Case Name:

R. v. Azubuike

IN THE MATTER OF The Highway Traffic Act, R.S.O. 1990, c. H.8

Between
Her Majesty the Queen, and
Theophilus Azubuike, defendant

[2002] O.J. No. 1807

Ontario Court of Justice
Provincial Offences Court - Toronto, Ontario
Quon J.P.

Heard: January 25, 2002.
Judgment: May 6, 2002.
(32 paras.)

Charge: Unsafe lane change - S. 142(1) Highway Traffic Act

Cases considered or referred to:

Erven v. The Queen, [1979] 1 S.C.R. 926, 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507 (S.C.C.)
R. v. Colabufalo, [2001] O.J. No. 2471 (O.C.J.), per Quon J.P.
R. v. Grzesiak, [1999] O.J. No. 937 (Ont. Ct. (Gen. Div.)) per Hill J. at Brampton.
R. v. Hoang, [1994] O.J. No. 3234 (Ont. Ct. (Prov. Div.)) per MacDonnell J. at Toronto.
R. v. Hodgson [1998] 2 S.C.R. 449, S.C.J. No. 66 (S.C.C.)
R. v. Monteleone (1987), 35 C.C.C. (3d) 193 (S.C.C.)
R. v. Sweezey [1974] O.J. No. 690, 20 C.C.C. (2d) 400 (O.C.A.) per Gale C.J.O., Dubin and Martin JJ.A.
R. v. Viau, [1997] O.J. No. 4301 (Ont. Ct. (Prov. Div.)) per Fontana J. at Ottawa.

Statutes, Regulations and Rules cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 142(1). Provincial Offences Act, R.S.O. 1990, c. P.33, s. 50(1).

Authorities referred to:

McWilliams, P.K., Canadian Criminal Evidence (2d ed.) (Aurora, Ontario: Canada Law Book Limited, 1984), p. 68.

Exhibits Entered:

Exhibit "1"	-	photograph of right side of blue car.
Exhibit "2"	-	photograph of wheel rim.
Exhibit "3"	-	photograph showing pen pointing to tire tread.
Exhibit "4"	-	photograph of police officer looking at blue car.

Counsel:

P. McMahon, prosecutor.
G. Faulkner, for the defendant.

QUON J.P.:—

1. INTRODUCTION

¶ 1 On this motion for a directed verdict of acquittal, the defence contends there is no evidence of the identity of the driver of the tractor-trailer truck involved in the accident. In this vehicular accident, the defendant is charged for making an unsafe lane change, which resulted in the collision with the prosecution witness. The prosecution witness did not see who had been driving the truck before it collided with her vehicle. However, after the accident the prosecution witness spoke to someone who had come from the truck that had collided with her. Furthermore, the investigating police officer testified that the defendant had been the driver of the truck and that the defendant had approached the officer and identified himself as the driver of that truck. Although, this is not direct evidence from someone actually seeing the defendant drive the vehicle in question, it is nonetheless indirect or circumstantial evidence that he was the driver.

¶ 2 Therefore, the issue to decide in this motion is whether there is any admissible evidence that identifies the defendant as the driver of the tractor-trailer truck that collided with the prosecution witness' vehicle. For a confession to be admissible, it must have been voluntarily made to a person in authority.

¶ 3 The motion for directed verdict was heard on January 25, 2002. The matter was then adjourned to May 6, 2002, for my ruling on the motion.

2. PROSECUTION EVIDENCE

¶ 4 The defendant has been charged under section 142(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8, for making an unsafe lane change at 12:30 p.m. on August 3, 2001, at Northbound Don Valley Parkway from eastbound Fred Gardiner Expressway. This occurred in the City of Toronto.

¶ 5 The defendant was absent from the courtroom while the prosecution presented its case and was represented by an agent according to s. 50(1) of the Provincial Offences Act, R.S.O. 1990, c. P.33.

