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THE ONTARIO COURT OF JUSTICE
TORONTO REGION

HER MAJESTY THE QUEEN
against

MAURIZIO TORNABENE

Charge(s):
Red Light

APPEAL PROCEEDINGS

Heard before the Honourable Justice R. Khawly
On March 18, 2003 at Toronto

APPEARANCES

Counsel for the Crown
Counsel for the Defence

Ms. H. Clement
Mr. T. Brown

Courtroom No. L
OLD CITY HALL

UPON COMMENCING

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MS. CLEMENT: Good morning, Your Honour, Clement, initial "H" for the City.

THE COURT: Thank you.

MS. CLEMENT: If we could deal with lines 19, Maurizio Tornabene.

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MR. BROWN: Good morning, Your Honour, my name is Todd Brown, B-R-O-W-N, first initial "T."

THE COURT: Good morning.

MR. BROWN: Agent for Mr. Tornabene who is not before you.

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THE CLERK OF THE COURT: What number is it, sorry?

MS. CLEMENT: Nineteen on the appeals proper list.

THE CLERK OF THE COURT: Thank you.

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MR. BROWN: Your Honour, I've included grounds for this appeal in your file only this morning. I've spoken with my friend. It seems that she doesn't have her copy of the transcripts.

I suggested that the matter be held down until two o'clock. Perhaps Ms. Clement could read my transcripts and perhaps Your Honour could review the grounds. I think it is a pretty narrow issue. We'd like to have it dealt with as soon as possible, so perhaps if the matter could be held down to two o'clock.

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THE COURT: Just a minute.

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MR. BROWN: Sure.

THE COURT: Well, except you have on Page 18 where the Crown is saying, "I've changed my

mind. I'm prepared to close the case without entering the statement given to the officer."

MR. BROWN: The statement that I'm referring to is the statement of Mr. Tornabene allegedly stepping forward in response to an inquiry by the investigating officer as to who was driving the vehicle. So, in my view, either there is a statement or there isn't.

THE COURT: Well, sounds like the Crown is saying, "I'm prepared to close my case without entering that statement."

MR. BROWN: Right, but then the learned justice of the peace took notice of the statement.

THE COURT: How do you know that? Where does it say that?

MR. BROWN: Well, it's in the judgment. Her Worship indicates that she's satisfied that Mr. Tornabene was the operator of the motor vehicle. The only way that Mr. Tornabene could be the operator of the motor vehicle is if the justice of the peace relied on --

THE COURT: Not necessarily. Not according to what the Crown says.

MR. BROWN: I'm not a hundred percent certain I follow Your Honour?

THE COURT: Well, the Crown seems to be saying, "I'm prepared to close the case without entering the statement given to the officer," specifically notwithstanding the other point raised.

MR. BROWN: Right. Well, in -- in --

THE COURT: Hence she must have thought she had

sufficient evidence of the driver.

MR. BROWN: She did feel that way.

THE COURT: Well, where --

MR. BROWN: And in my view, she was wrong.

THE COURT: -- where did she cast her mind to suggest she had evidence of him being the driver?

MR. BROWN: All right, quite simply put, Your Honour, the investigating officer who gave evidence at this trial wasn't present when the accident actually took place, when the collision occurred. He arrived after the --

THE COURT: I'm not talking about the officer.

MR. BROWN: Okay.

THE COURT: She must have felt she had enough evidence from the civilian witnesses that your client was the driver.

MR. BROWN: Are you referring to the Crown, Your Honour?

THE COURT: Yes.

MR. BROWN: Okay, the Crown has attempted to lead evidence at trial that Mr. Tornabene was the operator of the motor vehicle by eliciting an implied statement from the defendant, by having the investigating officer say, "All right, there are six or seven --"

THE COURT: Forget the investigating officer.

MR. BROWN: Well, that's --

THE COURT: Is there any evidence from any of the civilian witnesses --

MR. BROWN: No.

THE COURT: -- that he's the driver?

MR. BROWN: No.

THE COURT: You're sure about that?

MR. BROWN: Yeah, I'm certain. Perhaps I could, even on that point, direct you to the witness immediately prior to Officer Madeira. His name fails me, Your Honour. I'll give you a page number in a moment. The cross-examination of witness, civilian witness Nassau [phon.] on Page 14. Cross-examination by Mr. Bonen [phon.]:

"Mr. Nassau, do you remember how many police officers attended the scene of the accident?"

"When I was there, about four of them."

"No further questions."

A little higher on that page, the only evidence that would suggest that Mr. Tornabene perhaps was the driver was the bottom of Page 13:

"Did you see, at any time see a police officer speaking to the driver of the van?"

ANSWER: "I seen him talking to him, yeah, yes, I think a statement or something."

"Would you be able to recognize the police officer that you saw speaking to the driver of the van?"

"No, I don't."

