1938
* Dec. 12.
1939
* Jan. 16.
* Feb. 7.

NORMAN WALKER .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence—Admissibility—Trial on charge of manslaughter through motor car accident—Alleged admission by accused to police officer that he was driver of car—Highway Traffic Act, R.S.O., 1927, c. 251—Sec. 88 (5) (as enacted by 20 Geo. V, c. 47, s. 6)—Privilege thereunder—Construction, application—Sec. 40 (1)—Criminal Code, s. 285 (2)—Trial—Procedure—Proper practice—Trial judge deciding there is no evidence to go to jury, withdrawing case from jury and giving judgment for acquittal—Jurisdiction on appeals—Criminal Code (R.S.C., 1927, c. 36, as amended), ss. 1013 (4), 1025 (3).

On the trial of an accused on a charge of manslaughter through the operation of a motor car, evidence given by a police constable of an alleged admission by the accused to him as he was investigating the accident shortly after it occurred, and when there was no charge against accused and he was not under arrest, that accused was the driver of the car, was rejected on the ground that accused must be presumed to know that he was required under penalty to give the information by virtue of s. 88 (as enacted by 20 Geo. V, c. 47, s. 6) of the Ontario *Highway Traffic Act,* R.S.O., 1927, c. 251, and therefore his statement was not voluntary.

Subs. 5 of said s. 88 enacted that "any written reports or statements made or furnished under this section shall be without prejudice, shall be for the information of the Registrar, * * * and the fact that such reports and statements have been so made or furnished shall be admissible in evidence solely to prove compliance with this section, and no such reports or statements, or any parts thereof or statement contained therein, shall be admissible in evidence for any other purpose in any trial, civil or criminal, arising out of a motor vehicle accident."

Held: The said evidence of the police constable was admissible. Judgment of the Court of Appeal for Ontario, [1938] O.R. 636, ordering a new trial, affirmed.

Statements made under compulsion of statute by a person whom they tend to incriminate are not for that reason alone inadmissible against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them (*Reg.* v. *Scott,* Dearsley & Bell's Crown Cases 47; *Reg.* v. *Coote,* L.R. 4 P.C. 599, at 607).

Whether or not, in point of grammatical construction, oral as well as written statements are within the privilege created by s. 88 (5), yet, having regard to s. 40 of said Act and s. 285 (2) of the *Criminal Code* (as to a driver's duty, on the occasion of a motor car accident in which he is involved, to give his name and address—of which enactments the Ontario legislature must be presumed to have

* PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

1939

WALKER v. THE KING.

been aware when enacting s. 88) and to the manifest primary purpose of s. 88 (to provide for procuring information for record for statistical and rating purposes,. etc.), s. 88 has not in its true construction the effect of rendering such statements as that now in question under the circumstances in question inadmissible in evidence. Sec. 88 (5) should not be read as intended to qualify the duty imposed by said s. 40 (1) for the purposes and in the interests there contemplated, or the duty recognized by said s. 285 (2), *Cr. Code*. Sec. 88 (5), which is expressly limited to reports and statements made under s. 88, should in its operation be strictly confined thereto, and its general terms should not be construed as having the intention of creating a privilege in respect of the specific class of statements contemplated by said other enactments.

On the trial of an accused, if the trial judge decides that there is no evidence to go to the jury, the proper practice is for him to direct the jury to acquit and discharge the accused (*The King* v. *Comba*, [1938] S.C.R. 396, at 397-8). But where (in the present case) the trial judge, deciding that there was no admissible evidence of guilt to go to the jury, withdrew the case from the jury and gave judgment for acquittal, it was *held* that there was an acquittal within the meaning of ss. 1013 and 1025 of the *Criminal Code* (R.S.C., 1927, c. 36, as amended) and that under s. 1013 (4) an appeal lay to the Court of Appeal and, that court having directed a new trial on the ground that the trial judge had improperly held certain evidence to be inadmissible, an appeal lay to the Supreme Court of Canada under s. 1025 (3).

APPEAL by the accused from the judgment of the Court of Appeal for Ontario (1) which allowed the appeal of the Attorney-General for Ontario from the judgment of MacKay J. at trial acquitting the accused, and ordered a new trial.

