Ontario Supreme Court
R. v. DaCosta
Date: 2001-06-07

Regina

and

DaCosta

Court File No. 427/00 Orangeville

Ontario Superior Court of Justice Wein J

Heard: May 22 and 23, 2001

Judgment rendered: June 7, *2001*

Karen McCleave, for the Crown.

Matthew Webber, for accused.

[1] WEIN J.:—On his trial for dangerous driving causing bodily harm, the accused sought a ruling with respect to the admissibility of two sets of statements said to have been induced by statutory compulsion. These were two statements made to police officers at the scene which were said to have been made as part of the *Highway Traffic Act* investigation and induced by the obligations under the *Highway Traffic Act,* R.S.O. 1990, c. H.8, to report an accident to the police. The second set of statements included two statements to the accused's insurance company, said to have been statutorily compelled pursuant to the *Insurance Act,* R.S.O. 1990, c. I.8. Both arguments were raised in reliance on the decision of the Supreme Court of Canada in *R. v. White* (1999), 135 C.C.C. (3d) 257, affirming (1998), 122 C.C.C. (3d) 167 (B.C.C.A.).

[2] With respect to the statements to the police, the accused's counsel also raised the issue of voluntariness, but this aspect was not vigorously argued after the evidence was heard. I would, in any event, find that the statements were made voluntarily and that the question of admissibility falls to be decided on the basis of ss. 7 and 24(1) of the *Canadian Charter of Rights and Freedoms.*

PROCEDURE ON VOIR DIRE

[3] The application was not heard in advance of the jury being selected, although the Notice of Application was provided to the Crown and the Court well in advance of trial. In support of the application, counsel indicated that they intended to rely on the transcript of the preliminary inquiry and "such further and other material…".

[4] Because no affidavit was filed by the accused, the specific position taken by the accused in relation to the issue of his assertion that he was obligated to provide the statements under the relevant statutes referred to was not known to the Crown in advance. The Crown argued that the accused should be required to testify first on the *voir dire* and noted that a brief adjournment might be required prior to cross-examination. She also argued that given the onus on the defence in *Charter* applications, which of course is not disputed, the defence ought to call the police officers and insurance investigators. The defence argued that because the issue of voluntariness was still live, a blended *voir dire* ought to be conducted and the Crown ought to call the police officers.

[5] While recognizing there are limits on the Court's authority to direct the Crown concerning what witnesses the Crown ought to call, I ruled that since the issue of voluntariness is still before the Court, the Crown ought to call the police officers. The Crown agreed and subsequently, in view of that ruling, agreed to call the insurance company personnel as well. I simply point out that the inconvenience to the Court and more particularly to the jury of imposing a delay at the outset of trial so that such issues can be argued could easily have been avoided in this case. The defence had provided affidavit materials from the accused and the insurance adjusters in support of the application. It would have been obvious that there would be credibility issues, as set out in the evidence below, and that some time would be required to assess the issue. The Crown could have cross-examined prior to trial or have had the evidence on the pre-trial motions heard well in advance of the selection of the jury.

EVIDENCE ON VOIR DIRE

[6] The truck driven by Mr. DaCosta hit a cyclist who was riding along Airport Road, just south of Caledon East. The accident occurred in broad daylight on a Sunday afternoon: Mr. DaCosta stopped his truck and many other vehicles immediately stopped at the scene.

The police arrived within a few minutes. Tragically, the cyclist is now a paraplegic as a result of the accident.

The Police Statements

[7] When Constable Warren arrived, one other officer was already on scene tending to the injured bicyclist. A number of other people, including a nurse, were also assisting. Constable Warren asked the bystanders at large a general question concerning who was involved. Mr. DaCosta, who had been seated on the side of the roadway, approached her and said that he was the driver. She asked for his information and he went to get his wallet. She got the papers from him and she asked “what happened here?” Mr. DaCosta answered, “I’m hungover from last night. I dozed off for a moment. When I opened my eyes she was there”. The officer immediately told him not to say anything else. She thought it advisable that he not say anything until his rights had been read to him and the caution received. She went over and told the investigating officer what Mr. DaCosta had said, and that she told the accused not to say anything else. The officer agreed that she knew that this was a serious accident, that she was asking questions in her capacity as an investigator and that she knew she ad the right to ask the questions under the *Highway Traffic Act.* She also agreed that Mr. DaCosta was visibly distraught.

[8] The second police statement was taken by the investigating officer, Constable Ferguson. After he received the information from Constable Warren, he went over to the accused who by then was standing close to his vehicle on the road.

[9] Constable Ferguson asked the accused if he was the driver and he confirmed he was. He asked him if he was injured and Mr. DaCosta said no, he was just in shock. Mr. DaCosta also indicated he did not require medical attention. Constable Ferguson asked for the vehicle documentation and was advised that the other officer had it, so Constable Ferguson went and got it from Constable Warren.

