

COPY

FILE NO. 44619990061543

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

HON SIU

* * * * *

PROCEEDINGS DURING TRIAL

HEARD BEFORE HIS WORSHIP JUSTICE OF THE PEACE W. ROJEK
on the 2nd day of November, 2000 at Cambridge, Ontario.

* * * * *

CHARGE: s. 128 H.T.A., Speeding

APPEARANCES:

T. Jordao

Municipal Prosecutor

T. Brown

Agent for the Defendant

ONTARIO COURT OF JUSTICE

<u>WITNESSES:</u>	<u>Exam.</u> <u>in-Ch.</u>	<u>Cr.-</u> <u>exam.</u>	<u>Re.-</u> <u>exam.</u>
BAST, Jeff	1	4	
by Ms. Jordao			24
by Mr. Brown			28

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RULING ON MOTION

Page 38

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ONTARIO COURT OF JUSTICE

Regina vs. Hon SiuThursday November 2nd, 2000

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MS. JORDAO: The next matter Your Worship will be number 20 on the docket, Hon. Siu Hon.

MR. BROWN: Thank you. Good afternoon Your Worship.

THE COURT: Good afternoon.

10

MR. BROWN: My name is Todd Brown. I appear as agent.

THE COURT: And are you prepared to proceed?

MR. BROWN: Yes.

15

THE COURT: Very well. Mr. Siu Hon stands charged that on the 13th day of May in the year 2000 at 2:55 a.m. at Highway number 401 eastbound, city of Cambridge did commit the offence of speeding, 146 kilometres per hour in a posted 100 kilometres per hour zone contrary to the Highway Traffic Act section 128. On behalf of defendant, how do you plead guilty or not guilty?

20

MR. BROWN: Not guilty Your Worship.

THE COURT: Very well, thank you. Please have a seat and I will hear crown's case first.

25

MS. JORDAO: Thank you Your Worship. I'll call Constable Bast.

JEFF BAST, SWORNEXAMINATION-IN-CHIEF BY MS. JORDAO

MS. JORDAO: Q. Thank you Constable. How are you employed, in what capacity and for how long?

30

A. I'm employed with the Ontario Provincial Police as provincial constable since April '99.

Q. Thank you. Did you have cause to investigate

the matter before the court today?

A. Yes I did.

Q. Did you make notes?

A. Yes I did.

Q. How and when were the notes made?

A. Shortly after the time of the offence, in my own handwriting. There have been no additions or deletions.

Q. Do you have independent recollection of the matter?

A. I do.

Q. Do you simply require the notes to refresh your memory?

A. Yes.

Q. Permission Your Worship to use the notes?

MR. BROWN: Your Worship, I've seen the officer's notes. I have no objection to him referring to them.

THE COURT: Thank you. Officer, you may use your notes.

MS. JORDAO: Q. Go ahead constable.

A. O.k. On the 13th of May, year 2000 I was conducting stationary radar on Highway 401 eastbound, west of Cambridge Townline Road in the city of Cambridge, Regional Municipality of Waterloo. I was operating a Muniquip MDR-1 radar unit, serial number 14458 which was tested at 2:40 a.m. by manufacture's instructions. By internal means and use of tuning forks it was found to be in proper working order according to manufacturer's instructions. I was in a fully marked Ontario Provincial Police cruiser, 5121 positioned at 401 eastbound on the north shoulder. At 2:55 a.m. I observed a motor vehicle travel on 401 eastbound in lane one towards the rear of my cruiser at a rate of speed that appeared greater than 100 kilometres per hour which was the posted speed limit. When the

5 motor vehicle was approximately 50 meters from the rear of my
cruiser I activated the radar unit and observed a speed of 146
kilometres per hour. This was the locked speed. As the motor
vehicle past me I observed it to be a black B.M.W., licence
number 608XDB. I went after this vehicle and stopped the motor
vehicle 401 eastbound, just west of the service center. At this
time the driver of the motor vehicle identified himself with a
one piece valid Ontario driver's licence as Siu Hon or 5794
10 Turney Drive in Mississauga. At this time I issued a Provincial
offence notice number 61543769 for speeding, 146 kilometres per
hour in a posted 100 kilometre zone contrary to the Highway
Traffic Act section 128. I observed at this time that the roads
were damp, it was foggy and traffic was very light at this time
and at 3:20 a.m. I checked the radar device again to
15 manufacturer's instructions by internal means and tuning forks
and found it to be in proper working order.

Q. Thank you. Would you confirm for me the date of
the incident?

A. The date was the 13th of May, 2000.

20 Q. Thank you. What drew your attention to the
defendant's vehicle?

A. The speed appeared to be over the 100 kilometre
posted speed limit.

Q. Did you lose sight of the defendant's vehicle?

25 A. At no time.

Q. You said you identified the driver?

A. Yes. With a valid Ontario driver's licence.

Q. Could you confirm for me the date of birth of
the driver?

30 A. The date of birth was the 18th of April, 1973.

Q. O.k. Do you have the information as to when you
were trained on radar?

5 A. Ah, only that it was August of '99. I don't have the exact date.

Q. Who were you trained by?

5 A. Constable Rahim. Constable Rahim from Whitby detachment.

Q. Thank you. What is the purpose of radar?

A. To, to accurately measure the speed of a moving vehicle.

10 Q. Thank you. What, you indicated that you did two tests before and after on the radar. Can you tell me what the tests proved to you?

A. That the, the unit has worked, is in proper working order according to the manufacturer's specifications.

15 Q. Can you tell me at the time that you activated the radar, were there any other vehicle's in the beam?

A. No. The design of the roadway there is a bend right there. Traffic was light at the time and just because of the volume of traffic and the position of the vehicle there as no other vehicle in view behind my cruiser.

20 Q. Those are all my questions. I have no further questions Your Worship.

CROSS-EXAMINATION BY MR. BROWN

25 MR. BROWN: Q. Thank you Your Worship. Officer, you indicated that you were trained in August of '99, I believe it was?

A. Yes.

Q. And as a result of your training, I take it that you were trained to test the unit in accordance to the manufacturer's specifications before and after?

30 A. Yes.

Q. Is that correct? Now, you were, what was the

officer's name who trained you?

