

PROVINCIAL OFFENCES COURT

HER MAJESTY THE QUEEN

against

FILIPE FARIA

P R O C E E D I N G S

BEFORE HIS HONOUR JUDGE K. A. LANGDON, on
December 14th, 1987, at Brampton, Ontario.

APPEARANCES:

A. Lobo, Esq.

Prosecutor for the Crown

J. Burd, Esq.

Agent for the accused

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MR. LOBO: Number two on your list, Filipe Faria.

MR. BURD: Good morning, Your Honour, my name is John Burd, B-U-R-D. I appear as agent on behalf of the appellant who is present in court today.

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CLERK OF THE COURT: Step forward, please.

MR. BURD: Your Honour, this is....

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THE COURT: Give me a moment now to get my papers noted up here. Yes, I have read this transcript so you can proceed on that assumption.

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MR. BURD: Your Honour, this appeal is a conviction of careless driving, section 111, of the H.T.A. The appellant contends at this time that the crown did not establish a prima facie case sufficient to put the accused to a defence, let alone prove beyond a reasonable doubt, and there are three submissions to that effect, Your Honour. The first submission would be that the identification of the accused as the driver of the suspect vehicle is inadmissible. The second submission is that the description of the accident scene, the evidence describing the accident scene was inadmissible and the third one was that there was no evidence that this accident occurred upon a highway, as read out in the information at the trial.

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Going back to the first point, Your Honour, the identification of the accused not being admissible, I have here some stated...a recorded case, R. v. SLOPEK, I believe it's Ontario Court of Appeal. I have furnished the crown with a copy, Your Honour, and I do have one for the Court.

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THE COURT: It is alleged, is it, that there was no voir dire and it was based on a statement?

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MR. BURD: Yes, Your Honour, it was...there's Criminal Code statute and the Highway Traffic Act statute also that require that the... anyone involved in a motor vehicle accident over \$700.00 or with injuries report the accident forthwith to the nearest police office. It's compelled by statute and R. v. SLOPEK deals with the fact that even though this statement is compelled by statute and....

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THE COURT: It still has to be subjected to a voir dire. You do not have to reinvent the wheel.

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MR. BURD: Okay, Your Honour. I'm not sure how familiar Your Honour might be with that particular act, however in R. v. SLOPEK, if you notice there's a highlighted area on the very last page of the judgement and it reads; "It should be pointed out that this affirmed the judgment of Mr. Justice

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5 Addey 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 or control of the car. It was
not automatically admissible by virtue
of the statutory obligation imposed upon
10 him but that it was necessary to prove
such statement was not otherwise involuntary."
Now, Your Honour, this also includes...this
is identification of the driver identifying
himself....

15 THE COURT: I think you have made your point.
You do not have to reinvent the wheel.

MR. BURD: Okay, Your Honour. That was our
point on there was no identification of the
accused or the identification that was
produced in court was inadmissible. The
20 description of the accident scene, I also
have that...it's very questionable and the
reason being, if Your Honour refers to
the original transcript on page 7, line 25,
Mr. Agard, the prosecutor at the time, apparently
felt it was up to him to describe the accident
25 scene to the Court, because from line 25 on
page 7 to line five on page 8, Mr. Agard
is describing the scene of the accident to
the Court, however Mr. Agard being the crown
was never sworn as a witness.

30 THE COURT: Well, Constable Rowe did say on
page 7 it is a T intersection with Tedwyn

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being a cross street and Cliffe Road being the throughway. Cliffe Road runs north/south, Tedwyn runs east/west.

Now, we may not know which street....

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MR. BURD: Yes, Your Honour, but in cases like this the crown always relies on R. v. MCIVER and in that case there's a very clear picture of the accident, how it occurred and it demands an explanation, but that clear picture is provided by crown witnesses not the crown prosecutor, If you read that part of the transcript there is no intervention. The police officer isn't getting a word in sideways, it's all Mr. Agard....

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THE COURT: I have read that. I have just cited you the portion where the officer described the intersection. Line 15, on page 7.

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MR. BURD: Yes. I guess my point, Your Honour, would be that the description that the officer gave, which was very limited, was not sufficient to fit in with R. v. MCIVER where a very clear description begging of an explanation is required. That wasn't furnished by the police officer. It was very brief and not sufficient to call for an explanation. The third point why...our third submission regarding prima facie evidence is that all

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the evidence, physical evidence described by the police officer who was, by the way, not the investigating officer has to do with the lawn in front of 346 Tedwyn Drive and the tree in front of the house, 346 Tedwyn Drive. There is absolutely no mention of Tedwyn Drive, which is the street named in the information and also on page four, line one, this is the crown again asking a question of the police officer, "In your capacity as a police officer, did you take part in the investigation of a motor vehicle accident on a paved road close to Tedwyn Drive?" Now, throughout the trial, Your Honour, there was never any indication that this paved roadway was private property or otherwise, but it is apparent the crown doesn't believe this paved road is Tedwyn Drive, because he says 'close to Tedwyn Drive' a paved roadway close to Tedwyn Drive. The only other information...and upon cross-examination I questioned the police officer, I think very thoroughly, that no skid marks, no physical evidence was heard anywhere, except on the lawn and on the tree in front of the house at 346 Tedwyn Drive, so there was no evidence whatsoever of the offence having occurred upon a highway, which is part of the charge.

