2) of the Motor Vehicle Act, and that the presumption created by that section has not been displaced by evidence tendered on behalf of the accused, and therefore remains prima facie proof.

I am satisfied that there was evidence before Judge Reardon on which he was entitled to find that the standard signs had been erected in the regular fashion. The evidence of Constable Maillet in that regard was neither challenged nor contradicted. **That such signs were erected and were then in place is a finding of fact made by the Trial Judge.** Even if it were appropriate to reverse such a finding of fact on appeal, there is no basis to do so.

Accordingly, the appeal will be dismissed. The conviction and sentence will be affirmed.

DATED at Digby, Nova Scotia, this 24th day of March, A.D. 1992.

CHARLES E. HALIBURTON
JUDGE OF THE COUNTY COURT
OF DISTRICT NUMBER THREE

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CASES AND STATUTES CITED:

William G. Wilson v. Her Majesty The Queen C.W. No. 3894, dated July 31st, 1991

Motor Vehicle Act

R. v. Vining (1977) 28 N.S.R. (2d) 630