Regina v. Fex

[1973] 3 O.R. 242

ONTARIO
HIGH COURT OF JUSTICE
ADDY, J.

4TH MAY 1973

Criminal law — Evidence — Confessions — Statements by impaired driver to investigating officer at scene of accident — Whether fact that statements required by statute obviates necessity for voir dire to determine voluntariness — Cr. Code, ss. 233(2), 234.

The fact that a statement by an accused to a person in authority is made under compulsion of statute, such as the statements of a driver involved in an accident to the investigating officer pursuant to s. 233(2) of the Criminal Code, does not obviate the necessity for a voir dire to determine the voluntariness and hence admissibility of the statement.

[R. v. Cleaveley (1966), 49 C.R. 326, 57 W.W.R. 301, *folld*; Piche v. The Queen, [1971] S.C.R. 23, 11 D.L.R. (3d) 700, [1970] 4 C.C.C. 27, 12 C.R.N.S. 222, 74 W.W.R. 674; R. v. Washer, [1948] O.W.N. 393, 92 C.C.C. 218, *apld*; R. v. Pedersen, [1956] O.W.N. 212, 114 C.C.C. 366, 23 C.R. 198; R. v. Barnett, [1963] 3 C.C.C. 51, 40 C.R. 224, *not folld*; Walker v. The King, [1939], S.C.R. 214, [1939] 2 D.L.R. 353, 71 C.C.C. 305; Marshall v. The Queen, [1961] S.C.R. 123, 26 D.L.R. (2d) 459, 129 C.C.C. 232, 34 C.R. 216; R. v. Scott (1856), 2 Dears. & B. 47, 169 E.R. 909; R. v. Coote (1873), L.R. 4 P.C. 599; R. v. Turnbull, [1948] O.W.N. 795, 93 C.C.C. 131; R. v. Patrick, [1960] O.W.N. 206, 128 C.C.C. 263, 32 C.R. 338; Ibrahim v. The King, [1914] A.C. 599; R. v. Wilks (1966), 57 W.W.R. 377; John v. The Queen, [1971] S.C.R. 781, 15 D.L.R. (3d) 692, 2 C.C.C. (2d) 157, [1971] 3 W.W.R. 401, 15 C.R.N.S. 257; R. v. Dietrich, [1970] 3 O.R. 725, 1 C.C.C. (2d) 49, 11 C.R.N.S. 22, *refd to*]

Criminal law — Evidence — Confessions — Written statement by accused — Oral evidence of contents inadmissible in absence of proof of loss — Document itself must be introduced.

Criminal law — Evidence — Confessions — Voluntariness — Accused drunk at time of making of statement to police — On voir dire inquiry necessary to determine whether accused capable of comprehending what he was saying.

Criminal law — Evidence — Circumstantial evidence — Charge of impaired driving — Trial Judge disbelieving accused's testimony that he was not driving car — No evidence that accused driving — Conviction quashed — Judge's finding as to accused's credibility insufficient to establish contrary proposition that accused the driver — Cr. Code, s. 234.

APPEAL by the accused by way of stated case from his conviction for driving while impaired contrary to s. 234 of the Criminal Code.

R.M. McLeod, for the Crown, respondent.

H. Smyth, for accused, appellant.

ADDY, J.:— This is an appeal by way of stated case from a conviction of the accused by a Provincial Judge of the offence of driving whilst impaired under s. 222 (now s. 234) of the Criminal Code. The driving resulted in

an accident and the accused was interviewed at the scene and was later brought to the station for a breathalyzer test.

Considerable time was spent by both counsel for the applicant and for the Crown in attempting to determine what were the facts intended to be stated in the case. Many of the statements of fact were so incomplete as to leave some doubt as to what was actually stated. This was rather surprising, having regard to the fact that the case was originally brought before Wells, C.J.H.C., in June, 1971, and at that time the Honourable Chief Justice ordered the case to be remitted to the Provincial Judge for a restatement as neither the facts found nor the grounds on which the proceedings were questioned had been properly stated.

It is most important that, in a stated case pursuant to what is now s. 762(1) (b) (formerly s. 734(1) (b), the facts be clearly stated.

Counsel for the Crown suggested that I refer the case back to the Provincial Judge for a further restatement but, this would work a great injustice on the accused, whose counsel pointed out that more than three years had elapsed since the conviction and that it took nearly one and one-half years for the case to be restated after the Chief Justice's order referring it back.

