Case Name:

R. v. Haynen

Between
Her Majesty the Queen, and
Grant Haynen

[2002] O.J. No. 4943

Ontario Court of Justice
Toronto, Ontario
De Morais J.P.

September 4, 2002.
(21 paras.)

Motor vehicles — Regulation of vehicles and traffic — Rate of speed, defences — Necessity.

Trial of Haynan on a charge of speeding. A police officer clocked his vehicle exceeding the speed limit and followed him for several miles in his police car. The police car was known as a stealth car because its markings were only distinguishable from certain angles. The car lacked police lights on top. The officer claimed that Haynan had sped up to 131 kilometres per hour in a 90-kilometre per hour zone. Haynan claimed that he had not been aware that the vehicle was a police car, and that fearful of being followed and stalked or car-jacked, he sped up in an attempt to make the car stop following him. He drove toward his residence, eventually stopping for the police car.

HELD: Haynan was convicted. Under the Highway Traffic Act, speeding was an absolute liability offence. Haynan's defence of necessity failed in any event because he should have known that it was a police vehicle following him. Even without the top lights, it was marked in such a way that he could have distinguished it. Furthermore, his actions, had he truly been fearful of being stalked, were not reasonable. He continued to speed home, and passed a police station on the way, and it was not reasonable to lead potential car-jackers to one's residence. The defence of necessity failed.

Statutes, Regulations and Rules Cited:

Criminal Code.
Highway Traffic Act, R.S.O. 1990, c. H-8, s. 128.

Counsel:

Grant Haynen, on his own behalf.
D. Gluckman, municipal prosecutor.

¶ 1 **De MORAIS J.P.**:— The defendant enters a plea of not guilty to the charge of speeding 131-km/h in a 90-km/h zone, contrary to s. 128 of the Highway Traffic Act, R.S.O. 1990, c. H.8. The only ground of defence advanced by the defendant was that of necessity. There are differences between the evidence given by the officer and that given by the defendant that goes to credibility. Speeding is an absolute liability offence.

¶ 2 We heard from the investigating Officer, the witness for the prosecution, whom during the examination in chief and relying on his notes gave the following testimony:

> ... on July 3rd, 2001, I was working the night shift, 10:00 p.m. until 6:00 a.m.; and at this time, I was operating a police vehicle in the City of Toronto. ... this police vehicle is a blue Chevrolet Impala. It bears Toronto police markings, but these markings are offset, indicating that these markings are only visible at certain angles of viewing. Once viewed at these certain angles, it is readily identifiable as a police vehicle. It has been put on the road for the sole purpose of addressing a complaint of aggressive driving in the city of Toronto. It is better known as a "stealth vehicle." I was working in uniform at this time, and I was operating this motor vehicle at this time.
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> ... I was working, as I said, the night shift. The weather at this time was cool. It was clear and it was dark out. At approximately 3:20 a.m., I was northbound on the Don Valley Parkway at Don Mills. I was traveling in the centre lane, traveling at approximately 90 kilometres per hour when I was passed by a black BMW in the slow lane, or the curb lane, or lane 1, whichever you want to call it. This vehicle was traveling at a very high rate of speed in very light traffic. ... the Don Valley Parkway at this location is three lanes northbound. It is on a steady incline, and it is a 90 kilometre per hour zone.
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> ... I pulled behind this vehicle and began to follow this vehicle northbound. As I said, this vehicle was passing all the vehicles on the road, but the traffic was very light.
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> ... I activated my radar and received a speed-reading of 131 kilometres per hour in a 90 kilometre per hour zone ... at this time; I was using a Muni-quip Track Radar Unit, Model 5029, Toronto Police number. I was using it in the front antenna mode in the mobile position.
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> ... this radar unit is capable of accurately measuring the speed of moving objects, in this case motor vehicles. I tested this equipment at the beginning of my shift and at the end of my shift, as per manufacture's specifications. I found it to be in working order. I also used it numerous times during my shift without incident. I am trained and qualified in the use of this equipment. As I said, the speed-reading I obtained that confirmed my suspicion that the vehicle was speeding was 131 kilometres per hour in a 90 kilometre per hour zone.
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> I stopped this vehicle northbound at Lawrence Avenue East. The vehicle bore an Ontario marker of AJHB 705. As I said, it was a BMW product with a lone male occupant who identified himself with a valid photo driver's licence as one Grant Haynen, an address on Broadfoot --- an address an Broadleaf Road in Don Mills. I was satisfied with the identification that was supplied to me. I subsequently issued the offence notice before the Court for speeding 131 kilometres per hour in a 90 kilometre per hour zone, contrary to the Highway Traffic Act. ... I might note there was one correction on the face of the offence notice. That is my change and that is my initial at the top. This all occurred within the City of Toronto.

