Case Name:

R. v. Savage

Between
Her Majesty the Queen, respondent, and
Wayne A. Savage, appellant

[1980] O.J. No. 3028

Ontario County Court
Judicial District of York
Locke Co. Ct. J.

May 21, 1980.
(34 paras.)

Counsel:

F. Armstrong, Q.C., for the respondent.
D. Besant, for the appellant.

¶ 1 **LOCKE CO. CT. J.**:— Wayne A. Savage was convicted at Toronto on January 17th, 1979. The learned Judge of the Provincial Court Criminal Division held that on November 5th, 1978, Mr. Savage had the care and control of a motor vehicle at a time when Mr. Savage's blood content exceeded 80 milligrams of alcohol per 100 millilitres of blood, contrary to the Criminal Code.

¶ 2 From that conviction Mr. Savage appeals to this Court. Through counsel, he asks for either a new trial or a directed verdict of acquittal.

¶ 3 The facts may be summarized as follows.

¶ 4 At 4:15 a.m. on November 5th, 1978, Police Constable Hanna responded to a radio call to a single vehicle accident on Kingslake Avenue. Arriving at 4:15 a.m., he found a demolished, empty car up against a broken hydro pole. A group of several bystanders surrounded both the vehicle itself and some fallen electrical wires.

¶ 5 Constable Hanna was barely out of his marked police car when Mr. Savage, the appellant, voluntarily approached the officer and spontaneously spoke to Constable Hanna. Approximately six feet behind the appellant stood a male person who, on the evidence, was the wrecked vehicle's sole other occupant.

¶ 6 The first verbal message conveyed to Constable Hanna by the appellant became the subject of a voir dire conducted by the Provincial Judge. It is sufficient to observe that that communication consisted of the appellant's admission to having been the wrecked vehicle's driver. Following that statement all recorded by the officer, came another verbal statement by the appellant to the same officer at about the hour of 4:45 a.m. That conversation took place in the police car driven by Hanna, occupied by the appellant en route to the police station.

¶ 7 While not admitting that any verbal statement was voluntary, counsel for the appellant before me took no serious issue with the admissibility of the first statement given to the officer at the scene. Counsel does, however, strongly dispute the admissibility of the second statement given in the police car.

¶ 8 At trial, the officer swore the appellant when first speaking to him was very unsteady on his feet, his breath smelled of alcohol and his eyes were bloodshot. His speech was described as being very slurred.

¶ 9 Following the spontaneous statement by the appellant to the officer, the second police car containing one police officer arrived at the scene of the accident. There followed an ambulance and a fire truck. Constable Hanna, after asking the appellant about a cut on the appellant's chin, at 4:35 a.m. arrested, cautioned the appellant, and demanded a breath sample from him. He then placed Mr. Savage in Hanna's police car.

¶ 10 Having done that, Hanna directed salvage operations outside of the police car necessitated by the accident. Before doing so, he asked the recently arrived other police officer to "watch" the police car containing Mr. Savage.

¶ 11 At 4:45 a.m., Hanna drove the appellant to the police station. En route he conversed with Mr. Savage and during that conversation the officer obtained, after asking his questions, the important information regarding the time the collision had occurred. In his first spontaneous self-induced statement the appellant had admitted driving the vehicle, having lacerated his chin on the steering wheel. After his arrest and caution in the police car on the way to the station, the appellant told the officer that the accident occurred about ten minutes prior to his arrival at the scene.

¶ 12 At 5:10 a.m. Hanna turned Mr. Savage over to Constable Titmarsh for the purpose of obtaining a breathalyzer test.

¶ 13 The grounds of appeal are two in number. The first seeks success on the ground that the learned Provincial Judge erred in law in ruling as voluntary the second verbal statement given by Mr. Savage to Constable Hanna.

¶ 14 The essential reason submitted consists of the failure of the Crown to call as a witness all persons in authority who had contact with the appellant in the course of taking the first statement and its continuation in the police car.

¶ 15 In particular, the Crown it is submitted should have called the officer who was asked by Hanna. In "watch" the police car containing Mr. Savage at the scene.

¶ 16 The second ground of appeal concerns the failure of the certificate of analysis completed by the breathalyzer officer to specify on its face the total number of breathalyzer tests taken of Mr. Savage's breath. Counsel submits that the wording of Section 237 (1)(c) of the Criminal Code refers to samples of breath in the plural. Section 237 (1)(c)(ii) refers to "each sample ... taken as soon as practicable ...". Sub-paragraphs (iii) and (iv) refer to the words "... each sample ..." followed by the words "evidence of the results of the chemical analyses ..." In short, these pluralized references to the testing of extracted breath all clearly bespeak Parliament's intention to require two or more breathalyzer tests to be taken from a suspect's breath when evidence is being gathered by police in this type of prosecution.

¶ 17 Therefore, failure of the certificate to specify on its face the number of breathalyzer tests actually taken in this case deprives Mr. Savage of a full answer and defence. It is argued further that no accused can successfully cross-examine a certificate of analysis in the absence of its author. Nor can an accused prepare a defence when he knows not the full extent of the evidence the Crown may possess and is likely to call in connection with the results of a breathalyzer test taken.

¶ 18 In support of his second ground, counsel urges me to follow the decision of Regina vs. Rees 2 C.R. (3) P. 171. There the Alberta Supreme Court decided the issue in favour of the accused by applying Regina vs. Noble 1977 37 C.C.C. (2) 193 and Regina vs. Warnock 1977 1 W.W.R. 385 (B.C.)

