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R. v. Slopek

Between
Her Majesty the Queen, appellant, and
Edward Slopek, respondent

[1974] O.J. No. 826

Ontario Supreme Court - Court of Appeal
Toronto, Ontario
Gale C.J.O., Brooke and Martin JJ.A.

Heard: October 4, 1974.
Oral judgment: October 4, 1974. Released: October 15, 1974.
(8 pp.)

Counsel:

E.G. Hachborn, for the appellant.
G.R. Logan, for the respondent.

The judgment of the Court was delivered by

¶ 1 **MARTIN J.A.** (orally):— This is an application for leave to appeal by the Attorney General pursuant to section 771 of the Criminal Code on a question of law alone, from the judgment of His Honour Judge Mossop pronounced on February 4, 1974 whereby, on an appeal by way of trial de novo, Judge Mossop allowed the appeal of the accused from his conviction and entered a verdict of acquittal on a charge that:

> " ... being the person having the care, charge or control of a vehicle, which was involved in an accident with two bicycles driven by Catherine Robertson and Elizabeth Robertson on Pine Bush Road, with intent to escape civil or criminal liability, failed to stop his vehicle, give his name and address and offer assistance, contrary to section 233(2) of the Criminal Code."

¶ 2 The ground on which the Crown seeks leave to appeal is that the trial Judge erred in law in rejecting the evidence of a conversation of the accused with the investigating officer, having regard to the finding of fact which the Judge made that the statement made to the officer was voluntary in the sense that it had not been induced by hope of advantage or fear of prejudice inspired by a person in authority.

¶ 3 The officer investigating the accident out of which the charge arose, as a result of information he received, requested the accused to attend at the police station.

¶ 4 On appeal by way of trial de novo a voir dire was held to determine the admissibility of the statement which it was alleged the accused made to the officer and which was relative to his involvement in the accident in question. The trial Judge on the trial de novo held that the statement, although made voluntarily in the sense that I have described, was nevertheless inadmissible, considering himself bound by the judgment of Addy, J. in R. v. Fex, [1973] 3 O.R. 242. In his reasons for judgment the Judge said as follows:

> "It is my personal view that once having found the statement to be voluntary, though given under compulsion, it then becomes admissible in evidence without proof of anything further. In this regard, I am, with great respect, in disagreement with the view adopted by His Lordship, Mr. Justice Addy in the Fex case, where at Page 247 he holds that before the statement becomes admissible, the Crown must establish beyond a reasonable doubt that the accused was in fact the person having the care, custody and control of the car.
> It is my view that the decision of Regina vs Patrick, 1960, Ontario Weekly Notes, 206, which is relied upon to support His Lordship's opinion does not in fact support such proposition. In the Patrick case the accused was charged with obstructing justice for failing to supply the information required under The Highway Traffic Act and there the Court held that it must first be established that the person whose conduct is under review was actually in charge or control of the vehicle involved in the accident before a duty of disclosure is cast upon him.
> This decision is my personal view, and, with the greatest respect to His Lordship Mr. Justice Addy, does not support a proposition that a statement given which may perhaps incriminate an accused is not admissible unless and until the Crown has established beyond a reasonable doubt that the accused did in fact have care and control. Applied to the present case it means that this accused could have refused to answer any questions and could not have been convicted of breach of Section 139(1) of the Highway Traffic Act, or obstructing justice, without the Crown having established that he had care and control ...
> Were I not bound by the decision of Mr. Justice Addy, I would hold the statement given by the accused pursuant to his statutory duty under Section 139 of the Highway Traffic Act to be admissible. I am, however, bound by the principle of stare decisis to follow His Lordship's decision, even though I personally differ therefrom, and consequently, I must rule the statement inadmissible, since the Crown has not at this stage of the trial proven beyond a reasonable doubt that the accused was in fact the person having care, custody and control of the car at the material time."

