ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)

B E T W E E N :

HER MAJESTY THE QUEEN

(Respondent)

and

PHILIP AGNOLETTO

(Appellant)

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TRANSCRIPT OF PROCEEDINGS

AS HEARD BEFORE THE HONOURABLE JUDGE K. P. EVANS
at the Ontario Court of Justice (Provincial Division)
114 Worsley Street, BARRIE, Ontario,
on November 27, 1998.

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APPEARANCES:

P. Burke, Ms. — Counsel on behalf of the Crown

M. Higgins, Esq. — Agent on behalf of the Appellant

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November 27, 1998

MR. HIGGINS: Good morning, Your Honour. If I may, sir, Higgins, H-I-double G-I-N-S, initial M.

THE COURT: Mr. Higgins.

MR. HIGGINS: With the court's permission, I appear as agent for Mr. Agnoletto. This is a defendant appeal, sir, from a speeding trial conducted in Barrie in front of Her Worship Ms. Hilton and there is the ground of appeal indicated from Mr. Bird who conducted the trial that the Crown did not prove its case beyond a reasonable doubt and, however, the court obviously found that they did and registered a conviction.

The transcript I believe should be before this court indicating quite clearly that the officer did certain things with this machine, indicating under oath he tested it to the manufacturer's specifications. And his entire testing procedure, I submit, is contained in the transcript and it's found under...

THE COURT: Page eight.

MR. HIGGINS: ...yes, page eight, where he indicates that he conducted only the tuning fork test with this machine. He is then asked a couple of questions by Mr. Bird indicating, 'Are there other tests? Are you familiar with this or familiar with that?' He says that technicians - at the bottom of page eight, he says,

> "I didn't conduct those tests. Those, I believe, are checked by our technicians,"

and that's at line 27.

THE COURT: Yes.

MR. HIGGINS: However, he has previously qualified himself as being a qualified technician. He does that on page three. He says,

> "I'm a qualified technician,"

then says on page eight,

> "I don't do those tests. They're done by technicians."

So in fact he's either contradicting himself and he's not a technician or he's not even an operator. I submit that that's before the court certainly to bring question to the court as to the accuracy of the tests performed on the machine.

I do have the case of Her Majesty the Queen v. Fernando Milelli. This case is quite old and I submit it still stands for a very severe proposition with regards to the using of the MDR-1 machine. I have a copy for my friend and for the court and I think it's very crucial - and for the record, that's M-I-L-E-L-L-I. The case was heard December 28th, 1988, in front of your brother Judge Weseloh.

Going on to page two of the transcript, this is an appeal where Mr. Parker identifies, at 23, the officer continues, appendix C, Muni Quip MDR-1, track radar operating instructions. He goes through the system set-up over onto page three. Then he goes on to, around page, on line 18 on page three he says under paragraph D,

> "Aim the antenna towards the dashboard.

"Locate possible sources of interference." That of course was not done. There's no evidence of any other test being done here but that's obviously part of that transcript and I submit viable evidence and evidence that an MDR-1 used here and an MDR-1 used there are the same machine. They're identified as such.

Carrying on through page four...

THE COURT: Just a moment, please. Are you indicating that this case sets out the procedures that are required to be followed for someone who is testing the Muni Quip MDR track radar, operating the radar, and these are the tests that must be done by the officer?

MR. HIGGINS: These are among the tests that must be done, sir. The manual itself wasn't read into evidence and I think that's clear. However, this was...

THE COURT: Well, he indicates he hasn't even seen the manual.

MR. HIGGINS: I'm sorry, sir?

THE COURT: In this case, it's indicated he hasn't even seen the manual.

MR. HIGGINS: I submit that that's further on. There are further tests which have been brought into that including the range test, the beam length and range and it's indicated in Milelli. It's part of apprehension procedures and it's essential. The range is the sensitivity and can be controlled by the operator. It indicates in the Milelli transcript how a person who is

operating this machine is to go about ascertaining the range and usable function of the machine and that it's in fact essential and in there. Judge Weseloh agreed that, although Constable Angie had some 22 years of experience at the very end of it all, his vast experience didn't allow him to shortcut the testing and set-up procedures.