By interpreting the facts as stated with the assistance of counsel, a consensus as to the facts was ultimately arrived at sufficient to isolate the problems raised by the stated case.

There were two questions submitted by His Honour the Provincial Judge for consideration by this Court. They are as follows:

> Question l: "Did I err in determining that statements alleged to have been made by David Francis Fex were evidence against him without proof that the alleged statements were made voluntarily?"
> Question 2: "Did I err in point of law in holding that evidence adduced by the Crown constituted any evidence upon which the said David Francis Fex could be found to have committed the offence charged against him?"

The facts as stated show that the accused is alleged to have made statements to the police on three occasions: one at the scene of the accident to the investigating officer; one at the station to the constable administering the breathalyzer test. The final statement, apparently a written one, was never introduced by the Crown in evidence. The mere fact that it had been made was mentioned incidentally by the accused when testifying on his own behalf.

Dealing with the statements in the reverse order, the written statement, if it was made, cannot be used as evidence as it was not produced at the trial and no explanation was given to why it was not introduced. Wherever a written statement is available, unless evidence is given to its loss, the document itself must be introduced if one intends to rely on its contents. In any event, the contents are not stated.

As to the statement made to the constable taking the breathalyzer test, the Crown admitted that the statement was given while the accused was under arrest and that it would not be admissible without a voir dire and as none was held, it is not admissible.

A more difficult situation arises as to some oral statements made to the investigating officer at the scene of the accident. The facts on this point, as stated in the case, read as follows:

> ... when asked who was driving the car, the accused stated that he had been driving the automobile, that he had not been driving the automobile and that he had driven the automobile to a point in the City of Kitchener where he picked up a hitchhiker. No evidence was tendered by the Crown to prove that the statements allegedly made by the accused to this police officer were made by the accused voluntarily and counsel for the accused did not object to the admission in evidence of the statements allegedly made by the accused to this police officer.

Section 221(2) (now s. 233(2)) of the Criminal Code obliged the accused, if he was the person having the care, custody or control of the car at that time, to give his name and address to the constable.

It is clear that the mere fact of the existence of a statutory requirement to make a statement of this nature at the scene of an accident does not render the statement inadmissible as not being a voluntary one: Walker v. The King, [1939] S.C.R. 214 at p. 217, [1939] 2 D.L.R. 353 at p. 355, 71 C.C.C. 305 at p. 307; Marshall v. The Queen, [1961] S.C.R. 123, 26 D.L.R. (2d) 459, 129 C.C.C. 232, following R. v. Scott (1856), 2 Dears. & B. 47, 169 E.R. 909, and R. v. Coote (1873), L.R. 4 P.C. 599 at p. 607; R. v. Turnbull, [1948] O.W.N. 795, 93 C.C.C. 131, and R. v. Pedersen, [1956] O.W.N. 212, 114 C.C.C. 366, 23 C.R. 198.

Some learned authors, strangely enough, have stated quite categorically that the case of Marshall v. The Queen, supra, is authority for the proposition that the rules as to voluntariness do not apply where there is a statutory obligation such as s. 233(2) of the Criminal Code requiring a person to identify himself when involved in an accident. A meticulous perusal of the reported reasons in the Marshall case does not in any way justify any such statement. Neither directly nor indirectly, neither by its facts, its conclusions nor any extension of any of the reported statements of the learned Justices of the Supreme Court of Canada, who heard the case, can one arrive at any such a proposition. Mr. Justice Wilson, who presided at the trial, held a voir dire and specifically found that the statement was completely voluntary and admissible in the accepted legal sense. The statement was therefore admitted before the jury and the accused was duly convicted. He subsequently appealed mainly on the grounds that the bare fact that the statement was given pursuant to the statutory obligation of what was then s. 110 (5) of the Highway Traffic Act, R.S.O. 1950, c. 167 (now R.S.O. 1970, c. 202), rendered the statement inadmissible. The Court of Appeal of Ontario and the Supreme Court of Canada dismissed the appeal. There was no doubt in this case of the statement not being voluntary in the accepted sense. On the contrary, after a voir dire, there was an express finding by the trial Judge to the effect and his finding was specifically upheld by the Supreme Court of Canada.