[10] Constable Ferguson then asked Mr. DaCosta if he would attend in the police cruiser, for privacy. He also wanted to get Mr. DaCosta away from the victim because he was staring at her. As well, Constable Ferguson wanted to determine if he could smell an alcoholic beverage. Mr. DaCosta voluntarily went and sat in the rear seat. Constable Ferguson looked over the documentation and then cautioned Mr. DaCosta concerning the accident. He advised

him that whatever he said would be taken down in writing and could be used in court, and that the information was not privileged between himself and Mr. DaCosta. The officer indicated that Mr. DaCosta appeared to understand the caution.

[11] In response to subsequent questions, Mr. DaCosta confirmed that he had been dozing off and was about to pull over and when he opened his eyes "there she was". He said he tried to swerve but there she was. When asked if he had had anything to drink he said he had a few beers last night and probably still smells of alcohol. He said he had about 8 or 9 beers, stopping at 4:00 a.m. At this stage, the accused was informed that he was under arrest for impaired driving causing bodily harm. He was advised of his rights to counsel, his right to call a lawyer, and he was given the standard cautions and demands.

[12] Constable Ferguson also met with the accused the next day at his residence, and cautioned him again. When he asked Mr. DaCosta for information about the occurrence, Mr. DaCosta said he wished to remain silent. He said he "wished it could have been different; he could not take back a day and he should not say anything because it could be used against him".

[13] Constable Ferguson acknowledged that when he first spoke to Mr. DaCosta in the cruiser he told him that the statement would not be privileged but he did not advise of his right to remain silent until later, after he had formed the reasonable and probable grounds for arrest.

[14] With respect to the statements to the police officers, both officers were in uniform and there is no issue that the accused knew he was speaking to police officers. Mr. DaCosta acknowledged that his statements were as indicated, except he thought that Constable Warren told him, "do not say anything", and did not use the word "else". He testified that he answered all the questions because he felt like he was obligated to do so, because when you have an accident you have to report it. He testified that he did not feel that there was a choice not to answer. He answered questions in the cruiser as well because he felt obligated and there was at that stage no indication that he might be charged with an offence. He acknowledged in cross-examination that he knows of his right to remain silent, because he has a criminal record and has had involvement with the police in the past. He agreed that he answered in part because he wanted to help.

[15] Mr. DaCosta testified in cross-examination that when Constable Warren told him do not say anything he thought she meant to other witnesses, not do not “say anything else to the police”. Even though he has a record including a conviction for dangerous driving and is aware that his driving may result in a criminal charge, he testified that he did not think this would be a criminal matter and was not concerned about impaired driving.

[16] While I cannot accept the accused’s evidence that he thought Constable Warren was telling him not to talk to other witnesses, and while I am not satisfied that in testifying that he felt “obligated” to talk to the police he would have chosen that word at the time if asked, I am satisfied that he did subjectively believe that he was required to tell the police about the accident.

[17] As was noted in the decision of Justice Southin in the British Columbia Court of Appeal in *R. v. White* (dissenting in the result), the obligation by statute to report involvement in a motor vehicle accident is a well-known obligation even if the average citizen does not know all precise details of the statutory requirement. Drivers in general know that they have to report an accident and that they have to “talk to the police” about it. In my view, this is what the accused was trying to express: his more precise language may have been developed through his specific involvement in this case, but I am nonetheless satisfied that in this general sense, he felt compelled.

Statements to Insurance Company

[18] The vehicle was insured by Mr. DaCosta’s father. Almost three weeks after the accident, Mr. DaCosta went to his father’s insurance broker to give a written report about the accident. The broker testified that Mr. DaCosta was still emotional at this stage and so not a lot of detail was provided on the report. The written portion of the report states simply “driving northbound on Airport Road and at Old Base Line third party on the side of the road also northbound was hit by my car”. Mr. DaCosta also provided details of the purpose of the trip, the weather and his speed “about 60 kilometers per hour”.

[19] The broker told Mr. DaCosta that the accident report would be sent to the insurance company, that an adjuster would contact him, and that it would be important to cooperate with the adjuster.

[20] Mr. Reid, the independent adjuster, interviewed Mr. DaCosta at his work site on May 30th. He spent about a hour with Mr. DaCosta discussing the details of the event. Then he recorded those details in writing and had Mr. DaCosta sign the statement. This statement provides a great many more details of the offence, and details of Mr. DaCosta's prior driving record, and of his drinking on the night before the accident. It includes the statement, inconsistent with the statement that he gave to Constable Ferguson, that his last drink was about 6:30 a.m. the morning before the accident. Mr. DaCosta confirmed that he was tired and dozed off and the truck may have veered to the right and he opened his eyes and saw the cyclist. He tried to swerve left but still hit her.