I think under the circumstances, with the evidence of the officer before you that he's conducted at least one test and there's evidence from that transcript there are numerous tests which must be done in fundamental set-up as well as the fact that this officer in the Agnoletto case indicates he's never even seen a manual. To have left it to say I tested it and it was never challenged I think would be prima facia. The Court of Appeal says so in Bigoni.

However, it was challenged and it was clear, I think, in cross-examination the officer hasn't seen the manual, conducted one test only and is in fact not even sure that the operator who trained him was trained by the manufacturer. I think there should have been more than a reasonable doubt at the time and to find a conviction based on this evidence left that court in error. I'm going to ask that this court over turn that conviction and enter an acquittal.

THE COURT: Are there any other grounds that you were intending to advance in respect of the matter?

MR. HIGGINS: With respect to that, sir, no. Just the case of Milelli I...

THE COURT: No, not with respect to that. Any other grounds? Specifically the grounds with respect to what this radar is capable of measuring?

MR. HIGGINS: He does, Mr. Feeny does basically touch on it on page four and I did read that.

THE COURT: No. It's not Mr. Feeny's opportunity to - he's the prosecutor. There has to be evidence with respect to what the radar can test. Bottom of page two going to the top of page three. Sorry, bottom of page three going to the top of page four.

MR. HIGGINS: Yes, I just referred to that, sir. That's what I said. Mr. Feeny says, and he's leading a bit here, but - I'm being kind - he says

> "All right. Did you come to any other conclusions about its capability at all?"

and he says,

> "Yes, sir. I'm trained to operate it and it was operating and functioning properly."

He didn't hear what he wanted so he said,

> "Did you come to any conclusions about its capability in terms of..."

and he didn't lead beyond that. He said,

> "...the accurate measure of speed?"
>
> "Yes."

Now, he doesn't specify a moving motor vehicle and I think that is astute on Your Honour's part. He doesn't specify. He does say the accurate

measurement of speed but I didn't take that as being a tremendously strong ground. I think it certainly tweaked Your Honour's interest at the time. In a sense, I think the inference was drawn. I wasn't relying on that but I think certainly if one is to look at the essential ingredients of the case, certainly that is another point which should have been covered. I kind of glossed over that section because he did say, yeah, the accurate measurement of speed. I think it's a speeding trial and he's saying earlier on it's a motor vehicle, et cetera, et cetera. So perhaps I drew the conclusion. I jumped the bridge and perhaps I shouldn't have.

THE COURT: That's fine. Madam Crown?

MS. BURKE: Thank you, Your Honour. As to the ground argued by my friend, in my respectful submission, there's a great big distinction between suggestions put to a witness and evidence. You can ask a witness any question you want about what he did and whether he did tests A, B, and C, or whether he did tests A, B, C, D, E, and F; and you get the answers from the witness such as, for example, in this case, that there were some tests done and that on the basis of the testing procedure the witness was satisfied with the accuracy of the device in question. But in my respectful submission, simply asking the witness, in this case the radar operator, whether he did certain things and having him say no does not amount to evidence that those things were required and that the absence of those things being done

constitute proof or raise any doubt as to proof about the accuracy of the instrument, and that, in my respectful submission, is a big difference.

In this particular trial, while questions were put to the radar operator about whether he had done certain tests, there was certainly no evidence led to suggest that, absent those tests, the instrument could not safely be said to be in proper working order. And there are analogies from the criminal law in the area of drinking and driving and, for example, approved screening devices and breathalyzer and intoxilyzer instruments which I know Your Honour is familiar with which might come readily to hand when it comes to assessing the difference between a question and a suggestion put and actual evidence which raises a doubt.

In this particular trial, first of all, I would point out there is absolutely no evidence before the court that any training at all, whatsoever, is required in order for an individual to be able to use the device in question; secondly, there is no...