Mr. Bonen on behalf of the Defendant, quite rightly in my view, elicited from that same witness that there were four police officers at the scene of the accident. So that, if there's anything that the Crown could hang its hat on with regards to putting Mr. Tornabene behind the wheel, that's it. And in my respectful

5 view, Your Honour, it fails. And I'm not suggesting that the Crown couldn't have proven that he was driving the vehicle. And I think the appropriate remedy here is a new trial, for that reason and that reason alone.

10 THE COURT: Well, in any event, I see here that despite the Crown's position, that the learned justice of the peace did rely on the aspect when the officer said, "When I asked who the driver of the van was someone stepped forward and gave his driver's license."

15 In my view, that is not the subject of a voir dire in any event, because under the Highway Traffic Act, as you well know, one is bound to provide their driver's license when so requested.

20 MR. BROWN: But I agree entirely that Mr. Tornabene was under statutory obligation to identify himself as Mr. Tornabene. The Crown wants to take it a step further, have Mr. Tornabene put himself behind the wheel of a motor vehicle.

25 I think the law has been settled with clarity in that regard by the Ontario Court of Appeal in R. v. Slopek, of which I have a copy here today, Your Honour. If you want to put somebody behind the wheel of a motor vehicle, notwithstanding the statutory compulsion, the Crown is obliged in every case to prove that the statement wasn't otherwise involuntary, statutory obligation notwithstanding.

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And that was settled in the seventies, I

5 believe, Your Honour. I have a copy of that
with me here. I'm handing up ~~Slopek~~, Your
Honour. I apologize that it's not stapled. I
printed it this morning. Copy for my friend.

10 THE COURT: Well, it doesn't really much
matter, does it, because at the end of the day
in the circumstances in which this request was
made, following a voir dire, I don't think
there would be any suggestion that the
statement was not made freely and voluntarily?

MR. BROWN: I -- I --

THE COURT: Would there?

15 MR. BROWN: I'm sorry, I didn't mean to
interrupt.

THE COURT: Would there?

20 MR. BROWN: Yes, I -- I believe that there
would be such a suggestion. I've included that
as a third ground of appeal. I'm well aware
that if Your Honour reviews the transcripts and
finds that, in any event, the statement would
have been voluntary, my appeal would fail.

25 But under the circumstances, which is why
I point it out, that there were four police
officers present during the taking of the
statement at the scene of the collision. The
Crown has failed to illuminate all the
surrounding circumstances with regard to the
taking of the statement. And under those
circumstances, in my respectful view, Your
Honour, there is no way that this Court could
30 come to the conclusion that the statement was
taken freely and voluntarily. That was set out

in R. v. Hodgson, which is Supreme Court of Canada. I've handed a copy of that up.

THE COURT: All right, I think Mr. -- what's your name, sir, again?

MR. BROWN: Brown.

THE COURT: Brown has a good point, Ms. Clement. If you want this matter held down until two o'clock, that's fine. But I think he's got a pretty good point.

MS. CLEMENT: Again, perhaps this matter could be held down until two o'clock and I can review the transcript.

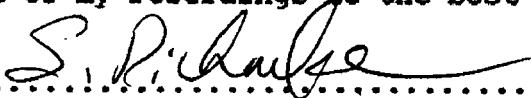
THE COURT: Very well.

MR. BROWN: Thank you, Your Honour.

THE COURT: Held down.

ADJOURNED TO TWO O'CLOCK

THIS IS TO CERTIFY that the foregoing is a true and accurate transcript of my recordings to the best of my skill and ability.


.....

SANDRA RICHARDSON, Official Court Reporter.

This transcript is certified only if Reporter's original signature (not a photocopy) appears on final page.

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Courtroom No. L
OLD CITY HALL

UPON COMMENCING

2:00 p.m.

5
MS. CLEMENT: Mr. Brown.

MR. BROWN: Good afternoon, Your Honour.

THE COURT: Good afternoon. Yes, Ms. Clement.

10
MS. CLEMENT: Your Honour, I have reviewed the transcript and I just would like Mr. Brown to respond to one question.

The grounds for appeal is that, at Lines 1:

15
"The learned justice of the peace erred in not directing a voir dire to ensure that the -- determine the voluntariness of the statement."

Perhaps Mr. Brown could direct me to what statement you are referring to?

20
THE COURT: The statement resulting from the police officer asking, "Whose car is this?" Or, "Who was driving this van?" The appellant then came forward and gave his driver's licence. Is that what you're referring to?

MR. BROWN: It is, sir, thank you.

MS. CLEMENT: My response to this is that the officer attended the scene of an accident.

THE COURT: Yes?

25
MS. CLEMENT: He made a verbal question.

THE COURT: Yes?

MS. CLEMENT: And someone responds.

THE COURT: Right.

30
MS. CLEMENT: This person responded. It is not a statement. I can direct the Court to Page 16 at Line 10.

THE COURT: Yes.

MS. CLEMENT: The officer indicates that, "Upon

5 | arrival at the scene, I spoke with the first witness who was in pain and was later transported to hospital. The second person approached me and this person identified himself as being the driver of the van."

THE COURT: Yes?