However, counsel for the Crown, in the present case, relied to a great extent on the authority of the case of R. v. Pedersen, supra, where Gale, J. (as he then was), with facts which were quite similar to the present case, admitted after a voir dire the statement given by the driver to the effect that he was driving the car. It is noted that, unlike the present case, the statement was made after the accused had been taken into custody and this, of course, imposes an even higher onus on the Crown. Counsel for the Crown, in the case before me, relied on the fact that the learned trial Judge in the Pedersen case apparently made no finding as to whether the statement was or was not voluntary in the accepted sense and stated at pp. 214-5 O.W.N., p. 370 C.C.C., his reasons from refraining from doing so as follows:

> In view of my decision that Mr. Pedersen was obliged to furnish his name and address and to say whether he was driving -- because if he was not driving there was not cast upon him by the subsection any duty to give his name and address -- it seems to me that it is pointless to discuss the question whether or not that information was voluntarily given in the sense in which that issue is discussed in the cases relating to confession. As Mr. Savage points out, any person who comes within that subsection must supply that information. The fact that he may be arrested for having failed to do so and thus be subject to the influence of the consequences of the arrest does not overcome the mandatory provisions of the statute, and that result obtains even though the information is subsequently furnished.

If this decision and the above reasons purport to lay down, as a principle of law, that the obligation of a person who has the care, custody and control of a car to give his name and address and offer assistance pursuant to s. 233 of the Criminal Code, removes from the Court the duty of inquiring whether his statement and, indeed, renders unnecessary a finding that his statement is otherwise a voluntary one in the sense that it was not induced by threats or offers of advantage, if given to a person in authority, then I respectfully disagree with that proposition.

To return to basic principles, one of the main reasons for excluding a statement of an accused person to a person in authority, unless it is a voluntary one in the accepted sense, is that a statement made to such a person after threats or inducements have been offered might very well not be true. Thus, a person who states to a

policeman that he is the driver might well not have been the driver if that statement was obtained under a threat, or by reason of duress, or of the offer of an inducement.

This danger of a statement being untrue obviously does not apply in the case of statement made under no other complusion than that of a statute, for if the accused were not the person who actually had the care, custody and control of the vehicle, there would be no obligation for him to speak and to state so. It would be most unjust to allow the Crown to merely prove that an accused person stated that he was the driver and to find that this very statement removes all necessity for any further inquiry as to whether the statement was, in fact, also a voluntary one in the accepted sense. This would offend against the most fundamental axiom of all systems of justice, justitia veritas est.

Furthermore, as stated previously if the accused was not in fact the driver or other person having the care, custody or control of the car, he would not be subject to the statute and the Crown, before using Section 233(2) as a basis for the admission of the statement at the very least, would have to establish beyond a reasonable doubt by other evidence that the accused was in fact the person having the care, custody and control of the car. (Refer R. v. Patrick, [1960] O.W.N. 206, 128 C.C.C. 263 at p. 266, 32 C.R. 338, per Schroeder, J.):

> A reading of these sections [Criminal Code, s. 221(2) now 223(2) and the Highway Traffic Act, R.S.O. 1950, s. 110] makes it readily apparent that unless it is first established that the person whose conduct is under review was actually in charge or control of the vehicle involved in an accident, no duty of disclosure is cast upon him under any of these enactments.

(Words in brackets are mine.)

It must be remembered that the Pedersen case, supra, refers to "confessions" and was decided in 1960, ie., some 10 years before the Supreme Court of Canada in Piche v. The Queen, [1971] S.C.R. 23, 11 D.L.R. (3d) 700, [1970] 4 C.C.C. 27, laid to rest many lingering doubts as to what statements should be established as being voluntary. Per Hall, J. (concurred in by Abbott, Martland, and Ritchie, JJ.), at p. 36 S.C.R., pp. 709-10 D.L.R., p. 37 C.C.C., of the above-mentioned report:

> In my view the time is opportune for this Court to say that the admission in evidence of all statements made by an accused to persons in authority, whether inculpatory or exculpatory, is governed by the same rule ...

(The italics are mine.) Also on the same page of the report Mr. Justice Hall approved the statement of Lord Sumner in Ibrahim v. The King, [1914] A.C. 599 at pp. 609-10, where the latter states that no statement by an accused is admissible in evidence unless it is shown to have been voluntary in the accepted sense.

During the 18th century the principle of nemo tenetur seipsum accusare gradually eroded and finally eliminated the established inquisitorial form of pre-trial inquiry practised by the Ecclesiastical Courts and the Star Chamber. This principle of freedom from inquisitorial incrimination finally received statutory recognition during the following century by the Indictable Offenses Act, 1848 (U.K.), c. 42. It is not recognized as a hallowed principle of our criminal law of evidence, jealously guarded by our Courts. An enactment in a statute that a person is obliged to give certain information pursuant thereto does not ipso facto permit that information to be used at the trial of an accused in order to implicate him in a crime if the statement was, in fact, extorted from him by threats or inducements, which would have rendered the statement otherwise inadmissible. The purpose of an enactment such as the one under consideration, in the absence of clear evidence to the contrary, must be taken to be to facilitate investigation and not to force an accused to inculpate himself at his trial, and strip him automatically of fundamental safeguards recognized for many years by our law.

