

Case Name:

R. v. Koumoudouros

Between

**Her Majesty the Queen, and
Branita Koumoudouros**

[2005] O.J. No. 5055

Certificate No. 68643727

Ontario Court of Justice
Hamilton, Ontario

B. Zabel J.

Heard: May 17, 2005.

Judgment: May 17, 2005.

(70 paras.)

Criminal law -- Appeals -- Appeal from conviction allowed because justice of the peace made an error in law in the decision. Transportation law -- Motor vehicles -- Offences -- Speeding -- There was no cross-examination of the officer or any other evidence to support that the speedometer used to clock the appellant's speed was certified and calibrated.

Appeal by accused, Koumoudouros, from conviction on speeding charge -- The officer used the speedometer in his own vehicle to clock the speed of Koumoudouros -- She argued that there was no evidence the speedometer was a certified calibrated speedometer -- HELD: Appeal allowed -- The officer was not cross-examined as to whether the speedometer was certified -- A reasonable doubt was established that was ignored in the original decision which was an error in law -- The conviction was set aside.

Statutes, Regulations and Rules Cited:

Highway Traffic Act

Counsel:

A. Senkus, Provincial Prosecutor

F. Alfano, Agent on behalf of B. Koumoudouros

B. ZABEL J.:-

1 MR. ALFANO: Good afternoon again, Your Honour, it's Frank Alfano for the record, sir, appearing as agent on behalf of the appellant. The appellant is not present. I do appear with her authority and her instructions. This is a speeding matter wherein the speed measuring device used was a speedometer in the police motor vehicle.

2 MS. SENKUS: Now, perhaps before we proceed any further, I understand that the appellant was to perfect the appeal from the last time. He's shown me a copy of further grounds for an appeal. I have not received that. I'm just wondering if Your Honour has that?

3 MR. ALFANO: We have actually a stamp on the dockets. I don't know if ...

4 THE COURT: No.

5 MS. SENKUS: Because the original grounds simply stated, 'I wasn't speeding over a 100 kilometre per hour zone'. The last time this was up for appeal, the judge ordered that the appeal be perfected to provide more specific grounds for the appeal.

6 THE COURT: I don't have it.

7 MR. ALFANO: I can show Your Honour. If I may approach?

8 THE COURT: Yes.

9 MS. SENKUS: The amended notice of appeal along with the original notice of appeal. You'll notice on the front page, sir, there's a stamp. I'm not sure - it was someone from our office who would have filed it, but there's a stamp and the date and signature. So I don't know why it would be that you didn't have it.

10 I can indicate that the grounds are fairly simple. If Your Honour wants to hear the argument in advance and then decide that perhaps my friend would be better off with notice, or Your Honour would be better off with notice. I'm certainly content to return, but insofar as that, I can indicate that I anticipate the argument to be quite a simple one, and ...

11 THE COURT: No, we're going to hear it today.

12 MR. ALFANO: Sorry?

13 THE COURT: We're going to hear it today. Continue.

14 MR. ALFANO: Very well, sir. The defender - or, the appellant was charged with speeding and this is a situation where it's a pace, wherein a police officer uses the speedometer in their police motor vehicle as opposed to, you know, a traditional laser or radar speed measuring device. So Bland - when you read the annotated Highway Traffic Act, merely indicates that a speedometer is deemed to be accurate until there's evidence to the contrary. In fact, it's not a very favourable headnote for the defence, but one of my practises, sir, is to read the entire case of which I've provided to you and my friend.

15 And in the case of Bland, which you can distinguish with the case at bar, is there was a certificate where a police officer had run that speedometer through a radar gun to verify its accuracy. That was not done in this case. In this particular case, when - and I'll turn Your Honour's attention to cross-examination - just a second. Okay. We're looking at page 6, sir.

16 THE COURT: Yes.

17 MR. ALFANO: And about line 19, where Mr. Cashmore (ph), who conducted the trial begins his cross-examination of this particular issue:

'Question: You said that the speedometer was certified and calibrated. Do you know who did that?

Answer: It's done at the factory. I don't know.

Question: Do you know how old this vehicle is - the individual technician's name?'

It appeared that he began a question in the middle of an answer.

'Question: Do you know how old this vehicle was at the time?