A. Constable Rahim from Whitby attachment.

Q. In what capacity does he, does Constable Rahim work?

A. As a, as a provincial constable and also as a qualified radar instructor.

Q. O.k. Would you have any personal knowledge as to whether or not officer Rahim was, who would've trained him? Would it have been by the manufacturer?

A. I know it would have been at the Provincial Police Academy in Orillia but I don't know the officer's name who trained him.

Q. O.k. And when you were trained, you were trained in the classroom or was this a roadside setting?

A. Ah, both.

Q. Both? In the course of your training, I take it you probably referred to some written materials, perhaps from the manufacturer?

A. Yes. I believe so.

Q. O.k. Would that have been perhaps a manual or a set of procedures?

A. Yes. As far as testing goes.

Q. And that's how, that's how you determine what the manufacturer's tests were?

A. Yes.

Q. Now, in accordance with your training, what is the purpose of testing this MDR-1 before and after?

A. To confirm that it's in proper working order.

Q. O.k. Would you agree with me that in accordance with your training it wouldn't be proper to operate the unit in a law enforcement capacity unless it was tested in strict compliance with the manufacturer's specifications?

A. Yes.

5 Q. You would agree with me? Now, would it be your evidence that you in fact tested the unit in accordance to the manufacturer's specifications on every occasion?

A. Yes. Before, I believe I gave the times of before and after the offence.

10 Q. Yes you did. And how long have you been using an MDR-1?

A. Since August of '99.

15 Q. Presumably that was the unit that you were trained on?

A. That,...

Q. That particular type of...

15 A. model?

Q. That particular type of radar is what you were trained on?

A. Yes. Yes.

20 Q. O.k. Now, how often would your duties have you use this particular type of radar unit?

A. Ah, every shift.

Q. Every shift?

A. I may not use it every shift but it's tested every time I take a unit it has that particular model of radar on it.

25 Q. But based on that, you would agree with me that you've tested this unit repeatedly?

A. Yes.

Q. Now, when you conduct the tests for this MDR-1, do you find them to be terribly complicated?

30 A. No.

Q. No? Given your experience, given your training and given that the tests aren't that complicated it would be fair

to say that you can do the tests by memory, is that correct?

A. Ah, pretty much, yeah.

5 Q. Could you outline the tests that are required for the MDR-1?

A. Sure. For the internal tests, you'd have the antenna set up, set the thumb wheel on the radar unit which is your target speed or which is what you want your target is set at...

10 Q. Mm, hmm.

A. And then you'd activate the radar that sends out the, a Doppler signal and you'd hear that coming through the MDR unit.

Q. You can actually hear it?

15 A. Yeah.

Q. It's audible?

A. It's a fuzzy...

Q. O.k.

A. The other test as you go through, make sure all the digits on the thumb wheel show up on the display.

20 Q. Mm, hmm.

A. And then you'd lock the radar unit, pick your antenna, grab your tuning forks and then if you're the first one, what I usually is a stationary mode.

Q. Mm, hmm.

25 A. From stationary mode I would strike the tuning fork off of a nonmetallic object and place it in front of the antenna. The speed on the tuning fork should match the speed that shows up on your target speed.

30 Q. Would you happen to know what that speed would be?

A. Ah, 150 is one of the tuning forks. The other is 50 kilometres per hour.

Q. O.k. Please continue.

5 A. O.k. For parallel, you'd after that you'd lock it, pick your parallel mode. That would be like if you're pacing someone to activate the, the radar. It will come out as a, like a minus sign on the display, tap the 150 kilometre per hour tuning fork off a nonmetallic object, place it in front of the antenna and speed, the patrol speed would show up as 150. You then tap the 50 kilometre per hour tuning fork off a nonmetallic object, place it behind the 150 kilometre tuning fork and it will give you a speed of 150 kilometres per hour. You lock your radar, change over to approach mode and then you tap the 50 kilometre per hour tuning fork off a nonmetallic object, place it in front of the antenna and speeds show up on the patrol speed as 50 kilometres per hour. Then you would tap the 150 kilometre per hour tuning fork off a nonmetallic object, place it behind the 50 kilometre per hour tuning fork and a speed of, just give me a second... a speed of 100 kilometres per hour should show up on the target speed display.

20 Q. Did you just do some math there?

A. Yeah. I was just trying to go through it in my head as I was testing.

Q. O.k. That was very detailed. Would that conclude the tests that you would conduct for an MDR-1?

25 A. Ah, I believe so. I've got stationary, approach, parallel. I went over all three of those?

Q. Yeah.

A. O.k.

Q. This, this Muniquip MDR-1, this is the type of radar unit with the round chronicled shaped antenna?

30 A. Yes.

Q. That's the...

A. Yes.

Q. typical type that you would see? And I guess it has a control box?

A. Yes.

Q. Where is the control box on the vehicle?

A. Right above, it's on the dash right above the steering wheel.

Q. So it's mounted on the dash?

A. Yes.

Q. Yes.

A. All our radar units in Cambridge I know are hard wired.

Q. Yes.

A. So they can't be taken out of one unit and placed into another.

Q. Right. And where in your motor vehicle would the antenna be and how many antennas are there?

A. In that particular one there was one antenna and we have, that's a marked unit with a roof package and the back windows, there's a stroke deck, I guess you'd call it and the antenn-, the rear antenna is mounted onto that rear stroke deck on the driver's side.

Q. I see. Now, who mounts the antenna there?

A. I know that particular unit was mounted by Constable Tuckett.

Q. O.k.

A. He's a radar instructor.

Q. All right. So, you don't do that?

A. No.

Q. You don't, you don't install these units in the car?

A. No.

Q. And did you say that there's only one antenna

in the vehicle?

A. I believe at that time in that vehicle there was one, yeah.

5 Q. O.k. And that's obviously a rear facing antenna?

A. Yes.

Q. O.k. Now, how large is this antenna, if you could just help me out?

10 A. I'd say about that long approximately.

Q. O.k. All right.

THE COURT: Hold on for a second. Let the record show that the officer showed something about one foot in length,...

A. Yes.

15 THE COURT: ... and about 12 inches in diameter.

A. No.

THE COURT: Smaller?

A. Yes.

THE COURT: About 12 centimeter in diameter.