The accused was charged with manslaughter under the *Criminal Code* (s. 268) arising out of the operation of a motor vehicle at about midnight of July 16 or early in the morning of July 17, 1937, in the township of Tiny, county of Simcoe, province of Ontario, and was tried before MacKay J. and a jury at Barrie, Ontario. The driver of the car in question failed to negotiate a turn and the car went off the highway into a ditch and overturned, resulting in the death of two persons in the car. The trial judge held that there was no evidence as to who was the driver of the car and withdrew the case from the jury and discharged the accused. He had held that certain evidence given by a police constable of an alleged admission by the accused (shortly after the accident, when there was no charge against accused and he was not under

(1) [1938] O.R. 636; [1938] 3 D.L.R. 516.

1939
WALKER
v.
THE KING.

arrest) that he was the driver of the car was not admissible; on the ground that the accused must be presumed to have known that he was required under penalty to give the information by virtue of s. 88 (as enacted by 20 Geo. V, c. 47, s. 6) of the Ontario *Highway Traffic Act* (R.S.C., 1927, c. 251), and therefore his statement was not voluntary. On appeal by the Attorney-General of Ontario, the Court of Appeal, Henderson J.A. dissenting, allowed the appeal and ordered a new trial (1). The accused appealed to this Court.

E. A. Richardson K.C. and *B. O'Brien* for the appellant.
C. R. Magone and *J. C. Anderson* for the respondent.

The judgment of The Chief Justice and Rinfret, Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE—*As to jurisdiction:* This question depends upon the effect of section 1013, subsection 4, and section 1025, subsection 3. These enactments are severally in these words:

1013. (4) Notwithstanding anything in this Act contained, the Attorney-General shall have the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone.

1025. (3) Any person whose acquittal has been set aside may appeal to the Supreme Court of Canada against the setting aside of such acquittal.

The proper practice, where the trial judge decides that there is no evidence to go to the jury in the well understood meaning of those words, is to direct the jury to acquit and discharge the accused (*The King* v. *Comba* (2)).

The basis of Mr. Justice MacKay's order was that there was no such evidence and it is common ground that he intended to pronounce a judgment of acquittal finally disposing of the charge in the indictment found against the appellant.

It is clear that, the learned trial judge having intended to pronounce, and having considered he was pronouncing a valid judgment of acquittal, what he did cannot be treated as a nullity. Presiding in a court of general jurisdiction, having authority to pronounce on its own juris-

(1) [1938] O.R. 636; [1938] 3 D.L.R. 516.
(2) [1938] S.C.R. 396, at 397-8.

diction, and his judgment being one which under appropriate conditions could competently be given, it was in its nature susceptible of being the subject of appeal (*re Padstow* (1)); and the Court of Appeal rightly dealt with it upon the footing that it constituted a judgment or verdict of acquittal. The proper conclusion would appear to be, as counsel for the Crown as well as counsel for the accused contend, that there was an acquittal within the meaning of sections 1013 and 1025. It is to be observed that the question with which the trial judge was dealing was a question of law alone, a question upon which it was the duty of the jury to act under his direction; their duty, in other words, to render a verdict of not guilty upon a direction given by him; his judgment, therefore, was appealable under section 1013 (4), and this appeal lies under section 1025 (3).

As to the merits: The Court of Appeal directed a new trial on the ground that the learned trial judge improperly held to be inadmissible the evidence of Constable Beatty touching an alleged admission by the accused that he was the driver of the car at the time of the accident and, consequentially, decided that there was no evidence implicating the accused.

In order to clear the ground, it seems to be necessary to observe at the outset that statements made under compulsion of statute by a person whom they tend to incriminate are not for that reason alone inadmissible in criminal proceedings. The term "voluntary," as employed in the summary description of the class of statements by accused persons which are admissible in criminal proceedings, is well understood by lawyers as importing an absence of fear of prejudice or hope of advantage held out by persons in authority and is interpreted and applied judicially according to lines traced by well-known decisions and by a well settled practice. But there is no rule of law that statements made by an accused under compulsion of statute are, because of such compulsion alone, inadmissible against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them (*Reg.* v. *Scott* (2); *Reg.* v. *Coote* (3)).

(1) (1882) 20 Ch. Div. 137. (2) (1856) Dearsley & Bell's Crown Cases 47.
(3) (1873) L.R. 4 P.C. 599, at 607.