¶ 5 In our view the judgment of Mr. Justice Addy in R. v. Fex, supra, did not require the Judge hearing the appeal by way of trial de novo to reach the result which he did. The question which Addy, J. had to decide was whether statements made by an accused, at the scene of an accident, were admissible without proof that they were made voluntarily, in the sense that they had not been obtained by threats or promises emanating from a person in authority, when preferred by the Crown on a charge of impaired driving for the purpose of proving that the accused was the driver. The position of the Crown in that case was that since the accused was under a statutory obligation to give the information, it was unnecessary to establish that the statements were not obtained by threats or promises. In effect, the contention advanced on behalf of the Crown was that since the accused was required by statute to make a statement under penalty it was irrelevant whether or not the making of the statement was preceded by threats, since he was required to make the statement in any event, pursuant to a statutory obligation. Indeed, the recent judgment in R. v. Smith (1973), 25 C.R.N.S. 246 would seem to support that proposition. In that case Mr. Justice McDermott, speaking for the Alberta Supreme Court, Appellate Division, said at page 251:

> "Here the statute composes the obligation. It is not voluntary. To go into an inquiry as to whether the statement was voluntary or not and then decide as a statement had been induced by threat that it was not admissible would be to allow the common law to override the Criminal Code."

The law in Ontario, however has taken a different course. The law has, of course, been settled since the case of Walker v. The King, [1939] S.C.R. 214 that the fact that a statement is made under the compulsion of a statute does not render the statement involuntary; that the term "voluntary" in relation to statements made by an accused to a person in authority is used in a special sense, namely in a sense that the statement has not been obtained by promises or threats.

¶ 6 Mr. Justice Addy rejected the contention of the Crown, in R. v. Fex, supra, and held that the fact that the statement was made under the compulsion of a statute did not relieve the prosecution from the burden of proving that the statement was not otherwise involuntary, that is, was not involuntary in the special sense in which that word is used in relation to statements made by an accused. In the course of dealing with the contention of the prosecution, that proof that the statement was not obtained by threats or fear was irrelevant, Mr. Justice Addy made the following statement at page 247, upon which Judge Mossop relied. He said:

> "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."

¶ 7 Mr. Justice Addy did not hold that a statement made at the scene of an accident by an accused that he was the driver, was not admissible unless it was also proved by extrinsic evidence that he was the driver, notwithstanding that the statement was shown to have been made voluntarily, but merely held that the fact that the statement was made pursuant to the statutory obligation did not dispense with the obligation of proving that it was not otherwise involuntary.

¶ 8 In the instant case the prosecution embarked on a voir dire to prove that the statement was not obtained by threats or promises and the Judge expressed himself as being satisfied that the statement had not been so obtained, and would have admitted the statement, but for the fact that he considered that he was bound by the judgment of Mr. Justice Addy. In our view, this is a misapprehension of what Mr. Justice Addy held. In the passage above referred to, Addy, J. was merely pointing out that he considered that the position taken by the Crown that, because the statement was made pursuant to a statutory obligation, it was unnecessary to prove that the statement was not otherwise involuntary, was, in his view, unsound, since in any event proof would have to be given that the appellant was in charge of the vehicle before the statutory obligation attached.

¶ 9 It should be pointed out that this Court affirmed the judgment of Mr. Justice Addy only insofar as it held that a statement made by the driver at the scene of the accident with respect to his having the care, control or the car, was not automatically admissible by virtue of the statutory obligation imposed upon him, but that it was necessary to prove such statement was not otherwise involuntary. In giving judgment Jessup, J.A. speaking for the Court said:

> "I would dismiss the appeal on the sole ground that I am of the opinion that the existence of a statutory duty under section 233 of the Criminal Code does not dispense with the onus

> upon the Crown to establish a statement made pursuant to that section was not otherwise involuntary. I do not wish to be taken as accepting otherwise the reasons which Addy, J.'s judgment proceeded."

¶ 10 We are, therefore, all of the view that having found that the statement was voluntary in the sense in which that term is defined in Ibrahim v. The King, [1914] A.C. 599, the trial Judge should have admitted the statement. We therefore allow the appeal, set aside the verdict of acquittal and direct a new trial.

MARTIN J.A.
GALE C.J.O.:— I agree.
BROOKE J.A.

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