20 MR. BROWN: Q. Thank you Your Worship. Now, this antenna is mounted presumably above the stroke deck?

A. Yes it is.

Q. Somewhere to the rear of the vehicle?

A. Yes.

25 Q. O.k. How, in relation to the rear window in the vehicle where would the antenna be mounted?

A. I would say approximately 20 inches maybe from the outside of the, of the windshield...

Q. O.k. So,...

A. Towards the center.

30 Q. So maybe just for clarity, just from the glass it's about 20 inches, pardon me 20 inches from the actual glass?

A. Approximately. I've never really measured it.

Q. Yeah. O.k. Now, this is a fully marked as you said, O.P.P. cruiser?

A. Yes.

Q. Does it have, what would you call it? A prisoner's cage or a barrier between the...

A. Yes it does.

Q. It does. And what's that barrier made of?

A. There's plastic plexiglass behind the driver's seat and the front passenger seat. There's a steel cage with approximately a one inch square metal cage, I guess.

Q. Now, you had indicated, I think you said that the test times are 2:40 a.m. and 3:20 a.m.?

A. Um, I believe so. Just let me double check. 2:40 a.m. was the first test and 3:20 a.m. was the second test.

Q. Those tests seem to be relatively close to the actual alleged offence time.

A. Yep.

Q. It could conclude that the unit was tested at your set up location there? That's where you conducted your tests?

A. No. 3:20, because he was, the traffic stop was just west of the service center.

Q. Oh, I see.

A. So I pulled into the service center and tested it there and the one at 2:40 would've been when I left detachment just before setting up.

Q. O.k.

A. That's approximately three minutes from the detachment to that particular spot on the highway.

Q. All right. Would you have to get out of your vehicle to test this unit?

A. Yes.

Q. You weren't assisted by another officer?

A. No.

Q. And the antenna is presumably mounted firm?

A. Yes.

Q. I think you had said it was hard wired before.

A. Yes.

Q. What if I were to suggest to you that with an MDR-1, this is a Muniquip MDR-1 that the manufacturer requires you to take the antenna and sweep the dashboard of a motor vehicle to test for potential sources of interference?

A. With the antenna?

Q. With the antenna.

A. Yes. That's correct. If you're using a front facing antenna. This was a rear facing.

Q. Right. O.k. Now, it would be your evidence that you didn't remove the antenna at anytime?

A. No. No.

Q. O.k.

A. They are hard wired.

Q. What if I were to suggest to you that the manufacturer in fact requires you to aim the antenna at the sky prior to...

A. For the Doppler.

Q. to test that the Doppler effect is actually working properly.

A. No. It could be, it's aimed towards the sky or towards a non-, like moving object. Wherever there's an open space.

Q. You would agree with me that I, I understand your intended to be mounted horizontally?

A. Yes.

Q. And that the beam would of course emit from the antenna in a horizontal fashion?

A. Yes.

Q. You would agree with me that the beam actually widens...

A. Yes.

Q. ... as it's projected, something similar to a flashlight for instance?

A. Yes.

Q. Would you agree with me that the beam is approximately 15 percent of the length at any given time?

A. I believe that's what it was.

Q. O.k. Based on, on what you've told us it doesn't sound like when you're conducting the Doppler test that there would have been a time when this antenna given that it's mounted horizontally and that the beam is emitted horizontally and fans out, I can't, I can't picture in my mind how you would do an appropriate Doppler test if there are solid objects clearly that would be in the beam such as the ground. Any comments on that?

A. Yes. The way I was trained is that you want, the reason you are pointing it to the sky is that there is nothing coming towards the antenna to give you that proper Doppler effect.

Q. Would it be that there's nothing coming towards the antenna or would it be that there's absolutely nothing obstructing the antenna?

A. Like the way I was trained is that there is nothing coming or blocking the antenna, like the actual beam.

Q. You've...

A. Like, because if there was some-, the way the Doppler, I'm not sure if you've ever heard the Doppler but if

5 there's something moving across the antenna it'll give you a different tone. And the purpose of that test is to actually show that when you hear that that there's an actual signal, like a beam being emitted from the antenna.

Q. You, you don't understand the Doppler test to mean, you would agree with me that the beam ultimately travels to infinity unless obstructed?

A. Yes.

10 Q. O.k. Would you also agree with me that if there is a solid object in the beam, that a portion of that beam is going to be reflected back to the antenna?

A. It may but the purpose of the Doppler test is to make sure that there is a beam being emitted. As long as I activate that and I hear a tone, it tells me that there's a Doppler signal being emitted from the antenna.

15 Q. In questioning you you've made reference several times in the last few moments as to the way you were trained. Now, I think we established earlier that you were in fact trained to test the unit in strict accordance with the manufacturer's recommendations?

A. Yes.

20 Q. O.k. Now, when I mentioned to you that the manufacturer may require the antenna to be aimed at the sky you seemed to agree with me but...

25 A. Yes. It's possible.

Q. ... but then said that it could also be aimed in a direction where there are solid objects but nothing moving.

30 A. I was also trained on the Tribar T-3 handheld. I know the handheld unit has to be aimed toward the sky. I could be mixing up the manufacturer's instructions for the MDR-1 and the Tribar T-3.

Q. So given what you've said then, you could,

being human be confusing the set up procedure for one radar unit with another radar unit?

A. Could you repeat the question sir?

Q. Based on what you just told us it would seem that there's a possibility that you're confusing the set up and test procedure for one particular type of radar unit with the type of radar unit...

A. As far as the Doppler test, yes.

Q. As far as the Doppler test.

A. But I know what the purpose of the Doppler test is.

Q. Well, if the manufacturer were to actually explicitly say that the unit should be aimed at the sky, if the manual in fact does, or the manufacturer does in fact recommend that...

A. O.k.

Q. ... would you agree with me then that the unit being, having conducted the Doppler test in the fashion that you did, would you agree with me that that wouldn't be in strict compliance with the manufacturer's recommendations?

A. I guess not, no.

Q. O.k. Now, you've indicated that during your testing your attention had been referred to several documents or materials from the manufacturer.

A. O.k.

Q. One of those presumably was a set of test procedures or manuals from the manufacturer?

A. Yes.

Q. You were trained in August of '99, is that correct?

A. Yes.

Q. Could you, could you give the court any reason

why on today's date you wouldn't be able to recognize the manufacturer's set up test procedure or the manual if it was shown to you?

5 A. Sorry?

Q. Could you offer the court any reason as to why you wouldn't be able to recognize the manufacturer's recommendations if they were shown to you today?

