Case Name:

R. v. Rolph

Between
Her Majesty the Queen, and
Wayne Rolph

[2002] O.J. No. 3591
Information No. 999 00 010185-00

Ontario Court of Justice
Stratford, Ontario
Carr J.

Oral judgment: July 18, 2002.
(16 paras.)

Charge: S. 76(1) Highway Traffic Act - Slow Moving Vehicle Sign Not Attached

Counsel:

H. Van Drunen, for the Crown.
S. Thibaudeau, agent for the appellant.

¶ 1 **CARR J.** (orally):— Thank you. I do not need to have the photos. My decision will be based on the first ground of appeal.

¶ 2 This is an appeal brought by Mr. Rolph after a conviction by the learned Justice of the Peace on January 11, 2002 in Stratford, Ontario. The one issue that I am dealing with, at this point in time, is whether or not a statement made by Mr. Rolph to an investigating police officer should have been admitted in the proceedings.

¶ 3 It is clear, from what I see in the transcript of evidence, that the only evidence the Crown had to establish that Mr. Rolph was in fact driving this particular vehicle, was his own admission which was obtained as follows:

> The officer arrived. There was an accident. There was a pickup truck that was significantly damaged in the front end, if I recall, and there was this machine, which appears to be a machine that spreads manure, nearby with several individuals around it. The officer arrived not knowing what had happened or anything about the situation and asked a question to the effect: "Who was driving this vehicle?" meaning the farm vehicle. Mr. Rolph came forward and acknowledged that he was driving.

¶ 4 The Justice of the Peace determined, after significant consideration I find, that this particular statement was admissible and that it should not be excluded based on the principles enunciated in White and other cases. In Regina v. White in paragraph 66, page 17, and White is a Supreme Court of Canada decision recorded at [1999] 2 S.C.R. 417, it states as follows:

> "The spontaneous utterances of a driver occurring very shortly after an accident are exactly the type of communication that the principle against self-incrimination is designed to protect. They are a personal narrative of events, emotions and decisions that are extremely revealing of the declarant's personality, opinions, thoughts and state of mind. The dignity of

> the declarant is clearly affected by the use of this narrative to incriminate. I would note that while it is well established that there is reduced expectation of privacy in a vehicle generally, compared to the expectation of privacy in dwelling, this fact is largely irrelevant to the analysis here. The question in this case involves the expectation of privacy that a declarant has in a confession. The fact that the confession has to do with a car is entirely incidental."

¶ 5 The court, at that point in time, indicated quite clearly, in my view, that spontaneous utterances, which I take the utterance of Mr. Rolph in this case to be, are exactly the type of communication that the principle against self-incrimination is designed to protect. The Justice of the Peace, in my view, seemed to think that this was something outside of the purview of the White decision. And, it may well be that he felt this way because of what is included at paragraph 80 of that decision and I quote as follows:

> "The driver is largely subject to the will of this officer with respect to what constitutes a compelled statement. Provided that the police have offered no indication to the driver that the statutory requirements for the reporting of an accident have been satisfied, it will likely be reasonable for a driver to assume that he or she continues to be subject to a statutory duty to speak to police. Accordingly, as a practical matter, it will be very important for the police officer, who takes an accident report while simultaneously investigating a crime, to delineate clearly for the declarant the start and end points of the actual accident report."

¶ 6 That particular phrase, in my mind, contains two issues that I must deal with.

¶ 7 Firstly, I read that to mean that there is almost an inference to be drawn that any driver that is approached by a police officer recognizes the statutory requirements regarding the reporting of an accident. And secondly, that the investigating officer, who takes an accident report, must set out clearly the start and end points of the particular accident report.

¶ 8 I do not accept, as it appears the learned Justice of the Peace accepted, that the declarant's statement starts somewhere after an acknowledgement or an admission that he or she was the driver. I find that that is in fact part of the accident report and the information should have been delineated, at that point in time, to the declarant prior to taking this statement or using this statement, that the officer was investigating a crime and that these statements may well be used against him as a result. That was not done here. It seems to me that that should have been done.

¶ 9 I agree with the analysis in Regina v. DaCosta by Madam Justice Wein at [2001] O.J. No. 2392. I accept her reasoning and I feel that that reasoning is the proper, with all due respect, interpretation of the White case. I find that to allow the comment made by Mr. Rolph into evidence does infringe against the principle of self-incrimination enshrined in the charter and I find that to admit such evidence was inappropriate and should not have been allowed by the learned Justice of the Peace.

¶ 10 I accept the submissions of Mr. Rolph's counsel. If a police officer comes upon a scene and asks who a driver is and he has witnesses that have observed who the driver is and they point to an individual that is one thing. But, where a person comes forward, feeling that they may well be compelled by statute to do so and acknowledges that they are a driver, I find that breaches the principle against self-incrimination.

¶ 11 Having made that determination I am not satisfied that the Justice of the Peace proceeded on the proper principles of law and I find that indeed he erred in law in admitting this particular comment made by Mr. Rolph. That being found, and that being the only evidence as to the identity of the driver in this matter, I am satisfied that this appeal should be allowed and the charge should be dismissed against Mr. Rolph.

¶ 12 MR. VAN DRUNEN: Thank you, Your Honour.

¶ 13 MR. THIBAUDEAU: Lastly Your Honour, in relation to that, paragraph 40 of the appellant's factum ...

¶ 14 **THE COURT**: Yes.

¶ 15 MR. THIBAUDEAU: ... I seek an order pursuant to 129 of the Provincial Offences Act awarding costs of the transcript only. This matter had a $110 penalty. I'm not seeking any costs in relationship to preparation or arguing which could be awarded I simply wish that Mr. Rolph be compensated for the transcript which is provided under Section 129.

¶ 16 **THE COURT**: Thank you. In considering that I do not need to hear from the Crown. This is a very involved argument and I find it is a very difficult argument and it seems to me that it is the type of matter that should have been aired in court. The cases, in regard to this matter, are certainly subject to interpretation and under the circumstances I feel that this is an appeal that should have been argued, and indeed was argued. Under the circumstances there should not be an order as to cost to follow this particular matter.

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