¶ 3 During Cross-Examination by the defendant, the investigating Officer brought additional facts to light. I will only deal however with those facts that are additional/new and not a repeat of what has already been said. They are as follows:

> Q. Do you have any idea what the distance is between the Don Mills Road exit and the Lawrence Avenue exit, approximately?
> A. It is approximately 4 1 2 kilometres.
> Q. There will be testimony latter that it is more like 5.1 kilometres. You indicated that the car passed you at a significant amount of speed.
> A. Yes, I did.
> Q. Why did it take you the better part of 5 kilometres to decide to pull this vehicle over if it had passed you at a high rate of speed?
> A. Simply because, one, I obtain the speeding reading; I then get your plate; I then do checks with your plate to make sure that the vehicle isn't stolen; and then I look for a convenient spot that is safe for both of us to stop. My vehicle is a blue Chevrolet Impala. It is equipped with only two flashing rear lights. If I pull you over in live traffic, sir, we're liable to get struck and either myself or yourself is going to get injured, and I, especially, don't want myself being injured. Therefore, I find an appropriate spot that I

think is convenient, and that was at Lawrence. It is a long ramp; therefore, it is a good place to stop you.

Q. And between the Don Mills ramp and the Lawrence ramp, the Eglinton ramp was passed as well; is that correct?
A. Absolutely. It certainly is.
Q. And you choose not to pull me over there.
A. As I said, I am - I am - I am doing numerous checks. It depends how long it takes my checks to come back. The last thing I want is to be involved trying to stop a stolen vehicle by myself. Once I confirm the vehicle is not reported stolen, then I feel it is fine to stop you.
Q. ... So not much traffic would have been endangered at some point when you are pulling someone over. It is a judgment call that there was not much traffic to worry about; is that fair?
A. Absolutely; but also, you have to remember, sir, that at 3:20 a.m. is also the approximate time of our night shift rush hour, which indicates that the bars are beginning to close; also, that is the time when most of our police cars on the Gardiner Expressway and the Don Valley Parkway get struck by drunk drivers, and I'm not interested in being struck by one of those drunk drivers. I am not interested in having you being struck by one of those people either. Therefore, I pick the most convenient spot, as I said. In addition, as far as the traffic goes, sir, speed is speed.
Q. And the design of that stealth vehicle is such that a car, which you are following, is going to have great difficulty, especially at that time of the evening, determining that it's being followed by a police vehicle as opposed to some other vehicle?
A. You passed my vehicle, sir, as far as I am ...
Q. I asked you a question. I would like you to answer the question.
A. I am trying to answer it, if you will allow me to. Could you ask the question again, please?
Q. The car is designed so that someone who is being followed by the car is not going to be able to readily identify it as a police vehicle; is that correct?
A. It is marked on the front as "Police," sir. As I said - as I said before, it also has a large push bar on the front. I cannot remember ever seeing an Impala with a huge push bar in the front and flashing lights attached two red flashing lights attached to it. It also says "Police" on the front, sir. You had every opportunity ...
Q. Why they call the car a "stealth" car, officer?
A. Pardon me?
Q. Why do they call the car a "stealth" car?
A. That is the name, they gave it, sir.

THE COURT: What is the relevance of that to the offence?

The defendant: Well, I have a defence, Your Worship; and my defence is a defence of necessity.

Q. Let me ask you this: are there any lights on the top of the vehicle?
A. No, sir, there are not.
Q. Okay. Officer, I am going to suggest something to you. I am going to suggest that you approached my vehicle at high speed from the rear.
A. At Lawrence Avenue, I probably did.