1939
WALKER
v.
THE KING.
Duff C.J.

The question of substance on the appeal is whether or not the alleged statement made by the accused to Constable Beatty was inadmissible in evidence by force of subsection 5 of section 88 of the Ontario *Highway Traffic Act* (R.S.O., 1927, ch. 251, as amended by 20 Geo. V, ch. 47, s. 6). Textually, the subsection is in these words:

> 88. (5) Any written reports or statements made or furnished under this section shall be without prejudice, shall be for the information of the Registrar, and shall not be open to public inspection; and the fact that such reports and statements have been so made or furnished shall be admissible in evidence solely to prove compliance with this section, and no such reports or statements, or any parts thereof or statement contained therein, shall be admissible in evidence for any other purpose in any trial, civil or criminal, arising out of a motor vehicle accident.

I do not disagree with the view that, in point of grammatical construction, the preferable reading of subsection 5 would be that it applies only to statements in writing; but grammatical considerations are not necessarily conclusive. If section 88 were to be considered by itself and apart from the enactments I am about to discuss, a good deal might be said for the view that the adjective "written" qualifies the word "reports" only, and that, consequently, oral as well as written statements are within the privilege created by subsection 5.

It is not necessary in the present appeal to examine the general question whether the *prima facie* or literal construction of subsection 5 as above indicated (namely, that it is limited in its operation to written reports and written "statements made or furnished under this section") gives the true effect of the section. We have to consider the admissibility of a statement of a particular class: a statement alleged to have been made by the driver or person in charge of a motor car directly concerned in a motor accident to the police constable engaged in the course of his ordinary duties in investigating the accident immediately after it occurred in which the driver is alleged to have identified himself as such.

We have to address ourselves to the question whether such statements or statements of a similar character made in similar circumstances are inadmissible by force of subsection 5, and this judgment, as will appear, is rigorously confined to the discussion and decision of that question.

My brother Kerwin has called our attention to the genesis of section 88 and has also called our attention

to section 40 of the Ontario *Highway Traffic Act* and section 285, subsection 2, of the *Criminal Code;* which were not discussed on the argument.

By section 40 of the Ontario *Highway Traffic Act* it is enacted:

40. (1) If an accident occurs on a highway, every person in charge of a vehicle who is directly or indirectly a party to the accident shall remain at or return to the scene of the accident and render all possible assistance and give in writing upon request to any one sustaining loss or injury or to any police constable or any officer appointed for the carrying out of the provisions of this Act or to any witness, his name and address, and also the name and address of the owner of such vehicle, and the number of the permit if any.

(2) Any person who violates any of the provisions of subsection 1 shall incur for the first offence a penalty of not less than $25 and not more than $100, and shall also be liable to imprisonment for any term not exceeding thirty days and in addition his licence or permit may be suspended for any period not exceeding sixty days; and for any subsequent offence, a penalty of not less than $100 and not more than $500 and shall also be liable to imprisonment for any term not exceeding six months, and in addition his licence or permit may be suspended for any period not exceeding one year.

The duty arising out of this enactment is obviously imposed in the public interest as well as in the private interest of persons injured. It is a reasonable presumption that the Legislature was not ignorant of the rule of law by which, in the absence of some provision to the contrary, statements made in execution of the duty imposed by this section would (as explained above) be admissible in evidence against the person making them. It seems clear enough that the enactment is a measure for securing information which may be employed for the purposes of legal proceedings, instituted either privately or *ad vindicatam publicam.*

Leaving section 40 for the moment, and turning to section 285, subsection 2, of the *Criminal Code.* That subsection is in these words:

285. (2) Whenever, owing to the presence of a motor car on the highway, an accident has occurred to any person or to any horse or vehicle in charge of any person, any person driving the motor car shall be liable on summary conviction to a fine not exceeding fifty dollars and costs or to imprisonment for a term not exceeding thirty days if he fails to stop his car and, with intent to escape liability either civil or criminal, drives on without tendering assistance and giving his name and address.

This enactment presupposes the existence of a duty resting upon the driver of a motor car not to withhold

1939
WALKER
v.
THE KING.
Duff C.J.

his name and address (in the circumstances mentioned) with the purpose of escaping legal liability, civil or criminal: a duty, it may be of imperfect obligation, but still a duty. It is not easy to reconcile the existence of such a duty with a rule of law having the effect of preventing statements made in conformity with it being adduced as evidence in criminal proceedings against the person making them.