A. No.

10 Q. Well, the court's indulgence please Your Worship.

THE COURT: Certainly.

MR. BROWN: Q. Maybe I could just hold up a picture for you. Is this the type of unit that you used?

A. Um,...

15 MS. JORDAO: Your Worship, I would object to this.

THE COURT: Just hold on. Maybe Madam Crown can see it first.

MR. BROWN: Sure.

20 MS. JORDAO: I have no indication that this is in fact the, from the company and I have, I myself have a copy of the Muniquip MDR-1 and it does not look like this. I can not say in fact that this is the unit. I would object.

25 MR. BROWN: If I could, I think we are getting into the rather fine area of law. I'm going to dig through this pile of case law that I have here and I'm going to attempt to refer your attention to an authority. The authority is that of Regina vs. James Troy. What we find in James Troy Your Worship is that when a witness such as the police officer today enters into a technical area of evidence such as radar evidence, that the door is open to the defense

30

to put things in front of that officer such as textbooks, photographs, manuals and anything that may pertain that he would have knowledge of, anything that pertains to the matter that's being dealt with. Now, the officer's given evidence in the capacity as somebody whose received specific and special training in the use of a particular machine. If the officer, and the court is going to accept the evidence of the officer along those technical line I would submit that it's open to the defense to challenge the officer on his training and on the things that he's learned in the course of his training with the use of materials. Materials such as, as I've indicated, photographs, manuals, textbooks. Anything that the officer may adopt as the authority. I noted with interest that my friend says that she doesn't recognize it as an MDR-1 or she doesn't recognize it as something that's being from a manufacturer. The point that I'm trying to make Your Worship is that the officer, to use the words from the James Troy decision is giving evidence in the capacity of somewhat of an, of an expert. Not an expert in the technical function of the machine but he's received special training in its use. Given that he's received special training in its use there is nothing to prevent the defense from putting in front of the officer, like in this case a photograph of the MDR-1 and then it's up to the officer having probably more knowledge than any of us as to what it is that he uses. He can turn around and say, yes that's the radar unit I used or, that's not the radar unit that I used. And it's not,

5 and I know my friend's being helpful but it's not
really my friend's position to say well I don't
accept this as, as the authority or I don't accept
this as being an MDR-1. That's something that's
going to fall in
the specific knowledge of the officer and I found
the decision for those Your Worship but I only have
one copy.

10 COURT CLERK: Do you want to review the decision
Your Worship?

15 THE COURT: I think we have spent too much time on
this issue. The issue is very simple. The issue is
that you have a copy of some kind of manual and the
question was does the officer recognize this picture
as the unit that he was using. I will allow it. Let
the officer advise us whether or not this is the
same radar we are talking about or a different one.
Afterwards, I might be interested in where this
picture comes from but this is a different portion.
20 So, the record will show that the officer is being
presented with a coloured picture of some kind of a
device I can see from my position. So, officer, can
you answer?

A. Yes. This is the particular unit.

25 THE COURT: This is how it looks like?

A. Yes.

THE COURT: Very well. Thank you.

30 MR. BROWN: Q. Thank you. Officer, given that
you've offered the court or you said that you couldn't offer the
court any reason why you couldn't effectively recognize the set
up and test procedures of the manufacturer, I would also like to
refer your attention to another document if I could.

THE COURT: Again, maybe Madam Crown could see it first.

MR. BROWN: I may have another one Your Worship.

THE COURT: And if you could counsel identify to the record what this is, what you are presenting to the witness.

MR. BROWN: It's interesting you say that Your Worship. I don't know if I can. I effectively can't give evidence and I don't know if I can adopt...

THE COURT: Where did you get this from? You have it. Where did you get this from?

MR. BROWN: I collect all kinds of things along these lines. But I mean, just as a question of law would the Court accept me saying this is the manufacturer's manual? With my assertion, I don't think that that would be proper. I think the only person...

THE COURT: I just have to have some identification on the record sir. As long as you say to my knowledge this is a copy of the manual...

MR. BROWN: To my knowledge, to my knowledge this is the Muniquip MDR-1 track radar set up and test procedure as set out by the manufacturer which is Tribar Industries.

THE COURT: Officer, now probably the question is to verify if this is the document.

MR. BROWN: Sure. I was inviting the officer to peruse the document as he's indicated.

THE COURT: Certainly.

MR. BROWN: He would recognize the set up and test procedure from the manufacturer.

THE COURT: Maybe we will let the officer to read

it first.

MR. BROWN: Sure.

5 A. Yes. This appears to be the same one I was
trained on.

MR. BROWN: Q. Thank you. You'd indicated that the
unit that you were using was hard wired, I believe?

A. Yes.

Q. And that you don't in fact install them?

10 A. No.

Q. It's done by somebody else?

A. Yes.

Q. So if I could refer your attention to the
manual that's before you, we will skip past system seven because
you don't do that.

15 A. No.

Q. Right. Under title number two it says
performance check, I believe. And I think it's about two or three
lines down, you would agree with me it says, "With the engine
turned off and the antenna aimed into the sky only a hiss sound
should be audible."?

A. Yes.

Q. O.k. Now, as you'd indicated earlier, this is
contrary to the way that you in fact tested it?

A. Yes.

25 Q. O.k. Do you think that there is a possibility
that you may have confused the T-3 Doppler test with the MDR-1
Doppler test?

A. It's possible.

30 Q. It's possible. Now, in accordance with your
training, I think, I think we've touched on this twice, you are
not to use this for law enforcement purposes unless it's tested
in strict accordance with the manufacturer's specifications.

Would you agree with me?

A. Yes.

5 Q. Yes. O.k. Now, would you have any comments as to whether or not this unit was in fact tested in strict accordance with the manufacturer's specifications?

A. No.

10 Q. O.k. Now, when this motor vehicle was approaching you from the rear, I believe you had said that it appeared to be speeding?