THE COURT: Just a moment. Are you saying that the defence must raise the issue as to whether training is necessary?

MS. BURKE: No, I'm not saying that but I am simply pointing out that the absence of that is significant here where what is also being sought to be relied on is the absence of certain other

things.

THE COURT: There is evidence that he was trained. He gave that evidence in direct. He says, I am a qualified technician. He was qualified in July of '97 by an instructor at the Ontario Police College or Ontario Provincial Police.

MS. BURKE: Yes.

THE COURT: And he says that according to the manufacturer's check list, he did certain things.

MS. BURKE: Yes. For all we know, on the evidence taken at this trial, that's superfluity. There's no evidence that the training should consist of certain specified things. There is no evidence that the testing procedure should consist of certain specified things without which specified things, either in the area of training or in the area of testing, the device cannot safely be said to be in proper working order.

So my submission to the court is, while there were some questions put to the officer about just what he'd done, those questions are without evidentiary significance because we certainly can't take judicial notice - Your Honour can't take judicial notice and nor could the Justice of the Peace who heard the trial - can't take judicial notice of what's required in order to establish that the operator of a device is a qualified operator; nor can the Justice of the Peace take judicial notice of what's required by the operator of the device by way of testing of the device in order to establish that the device is in proper working

order. So while there are lots of questions about did you do this and didn't you do that and do you know whether this is required or not, there's absolutely nothing which moves in any way the officer's assertion that the device was in proper working order.

THE COURT: But the officer's assertion that it's in proper working order is based upon, number one, he has been trained to operate this machine...

MS. BURKE: Yes.

THE COURT: ...number two, that he did tests according to the manufacturer's check list and he's saying as a result of doing that I now know that this radar is working properly.

MS. BURKE: Yes.

THE COURT: The defence is saying, in respect of the matter, a) he did one test which is a tuning fork test; that the officer was asked about other tests, indicated he didn't know about those tests, asked him if he'd read the manual and he said, never saw it. Now, how can he possibly stand before the court as a qualified technician and a qualified operator of that mechanism if he's saying I do things according to the manufacturer's check list but I haven't even seen the manual that dictates it.

MS. BURKE: Because he's relying on the hearsay of his training which, without proof that there was some hole in that, stands on its own.

THE COURT: But how could the defence ever prove there was a hole in the training?

MS. BURKE: Simply, Your Honour, by asking the

officer the questions about what he did, getting his evidence about it, confronting him with the manual and then, quite frankly, calling evidence about what would be required in order to establish.

THE COURT: So you're saying that a person who represents himself...

MS. BURKE: Yes.

THE COURT: ...who comes before the court, is contesting the evidence of an officer who says I am trained to operate this item, is required to get a hold of the manual of operation for a radar device used by the police to detect speeders, and present that to the witness as a contradictory aspect of the evidence that he's already given with respect to what tests he did?

MS. BURKE: That is exactly what I'm saying, Your Honour. I am not aware of any provision of law in the Provincial Offences Act or in the common law which relaxes the rules of evidence simply because an individual is representing him or herself.

THE COURT: The statement at page nine, line 15,

> "My training was by a qualified O.P.P. instructor and he showed us how the use of the tuning forks and setting up the radar et cetera."

That's the essence of his training according to his own evidence.

MS. BURKE: Yes.

THE COURT: Okay.

MS. BURKE: Et cetera.

THE COURT: Well, yes, whatever et cetera is.

MS. BURKE: Yes.

THE COURT: Okay. Then the next question.

"Okay. So then when you say it's according to the manufacturer's specifications, if you haven't seen the actual manual, then how can you be certain that in fact the tests that you had done were the manufacturer's specifications?"

"Well, I'm presuming that the instructor that I had was teaching from the manual. He said he was."

MS. BURKE: Yes.

THE COURT: Aren't we talking about hearsay? If you're relying on the hearsay aspect of things, but then the question goes on,

"But we can't be certain of that, can we? Answer: No."