The point before me was specifically dealt with in the two western Canadian cases of R. v. Wilks (1966), 57 W.W.R. 377, and of R. v. Cleaveley (1966), 49 C.R. 326 at p. 329, 57 W.W.R. 301, where Mr. Justice Johnson stated:

> I am of the opinion a statement given by an accused under the compulsion of statute is admissible in evidence in a proceeding under the Criminal Code of Canada unless specifically excluded by proper enactment or exclusionary rule. But before being admitted, such statement must otherwise be shown to have been made voluntarily in the sense in which that term is used in connection with admissions, confessions and statements of accused persons.

I completely agree with this statement of the law.

In the stated case before me it is to be noted that the accused, among several contradictory statements, stated to the police that he was the driver. The statute does not, in any way, require a person to state that he was the driver at the time of the accident or at any time for that matter nor indeed does it specifically oblige him to admit that he was the person who actually had the care, custody and control of the vehicle, although it might well be successfully argued that if the latter obligation were not implied, the effect of the statute would in effect be frustrated. Be that as it may, and notwithstanding the Pedersen case, supra, a statement or admission that a person was or was not the driver at any relevant time is not required by the statute, the only requirement being that the person making the statement give his name and address with this obligation resting on any person having the care, custody or control of the car. The case of R. v. Barnett, [1963] 3 C.C.C. 51, 40 C.R. 224, was relied on by counsel for the Crown. I respectfully disagree with the conclusion arrived at by the learned Judge in that case and most emphatically with his view that either of the cases of Marshall v. The Queen, supra, or R. v. Patrick, supra, in any way support the principle that a statement made under what was s. 221(a) of the Criminal Code excludes that statement from the rule of Ibrahim v. The King, supra. Briefly put: the statute obliges the person to speak but does not ipso facto make the statement admissible at his trial on a criminal offence.

The problem as to whether a statement must be voluntary before being used as evidence, in my view, is often confused with the question as to whether or not there should, in all cases, be a voir dire on that issue before the evidence is actually heard at the trial. Although all statements made to a person in authority must clearly be found to be voluntary, there appears to be no absolute necessity for a voir dire in all cases; for instance, where the accused is not under arrest or charged at the time and the evidence leading to the introduction of an utterance or oral statement establishes that the accused volunteered the statement and there is no other evidence showing or tending to show that it might not be entirely voluntary: see John v. The Queen, [1971] S.C.R. 781 at pp. 793-5, 15 D.L.R. (3d) 692 at p. 702, 2 C.C.C. (2d) 157 at p. 167, per Ritchie, J. Another instance where a voir dire would not be required is where the accused's counsel unequivocally admits that the statement made by his client was voluntary and that any inquiry on that point can be dispensed with: R. v. Dietrich, [1970] 3 O.R. 725 at p. 734, 1 C.C.C. (2d) 49 at p. 58, 11 C.R.N.S. 22 (C.A.) [application for leave to appeal to Supreme Court of Canada dismissed [1970] 3 O.R. 744n, 1 C.C.C. (2d) 68n].

Another area of confusion arises in comparing cases which are tried by a Judge alone and cases which are tried by a Judge and jury. It might very well be that, although in a given set of circumstances when a case is being tried with a jury, a Judge would be absolutely obliged to hold a voir dire before a particular statement or utterance is mentioned in evidence before the jury, yet when the case is heard by a Judge sitting alone, he might very well proceed with the case without having an independent voir dire, if it seems to him to be clear that the statement at first blush appears to have been given voluntarily. From a practical standpoint it matters little since it is the same person who must pass on the voluntary nature or otherwise of the statement and, in order to do so, he must hear the evidence relating thereto which evidence may include the contents of the statement itself. However, in the case of any such evidence being admitted without a voir dire, it would then be his obligation to offer the accused the right not only to be heard himself but also to call other witnesses on the sole issue of the voluntary nature of the statement, altogether apart from his right to testify or not testify or to call evidence at the trial itself. It would also, of course, in all cases be incumbent upon the trial Judge to state whether he has found the statement to have been voluntarily given and to say whether he is or is not considering the statement as legal, admissible evidence in the trial. It is also important in the interests of justice and of a fair trial that any such finding be made and pronounced before the accused is obliged to elect whether he will call evidence on his own behalf.