Answer: No, I do not.

Question: You're saying this is done at the factory, as in when it's built, do you mean?

Answer: I believe so.

Question: But you don't know?

Answer: I don't know.

Question: So if you don't know who does it or when it was done or where it was done, why do you say you had no reason to doubt it? Why do you tell the court that it's a certified calibrated speedometer when you really don't know?

Answer: We're told it's a certified calibrated speedometer. I have no reason to doubt that information.'

18 The first problem I have is that when you say a speedometer is certified, there's a certificate. Anything certified, sir, with the greatest of respect, would have a certificate certifying certain facts. In this particular case, we're talking about a sticker that's on a speedometer that says, 'Certified'. It doesn't have anything beyond ...

19 THE COURT: Where's it say that in the transcript, sticker on the speedometer?

20 MR. ALFANO: In fact, I would think that it's - brief indulgence, Your Honour. Sorry, sir, it does not say that.

21 THE COURT: Mm-hmm.

22 MR. ALFANO: Yes, okay. I read a cursory glance of the evidence in-chief. It does not appear - I mean, I know from other cases it's just a sticker, but clearly in this case, no certificate was ever tendered as in the case of Bland, which will do ...

23 THE COURT: So all you have is the testimony of the officer which is being challenged by the defence?

24 MR. ALFANO: Yes.

25 THE COURT: I see.

26 MR. ALFANO: But the thing is that it was challenged. The officer, when he says 'certified calibrated speedometer', there's no certificate, he can't tell us who did it, he can't tell us when it was done, he can't tell us anything other than he had no reason to doubt it. Now, the question the court would have to come to is: does that in itself amount to proof beyond a reasonable doubt?

27 Now, Bland is a case that the prosecution generally relies on. When you look at the facts in Bland and how they came to the conclusion that you could - a speedometer is deemed to be accurate, in this case, it was considered accurate until there was evidence to the contrary simply because of the steps that they took in this case. The unit itself was run through a radar unit. They had documented when it was done, how many kilometres the vehicle travelled since it was done. There was more than just, 'Well, I had no reason to think it wasn't working' ...

28 THE COURT: Is that your basic argument?

29 MR. ALFANO: That's the crux of it.

30 THE COURT: Okay, I'm going to hear from the Crown.

31 MR. ALFANO: Certainly, sir.

32 MS. SENKUS: Well, I think it terms of if there's any evidence to refute it, that although the officer is unable to say that, 'I don't know what specific date it was done but that I have no reason to doubt it', I would suggest that that would fall in line with that there's a presumption of whatever tests had to be done, or if any tests had to be done, and in this case, really the only thing the officer has to say is that 'I have no doubt to' ...

33 THE COURT: But there wasn't even any evidence there was a sticker or something saying it was.

34 MS. SENKUS: No.

35 THE COURT: No?

36 MS. SENKUS: Nothing like that.

37 THE COURT: Mm-hmm.

38 MS. SENKUS: The officer clearly did not have any of that.

39 THE COURT: Mm-hmm.

40 MS. SENKUS: But I would still suggest that there is some presumption in favour of regularity and legality, that in fact in cross-examination, that's not ordinarily the place where one would create evidence for the defence. Or if that's a prima facie case put forth, it may only affect the weight of the evidence. And I think in Her Worship's decision, she states, and that's the point ...

41 THE COURT: Yes.

42 MS. SENKUS: ... with respect to the weight of the evidence, she states, 'There's no evidence

to the contrary. The defence did not call any evidence so there's nothing to the contrary to suggest that ...'

43 THE COURT: But how can they call evidence to the contrary? They don't have access to the vehicle and they can't say, 'Oh, we've tested the vehicle, it's not accurate' when they don't have access to the vehicle.

44 MS. SENKUS: But in terms of whether or not the specific make of the vehicle, or when it was - when the vehicle was manufactured in terms of any calibration at that time, and if it would have ordinarily been done.

45 The other point with Bland, and I concede that there was no sticker ...

46 THE COURT: Mm-hmm.

47 MS. SENKUS: ... he didn't - he wasn't able to or didn't test the vehicle against radar. But the other point in Bland is that on page 4 ...

