Indexed as:

R. v. Zalai

Between
Her Majesty the Queen, and
Susan Zalai

[2000] O.J. No. 3294
Court File No. 56168042

Ontario Court of Justice
Toronto, Ontario
Oates J.

June 19, 2000.
(39 paras.)

Charge: s. 130 - Highway Traffic Act - Careless Driving.

Counsel:

S. Theroux, for the Crown.
L. Ben-Eliezer, for the defendant.

¶ 1 **OATES J.**:— Is the counsel here on that continued matter?

¶ 2 MS. THEROUX: Yes.

¶ 3 **THE COURT**: I think we should do the continuation first. Are there any other guilty pleas or set-dates that we can deal with that you know of?

¶ 4 MS. THEROUX: No, Your Worship.

¶ 5 MR. BEN-ELIEZER: Good morning, Your Worship. Ms. Zalai is before the Court and I am Ben-Eliezer, initial L., I am counsel and we are prepared to proceed.

¶ 6 **THE COURT**: You are ready to proceed again?

¶ 7 MR. BEN-ELIEZER: Yes, Your Worship.

¶ 8 **THE COURT**: Ms. Theroux?

¶ 9 MS. THEROUX: Yes, we are, yes.

¶ 10 **THE COURT**: Nothing further from you, Ms. Theroux, either?

¶ 11 MS. THEROUX: No, Your Worship.

¶ 12 **THE COURT**: Alright. This matter was put over from May the 30th, 2000 for the Court to consider the submissions made by counsel for the accused at the conclusion of a voir dire which was held to determine the admissibility of a statement given to P.C. Dal Grande who arrived on the scene of this accident and who was the investigating officer. The argument put forward dealt with the Canadian Charter of Rights and Freedoms, specifically chapter 7 and 10(b).

¶ 13 The remedy sought by the accused is the exclusion of the statements of the accused made to P.C. Dal Grande regarding the accident. As the driver of the motor vehicle in question and there apparently being someone injured, that being the gentleman on the ground, but no damage to the motor vehicle, the accused is required by the Highway Traffic Act, section 199(1) to report the accident forthwith to police and furnish him, in this case P.C. Dal Grande, with the information as may be required by the officer to complete his report to the registrar. The police officer, P.C. Dal Grande, is required by section 199(3) of the Highway Traffic Act to receive that information from the accused and forward his report to the registrar.

¶ 14 P.C. Dal Grande's evidence is he arrived on the scene of the accident, proceeded with his investigation, the accused identified herself as the driver of the motor vehicle involved and at that time the accused seemed visibly upset. P.C. Dal Grande indicated there was no other person in authority present other than himself. The accused accompanied P.C. Dal Grande to his police cruiser at which time the accused furnished him with the necessary documents required and he asked the accused what happened and the accused at that time furnished P.C. Dal Grande with an oral statement of how the accident occurred. Up until this moment P.C. Dal Grande had no intention to charge the accused, he had no idea as to what occurred. He indicated that he did not read the accused's statement back to her nor was any caution given to the accused or any other reference to obtaining counsel.

¶ 15 The accused in her evidence testified that P.C. Dal Grande spoke to her, asked her what happened and then she answered the questions. She felt she could not say "no" to answering the questions and she confirms the statement was given in the police cruiser. She was uncertain as to whether the doors were opened or closed.

¶ 16 In cross-examination the accused indicated the officer asked her for her documents, that she wanted to tell the police officer what happened and she said she had to tell the officer what had occurred. The officer, after the statement was taken, indicated she was free to go.

¶ 17 A second statement was given to P.C. Dal Grande at the accused's home on September 26th which the prosecution has acknowledged would not be admissible as the officer indicated the accused was a suspect at that time and he was thinking of laying charges after receiving more clarification of the events from the accused. The argument, therefore, deals only with the statement obtained from the accused at the accident scene.

¶ 18 Dealing with section 10(b) of the Charter first, contained in the grounds for this application is count number two; "Members of the Metropolitan Toronto Police Service detained and arrested the appellant in connection with the said charge." The evidence clearly indicated the accused was at no time under arrest although she was in fact detained at the scene in order for the accused and the officer to comply with sections 199(1) and 199(3) respectively of the Highway Traffic Act.

¶ 19 Count number four; "The said police officers obtained these statements and utterances without

advising the appellant of her right to ensure, retain and instruct counsel and without giving the appellant a reasonable opportunity to do so." The matter, under these circumstances, has been dealt with previously in numerous Appeal Court decisions. So called "detention," and I use that term loosely, has been found to be reasonable and not in breach of the accused's rights under this section in these circumstances. How else could a police officer obtain necessary information from a driver if the driver were not detained long enough for an officer to obtain the necessary information as required by the registrar.