[21] Mr. DaCosta acknowledged that he gave this statement and signed it.

[22] However, a major point of discrepancy in the evidence concerns whether or not Mr. DaCosta had asked for his statement to remain privileged. Mr. Reid testified that Mr. DaCosta never brought up the issue of privilege. He testified that Mr. DaCosta never asked that the statement stay with the insurance company just for insurance purposes. He said if Mr. DaCosta had asked about this he would have remembered. By contrast, Mr. DaCosta testified that he asked Mr. Reid if the statement would be released and Mr. Reid said it would not. Mr. DaCosta testified that he believed the statement was privileged and that if he did not give a statement he would be denied insurance. In cross-examination he indicated that he was "positive" that he asked if the statement would be released to anyone, and testified that Mr. Reid had said it would just be between the insurance companies. Mr. DaCosta indicated in cross-examination that he asked Mr. Reid to sign something to that effect but Mr. Reid said there was no need. As a result, he gave the statement because he believed it would not go to the police, and because he was obligated by law to give it.

[23] I am not satisfied that Mr. DaCosta made these inquiries concerning privilege to the adjuster. Credibility on this issue is difficult to assess, since both witnesses testified in an apparently forthright manner. However, given the specific questions asked of the insurance adjuster, and the embellishments added by the accused in cross-examination, I find that this part of the conversation did not occur.

[24] Nonetheless, given the circumstances under which the statement was taken, the lengths to which the company had to go to obtain a full statement, and the underlying possibility that the company was going to void the policy, I am satisfied that Mr. DaCosta signed his written

statement because he felt that he was obligated by insurance regulations to give such statements.

THE LAW

[25] In *R. v. White,* the Supreme Court of Canada analyzed the scope of the protections provided by the principle against self-incrimination as contained in s. 7 of the *Charter* in the context of the admissibility of statements given as a result of statutory compulsion. The Court held that while use immunity provisions created by provincial motor vehicle legislation cannot extend directly to proceedings under the *Criminal Code,* as it would be *ultra vires* the province to restrict the admissibility of evidence in criminal matters, the principle of self-incrimination guaranteed by s. 7 did provide a protection against uses of information compelled by statute or otherwise. The majority held that while s. 7 does not provide absolute protection against all such uses of information, in the context of that particular case, involving a purely criminal offence, the protections did lead to the conclusion that the use of the statements would violate the *Charter.* Accordingly, the evidence was properly ruled inadmissible under s. 24(1) of the *Charter.*

[26] In analyzing the scope of the principle in the context of s. 7 as opposed to other enumerated expressions of the principle, the Court held that the protections of the principle against self-incrimination contained in s. 7 are “specific and contextually sensitive”.

[27] The principle enunciated in *R. v. Fitzpatrick* (1995), 102 C.C.C. (3d) 144 (S.C.C.), where use immunity was analyzed in the regulatory context was therefore distinguishable because of the context in which it arose.

[28] In the context of statements made under compulsion of motor vehicle legislation, the Court noted that the statements are taken under pronounced psychological and emotional pressure, that the use of such statements for incrimination in a criminal matter was not a purpose of the regulatory regime, that there will be a significant fear of prejudice if the person does not speak, and that permitting accident reports to apply in criminal proceedings would give the driver an incentive to lie and might increase the possibility of abusive conduct by state officials.

[29] It is important to note that in *White* the Court was assessing a situation where the statement had been volunteered by a “hit and run” driver the day after the incident. When the

statement was taken, she was advised that although she was not required to provide a written statement she could be required to provide a statement under the *Motor Vehicle Act.* Importantly, she was also advised that any statement she gave under the *Motor Vehicle Act* could not be used against her in court because of the specific provisions of the legislation in that province. As well, the Court had clearly found that the statement was given in the context of a discussion of the motor vehicle legislation.

[30] In a careful and thorough argument, the Crown sought to distinguish the *White* case, primarily on the basis of the fact specific reference had been made to the motor vehicle legislation in the conversation leading up to the taking of the statement. By contrast, Mr. DaCosta was responding to general questions, and was quickly told that the conversation was not privileged. While I acknowledge these are significant differences, and notwithstanding my findings that to some extent the language now employed by Mr. DaCosta has been chosen by him to bolster his claim, I nonetheless remain of the view that he was influenced by the fact that he felt he had to give a statement because of a generalized non-specific understanding of a driver's responsibilities under the *Highway Traffic Act.*

[31] Importantly, in the majority reasons in *White,* Justice Iacobucci noted:

> 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. [Para. 66.]