The Ontario Legislature is presumed to know the statute law, and accordingly is presumed to have been aware, when enacting section 88, of the law as laid down in section 285 (2) of the *Criminal Code* as well as, needless to say, in section 40 (Wilberforce, Statute Law, pp. 30 and 31; 31 Hals. pp. 456 and 491). The primary purpose of section 88 is, manifestly, to make provision for procuring information for record with the Registrar which may be useful for statistical and rating purposes, and other purposes of general public interest in relation to motor traffic. Subsection 5 is aimed, no doubt, at silencing the apprehensions of people from whom such information must be obtained. Such being the purpose and effect of section 88, it ought not to be read as intended to qualify the duty imposed by section 40 of the *Highway Traffic Act* for the purposes and in the interests mentioned above or that recognized by section 285 of the *Criminal Code*. Subsection 5, which is expressly limited to reports and statements made under section 88, ought to be strictly confined in its operation to such statements and reports and its general terms should not be construed as having the intention of creating a privilege in respect of the specific class of statements contemplated by section 40 of the *Highway Traffic Act* or by section 285 of the *Criminal Code;* by which a driver or person in charge of a motor car in the circumstances envisaged by those enactments gives his name and address or simply identifies himself as such.

Had such been the intention of the Legislature in enacting subsection 5, that intention, we must presume, would have been stated in explicit words.

The proper conclusion seems to be that subsection 5 has not in its true construction the effect of rendering such statements inadmissible in evidence. Nothing is de-

cided and no opinion is intimated touching the effect of the subsection as to statements dealing with other matters or made in different circumstances.

In this view it is unnecessary to discuss section 35 of the *Canada Evidence Act* or sections 599 and 685 of the *Criminal Code;* nor is it necessary to examine the question whether, if subsection 5 of section 88 on its proper construction applied to statements such as that under consideration, this could have the effect of excluding such statements as evidence in criminal proceedings proper. For these reasons, since the evidence adduced was admissible, a new trial was rightly ordered and the appeal should be dismissed.

CROCKET J.—I agree that in the circumstances of this case the judgment entered upon the learned trial judge's withdrawal of the case from the jury must be deemed to have been an acquittal within the meaning of s. 1013 (4) of the *Criminal Code* and that an appeal therefore lay to the Court of Appeal and from the judgment of that Court under s. 1025 of the *Code.*

As to the admissibility of Constable Beatty's evidence regarding the defendant's alleged admission that he was the owner of the car involved in the accident, I am of opinion that it does not fall within the privilege created by section 88 (5) of the Ontario *Highway Traffic Act* for any written reports or statements made under the provisions of that section to any police officer or to the registrar and that that privilege ought to be strictly confined to communications which are required to be made for the purposes of and in accordance with the provisions of that section. The statement alleged to have been made by the defendant to Constable Beatty, which the learned trial judge held inadmissible under the provisions of s. 88 (5), related only to the defendant's identification as the driver of the car involved in the accident. The trial judge's attention was not called to the provisions either of s. 40 (1) of the Ontario *Highway Traffic Act* or to s. 285 (2) of the *Criminal Code;* neither were they called to the attention of the Court of Appeal nor to our attention during the argument here, but, having, as my Lord the Chief Justice has stated, been brought to our attention by my brother Kerwin since the argument, they must

1939

WALKER v. THE KING.

Crocket J.

be given due effect in arriving at a conclusion as to the admissibility of Beatty's evidence. The clear object of both the two last indicated enactments was to require the driver of any motor vehicle involved in an accident on a highway to stop his car at the scene of the accident and there identify himself as its driver. Neither of these enactments created any privilege regarding the driver's duty to do so.

S. 285 (2) of the *Criminal Code* was in force at the time of the enactment of the Ontario *Highway Traffic Act,* and, as pointed out by my Lord the Chief Justice, the Legislature must be presumed to have been aware of its provisions when it enacted its *Highway Traffic Act.* S. 88 (5) having expressly confined the privilege created thereby to written reports or statements made under s. 88, I cannot see how the privilege created by s. 88 (5) in respect of communications made for the purpose of and in accordance with the provisions of that section can well be extended to specific communications required by either s. 40 (1) of the *Highway Traffic Act* or s. 285 (2) of the *Criminal Code* for another purpose.

Apart, therefore, from the question as to whether the privilege provided by s. 88 (5) of the Ontario *Highway Traffic Act* embraces oral as well as written reports or statements, which it is not now necessary to decide, I am of opinion for the reasons stated that the evidence of Constable Beatty, confined as it was to the defendant's alleged admission touching his identification as the driver of the car at the time of the accident, was admissible.

Appeal dismissed.

Solicitors for the appellant: *Phelan, Richardson, O'Brien & Phelan.*

Solicitor for the respondent: *W. B. Common*