A. Yes.

Q. O.k. You activated the unit, the MDR-1 when the vehicle was 50 metres?

A. Approximately.

15 Q. O.k. 50 metres past you or to the rear of you?

A. Approach-, yeah. Coming up from behind.

Q. O.k. It was still, it was still behind you?

A. Yeah.

20 Q. O.k. Now, this is in the small hours of the morning. It was dark outside I presume?

A. Ah, yes. I believe the, there's lights from Townline Road overpass.

Q. O.k. Would you have been viewing this vehicle as it approaches through a mirror in your vehicle?

A. Yes.

25 Q. Which mirror would that be?

A. The rearview mirror.

Q. O.k. Now, you had indicated that it appeared to be travelling in excess of 100 kilometres per hour?

A. Yes.

30 Q. I'm going to suggest to you that you only became aware of the fact that the vehicle as you believe it was travelling at 146 kilometres per hour as a result, as a direct

result of the reading from your MDR-1.

A. No.

5 Q. So you knew that this vehicle was travelling at 146 kilometres per hour...

A. No.

Q. without using the MDR-1?

10 A. I knew that, I could tell by looking at the vehicle from my experience driving that the vehicle was well over the 100 kilometre per hour speed limit.

Q. Well over the speed limit?

A. Part, yes. And part of my training, I couldn't tell exactly it's 146 as part of my radar training.

15 Q. O.k. I think you've answered my question. So the 146 figure came from the unit?

A. Yes.

Q. And not from anywhere else?

A. That particular 146?

20 Q. Albeit that you know that the vehicle appeared to be travelling in excess of the speed limit, we've established that. But the 146 came from the MDR?

A. I knew it was between, somewhere between 140 and 150 kilometres per hour as part of my training.

Q. O.k. While looking in a mirror?

A. Yes.

25 Q. At nighttime?

A. At nighttime.

30 Q. The court's indulgence please Your Worship. Could I, could I refer your attention again to the text under item two in the manual, it says performance check. I have a rather tattered copy so maybe you could just attempt to follow along. Does it not say aim the antenna toward the dashboard?

A. Yes.

5 Q. And the car interior?
 A. Yep.
 Q. And find out where spots of interference are
located?
 A. Mm, hmm.
 Q. Particularly the A/C fan?
 A. Yes.
 Q. You didn't do that?
10 A. No.
 Q. No.
 A. Because it was facing the rear.
 Q. O.k. Are you of the mind that you're not
required to do that? I think you said earlier that the antenna
was...
15 A. Yes. The way, the way I was trained the
antenna, what they, the way people used to set up is that it
would be set up on the driver's side mirror, like passenger side
window facing, like to approach...
 Q. O.k.
20 A. In that situation the antenna would be coming
into the interior of the vehicle.
 Q. I see.
 A. O.k. It could pick up the fan or something like
that but if it's facing out the rear there's no interference.
25 Like, there's no fan turning around in there. That's the way I
was led to believe the antenna operated.
 Q. That's in accordance with your training?
 A. Yes.
 Q. You wouldn't be able to direct me in the
30 manufacturer's manual where it says anything like that?
 A. No.
 Q. Your Worship, I think that concludes my

questions.

THE COURT: Now, what are we doing with this manufacturer's instructions? Are you filing it as an exhibit or do you want it back?

MR. BROWN: If it assist the record or this court Your Worship, I'm content that it be attached to be marked as an exhibit.

THE COURT: Exhibit one. Thank you.

EXHIBIT NUMBER ONE - Manufacturer's instructions manual for the MDR-1 radar, produced and marked.

THE COURT: Can I have it?

MR. BROWN: I don't know if the photograph would be necessary though. It's the only one I have.

THE COURT: No. I understand that the photograph was actually took to identify that the document was of the same object. All right. Now, we have today's time constraint because this is a walk in guilty plea court as well as a hearing court. So we will have to break at 1:00 and resume at 2:30. Any re-examination Madam Crown?

MS. JORDAO: Briefly Your Worship.

THE COURT: Very well.

RE-EXAMINATION BY MS. JORDAO

MS. JORDAO: Q. Constable, my friend has suggested that there is some confusion surrounding the T-3 and possible testing procedures and the manufacturer's testing. When you were giving evidence as to the procedures that you follow, I noticed that you looked down, you closed your eyes, you moved your hands a few times as if you were going through motions and did some

perhaps calculations in your head. Could the confusion be surrounding the fact that you're not actually with the Muniquip right now?

5 A. Yes.

Q. Do you believe that on the date that you tested this that you did test it in accordance with manufacturer's directions?

A. I believe so.

10 Q. And do you believe that perhaps the confusion surrounding the T-3 is the fact that it is not present with you right now and is your testing procedures on these devices so regular to you that you can do them pretty much without thinking when they're there?

15 A. Ah, somewhat. I just started using a new radar unit.

Q. Mm, hmm.

A. It's got different testing procedures.

20 Q. So is it safe to say that while you're testing your equipment, the results that are shown to you are what indicate you to do the next step?

A. Yes.

Q. It's pretty much by memory?

A. Yep.

25 Q. Thank you. Can confirm today whether or not the Doppler evidence that was provided would have had any ill effects on the speed that was registered?

A. No.

MR. BROWN: I would have to object to that Your Worship.

30 THE COURT: Just, I won't allow this objection. Go ahead. I want to hear about Doppler as much as I can.

MS. JORDAO: Yes.

5 A. The way the Dop-, the purpose of the Doppler test is to show that there is a beam being emitted from the antenna unit. So, when you hit, when I turn the unit on the thumb wheel is set to zero. If there's a Doppler beam sent out I believe is says, there's a hiss or something. I know it sounds like interference and that tells me if there's a beam being sent out. If for some reason the cables aren't connected properly to 10 the antenna there will be no hiss or interference sound. That tells me that there's no beam being emitted and they have to check the connections.

Q. So, if you do not hear a hiss it's working correctly?

15 A. The Doppler signal is being sent out if you hear the hiss.

Q. You indicated that there was a difference between a rear facing test on a Doppler and a front facing testing on a Doppler?

20 A. The way I was, this is the way I was trained. That the purpose of testing your interior and your fans and stuff like that is because the way it used to be done is that the antenna would be placed on the window, the driver's side passenger, like rear passenger side and it, so when the beam being emitted it's emitted like a flashlight. So it would be 25 coming into the interior of the vehicle so you could get interference from the fan or something like that. But with the antenna being faced out the rear, there is nothing from the interior that would interfere with the beam.

Q. If there were interference what would happen?

30 A. You would get, I guess ghost readings.

Q. O.k.

THE COURT: What did you say sir? Ghost readings?

A. Ghost readings. What would happen is during the tests, that's just a term that they use.

MS. JORDAO: Yeah.