Q. Pardon, me?
A. At Lawrence, I probably did.

Q. No. I am suggesting that our initial contact was you approaching my vehicle at high speed at approximately the Don Mills exit.

A. No.
Q. You have notes of this incident, officer?
A. Right here, sir.

The defendant: May I be allowed to examine the officer's notes?

THE COURT: Yes.

Q. Show me where they begin. What, what does this say? I am sorry.
A. "Bob Cool."
Q. Can you explain this to me, please? I am trying to ...
A. Certainly. ... As I said, that is the call signal for the vehicle. Cool, clear and dark.

Northbound took the Don Valley Parkway, at Don Mills, passed me, black BMW passing, going slowly, traffic light, follow northbound to past Eglinton. 131 in a 90. Muni - quip, that is the radar unit I was using. Sir, that is mobile. Stopped vehicle at Lawrence. Lone occupant, valid driver's licence.

Q. Okay. When you displayed your signal for the vehicle you were pursuing to stop, how did the vehicle react?
A. I could not tell you.
Q. The vehicle pulled over?
A. Yes, or else you would have been charged with something else.
Q. Apart from speed was the vehicle being driven in a controlled manner?
A. I would not know sir. I was not driving it.
Q. From your observation, apart from speed, was the vehicle being driven in a controlled manner?
A. Again, I was not driving it, sir.

¶ 4 At this time the defendant was affirmed and gave the evidence that follows:

... on the weekend in question, I had been engaged all weekend on a matter that involved me to travel to Vancouver early on the Tuesday morning. I left my office at approximately 3:00 a.m. to travel home to pack for that trip. I was driving a black BMW, four-door, Sedan at that point in time.
When I got to the Don Valley Parkway, headed northbound, I put on my speed control and set it at 90 kilometres per hour. I was driving from -- I got on the Don Valley Parkway at the Adelaide exit, drove north. At approximately, just as I was passing the Don Mills exits, I noticed in my rear-view mirror a car traveling at extremely high-speed come up behind me. The car slowed and pulled in behind me. I was in the furthest right lane, traveling at 90 kilometres per hour. The car pulled in behind me -- there was virtually no other traffic on the road -- and continued to follow me. I was puzzled by this. I was concerned by this. What I did was I reduced my speed to approximately 80 kilometres per hour. The car continued to maintain that pace did not overtake me. I increased my speed to 90 kilometres per hour, to 100 kilometres per hour, and to approximately 110 kilometres per hour. The vehicle maintained its distance behind me. I then slowed my vehicle again, after I had taken it to 110 kilometres per hour, hoping that the vehicle would pass me. I could not understand why this vehicle was pulled in behind me in these traffic conditions. The car would not pass no matter what happened. At this point in time, I did not know what was occurring. I was concerned that I was being the victim of a car jacking. There were press reports, and I would like to file this as an exhibit, (Exhibit one for the defence) of three recent cars, jacking that had taken place, and I have a copy for you. And I will refer to latter.
Obviously, the vehicle that was following me was not interested in either overtaking me or doing anything other than following me. I was concerned that I was being stalked. All I could

see in my rear-view mirror at 3:20 a.m. were the lights, the headlights, on the car. There were no lights, obviously, on the top of the car or anything else that I could see in my rear-view mirror that would identify this vehicle as a police vehicle.

For approximately the five minutes that it took to travel the 5 kilometres from the Don Mills exit to the Lawrence exit, I considered what I was going to do; and I decided that when I got close to my exit, which was the Don Mills Road west exit, that I would accelerate and make it home, to the safety of my home, before this vehicle. I had no idea what was in the mind of the people pursuing me, but this was strange behavior at three o'clock in the morning on a weekend.

This is a map (Exhibit 2) of the route that the police vehicle, which I did not know was a vehicle at the time, and I was following. You will see the first map is map 17. This is taken from one of the local map publishers. And you will see Don Mills. In the left corner, in yellow highlighting, for all concerned, is the Don Mills Road exit on the Don Valley Parkway. The map continues onto Map 33, where you can see that the Parkway winds past Eglinton Avenue, past the railroad tracks. And the yellow part ends at the Lawrence Avenue overpass where I pulled over in response to the police officer's signal to stop. And the green part on this map indicates the route that I intended to take, which was to accelerate my vehicle to get onto the on-ramp and over to Lawrence Avenue and onto Woodcliff and Broadleaf Road which, as the officer indicated, is my address.