¶ 6 Emily Dawidoitz was the driver of a 1991 Nissan 2-door blue vehicle involved in an accident with the tractor-trailer truck on August 3, 2001. On that date, she and three friends were in this blue Nissan vehicle travelling eastbound on the Gardiner Expressway just before the Don Valley Parkway. They had been driving in tandem with the truck for at least five minutes. Her vehicle was in the farthest left lane and the

truck was to her right in the next lane. While coming out of the curve leading to the Don Valley Parkway, Dawidoitz noticed the cab of the truck pull up beside her and move slightly ahead of her vehicle. She then noticed the truck start to move closer to her vehicle. Her friend Monica, in the passenger seat, screamed, "My God" and grabbed the dashboard. Dawidoitz then saw the back of the truck come towards her car and strike it on the front right side. Glass shattered and her vehicle was pushed against the guardrail. She then veered off to the left and stopped.

¶ 7 Dawidoitz testified the truck that hit her stopped about 500 meters ahead. In describing what happened after the truck had stopped, she testified that, "he stopped and I remember him - something a bit ahead of us and he came out of the vehicle to see if we were okay. And then he offered to help, I was in shock and he offered us his cell phone to call the police, so the police arrived on scene."

¶ 8 She further testified that this male had come out of the truck. She then said she does not recall his name because he did not say it at that point.

¶ 9 Dawidoitz described the driver of the truck that hit her as a 5'-11" tall, black male in his mid 30's. This male was still at the scene of the accident when the police arrived. However, he had told Dawidoitz that he did have to leave but Dawidoitz had requested that he stay until the police showed up.

¶ 10 Dawidoitz described the road where the collision occurred as being two or three lanes differentiated by broken white lines. She stated she had been travelling at about 70 to 75 kilometres per hour and that the truck had been going faster at about 80 to 90 kilometres per hour. She states the truck had been travelling faster because he was attempting to change lanes. She could not recall if the truck had been signalling or not. However, she was only able to see the front and side of the truck just before it collided with her vehicle. She also stated that the truck did not pull completely ahead of her before the accident. She was surprised that the truck tried to switch lanes because her vehicle had been right beside the middle of the truck.

¶ 11 In cross-examination, Dawidoitz testified that at no time prior to the accident did she see the operator of the truck that collided with her. She stated her vehicle is low while the truck is a big transport truck. She also stated she was not looking up at him but looking at the road. When the collision occurred, she stated that she could see the front half of the trailer portion and the red cab of the truck. She said she would have been travelling closer to the rear of the truck just before the collision.

¶ 12 In addition, during cross-examination, when asked if she had spoken to anyone else in the defendant's truck, she testified that he was the only one in the truck.

¶ 13 Officer Sinclair of the Toronto Police received a radio call at approximately 1230 hours about an accident on the Don Valley Parkway just north of the Gardiner Expressway. Sinclair arrived at the scene of the accident at approximately 1247 hours. He said he noticed that there were two vehicles stopped and apparently involved in a motor vehicle collision. On the Dawidoitz vehicle, the officer noticed damage to the right side of the vehicle, specifically the right mirror, right bumper fender, right door, right rear fender and the right front tire and rim. The officer also observed the other vehicle just ahead of the Dawidoitz vehicle. It was a tractor-trailer truck.

¶ 14 Officer Sinclair then testified that a gentleman approached him and identified himself with a valid Ontario driver's license in the name of Theophilus Azubuike of 19 McIvor Street. The officer then stated that Azubuike was driving the tractor-trailer with Coca-Cola bottling markings. The trailer cab bore Ontario plates 640 23X. Azubuike provided the officer with a valid permit and a valid insurance slip. The officer

noticed minor damage to the left side by the rear of the tractor-trailer. After investigating the accident, Officer Sinclair charged Azubuike with making an unsafe lane change.

¶ 15 Officer Sinclair then described the location of the accident. He stated that the accident occurred on the Don Valley Parkway about 200 to 300 meters north of the Gardiner Expressway where the lanes curve and then straighten out. There were two lanes for traffic in this area of the accident and they were clearly marked. Sinclair also described the location of the accident having skidmarks and debris. He also described the day as sunny, humid and clear.

¶ 16 When Sinclair was asked in chief whether he attended the tractor-trailer truck, he stated that, "At this time there was a gentleman, as the witness described, male black, approximately 5'-10" dark hair. And identified himself as the driver of that motor vehicle." Sinclair also said that based on the information he received from the prosecution witness, Dawidoitz and from the defendant, he charged the defendant with making an unsafe lane change.