MS. CLEMENT: My response to the grounds stipulated is that this is not a statement, Your Honour. Someone, an officer, attends. He's conducting an investigation. He makes inquiries as to who was driving a particular vehicle and someone approached indicating that they're the driver.

15 | I would submit that it is not a statement and I would also submit that there was no error made at this time, after reviewing the totality of this case in particular.

THE COURT: Except that, if you look at the reasons for judgment at Page 27, it must have been either in the evidence somewhere or the learned justice made the inference, because --

20 | MS. CLEMENT: Where is this?

THE COURT: -- at Line 4 and 5, six or eight people standing around at the scene of the accident and the officer asked, "Who is the driver of this vehicle? Of this white van?" And the defendant stepped forward and produced a driver's licence to identify himself.

25 | MR. BROWN: That's Page 20 is where that evidence is, halfway down. Line 10, Your Honour.

30 | THE COURT: "I asked who the driver of the van was of all the people that were around and he stepped forward stating that he was the driver

of the van."

5 MS. CLEMENT: And he stepped forward as the --

THE COURT: "Stating that he was the driver of the van." He's making a statement.

10 MS. CLEMENT: So, is the Court concluding that, in these circumstances, the voir dire should have been conducted because somebody voluntarily stepped forward indicating that they were the driver of the van?

15 THE COURT: Well, except they don't necessarily voluntarily step forward. It is a result of the question being asked by the officer. So the issue is whether the word "voluntary" is the right word.

20 In other words, I don't think Mr. Brown is arguing that that statement cannot be led. I think what Mr. Brown is arguing is that, before the statement can be led, it should be subject to a voir dire, which the Crown concedes in the transcript. Then, the Crown says, "I'm not relying on it."

25 If the Crown is not relying on it, then on what basis is the justice of the peace looking at the statement? And the justice of the peace is using that statement to assist him in arriving at his conclusion.

MS. CLEMENT: Could Your Honour direct me to where exactly the justice of the peace --

30 THE COURT: Where the Crown says, "I'm not relying on it"?

MS. CLEMENT: Yes.

THE COURT: Page 18, Line 14:

5 "Yes, Your Honour, if I may, I have just changed my mind." See that? Ms. Theroux:

"I'm preparing to close the case without entering the statement given to the officer. I'm withdrawing my request of a voir dire to enter the statement."

10 Hence, if she's not relying on the statement, on what basis does the learned justice of the peace rely on this statement to come to his conclusion?

15 MS. CLEMENT: But then, at Page 19, Ms. Theroux indicates that, "...where there is no voir dire required because it is a spontaneous utterance."

20 THE COURT: Well, I'm not quite sure it's a spontaneous utterance. Usually, a spontaneous utterance occurs when something happens and someone makes an immediate comment. In this case, there's an accident and the officer arrives on the scene, so that some time has elapsed. He makes a particular request and the statement is made.

25 That is not part of the res gestae, but that aside, if you move on, Ms. Theroux goes on to say at Line 21 on Page 20,

"Okay, again, without the -- well, there's evidence with respect to the officer repeating into the Court what this person said. However, those are my questions. I have no further questions for the officer with respect to how he determined who was the driver of the motor vehicle."

30 Seems to be suggesting that she is not revisiting the fact that she is not relying on that statement.

5 "Again without the -- well, there's evidence with respect to the officer repeating into the Court what this person said, however, those are my questions."

10 Sounds like she's throwing in the towel and saying, "I'm not using the statement." I don't know, then, on what basis the learned justice of the peace is looking at that particular statement.

5 Then she changes her mind on Page 22, I'll grant you that. Seems to be suggesting that a voir dire is not required and I'm not so sure that she is correct in that interpretation. So, she seems to be taking back what she said earlier and goes on to say:

20 "But we intend to close our case and rely on - - to prove identification with respect to the manner in which the officer made an inquiry to the people present and received a response of someone who then identified himself with a valid driver's licence..."

Hence, she is now telling the Court to rely on that statement. If that is her last position, what Mr. Brown is suggesting is that this is subject to a voir dire.

25 And I think he's got a point. My point to Mr. Brown was, assuming a voir dire was required, at the end of the day, would it much matter?

30 And his answer is, Well, there were four officers there, so they would have to call all four officers to make sure that there was no suggestion of threat or inducement. And in law, he's right.

Appeal allowed, matter will go for re-

trial.

MS. CLEMENT: I'm suggesting April the 30th at 9:00 a.m. in Courtroom 6-0-3 to set a date for trial.

MR. BROWN: That was 30th?

MS. CLEMENT: Yes.

MR. BROWN: I'm sorry, what time?

MS. CLEMENT: Nine a.m.

THE CLERK OF THE COURT: Straight for trial?

MS. CLEMENT: To set a date, 6-0-3.

MR. BROWN: Thank you for your consideration, Your Honour.

THIS IS TO CERTIFY that
the foregoing is a true and accurate
transcript of my recordings to the best of my skill and ability

.....
SANDRA RICHARDSON, Official Court Reporter.

This transcript is certified only if Reporter's original signature (not a photocopy) appears on final page.