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R. v. Bruno

Between
Her Majesty the Queen, respondent, and
Domenico Bruno, appellant

[1975] O.J. No. 1017

Ontario Supreme Court - Court of Appeal
Toronto, Ontario
Kelly, MacKinnon and Lacourciere JJ.A.

Heard: October 16 and 17, 1975.
Oral judgment: October 17, 1975.
Released: October 24, 1975.
(4 pp.)

Counsel:

M.A. Wadsworth, for the appellant.
C. Scullion, for the respondent.

The judgment of the Court was delivered by

¶ 1 **MacKINNON J.A.** (orally):— The appellant, Domenico Bruno, appeals from his conviction on a charge of dangerous driving, by His Honour Judge Graburn, without a jury, on July 25, 1974. There were two other counts of causing bodily harm by criminal negligence, which were withdrawn. The appellant, as a result of the conviction, was sentenced on September 27, 1974 to one year in the reformatory and prohibited from driving anywhere in Canada for three years.

¶ 2 As we propose to allow the appeal and direct a new trial it will not be necessary, nor advisable, to review the facts, other than as they relate to the one issue which, we are all of the opinion, caused a mistrial.

¶ 3 The central issue on which the guilt or innocence of the appellant fell to be determined was the presence or absence of consciousness at the time of the accident which gave rise to the charges. Shortly after the accident the appellant was interviewed by police officers to whom he gave a statement which statement was admitted at the trial by his counsel to be a voluntary one. The Crown was well aware of this statement before the close of its case but chose, for reasons of its own, not to introduce it as part of its case. However, after the appellant had given evidence a police constable was called for the purpose of proving certain portions of this statement upon which portions the appellant had been cross-examined.

¶ 4 In our view these particular portions went to the heart of the matter and it does appear from the

judgment of the learned trial Judge that he felt they were relevant to the issue whether he would believe the appellant's evidence that he was unconscious for some short period of time prior to and at the time of the accident.

¶ 5 The Crown sought to support this procedure by arguing that the statement (and the cross-examination on it), was credibility of the appellant. However, the portions which were read clearly related to what was agreed to be the basic issue involved in his trial. It would require great mental agility on the part of the trial Judge to disassociate the words which were being quoted to the appellant as his statement from that basic issue.

¶ 6 A statement made by Mr. Justice McPherson in Regina v. Drake, 12 C.R.N.S. 220; 1 C.C.C. (2d) 396, 397 is apposite:

> "It is a well known principle that evidence which is clearly relevant to the issues in the possession of the Crown should be advanced by the Crown as part of his case and such evidence cannot properly be admitted after the evidence for the defence by way of rebuttal. In other words the law regards it as unfair for the Crown to lie in wait to permit the accused to trap himself. The principle however does not apply to evidence which is only marginally minimally or doubtfully relevant."

¶ 7 In our view the evidence which was sought to be introduced, initially by way of cross-examination and then in reply, could not be described as "marginally, minimally or doubtfully relevant", and accordingly it was not proper to have introduced the statement in this fashion.

¶ 8 It was argued before us that, quite apart from this statement, there was ample evidence to justify the conviction of the appellant. However, in view of the learned trial Judge's reliance on the statement and his references to it, we are not in any position to say that it did not play at least some part in the resulting conviction. Accordingly, we are of the view that it is not a proper case for the application of section 613(1)(b)(iii).

¶ 9 With regard to the other grounds advanced by counsel for the appellant, we would not have been prepared to have allowed the appeal on any of those other grounds. Because of the manner in which we are disposing of this appeal we are not called upon to pass on the propriety of the sentence and anything I have said should not be taken as approving or disapproving the sentence which was imposed in this case.

¶ 10 In the result the appeal is allowed the conviction quashed and a new trial directed.

MacKINNON J.A.
KELLY J.A.
LACOURCIERE J.A.

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