A. When you're doing your antenna, like with your tuning fork tests you will get a reading like 180 or something way up there and what it is it's just picking up interference.

MS. JORDAO: Q. So if there is interference you are aware of it?

A. Yes.

Q. And on this date, I know we have covered this issue once. On this date, was there any signs of interference?

A. No.

Q. Was the radar device working properly according to your observations?

A. Yes.

Q. Do you have any doubt that the defendant's vehicle was travelling at the speed it was?

A. No.

Q. What would you have estimated, I know I went on a ride along myself...

MR. BROWN: I'm sorry to interject Your Worship but the purpose of a re-direct or re-examination is not to explore new issues. The purpose of the re-direct is to clarify issues that have been brought up. This is not the opportunity for the crown to A, cross-examine their own witness and B, to get another kick at the can to establish things that they may not have covered prior to cross-examination by the defence. Simple points of clarification only. That's what protocol as I understand it would dictate Your Worship. This is becoming a whole new examination and I'm certainly opposed to it Your Worship.

MS. JORDAO: Your Worship, with all due respect, he did ask the officer what speed he was travelling and whether that speed was by observation or by radar.

MR. BROWN: And I think it was answered and I don't think that the radar was unclear. If the answer was unclear, my friend didn't hear it or the court didn't hear it, that would be one thing. But if...

THE COURT: Very well. Following your own explanation, you opened that avenue, or I should say Crown opened that avenue, you explored this avenue. I think Crown has the right to clarify this issue. Go ahead.

A. O.k. I would estimate the vehicle speed to be between 140, 150 kilometres per hour. During our test, or our training procedure they use the laser and radar unit and you will have two different operators and the instructor will say how fast is that blue Ford going, I'd give my speed and then the radar and the laser would have the speed and we'd just see how close we were. We had to be within five kilometres.

MS. JORDAO: I have no further questions Your Worship.

THE COURT: Very well. Thank you. Any re-examination to re-examination?

MR. BROWN: Well, most certainly Your Worship and I intend to be brief.

THE COURT: Very brief. We have about five minutes left and one walk in guilty plea.

MR. BROWN: Let's see if we can realign the focus here.

RE-EXAMINATION BY MR. BROWN

MR. BROWN: Q. Officer, you indicated that you were

possibly confused between the set up procedure with an MDR-1 and a T-3. Is that correct?

A. Yes.

Q. Could you please tell this court in accordance with your training what the purpose of a Doppler test would be, pointing it at a solid object as opposed to a Doppler test being pointed straight up in the sky and have you learned anything in your training to differentiate between the two?

A. Between the two?

Q. Now, you saw the manual. You agreed that the manual says it should be pointed at the sky?

A. Yes.

Q. You did it pointing it with solid objects in the beam. Can you explain why the manual would have you pointing it at the sky but yet you pointed it at a solid object and you don't seem to have any concerns that the Doppler test was done properly?

A. O.k. The reason you point it at the sky, it's not hitting anything. It's going on like, as you said for infinity. So, it will give you a different tone.

Q. So you get a different tone than with...

A. A different, a different hiss. Like it would be a longer hiss whereas if it hits an object it would be a shorter hiss.

Q. O.k. Well, that would be quite a striking difference then, would you not think? I mean you've got the unit pointing at the sky and you're getting a particular tone versus pointing the unit at a solid object and you get a different tone than that?

A. No I wouldn't.

Q. You don't ...

A. The purpose of the Doppler test is to make sure

there's a beam being emitted. It has nothing to do with testing it for collaborations as far as speed goes. That's what your tuning forks tests are for.

5 Q. Well, you would agree with me you wouldn't have to point it up at the sky to find out if there's a beam being emitted, would you?

A. Correct.

10 Q. In fact I'll suggest to you you wouldn't have to point it anywhere. You could just, anywhere, any old place all's you have to do is turn the audio up on the unit and if you hear a tone you know that there's a beam being emitted. Isn't that correct?

15 A. No. If it's too, if it's too close to something you're going to get a weird hissing sound.

Q. But you won't get a hissing sound at all if the cable's not connected properly or if there's no beam?

A. Correct.

20 Q. So again I'll suggest to you you could point it anywhere to find out if there's a beam being emitted. Anywhere, isn't that correct?

A. I,...

Q. You could point it at the wall. Point it at the ground. You're going to get a tone if everything's working properly, aren't you?

25 A. I've never, never tried it so I'm not sure. If I were... I'm not right against the wall or anything so I can't...

Q. If the beam's being emitted, the cables are connected properly, everything seems to be working...

30 A. Mm, hmm.

Q. ... and you have the audio turned up you're always going to hear a tone, aren't you?

A. You should.

Q. That's right.

A. But I've never tried it to see if you do.

5 Q. Right. And if you point it at the sky you're going to get a different tone than everything else?

A. You'll still get the hiss but it will be a different...

10 Q. It will be a different tone. And you didn't do that on this day?

A. Point it to the sky?

Q. Yes.

A. No.

Q. And the manufacturer says you should?

15 A. Yes. According to the manual that you showed me.

Q. And as you said your training says do it exactly the way the manual says?

A. Yes.

Q. And you didn't?

20 A. No.

Q. And there may be some confusion with the T-3?

A. Yes.

Q. Thank you.

25 THE COURT: No more re-examination or reply.

Officer, thank you. You may step down. Very well. We will have to break right now. I still have one walk in guilty plea to entertain. Just before we go does that complete Madam Crown's case?

MS. JORDAO: Yes Your Worship, it does.

30 THE COURT: Any evidence offered by defence?

MR. BROWN: I'll indicate Your Worship my intentions are to ask for you to consider a nonsuit

application. Failing that, I will not be calling any evidence.

THE COURT: Very well. We will address the nonsuit motion after the lunch hour which will be roughly around 2:30 if everything goes the way I think it will go, or 2:45 I hope, at the worst. Thank you

R E C E S S

UPON RESUMING:

THE COURT: Very well, thank you. Now we can get back to the argument. I believe that we have closed the evidence and the usual part would be that I would invite Madam Crown to make submissions but I understand that there will be a motion for nonsuit filed with the Court first.