¶ 19 In reply, Crown counsel has referred me to the decision of Mr. Justice Griffiths of the Ontario High Court of Justice in Regina vs. St. Cyr 1979 47 C.C.C. (2) 13 where, as I read that decision, the learned Trial Judge disagreed on the same issue with Regina vs. Noble. Crown counsel has further referred me to the case of

Regina v. Grace 31 N.S.R. (2) 596 and Regina vs. Dempsey 24 New Brunswick Reports (2) 479 where Mr. Justice Limmerick appeared to disagree with Regina vs. Rees.

¶ 20 There would therefore appear to be a rather clear conflict of judicial opinion on this subject as between Eastern Canadian Courts and Western Canadian Courts. The application of common sense appears to easily solve the practical problem at the street level where most Canadians go about their daily lives. A person under arrest for suspicion of impaired driving or an alcohol-related driving offence is proscribed by Statute from having his accuser, at least in the person of the breathalyzer operator, appear in open Court without leave of the Court. Instead he is confronted usually with only a certificate of analysis which cannot ever be successfully cross-examined. While those charged with most other criminal offences are not faced with the same restrictions, citizens facing suspected alcohol-related driving offences certainly are. Surely, therefore, the certificate of analysis might be expected to specify the number of tests taken.

¶ 21 Having, however, perused the decisions I have cited, with regret I feel compelled to follow the case precedent of a superior Court. I respectfully defer to Regina v. St. Cyr and regretfully reject this ground of appeal.

¶ 22 The other ground of appeal provides equal difficulty to properly resolve. The Crown's case depends upon the evidence contained in the certificate of analysis. Without that evidence, the symptoms of impairment seen in the accused by Constable Hanna constitute the only evidence of the quantity of alcohol consumed by the accused. Vital to the Crown is the necessity of the admission of evidence of the time the accused drove the vehicle.

¶ 23 The contents of the second statement by the appellant to Hanna in the police car link the time frame within which the accident occurred by connecting the time to the breathalyzer readings obtained. Without both of these segments of evidence, the Crown would be quite unable to satisfy the onus of proving that at the time the appellant drove the car into the pole, his body contained a proscribed quantity of alcohol within the statutory two hour period.

¶ 24 The issue I must decide is whether in an alcohol-related driving charge laid under the Criminal Code, the same law relating to the admissibility of the accused statement applies as it does on the same subject but in relation to other criminal charges.

¶ 25 Ordinarily, it is trite to observe that the presiding judicial officer must mandatorily conduct a voir dire to determine that admissibility unless specifically waived (and this is far from clear). Failure to do so is fatal to admissibility of the statement, Regina v. Erven 1979 C.C.C. (2). Here the record discloses that a voir dire may have been held.

¶ 26 It is contended, however, that the Crown has failed to call as a witness the police officer who was asked by Constable Hanna to "watch" the police car containing the arrested appellant. There is no doubt that at this time the appellant was under arrest and had received the usual caution. There is also no doubt on the evidence that the passage of time between the arrest and the caution and the conversation between the appellant and Constable Hanna en route to the police station was quite short.

¶ 27 Counsel for the appellant contends that without the missing police officer being called to testify on the voir dire, the Court will never know what, if anything, transpired between the officer and the appellant who sat in the very car the missing police officer was watching.

¶ 28 Whether the police officer was "watching" the vehicle or the appellant or both is really not the essential issue. Without doubt the irresistible inference can be drawn that the missing officer was in close physical proximity to both the appellant and the vehicle itself to perform either function.

¶ 29 The Crown must prove beyond a reasonable doubt that the statement after the accused was arrested and cautioned was voluntarily made to Hanna. The trial Judge, as I understand the law, must be satisfied that no threats, hopes, promises or inducements were held out to the appellant in these circumstances. In addition, the

Court must be satisfied upon examination of all of the circumstances surrounding the case has proved on the facts in evidence, that this is so. There is no onus on the appellant to prove anything. The burden of proof remains on the Crown and never shifts (Ibrahim v. The King.)

¶ 30 The transcript of evidence is silent as to what, if any, conversation, words or gestures transpired between the appellant seated in the police car under arrest and the police officer who was delegated by Hanna to "watch" the vehicle. No one will ever know how that police officer "watched" the car. He may well have done nothing more than silently contemplate the vehicle. On the other hand, this may not be the case at all.

¶ 31 I see no difference in the application of the rules of the admissibility of statements in circumstances such as this as between a statement taken from an accused in an alcohol-related criminal driving charge and, for example, the statement taken from an accused under arrest and charged with rape or murder. If anything, an accused rapist or murderer may, in actuality, obtain even more protection than a citizen charged driving a motor vehicle when it is suspected and believed on reasonable and probable grounds that he or she has an excessive quantity of alcohol in his or her body.

¶ 32 Surely both accused in either situation are entitled to the same protection under the law.

¶ 33 Without doubt the officer who was asked by Hanna to watch the car was, as a matter of law, in these circumstances, a person in authority. That officer was not called on the voir dire conducted by the learned Provincial Judge. With respect, I am of the view that that officer, should have been called to testify and to be cross-examined in these particular circumstances. Failure by the Crown to have called him makes the statement given by the appellant to Hanna within a matter of minutes of the presence of the missing officer at Hanna's police car inadmissible. The case law on the subject is so commonly known that I consider it unnecessary in this clear context to enumerate it.

¶ 34 In the result, the appeal is allowed, the conviction is quashed and a new trial ordered.

QL Update: 20040128
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