¶ 20 The appeal decisions have dealt with the accused's so called "detention" as reasonable in the circumstances and in these circumstances rights to counsel are not required. When I also consider the section of the Criminal-Code which allows police officers to conduct R.I.D.E. programs, the Supreme Court has held that stopping of motor vehicle for what ever length of time necessary to conduct a spot check is reasonable in the circumstances. Therefore, dealing with the accused's submissions regarding breach of the charter under section 10(b), I do not find upon the evidence before me that there was any breach of that section. Any detention of the accused was only for compliance to the Highway Traffic Act provisions, section 199(1) and 199(3).

¶ 21 The second argument deals with an alleged breach under section 7, dealing with the life, liberty and security of a person. This argument basically deals with self-incrimination. It is submitted by the accused that statements given to P.C. Dal Grande to comply with the Highway Traffic Act may not be used in evidence by the prosecution against the accused. In support of that argument, counsel refers to four cases; Regina versus Morin, Regina versus Bazenet, B-A-Z-E-N-E-T, Tomsen, T-O-M-S-E-N, versus the Queen and finally Regina versus White, W-H-I-T-E.

¶ 22 The most recent case of the cases is the Regina versus White, Supreme Court of Canada. Joanne White was involved in an accident and reported it to the police by telephone the next day. This is a British Columbia case, by the way. An officer attended at her home and she told him her version of the accident. The officer read her her Charter Rights, she then spoke to her lawyer and subsequently advised the officer she would not supply a statement with respect to the accident. The officer advised her, even though she was not required to provide a written statement, she was required to provide a statement if requested by the police under the Motor Vehicle Act, that is the equivalent to our Highway Traffic Act, and the statement could not be used against her in court.

¶ 23 The accused was later charged with Failing To Stop At An Accident under section 252(1)(a) of the Criminal Code. At the trial the crown had sought to adduce evidence of three conversations the accused had with the police, evidence of the conversations linked to the accident. On a voir dire the accused stated she knew immediately, in being involved in an accident, that she was under a duty to report it. She felt the officer attended at her premises to take an accident report and that she was under a duty to speak to him about the accident and that she felt so obligated, even after speaking to her lawyer.

¶ 24 The trial judge, even though he found the accused's statement to be voluntary, allowed the defence motion as to infringement of section 7, self incrimination, as part of the fundamental justice and excluded the statements under section 24(1) of the Canadian Charter of Rights and Freedoms. A motion to dismiss was granted as the Crown had failed to prove the identity of the driver. The Court of Appeal dismissed the Crown's application on the section 7 issue. The primary issue here was whether the admission into evidence in a criminal trial of statements made by the accused under compulsion of the Motor Vehicle Act offends principle against self-incrimination embodied in section 7 of the charter.

¶ 25 The appeal was dismissed by the Supreme Court. The Court held on page two; "Statements made

under compulsion of section 61 of the Motor Vehicle Act are inadmissible in criminal proceedings against the declarant, their admission in a criminal trial would violate the principle against self-incrimination which is one of the fundamental principles of justice protected by section 7 of the Charter. The respondent's statements to the police in this case were made under compulsion."

¶ 26 The fourth paragraph on page two outlines four self-incrimination concerns which were present. Without reading them all, I wish to take particular note of the second concern which reads "The vesting of responsibility for taking accident reports in the police transforms to what might otherwise be a partnership relationship into one that is adversarial, for the police officer can simultaneously be investigating a possible crime where the driver is the suspect. The driver is generally in the officer's immediate physical presence at the time of giving the accident report resulting in a context of psychological and emotional pressure."

¶ 27 The next paragraph speaks; "Immunity against the use of an accident report in subsequent criminal proceedings is itself a balance between society's goals of determining the truth and the fundamental importance for the individual of not being compelled to self-incriminate. The balance, which must be struck, in the context of the reporting condition of the Motor Vehicle Act is between a driver's right not to be compelled to self-incriminate in criminal proceedings and the province's interest in highway safety." That section also deals with reporting the accident as we are dealing with here, the compulsion section.