ARGUMENTS

Defence argument

¶ 17 The defence submits that the prosecution had failed to produce a prima facie case. The evidence before the court is that the prosecution witness was operating a vehicle adjacent to a tractor-trailer. At no time, submits the defence, did this witness notice the operator of the tractor-trailer. She had been at a much lower level that the transport truck and was unable to make a visual observation of the operator. After the collision, the prosecution witness indicates somebody approached her vehicle and asked her and her passengers if they were all right. The officer was obviously not there at the time of the accident. He arrived some 17 minutes later and had a conversation with the witness and someone who claimed to be the operator of a motor vehicle.

¶ 18 Therefore, the defence suggests that there is no evidence before the court indicating who was actually operating the tractor-trailer truck at the time of the offence. That is, the prosecution has been unable to give the court any evidence as to who was driving or behind the wheel of the tractor-trailer at the time. There is no prime facie case because there is no evidence regarding identification. In order to make a prime facie case, the defence submits, there has to be some evidence indicating the defendant was actually the operator of the tractor-trailer at the time of the accident and that has not been done.

Prosecution's argument

¶ 19 The prosecution disagreed and submitted that there was a prime facie case. It is a reasonable inference that when nobody else is in this tractor-trailer truck and the defendant leaves this tractor-trailer and approaches both the prosecution witness and the officer, the defendant is in fact the driver of the tractor-trailer.

¶ 20 Furthermore, submits the prosecution, the description of the defendant provided by the witness was the same as that provided by the officer. After the officer spoke with the prosecution witness and the defendant, the officer chose to charge the defendant. The officer was also satisfied with the defendant's identity.

¶ 21 Moreover, the prosecution submits, these vehicles do not come to rest by themselves. Indeed, they

get there by the actions of someone and with the participation of someone. There was no one else involved or around the tractor-trailer. Thus, the prosecutor argues, the court is entitled to make a reasonable conclusion that the defendant was the operator of the tractor-trailer. In fact, it is so reasonable that it would be unreasonable to come to any other conclusion.

3. ISSUES

¶ 22 Is there any admissible evidence, upon which a reasonable and properly instructed trier-of-fact could find or draw a reasonable inference that the defendant had been identified as the person who had been driving or operating the tractor-trailer truck that collided with Emily Dawidoitz's vehicle on August 3, 2001?

4. ANALYSIS

¶ 23 The court is not being asked to decide the merits of this case or to weigh the evidence at this time. Instead, the defence asks for this matter to be dismissed because it claims the prosecution has failed to provide any evidence on an essential element of the charge under s. 142(1). The defence argues that there is no evidence that the defendant was behind the wheel or had been operating or driving the tractor-trailer truck involved in the accident or that committed the unsafe lane change.

¶ 24 The starting point in deciding whether this motion should succeed, especially, under these circumstances where an important element of the offence may be based on circumstantial evidence, is to consider the Supreme Court of Canada's decision in R. v. Monteleone, [1987] 2 S.C.R. 154, [1987] S.C.J. No. 52, 35 C.C.C. (3d) 193.

¶ 25 In R. v. Monteleone, the Supreme Court held that while there must be evidence on all essential elements of the charge to prevent a trial judge from granting the motion for a directed verdict, there need not be direct evidence on all essential elements. They held that it was sufficient if the evidence on some or all essential points is entirely circumstantial. McIntyre J. for the court wrote at pp. 7-8 of [1987] S.C.J. No. 52 that [emphasis is mine below]:

> Our sole concern is to inquire whether there was a case made by the Crown at trial which ought to have been left to the jury for that determination.
> The law on this subject is well settled. In United States of America v. Shephard, [1977] 2 S.C.R. 1067, Ritchie J., speaking for the majority of the Court, said, at p. 1080:
>
> > I agree that the duty imposed upon a "justice" under s. 475(1) is the same as that which governs a trial judge sitting with a jury in deciding whether the evidence is "sufficient" to justify him in withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The "justice", in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction. [Emphasis added.]
>
> The matter came up for discussion in this Court more recently in Mezzo v. The Queen, [1986] 1 S.C.R. 802. In that case, the majority (Beetz, Estey, McIntyre, Chouinard and Le Dain JJ.) reaffirmed the authority of the judgment of Ritchie J. in Shephard and reviewed many of the authorities on which it is based. R. v. Comba, [1938] S.C.R. 396, supra, relied

on by the appellant and adopted by the trial judge in the case at bar, was discussed and distinguished from Mezzo in that it was a case [page 161] where there was no evidence to go to the jury. In relying on the Shephard case, I am in agreement as to the law, both with the trial judge and the Court of Appeal. The Shephard test for the giving of a directed verdict applies to a case resting solely on circumstantial evidence as well as one based on direct evidence. The question of whether circumstantial evidence meets the requirement of the so-called rule in Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136, is for the jury to determine. This was settled in Mezzo, at pp. 842-43, in these terms:

> I am aware, of course, that in R. v. Knox, [1968] 2 C.C.C. 348, and R. v. Sawrenko (1971), 4 C.C.C (2d) 338, the British Columbia Court of Appeal and the Court of Appeal for the Yukon Territory held that, when faced with a motion for a directed verdict in a case dependent on circumstantial evidence, it was the duty of the trial judge to decide whether the evidence satisfied the rule in Hodge's Case. Only if it did, was the case to the jury for determination of guilt or innocence. In this sense a weighing process or an assessment of quality was contemplated on the part of the judge. Those cases, however, were effectively overruled in this Court in R. v. Paul, [1977] 1 S.C.R. 181, and Lavoie v. The Queen, [1977] 1 S.C.R. 193, and even in circumstantial cases the law now is that any determination as to compliance with the rule in Hodge's Case would be left to the jury. [Emphasis added.]

Where there is before the court any admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably, would justify a conviction, the trial judge is not justified in directing a verdict of acquittal. It is not the function of the trial judge to weigh the evidence, to test its quality or reliability once a determination of its admissibility has been made. It is not for the trial judge to draw inferences of fact from the evidence before him. These functions are for the trier of fact, the jury.

¶ 26 In addition, MacDonnell J. in R. v. Hoang [1994] O.J. No. 3234 (Ont. Ct. (Prov. Div.)), in considering whether an accused should be committed to stand trial, referred to the test in R. v. Monteleone at para. 24 and stated:

> A justice applying the test for committal or non-suit is not entitled "to weigh the evidence, to test its quality or reliability once a determination of its admissibility has been made"

¶ 27 According to P.K. McWilliams Q.C. in his textbook, "Canadian Criminal Evidence (2d ed.)", at p. 68, direct and circumstantial evidence may be classified according to its purpose:

> Direct evidence, that is, evidence that is adduced to prove the fact itself as opposed to indirect or circumstantial evidence which is adduced to prove some other fact in issue, or relevant to an issue, by inference from the fact adduced. It does not have regard for the form of evidence but to its purpose.
> Indirect or circumstantial evidence. Wills, An Essay on the Principles of Circumstantial Evidence, 6th ed. (1912), pp. 19-20 made this category of evidence clear:
> On a superficial view, direct and indirect or circumstantial would appear to be distinct species of evidence; whereas these words denote only the different modes in which those classes of evidentiary facts operate to produce conviction. Circumstantial evidence is of a nature identically the same with direct evidence; the distinction is, that by DIRECT

> EVIDENCE is intended evidence which applies directly to the fact which forms the subject of inquiry, the factum probandum;
> CIRCUMSTANTIAL EVIDENCE is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts of such a nature that the mind is led intuitively, or by a conscious process of reasoning, towards or to the conviction that from it or them some other fact may be inferred. A witness deposes that he saw A. inflict on B. a wound, of which he instantly died; this is a case of direct evidence. B. dies of poisoning; A. is proved to have had malice and uttered threats against him, and to have clandestinely purchased poison, wrapped in a particular paper, and of the same kind as that which has caused death; the paper is found in his secret drawer, and the poison gone. The evidence of these facts is direct; the facts themselves constitute indirect and circumstantial evidence as applicable to the inquiry whether a murder has been committed, and whether it was committed by A.