In the stated case before me it is therefore clear that, before making a finding of guilt based on the statement, a specific finding should have been made as to whether or not the statement was voluntary, and, previously thereto

unless the accused or his counsel had admitted the voluntary nature of the oral statement, which they apparently did not do, the former should have been afforded the opportunity of testifying and of calling evidence if he so desired on that particular issue. A mere failure on the part of counsel for the accused, to object to the introduction of the oral statement without a voir dire, is not sufficient. Since the Court must find as a fact whether or not the admission was voluntary, the finding must be made either after evidence has been heard on the issue or after a specific admission of fact had been made. The silence of an accused is such a situation or his failure to object cannot be construed as an admission as there is no obligation on an accused to say anything at his trial and there is no prima facie presumption at law that any statement of an accused made to a person in authority is voluntary.

Altogether apart from the question of a voir dire, to determine whether the statement was voluntary within the meaning of the rule of Ibrahim v. The King, supra, the evidence at the trial disclosed that the accused was so drunk that an inquiry should have been held to determine whether he was physically capable of making any statement whatsoever or whether he was so drunk as to be incapable of comprehending what he was saying or what was going on about him. The accused testified that he does not remember making any oral admission at the scene whatsoever. The arresting officer stated that the accused at the scene made three oral statements which appear to be contradictory. They are quoted above in the extract from the stated case. He also testified that the accused was extremely drunk, could not speak coherently and fell asleep in the back seat of his cruiser. The only other evidence as to the condition of the accused is to the effect that some three and one-half hours after the accident, the breathalyzer reading given to the accused at the station showed a blood alcohol content of some 1.8 parts per thousand. This undoubtedly would normally indicate an advance state of intoxication even at that late time. Yet, no consideration was given to the question whether the accused was under the influence of liquor to such a degree that the voluntary character of the statements would be affected to the extent that it would be rendered inadmissible pursuant to the principle enunciated by McRuer, J. (as he then was), in R. v. Washer, [1948] O.W.N. 393, 92 C.C.C. 218.

In answer to the first question I must, therefore, state that the learned Provincial Judge did err in determining that the statements alleged to have been made by the accused were evidence against him without proof that they were made voluntarily.

I will now deal briefly with the second question. The accused, at the trial, testified that he did not recall any oral statement made and that, under a threat of being held in custody all night, he did make a written statement (which statement was apparently at no time introduced by the Crown nor even referred to by Crown witnesses) to the effect that he had been driving the car. Since the Crown did not choose to introduce the written statement, the accused, of course, could not do so (which in fact he did not do) nor indeed could he refer to it (which he did in fact do). However, the accused's sole reference to the written statement was to the effect that it was not a voluntary one. He also denied under oath ever having driven the car that evening at any material time. The only other two witnesses called by the Crown on this point were the witnesses Wilson and Steckler, both of whom were in the car with the accused, and both of whom testified that the accused had not been driving but that Steckler had been driving. The trial Judge stated that he disbelieved both the accused and Wilson but made no finding as to the credibility of Steckler. From the way the case is stated, however, one might conclude that the trial Judge also disbelieved Steckler. This was the only evidence concerning the identity of the driver apart from the statements of the accused.

I cannot subscribe to the argument of counsel for the Crown to the effect that, from the sole fact that the trial Judge disbelieved the accused when he referred to a written statement and also stated that he had not been driving the Court could find as a fact that the accused had driven the car. In the complete absence of any positive evidence, either direct or circumstantial, that the accused was the driver of the car, the mere fact that an accused testified and is disbelieved is certainly not sufficient to found a conviction on a criminal charge, in accordance with the standard of proof required in criminal cases, any more than the fact that a witness is disbelieved when testifying that he himself was driving can be sufficient to make a finding of fact beyond a reasonable doubt to the effect that it was the accused who was driving.

A trial Judge's opinion as to the credibility of a witness without anything more is not sufficient to establish beyond a reasonable doubt a contrary proposition which is a necessary element of the offence.

In the complete absence of any evidence that the accused was driving the car, it follows that the second question must also be answered in the affirmative.

Since there was no evidence adduced by the Crown upon which the accused could be found to have committed the offence charged, the conviction will be quashed and finding of not guilty entered.

An order shall issue accordingly.

Appeal allowed; acquittal entered.