So the witness is not sure of from whence the qualified technician or instructor was teaching him but he stands up in the court and says, 'I am trained and qualified as of July of '97 to operate this item...'

MS. BURKE: Yes.

THE COURT: '...based upon my training, that training I can't tell you whether he was using the manual or not, the manufacturer's manual, but I was trained how to set it up and the use of the tuning forks and therefore I'm a qualified technician.'

MS. BURKE: Your Honour, all I can tell you is we have no idea from this transcript what's in the manual and what's not.

THE COURT: And we can't tell what's in the training or what's not.
MS. BURKE: No.
THE COURT: And we've now got some case law that indicates that, with respect to the matter, there is certain items that have to be done, for example, in connecting the antenna and the power cable to the console, placing switches in stationary standby, turning the power switch on, observing - none of which is indicated that he was trained to do or did do in this matter.

I mean, can you not see the concern that an individual would have if the court is to rely on an officer to say, 'I am qualified to do this because I have been trained,' and then indicates that he's not sure of the basis of his training but says 'I did what I was supposed to do because of the manufacturer's check list' when there's no indication that he's ever seen the manufacturer's check list because he's never seen the manual.
MS. BURKE: And there's no indication what's on the manufacturer's check list which would...
THE COURT: But that's the...
MS. BURKE: ...raise any doubt about whether he followed it or not.
THE COURT: No, but that's the whole point. If he says, 'I did it according to the manufacturer's check list,' but he's never seen a manual, what is he relying on to say these are the proper tests?
MS. BURKE: I think Your Honour and I are going in circles. My respectful submission is just simply

- and I say that meaning no disrespect.

THE COURT: I know.

MS. BURKE: But my respectful submission is just simply it's not enough to keep asking questions of a witness whether they've done something unless you're going to follow that up with the proof that they should have which would raise the doubt. Asking questions alone doesn't raise a doubt. I mean, I referred earlier to the analogy of the approved screening device or the breathalyzer instrument and, I mean, certainly it's not incumbent upon the Crown in an approved screening device case to call the officer to go through in intimate detail the nature and workings of the device, his minute knowledge of it, the basis of his training in relation to the device. It's enough the officer says it was an approved screening device. In fact, that alone, barring challenge, is enough. If he says it's an approved screening device and is helpful enough to name it and it happens to be one of the approved screening devices in the Code, that's enough. If he says, 'I tested it, I was satisfied that it was in proper working order and would register accurately in relation to a sample of breath blown into it,' that's enough.

Now, if a defence counsel were then to say to that officer, 'Well, don't you know,' and suggest a whole bunch of things about the interior workings of the device which the officer might have been advised about or might not have been advised

about, ask him a bunch of questions about the interior workings of the device and have the officer say, 'Yeah, I know about that. Sure. I guess that works that way.' Would there not have to be some follow-up evidence about, well, if there's a question about whether this thing was working properly, that if it wasn't working properly would result in a false reading? I mean, certainly it wouldn't be enough for defence counsel to simply say to the officer you don't know whether there was a kinked tube inside the approved screening device, do you?

THE COURT: No, but that's a little different than this case. What if you said to the officer, you say that you're qualified to operate this machine. You know that there's five tests to be done on the matter and the guy says, 'No, I only do one.' And he says, 'Well, do you know what this test is?' 'No, I don't.' 'Do you know what this test is?' 'I don't know that either.' With respect to the matter, the evidence in respect of this situation would be, 'Yes, I know there are tests that have to be done. I did one. But I did it according to my training.' If the training is called into question, isn't that capable of raising a reasonable doubt?

MS. BURKE: In my respectful submission, it's not.

THE COURT: Okay.

MS. BURKE: And I guess that's really where my point ends and perhaps the questions that Your Honour has been asking me suggest where Your Honour is sitting on this. In my submission, it's

not enough to draw it into question such that it raises the doubt. There would have to be some follow-up evidence to show that those were meaningful questions. Otherwise, any line of questioning, including 'Do you know whether the device came from Mars?' Well, if it came from Mars, it wouldn't be an approved screening device, would it? That alone would suffice and, in my respectful submission, that's not where the rules of evidence take us.