[32] Against this statement of principle, I am unable to find that the distinguishing features of this case provide a different context that leads to a different result. Justice Iacobucci went on to say that the principle against self-incrimination is strongly brought into play by numerous aspects of the context surrounding the compulsion to make an accident report, such that "a driver who makes a statement pursuant to the statutory duty [as set out in motor vehicle legislation] is entitled, at least, to use immunity in criminal proceedings in relation to the contents of that statement". [Para. 67]

[33] It was not argued, nor can it be realistically said, that anything turns on the distinctions between the British Columbia legislation and the Ontario legislation in question, notwithstanding that the Ontario legislation is far less specific than the B.C. legislation concerning use immunity.

[34] The Court recognized that the inability of police to rely upon statements made under the compulsion of the motor vehicle legislation highlights the importance of questioning a driver separately for the purpose of engaging in a criminal investigation. The Court acknowledged the logistical difficulty created by the existence of motor vehicle legislation and the need to question persons suspected of motor vehicle offences. In analyzing this problem, the Court noted:

> If police wish to use in criminal proceedings information acquired from the driver through questioning, the information must not be provided pursuant to the duty [in the motor vehicle legislation]. There are several ways in which police might organize their investigation in order to prevent any information acquired independently of s. 61 from becoming tainted, as it were, by the accident report that is subject to use immunity. One possibility which appears to be contemplated by [the B.C. legislation] is for police to inform the driver that they intend to secure the details of the accident report, not from the driver himself or herself, but "by other inquiries", thus terminating the driver's statutory duty to report the accident and permitting police to begin their investigation immediately. [At para. 65.]

[35] That advice is clearly directed towards guiding the police. It would certainly have been good advice for Constable Ferguson to have followed in the context of this particular case. It would not, however, have assisted Constable Warren at the very first stage of the inquiry, when a number of people were present, and even the identity of the driver was not known, and when it was not even known whether any criminal or motor vehicle offence had been committed. In this regard, the Supreme Court of Canada held, after reviewing the test to be determined in establishing the existence of compulsion, that:

> The application of the principle against self-incrimination begins, and the societal interest in the effective investigation and prosecution of crime is subordinated, at the moment when a driver speaks on the basis of a reasonable and honest belief that he or she is required by law to do so. [At para. 77.]

[36] The Court held that the appropriate test for determining compulsion under motor vehicle legislation is:

> …whether, at the time that the accident was reported by the driver, the driver gave the report on the basis of an honest and reasonably held belief that he or she was required by law to report the accident to the person to whom the report was given. [At para. 75.]

[37] As was noted earlier, it is quite clear that most drivers are aware of the duty to provide information including their documentation and a report of what occurred to the police after an accident. This necessarily involves an admission of being the driver. In *White* itself, the exclusion of that acknowledgement resulted in the case being dismissed as there was no additional evidence to prove identity. In very similar circumstances, in *R. v. Zalai,* [2000] O.J. No. 3294 (QL) (Ont. C.J.) June 19, 2000), the Court ruled that a similar statement was inadmissible on the basis of the *White* decision.

[38] Not without difficulty, I am therefore compelled to conclude that the principles in *White* do not permit me to distinguish the context that arises in this case. The accused's statements to the police must accordingly be ruled inadmissible.

STATEMENTS TO THE INSURANCE COMPANY

[39] The Crown has vigorously argued that the relationship of the accused to his insurance company is private, not involving the State, and that derivative use immunity cannot apply in these circumstances. The Crown relied in particular on the decision of the Ontario Court of Appeal in *R. v. Syed,* [2000] O.J. No. 3535 (QL) [reported 22 C.C.L.I. (3d) 163], where, in an arson case, the trial Court had held that oral statements made to insurance adjusters were not improperly admitted at a trial. The trial decision predated *White.* In a short endorsement, the court noted that there was no evidence supporting the argument that the accused reasonably believed his statements were made under legal compulsion, even if it were assumed that statements made under s. 148(6) of the *Insurance Act* were statements under statutory compulsion.

[40] However, in *R. v. Spyker* (1990), 63 C.C.C. (3d) 125 (B.C.S.C.), the Court held that insurance statements provided after a motor vehicle accident were inadmissible because of the mandatory nature of the statements and the right against self-incrimination. It was ruled

that admission of the statements would violate s. 7 rights and the statements were ruled inadmissible pursuant to s. 24(1) of the *Charter.*

[41] While it is true that a private contractual relationship exists between the insurance company and the insured, it is also true that insurance is mandatory. In that sense it cannot be realistically said that the relationship is purely voluntary. The reporting requirements are set out by regulation, not by individual contract. For the same reasons enunciated in *White,* there is an element of statutory compulsion to the declarations required under the *Insurance Act.*

[42] Notwithstanding my finding that the accused embellished his evidence concerning the specifics of the conversation he had with the insurance adjuster, I remain of the view that he did feel compelled to make the statements, and that he gave it because it was a statutory requirement and under the belief that the statement would remain privileged. In these circumstances, these two statements as well must be ruled inadmissible.

Statements excluded.