48 THE COURT: Yes?

49 MS. SENKUS: ... of the decision that was provided to you, paragraph 7, it states, 'The trial judge in Thibodeau' and it's making reference to some cases that the appellant in that case ...

50 MR. ALFANO: Sorry, what page is my friend referring to, of Bland?

51 MS. SENKUS: Page 4 of 9.

52 THE COURT: Page 4 of 9, paragraph 7.

53 MS. SENKUS: Paragraph 7. '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 miles per hour possible error on the officer's allegations of a speed of 95 miles per hour, thereby reducing it to 80 miles per hour.'

54 And then further down about halfway down through that paragraph, 'The trial judge therefore ruled that a prima facie case had been established as to a speed of at least 80 miles per hour.' In this particular case, I believe the speed limit was 55 kilometres over the speed limit. I think he was charged with 149 kilometres over the speed limit, but the actual pace, on page 3 of the transcript, at line 5, it indicates he paced the vehicle for 3.9 kilometres at a distance of 155 kilometres an hour.

55 And then at paragraph 14, page 5 of 9, the court relied or followed the decision in Nicholas v. Penny (ph), where paragraph 14 refers to the divisional court decision, and the issue again being the admissibility or inadmissibility of speedometer tests, states that, '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, that such evidence might be shaken on cross-examination or contrary evidence as to the speed might be given by the defendant.'

56 Again, in Her Worship's decision she states, 'I have no reason to doubt what the officer has said. I have no reason to doubt his belief that the speedometer was working properly.'

57 MR. ALFANO: If I may respond? I do have some submissions to make in regards to the actual decision itself, in that in my respectful submission, the onus rests on the prosecution to prove the charge.

58 But when you read the decision, and I refer you to page 7, it looks like line 28, I think, where it says, 'HER WORSHIP: But I have the evidence that it's certified and calibrated.' She takes that evidence almost as gospel. That's all she needs to hear was those words, 'certified' - the fact that there's no certificate, there's no evidence as to who calibrated, when it's calibrated, the fact that he says, 'It's certified and calibrated', that's it. That hurdle's now met as far as the justice is concerned. Because in her decision, she doesn't consider anything else in cross - she failed to consider any of the evidence that was brought out in cross-examination.

59 She goes on to say, 'I have the evidence that the officer has no reason to believe that it's not accurate and I have no evidence to the contrary.' With the greatest of respect, I think that amounts to evidence to the contrary. When you cross-examine, you say, 'Okay, you say it's certified and calibrated. Who certified it? Where's the certificate? Who did it? When was it done? How was it done? How long ago was it done?' None of these questions can be answered, so how can you then take the initial evidence that if unchallenged, I would agree it's prima facie evidence, but once you start asking questions and then none of those can be answered, how can she find as fact then in fact it is certified and calibrated? There was nothing, nothing for her to make that finding. At least in Bland, there existed a certificate.

60 THE COURT: Yes. I'll hear from the Crown.

61 MS. SENKUS: Just one other point with respect ...

62 THE COURT: Yes.

63 MS. SENKUS: ... to the certificate. I think in the Bland decision, and if I may have a moment, there was discussion as to whether or not a certificate must be produced at all times, and it was deemed that that would be unreasonable - if I could just have a moment? I believe I highlighted it. I think it's on the top of page 4.

64 THE COURT: Yes?

65 MS. SENKUS: Paragraph 7, actually the same paragraph that I had initially referred to, about

six lines down, the sentence starting, 'After referring in his reasons for judgment to the impracticability of producing the certification 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 ...'

66 THE COURT: No, we didn't have that in this case.

67 MS. SENKUS: No, but the point I'm trying to make is that the suggestion that there has to be proof of the card or a certificate as to when the speedometer was calibrated would be impractical for each and every case that would be before the courts. Those are all my submissions.

68 THE COURT: Thank you. I've heard enough.

REASONS FOR JUDGMENT

69 THE COURT: Considering everything presented to me, I find that the case at bar is distinguishable from Bland, 6 O.R. (2d) 54, and I further find that in light of the cross-examination of the officer that a reasonable doubt was established and that was ignored by the learned justice of the peace in her finding. She erred in law, and accordingly, the appeal is allowed. Conviction is set aside.

70 MR. ALFANO: Thanks, Your Honour.

qp/s/qw/qlnxd/qlbdp