¶ 28 The indirect or circumstantial evidence in the present case of the identity of the driver of the tractor-trailer truck and that the defendant was that driver comes from the testimony of Emily Dawidoitz in conjunction with that of Officer Sinclair. Dawidoitz stated that the 5'-11" black male in his mid 30's, who exited the truck that had collided with her vehicle and asked if the occupants of her vehicle were all right, then offered the use of his cell phone to call the police and then requested that he be allowed to leave, was the only person in the tractor-trailer truck. Officer Sinclair testified that the person driving the tractor-trailer truck was the defendant. Sinclair also testified the defendant was a 5'-10" black male with dark hair who had identified himself with a valid Ontario driver's licence as Theophilus Azubuike of 19 McIvor Street. Hence, Dawidoitz's evidence that there was only one person in the truck, a black male similarly described by Officer Sinclair as the person driving the truck, combined with Sinclair's evidence of the name of the driver being Theophilus Azubuike, is indirect or circumstantial evidence that the defendant was the driver of the truck that collided with the Dawidoitz vehicle. At this juncture, the court is not required to weigh or consider this evidence for credibility or for value.

¶ 29 Evidence of someone confessing to a police officer or to another witness that he or she was the driver of a particular vehicle involved in an accident is also evidence of the identity of that driver. In the present case, if the defendant had made a statement or confessed to Officer Sinclair, a person in authority, that he was the driver of the truck involved in the accident, that admittance or confession in order to be admissible as evidence must either meet the test of voluntariness in a voir dire (see Erven v. The Queen, [1979] 1 S.C.R. 926, 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507 (S.C.C.)), or it must be clear from reliable evidence that it was made voluntarily (see R. v. Sweezey (1974), 20 C.C.C. (2d) 400 (Ont. C.A.) referred to by L'Heureux-Dubé J. of the Supreme Court of Canada at p. 495 of R. v. Hodgson (1998), 127 C.C.C. (3d) 449) and my decision in R. v. Colabufalo, [2001] O.J. No. 2471 (O.C.J.) at para. 60). On the other hand, if the prosecution is not entering the defendant's statement that he was the driver for the truth of its contents but that the statement was made, then it is admissible as evidence for another purpose.

¶ 30 Since this court is allowed to consider indirect or circumstantial evidence as evidence of a required element of the offence, I find that the prosecution has provided some evidence concerning the identity of the driver of the trailer-tractor truck. It has also provided some evidence that the defendant was the driver of that truck. Although the identification evidence is circumstantial, this court is not required at this moment to evaluate, weigh or assess the quality of any circumstantial evidence or to analyze it under the rule in Hodge's case, on a motion for directed verdict.

¶ 31 In conclusion, there is some evidence of each essential element of the offence, including indirect or circumstantial evidence of the identity of the driver of the tractor-trailer truck involved in the accident with

Emily Dawidoitz. Ergo, the prosecution has presented a case containing evidence on all essential points of the charge contained in s. 142(1) of the H.T.A., that if believed by this court, and unanswered, would warrant a conviction. As a result, the motion by the defence for a directed verdict is dismissed.

QUON J.P.

* * * * *

APPENDIX

Cases Considered or Referred To

¶ 32

Erven v. The Queen, [1979] 1 S.C.R. 926, 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507 (S.C.C.)

R. v. Colabufalo, [2001] O.J. No. 2471 (O.C.J.), per Quon J.P.

R. v. Grzesiak, [1999] O.J. No. 937 (Ont. Ct. (Gen. Div.)) per Hill J. at Brampton.

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R. v. Hodgson [1998] 2 S.C.R. 449, [1998] S.C.J. No. 66 (S.C.C.)

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R. v. Sweezey [1974] O.J. No. 690, 20 C.C.C. (2d) 400 (O.C.A.) per Gale C.J.O., Dubin and Martin JJ.A.

R. v. Viau, [1997] O.J. No. 4301 (Ont. Ct. (Prov. Div.)) per Fontana J. at Ottawa.

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