¶ 28 On page six reference is made to section 61 of the Motor Vehicle Act which says "The declarant is protected against self-incrimination by statutory guarantee with two exceptions, neither the report nor any information obtained in it is admissible in a trial or proceeding arising out of an accident." The White case makes reference to decisions in Regina versus Fitzpatrick, November 1995, which deals with a charge under the Games and Fisheries Act. This case dealt with the over-fishing by the accused and subsequent reporting as required by regulation of the species, time, place and poundage of the fish caught. Page 15 of the White decision at paragraph 56 as outlined in the Fitzpatrick case, "The accused and the state were not in an adversarial relationship at that time. The Canadian Charter of Rights and Freedoms arguments may be made in relation to any statute or law in Canada. Such statutes and laws obviously must conform to the provisions of the Charter."

¶ 29 The argument put forth in the case by the accused before me basically is that the accused is, by compulsion under section 199(1), required to provide to the police officer particulars as to the accident and therefore any right under section 7 of the Charter is guaranteed against self-incrimination and that any statement or information obtained as a result of section 199(1) compliance is inadmissible against her in these proceedings. It is also submitted, as in the White case, the compulsory requirement by a driver to report the accident to police puts these individuals in an adversarial relationship, that being a police officer is required to receive compulsory information and he is also, in his capacity as a police officer, required to determine if any provincial or federal statute has been breached by the driver.

¶ 30 The main difference, in my opinion, between the White decision and the Fitzpatrick decision as decided by the Supreme Court is the matter of adversarial relationship. White found that there was an adversarial relationship in its case whereas Fitzpatrick found there was not, considering the facts in its case.

¶ 31 This matter was put over by myself to refer to all cases quoted, specifically White and Fitzpatrick. Also argued was that within this case what we are dealing with was strictly provincial regulations and not provincial statutes and federal statutes as in White, that being the Motor Vehicle Act of British Columbia and the Canadian Criminal Code.

¶ 32 After careful reading of the case laws submitted and the very thorough and complete submissions made by Ms. Theroux and Mr. Ben-Eliezer, I find as follows: Upon arriving on the scene, P.C. Dal Grande did exactly what he was required to as outlined by section 199(3) of the Highway Traffic Act, that being obtaining the identity of the individuals involved, obtain a report from the driver of the motor vehicle involved and obtaining all other relevant information he would require to comply with section 199(3) of the Highway Traffic Act. As a police officer, in addition to receiving information required by the Highway Traffic Act and forwarding it to the Registrar, he also as a police officer must make the determination as to whether any breach of any provincial or federal statute has occurred. That being the case, it puts police officers in a position of not only being an "agent or representative" of the Registrar but also an agent or representative of the Crown or the state. In my opinion, what this does is, as is outlined in the White case, put the officer and the accused in an adversarial relationship.

¶ 33 The accused, upon request of P.C. Dal Grande, complied with section 199(1) of the Highway Traffic Act as she is required to do so. She identified herself as the driver and supplied all the additional information P.C. Dal Grande required to complete his accident report to comply with the Highway Traffic Act.

¶ 34 For those reasons I am of the opinion that I am bound by the White decision and therefore the statement and utterance as given to P.C. Dal Grande by the accused to comply with the provisions of section 199(1) of the Highway Traffic Act are not admissible against the accused in these proceedings. The remedy under section 24(2) of the Canadian Charter of Rights and Freedoms is granted as I am of the belief that the admission of it into the proceedings would bring the administration of justice into disrepute, therefore the statement is not admissible.

REASONS FOR JUDGMENT:

¶ 35 **THE COURT**: The accused is charged with Careless Driving under the Highway Traffic Act, section 130, alleging an offence on the 13th of September, 1999. As I indicated earlier, there is a difference between the prima facie case before the court and the Crown proving the case beyond a reasonable doubt. We are at the stage where the argument is reasonable doubt.

¶ 36 As it was pointed out earlier, Officer Dal Grande arrived on the scene, there was a gentleman on the road beside the vehicle, there was no indication of any damage nor any physical evidence with regard to skid marks, et cetera, I believe he said it was raining at that time and the roads were wet. There are no witnesses to indicate how the accused was driving leading up to what ever occurred, if it did occur. Without any evidence to support any of the driving of the accused beforehand, although it may seem ironic that I can ask for a defence, this is, as I said, proving the case beyond a reasonable doubt in this case and in this case I find that the Crown, without any other additional evidence other than what P.C. Dal Grande was able give to the Court as to his observations, and without any other evidence the Crown has not, in fact, proved the case beyond a reasonable doubt and for that reason it is dismissed.

¶ 37 MR. BEN-ELIEZER: Thank you, very much, Your Worship. I thank my friend.

¶ 38 **THE COURT**: Thank you.

¶ 39 MS. THEROUX: Thank you.

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