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THE COURT: Doesn't it boil down to this? The officer comes upon a motor vehicle, the front end has sustained severe damage and is apparently still in collision with a tree on someone's lawn, and the back wheels of the car on someone's driveway and there are skid marks leading across the boulevard from Tedwyn Drive to the place where the car was found at rest. Is that not what was proved?

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MR. BURD: No, Your Honour, everything is correct except skid marks on the boulevard. All the skids were on the lawn itself not on....

THE COURT: Well, he described it was the boulevard. That is true, the ruts were in the grass.

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MR. BURD: That's correct.

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THE COURT: Now, if I find somebody on my front lawn, smashed into my tree some distance from the road, it seems to me that calls for an explanation. You drive your car on the highway and I walk across the lawn.

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MR. BURD: If it were a charge of dangerous driving under the Criminal Code I would say that the crown would be well...that would be a different situation, Your Honour.

5 THE COURT: Well, I will not buy that, but I will hear from Mr. Lobo on the first point. Any admissible evidence of the identification of the driver?

10 MR. LOBO: Well, Your Honour, the only thing I can point out was page nine, it's a matter for Your Honour to decide whether it's going to be considered admissible or not. "Yes, sir, he identified himself to myself and the other officer as the driver."

15 I think this particular part...that is at line six. This particular part, Your Honour, whether it comes under the compulsion of the Highway Traffic Act where somebody is supposed to tell what happened or not, I don't know, but I would like to bring to Your Honour's attention...I would definitely be in agreement that any further statement as to how that took place, which is in fact... 20 has to be given by the officer and that is done under a statutory compulsion of the Highway Traffic Act. It definitely needs a voir dire to be made admissible but purely the identity that 'I was the driver of the vehicle', my submission to you would be it would be completely held up and jeopardized in the way the prosecution that conducted it before every case. The person, for instance, you have a simple rule of the road, where a person is caught speeding or going through an amber light or a red light and the officer 25 30

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says, that was the driver, but he identified himself to me as such and such. It looks like we would need a voir dire if that's the case. Besides, Your Honour, I would bring to your attention, I believe it is, R. v. FEDORUK, where the similar principle was argued and decided upon, where counsel appeared on behalf of Fedoruk and when the name was called said he was pleading not guilty on behalf of the accused and at some point later during the trial when the officer was unable to point out....

THE COURT: Oh, the income tax case. I remember that, yes. I do not think that applies in this situation.

MR. LOBO: The principle is, Your Honour,... I'm saying that when a person comes before the....

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THE COURT: That deals with identification, is the person that is shown in the summons the same person that was there, which is slightly different. I do not think there is any dispute that this being a Part III and there was a summons later, but the issue is not was he at the scene, but was he the person? The question is, is there proof that he was the driver of the car?

MR. LOBO: Actually, I just got the transcript this morning, Your Honour, and it may be correct,

5 the only thing that I can find in the whole
thing was page nine where he said he was
the driver, and my submission to you, just
for that part, there would be no need for
a voir dire.

THE COURT: Okay.

10 MR. BURD: Your Honour, I....

THE COURT: Unless you want me to dismiss your
appeal, you best sit down.

MR. BURD: All right.

15 R U L I N G

LANGDON, K. A., P.C.J. (Orally):

20 The three elements of most charges; act, identity
and intent. Here the prosecution relied on
what essentially was a statement from the
accused to prove identification of the accused
as the driver of the car. That is a form
of confession and although it may be highly
inconvenient it has to be entered after a
voir dire. There is no exception to that
principle. It applies to anything relevant,
25 including identification.

30 There was no voir dire as to the accused's
statement that he was the driver and there
was thus no admissible evidence that the
accused was the driver of the car.

As to the other two grounds of appeal, there is no merit in them at all that I can see, but the appeal will be allowed. The conviction and sentence are set aside.

MR. BURD: Thank you, Your Honour.

THE COURT: The fine and costs paid to be refunded in full. A verdict of not guilty will be entered.

THIS IS TO CERTIFY THAT the foregoing is a true and accurate transcription from the record made by sound recording apparatus, to the best of my skill and ability.



Judith Whitehouse
Certified Court Reporter.