THE COURT: Are you aware of page nine, line ten, the question,

> "Okay, officer, if I was to show you a copy of the manufacturer's manual, would you be familiar with that?"

And the answer was,

> "No."

MS. BURKE: Yes.

THE COURT: All right. Thank you.

MR. HIGGINS: Very brief in response. My friend uses analogies of screening devices. I think Your Honour is quite clear screening devices only go towards forming a belief and are generally not entered as evidence and I think the Court of Appeal in Milne went through that quite clearly. It only goes towards leading for another demand and of course there you go to an approved by legislation machine. The instrument itself, any one of which is approved by legislation in the Code.

I submit that those machines have a presumption of

accuracy not enjoyed by radar. And in fact, if a technician on those machines were to issue a certificate which has its presumption of identity on it and everything was done properly and has evidentiary value on its face, if he's under cross-examination and he says, 'Yeah, I signed that but I didn't do any of that because I don't have to. I just did the one because I was shown the one,' the check list is all there, it has to be done, even on machines with legislative approval. Radar doesn't enjoy that. Radar enjoys merely the use as an investigative tool or a corroborative piece of evidence. It's not before the court, I submit, if the corroborative evidence is reliable or able to accurately measure the speed of moving motor vehicles based on the fact that it's not properly tested and then my friend goes into those avenues, those machines have a legislative approval. This machine simply does not and the officer's evidence, I think, does fall far short of bringing it into an approval case.

REASONS FOR JUDGMENT

THE COURT: I have listened to the submissions with respect to the evidence that was presented in the case of Philip Agnoletto. It is a speeding case and the evidentiary matters were put before that court. This appeal is brought on the basis that there should have been a reasonable doubt in the court's mind as a result of the evidence taken.

Certainly at page three of the evidence it indicates that the officer is a qualified technician, having being qualified in July of '97 by an instructor of the Ontario Provincial Police with respect to dealing with the device and he indicates that according to a manufacturer's check list he pursued a specific test with respect to testing the machine to see that it was operating properly. He testified that the machine was operating properly.

There is no evidence before the court that the machine is capable of testing the speed of moving vehicles as set out in the evidence. Furthermore, in cross-examination, questions were put to the officer questioning was he aware that there were other tests that were required under the manufacturer's specifications other than the tuning fork test. He indicated in his testimony that he was not aware of these other tests. He was asked about a specific test and indicated that he did not do those tests, and that he believed they were to be done by the technicians periodically. He indicated it would not be done by himself, yet he had qualified himself as a technician earlier in his evidence in direct examination.

When asked if he would recognize a copy of the manufacturer's manual with respect to this radar device, the officer indicated no. He said his training was by a qualified officer and

"he showed us the use of the tuning forks and the setting up of the radar, et cetera."

Furthermore, in response to the question,

"How could it be according to the manufacturer's specifications that you did your tests if you haven't seen the actual manual?"

he indicated,

"Well, I'm presuming that the instructor that I had was teaching from the manual. He said he was."

"But we can't be certain of that,"

and the officer said,

"No."

With respect to this matter, there are a number of areas in the evidence that was presented that could raise a reasonable doubt as to the ability of the officer to testify that the machine was operating properly. The learned Justice of the Peace, in my view, erred in not assessing all the evidence that had been presented in this matter that could properly raise a reasonable doubt that the radar machine that was being tested was tested properly and was in proper working order. For these reasons, the appeal will be allowed and an acquittal entered.

MR. HIGGINS: Thank you, Your Honour.

MS. BURKE: Thank you, Your Honour.

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THIS IS TO CERTIFY that the foregoing is a true and accurate transcription from the record made by sound recording apparatus, to the best of my skill and ability.

M. Barrett,
Certified Court Reporter