SUBMISSIONS ON MOTION BY MR. BROWN

MR. BROWN: That is correct Your Worship and I thank you for that. I'm going to try to be brief. I'm going to set out basically what I think it is that is lacking in the crown's case. Now, you've heard evidence from the officer and he's very candid and he did very well under cross-examination, that the radar that he was using is not to be used for law enforcement purposes unless it was tested in strict compliance with the manufacturer's specifications. That was the officer's evidence. The officer agreed that it was not tested in strict compliance with the manufacturer's specifications. The officer admitted that he probably confused the test procedure with another unit, namely a T-3. Having said all of this in evidence Your Worship,

5 the officer was still satisfied personally that the
unit was operating properly but he's not a
technician and he's only been trained how to use the
machine. Now, I'm submitting Your Worship that he
didn't use the machine the way he was trained to. I
10 think that came out in evidence. He did not use the
machine the way the manufacturer says to. That came
out in evidence. But after having said that, he was
still personally satisfied that it was working
accurately and that was his personal belief. Now,
what I'm proposing Your Worship is that you adopt
the view that the Court can take notice of the
readings from a radar unit only under very specific
15 circumstances; that the unit was being used by a
trained and qualified radar operator, that the unit
was tested before and after in accordance the the
manufacturer's specifications and that it was found
to be working accurately. If those three things have
been established successfully by the prosecution
20 Your Worship, I would submit that with respect to
the speed anyway, that would go towards a prima face
case. If the unit is not tested in accordance with
the manufacturer's specifications, it's not going to
be a prima face case. I submit Your Worship this is
25 a very black and white thing. Nobody in this room,
to the best of my knowledge is a radar technician.
We rely heavily on the training of the officer. We
rely on the officer to do precisely what it is that
the manufacturer tells him to do. It's very
important that he conduct those tests in the fashion
30 that tell him to because he's not a technician. It's
not for the officer to abridge the testing

5 procedure, amend the testing procedure, substitute
his own personal views on how the unit should be
tested. He has been told when he can assume that the
unit is functioning properly and it is after it has
been tested the way the manufacturer says to. The
officer was quite candid in his evidence. I don't
10 think that this court could find that the unit was
actually tested the way the manufacturer requires it
to be. Now having said that Your Worship, you're
left with the reading of, I believe it was 146
kilometres per hour. That reading came from a radar
unit. I believe that reading has been impugned and
that it is not reliable and does not constitute
15 prima face evidence that the vehicle was travelling
146 kilometres per hour. However, you are left with
the officer making a visible observation and in his
assessment he initially felt that the vehicle was
travelling in excess of the speed limit and then he
offered some estimates that varied as to the speed
20 of the vehicle. But he did concede that the number
146 came from the reading of the radar unit. Now, I
at this time Your Worship, I'm going to rely on a
decision from the Provincial Offences Appeal Court.
This is a decision called R. vs. Maria Arvanites and
I'm going to hand you a copy Your Worship if I
25 could.

THE COURT: Certainly. Madam prosecutor will get a
copy too?

MR. BROWN: Absolutely.

THE COURT: Thank you.

MR. BROWN: Now, it's a lengthy decision Your

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Worship and it touched on several issues but if I could direct your attention to Mr. Justice Sheppard's judgment which is near the rear, I could direct you to the page. Page 19, Your Worship if I could direct you there. This excerpt forms part of Mister Justice Sheppard's judgment with respect to readings from mechanical devices such as radar units. At approximately line 17 His Honour makes it quite clear and I'm going to read this into the record;

"This court does not accept the proposition both enunciated by the learned Justice of the Peace and argued today...", pardon me, "...and argued by the prosecutor today that a person can be convicted of this offence because to use the prosecutor's words today 'anyone can tell when a vehicle is speeding.' This is a particularized offence that requires the Crown to prove to the necessary evidentiary standard a particular quantum." And I stress this Your Worship, "and to do that it is necessary to rely on the read out from the radar device."

In the Arvanites trial the officer in that matter offered very similar evidence to Officer Bast today. In that matter she indicated that the vehicle appeared to be speeding, that it was clearly speeding, there was no doubt in her mind it was speeding. It wasn't accepted by the Provincial Offences Appeal Court Your Worship as a prima face case. If you can't rely on the reading from the radar unit then you can't have a prima face case.

5 With respect to the 146, I take issue with the exact
amount of speed, the quantum as Mister Justice
Sheppard outlines. The charging document specifies a
speed, 146. That forms part of the crown's case.
It's an essential ingredient. The crown must lead
admissible, reliable evidence that the vehicle was
travelling at that speed. Not simply that it
10 appeared to be speeding, that it was travelling at
146 kilometres per hour. I don't think that you have
that evidence today Your Worship. I don't think that
the court could rely or lend any weight whatsoever
to the reading that came from the radar device
simply because it wasn't tested the way that it was
suppose to be. Given that, I invite Your Worship to
15 dismiss the charge.

THE COURT: Ma'am?

SUBMISSIONS ON MOTION BY MS. JORDAO

20 MS. JORDAO: First and foremost Your Worship, I
would like to submit that the recommendations that
are suggested by the manufacturer are just that,
recommendations. They may in fact say specifications
however I'd like to review the document again as my
copies all say recommendations which would to me
25 indicate that they are recommended. The confusing,
confusion surrounding the T-3 unit, I believe that
the officer testified that it's not that he did not
test it according to the proper unit, it's that
while on stand he was confusing the two issues.
However, while testing the unit outside on that date
30 it was tested properly. I would suggest that the,
the processes that the officer went through while he

5 was on stand including the tapping of the tuning
forks, which you know, I observed myself, that the
tapping of the tuning forks, etcetera is much like
using a telephone or remembering a telephone number
and having to actually dial it before remembering
that. The officer further went on to state that the
testing that he performed accurately measured the
10 speed, that if there was a problem with the device
that he would either get a ghost reading if there
were any obstructions in the view, that the Doppler
was not working corr-, or if it was working
incorrectly that it would make a strange hissing
sound. The officer is a qualified radar operator and
was trained by a qualified radar instructor. He
15 testified that the equipment was working properly as
proven by the tests and by his visual observations.
I submit Your Worship that he was very knowledgeable
on the subject which given the fact that he's only
been a constable for under a year I think he was
20 perhaps a little nervous and that could have
attributed to some of his confusion. However
nonetheless, I think he answered our questions
sufficiently in terms of whether or not these tests
which are alleged not to have occurred, however
25 which I would suggest did occur but didn't occur on
the stand do not negate the fact that the
observation was one of 146 in a 100 kilometre per
hour zone and that there were sufficient tests
performed on the equipment to prove that the
30 equipment was in fact working properly and if the
equipment wasn't working properly I would suggest
that much different readings would have came out of

5 the machine including the signs. I understood that if there was anything in the view the radar would not read a proper reading and his observations clearly matched that, within reason as to the speed of the vehicle. I believe that the prosecution has reached a prima face case. Those are my submissions.