I took every opportunity that I could to assuage my concerns about the vehicle following me by varying my speed, which was unsuccessful. I only took this step of increasing my speed as I approached home in an effort to get home as quickly as possible from a vehicle that I had no way of knowing was a police vehicle. I disagree absolutely and categorically with the police officer's evidence that I passed his vehicle. That did not occur, and that is my evidence. I was traveling at 90 kilometres per hour with my speed control unit on until this officer approached me from behind at extremely high speed and pulled in behind me, and I continued to do the best I could in terms of mild evasive action to find out why this car was following me and get it to stop following me, and it would not, so I took the steps I did.

That is my evidence.

¶ 5 Cross-Examination by the prosecution went as follows:

Q. Have you had any encounters with this officer prior to this incident?
A. Not that I am aware of; no.
Q. Can you think of any reason why this officer might stop you for speeding if indeed you were not speeding?
A. I was speeding. I was -- I do not deny that I was traveling at 131 kilometres per hour at the time he pulled me over. I have explained why I was traveling at 131 kilometres per hour, and I do not know why he would say that I passed him when clearly he did not -- I did not pass him.

¶ 6 At the time of submissions the defendant produced for the court a prepared written legal argument of about 80 pages in 7 tabs, which, I should add having not been notified of such took the prosecution by surprise. The prosecution however even though having not had a chance to review it decided to proceed regardless. The defendant proceeded by stating that he would like to augment the written legal argument submitted with oral submissions as well, which he did.

¶ 7 In dealing with the issue of credibility, I will say that I have some difficulty in accepting the facts as stated by the defendant versus those presented by the prosecution through its witness.

... You put on your speed control and set at 90 kilometres per hour - a car traveling at extremely high speed comes up behind you. The car slowed and pulled in behind you ...

The evidence given by the officer was that he was working the night shift and traveling northbound on the Don Valley Parkway at Don Mills on the centre lane at approximately 90 kilometres per hour when he was passed by a black BMW on the curb lane and that this

> vehicle was traveling at a very high rate of speed in very light traffic. He pulled behind this vehicle and began following it. Although traffic was light, the said vehicle was passing all the vehicles on the road. He activated his radar and received a speed reading of 131 kilometres per hour in a 90 kilometres per hour zone.

¶ 8 I honestly cannot believe that this police officer or any other for that matter would "travel at extremely high speed" and pull behind a vehicle that was allegedly traveling at the posted speed of 90 kilometres per hour. You went on to say that you changed your speed more than once to higher and lower than 90 kilometres per hour and that this vehicle continued to follow you. You then stated that you were concerned that you were being the victim of a car jacking. You go on to say, "Obviously, the vehicle that was following me, was not interested in either overtaking me or doing anything other then following me". Again, I have great difficulty with those statements mainly because you could have done a number of things such as change lanes, pull to the shoulder of the road even exit at the Eglinton Ave. exit which incidentally would bring you to a close by Police Station, but you chose not to do any of those. Instead, you choose to "... take this step of increasing my speed as I approached home in an effort to get home as quickly as possible from a vehicle that I had no way of knowing was a police vehicle".

¶ 9 Again, why would anyone thinking that he is being car jacked lead the other person or persons to his own place of residence? It just does not make any sense to me.

¶ 10 Regarding your inability to determine that the car following you was a police car because it was "an unmarked police vehicle". As the evidence shows this is not an unmarked police vehicle, but one commonly referred to as a "stealth" car which is marked in the front as Police, has a large push bar on the front with two red flashing lights attached as well as markings on the driver and passenger doors the last being visible only at certain angles. Having said that I cannot accept your statement, that this was an unmarked police vehicle, that being a type of vehicle that exists and is used by the police.