10 RULING ON MOTION BY ROJEK, J.P.

15 THE COURT: Very well. The facts in this case are basically a not disputed one to some extent. On the day in question being the 13th day of May in the year 2000 at around 2:55 a.m. Officer Bast, member of the Ontario Provincial Police had said he parked his cruiser to examine the speed of moving motor vehicles using the MDR radar device which he was supplied with at his station. That particular set had been installed by another officer, was hard wired which I understand is easily removed and put back, it contained the actual radar device on the dashboard and the antenna was installed some 20 inches from the outside of the rear window. I understand that the end of the MDR was pointing towards the end of the cruiser. The officer tested this device prior, I believe it was 2:40 and at 3:30 or 3:20 a.m. and in his opinion this Muniquip MDR-1 track radar device was operating properly. He was trained in operating radar device by a qualified radar instructor whom he believed was trained at the Orillia Police Academy to become one. At some point in time, around 2:55 a.m. the officer had observed a motor vehicle approaching from behind and in his visual observation made through the rearview mirror

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when he was positioned within the City of Cambridge, he observed that there was a fast approaching motor vehicle. Then he obtained within the area of approximately 50 metres a speed reading of 146 kilometres per hour. This all is happening on a highway 401 in a 100 kilometres per hour zone. Subsequently that vehicle was pulled over and the driver of that vehicle, Mr. Siu Ha Hon had been identified and handed a Provincial Offences Notice. The motion before, there is no evidence in the contrary presented at this stage. There is a motion for a nonsuit. The defence puts before me a proposition that there are certain elements of the speeding charge which crown has to establish to produce a prima face case before the court. One of the elements and I will not repeat elaborate submissions from the defence counsel is that the device which courts rely in dealing with the speeding charges that the device must be tested according to manufacturer's instructions. It was very, very interesting and I would say it was actually a very interesting case to hear. In very lengthy cross-examination the officer explained in great detail how the particular device that he was using was tested and why he believed it was working properly. It was discovered and admitted by officer Bast today in cross-examination that the part that is called, or that was referred as a Doppler effect had been not tested properly. There had been presented Muniquip MDR radar instruction and the copy which was confirmed by officer Bast as the

5 operating instructions and by presenting a picture
of that device, we came to the conclusion that we
are talking about the same motor length equipment.
On the performance check which is page one of
exhibit number one, actually one of the very first
tests which I understand has to be some significance
to it, which is as follows;

10 'With the engine turned off and the antenna aimed
into the sky only hiss....,' this is quotation,
'...should be audible. Turn engine on. Only slight
noise from the car's ignition system should be
audible.'

At the end of this page is following;

15 'Mount the antenna aiming down the road and listen
to the Doppler sound of moving targets. This should
be a clean whistle."

20 This part of tests were definitely not done by the
officer. He definitely stated that he did not aim
his antenna against the sky, that it was his belief
based on the instructions which he received that
just aiming the antenna in a general direction with
no objects parallel to the ground will suffice to
substitute the test included in that instruction. It
was agreed and confirmed by Constable Bast that the
25 beam emitted from the radar device is spreading like
a flashlight. A flashlight spreads in a 360 degree
circle so definitely if the beam is aimed parallel
to the ground it eventually will be hitting solid
obstacle which is the ground itself. All the other
30 tests were not questioned and they were conducted
according to the specifications and the officer was
very detailed in describing, which I was hearing

5 with a great interest how in particular modes the
tuning forks were used and to which conclusion which
test was leading this officer. The officer is not an
expert witness. He is qualified to operate the radar
device however, no specific scientific explanation
about Doppler effect had been presented to the court
and it is the officer's knowledge from the course
10 that the aiming against the sky test is only for the
purpose of assuring the operator that the beam is
hitting back the radar device and it has nothing to
do with collaborating speed or collaborating or
reading speed of moving motor vehicles while the
radar was used for such reason. So we have
15 established basically based on the evidence given by
the officer that not all of the specifics of
manufacturer's instructions were complied with. I
have been presented with the case from Toronto Court
which is quoted as Regina vs. Maria Arvanites, dated
December 6th, 1999 in Toronto before Ontario Court
20 of Justice the Honourable Justice Sheppard. The
conclusion as listed on page 19 reads as follows;

25 ' This court does not accept the proposition both
enunciated by the learned Justice of the Peace and
argued by the prosecutor today that a person can be
convicted of this offence because there is the
prosecutor words today, anyone can tell when a
vehicle is speeding. This is,...' and this is
probably the most important part, ' This is a
30 particularized offence that requires the crown to
prove the necessary evidentiary standard, a

particular quantum and to do that it is necessary to rely on the read out of the radar device.'

5 Now, I am not an expert in this whole issue and I know basically anything, any of my knowledge coming from this court is the only knowledge which I might have about operating radar device and the concept and principle of radar in my mind is based on my basic high school education during the basic physics course and I believe that is all I can say about this. It is the officer's belief that this Doppler effect will have no effect on the final reading of the radar. The crown did not produce expert evidence that could explain to this court if the officer is right or not and the officer's opinion is only the officer's opinion and for the purpose of this case it can not be treated in any other form. The officer had visual observation of a speeding vehicle, had obtained a reading from the radar device which to his belief created precise reading and in his belief this radar device was properly tested. It has been provided to me by the way of cross-examination that the testing was not done completely according to manufacturer's instructions and not having an expert witness which would explain to this court whether or not that deviation from the instruction may or may not have an impact on the accuracy of the reading, I am being left with a reasonable doubt and I am ruling that the crown failed to prove the case. Case dismissed.

30 MR. BROWN: Thank you for your consideration Your Worship.

5 THE COURT: Thank you. This actually was a very
interesting case and I thank you both of the parties
to this proceeding for your input. Thank you.

MS. JORDAO: Thank you Your Worship.

10
15 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.