¶ 11 I will now deal with the offence of speeding. Considering all the research you did in preparing for your defence I am sure that you are no doubt aware that speeding is an Absolute Liability Offence. In R. v. Sault St. Marie (City), [1978] 2 S.C.R. 1299 (S.C.C.), Dickson J. articulated three categories of criminal and quasi-criminal offences: full mens rea offences; strict liability; and absolute liability. Speeding is generally understood to be an absolute liability offence, that is, one

> ... in respect of which the Legislature had made clear that guilt would follow proof merely of the proscribed act.

¶ 12 To obtain a conviction, the prosecution needs not show that the defendant intended to speed. Intention is, prima facie, irrelevant to the offence. Nor may the defendant raise the defence of due diligence in speeding. In other words, it is equally irrelevant that the defendant took all reasonable steps to avoid speeding. I must add that there is ample authority supporting the proposition that speeding is an offence of Absolute Liability. (R. v. Gillis (1974), 18 C.C.C. (2d) 190 (N.S. C.A.), R. v. Hickey (1976), 30 C.C.C. (2d) 416 (Ont. C.A.), R. v. Harper (1986), 44 M.V.R. 313 (B.C. C.A.), R. v. Gerathy (1990), 22 M.V.R. (2d) 57 (B.C. C.A.) and R. v. Lemieux (1978), 41 C.C.C. (2d) 33 (Que. C.A.)).

¶ 13 Having said that, I wish to say that although speeding nor the rate of speed in this matter is an issue, since you admitted to traveling at 131 kilometres per hour at some point, I felt that it should be addressed never the less.

¶ 14 Now in dealing with the Defence of Necessity that being your chosen defence in this matter, I want you to know that I read all the case law presented by you during your legal argument and I agree with you in that:

1. The defence of necessity is well established in Canadian law. (R. v. Latimer, [2001] 1 S.C.R 3, and Perka v. R., [1984] 2 S.C.R. 232).
2. The defence of necessity is available in cases involving driving offences under the Criminal Code. (R. v. Woodhouse (1982), 38 O.R. (2d) 351 (Co. Ct.) and R. v. Fry

(1977), 36 C.C.C. (2d) 396 (Sask. Prov. Ct.)).

3. The defence of necessity is also available in cases involving offences under provincial highway traffic legislation, including the offence of speeding. (R. v. Morris, [1994] B.C.J. No. 1253, 5 M.V.R. (3d) 110 (B.C.S.C.) and R. v. Kennedy (1972), 7 C.C.C. (2d) 42 (N.S. Co. Ct.).

¶ 15 There are however four principle limitations on such a defence:

a) There must be "clear and imminent peril" calling out for action without deliberation.
b) There must be no reasonable legal alternative to the illegal act.
c) The harm inflicted by the illegal action must be less than would be present if the "clear and imminent peril" were manifested.
d) If the harm, which forms the basis for the defence, was foreseeable and avoidable at an earlier time without any illegality, the defence is unavailable.

¶ 16 In R. v. Kennedy (1972), 7 C.C.C. (2d) 42 (N.S. Co. Ct.) the defendant was traveling 64 miles per hour in a 40 miles per hour zone. He testified that he could not slow down because he was being followed too closely. O'Hearn Co. Ct. J. said,

> In the instant case, I have no doubt that preservation of the life of the defendant, or his wife or even of a valuable piece of property such as his motor vehicle might justify exceeding a speed limit but I have a problem as to whether the course he took was necessary.

¶ 17 A similar result was arrived at in R. v. Paul (1973), 12 C.C.C. (2d) 497 at p. 497-498 (N.S. Co. Ct.)

¶ 18 Having said that, in applying the rule in the Sault St. Marie case to this case, I find that the offence of speeding under s. 128 of the Highway Traffic Act is an Absolute Liability offence, and that the intention of the defendant, as per his testimony and in particular taking into account my previous comments would not justify his admitted act of driving his motor vehicle at a speed in excess of the legal limit.

¶ 19 Even if the Defence of Necessity were open to the defendant in the present case, the burden of proof would lay upon him to satisfy the court that his action in driving his car in excess of the limit was the only means open to him. The evidence adduced at the trial suggests otherwise and clearly does not support such finding.

¶ 20 Having heard and reviewed all the evidence, I find that the prosecution has proven its case beyond a reasonable doubt. Consequently I find you guilty on this matter.

¶ 21 Do you wish to say anything in respect to sentence?

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