ALAN THOMAS MARSHALL ....APPELLANT;

1960
*Oct. 19
Dec. 19

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence—Motor vehicles accident—Statements made to police—Whether admissible in criminal proceedings—The Highway Traffic Act, R.S.O. 1950, c. 167, s. 110, as amended—Canada Evidence Act, R.S.C. 1952, c. 307, s. 36—Criminal Code, 1953-54 (Can.), c. 51, s. 7(1).

The appellant was convicted on a charge of causing death by criminal negligence in the operation of a motor vehicle contrary to the *Criminal Code*. The Court of Appeal having dismissed his appeal, the appellant appealed to this Court on a question of law whether oral statements as to the quantity of beer he had consumed prior to the accident made to the police by him were inadmissible at the trial because of s. 110 of *The Highway Traffic Act* of Ontario.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau and Judson JJ.: By common law a confession was admissible when it was proved to have been voluntarily made in the sense that it was not induced by threats or promises. Here

the trial judge was right in holding that the statements made by the appellant were voluntary. If s. 110(5) of *The Highway Traffic Act* purported to alter the rule, its application in a trial under the *Criminal Code* was excluded by s. 36 of the *Canada Evidence Act* because s. 7(1) of the Code retained the old common law. But in view of the amendment contained in s. 20 of c. 17 of the Statutes of 1938, wherein the words "civil or criminal" were stricken from the section corresponding to the present s. 110(5) of the Act, it was never the intention of the Legislature to so alter the rule.

Per Locke and Cartwright JJ.: Statements made under compulsion of a statute were not by reason of that fact alone rendered inadmissible in criminal proceedings against the person making them. *Walker v. R.*, [1939] S.C.R. 214; *R. v. Scott,* (1856), Dears & B. 47; *R. v. Coote,* (1873), L.R. 4 P.C. 599, referred to. This rule was continued as part of the criminal law of Ontario by virtue of s. 7 of the Criminal Code.

Section 36 of the *Canada Evidence Act* could not be interpreted as providing that where a law in the province in which criminal proceedings are taken renders a statement made under specified circumstances inadmissible in civil proceedings it shall be inadmissible in criminal proceedings also. *R. v. Gordon,* [1946] O.R. 845; *R. v. Pedersen,* 23 C.R. 198; *R. v. Arnew,* 30 C.R. 318, disapproved.

In addition the words in s. 36, "subject to this and other acts of the Parliament of Canada" prevented the section having the effect that a statement made pursuant to the obligation imposed by s. 110 of *The Highway Traffic Act* should be inadmissible in criminal proceedings.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the conviction of the appellant. Appeal dismissed.

H. S. Honsberger, for the appellant.

W. C. Bowman, Q.C., for the respondent.

The judgment of Kerwin C.J. and of Taschereau and Judson JJ. was delivered by

THE CHIEF JUSTICE:—By leave of this Court Alan Thomas Marshall appeals upon a question of law against a judgment of the Court of Appeal for Ontario dismissing his appeal from his conviction upon a charge that he caused the death of James Brown by criminal negligence in the operation of a motor vehicle contrary to the *Criminal Code*. The point of law is whether oral statements as to the quantity of beer he had consumed prior to the accident made to the police by the appellant were inadmissible at his trial upon that charge because of s. 110 of *The Highway Traffic Act,* R.S.O. 1950, c. 167.

The appellant was tried at the Toronto Assizes before Wilson J. and a jury. The evidence for the Crown was that about 5.45 p.m., on August 4, 1959, the appellant was driving a Volkswagen automobile in an easterly direction along the Lakeshore Road, a wide street with two sets of streetcar tracks, at about forty-five miles per hour in a thirty-mile per hour zone and barely avoided colliding with the rear of a streetcar proceeding in the same direction and which streetcar was coming to a stop at a stop light. Later the Volkswagen made a wide sweep in passing a truck, went into a spin and struck another automobile, as a result of which Brown was fatally injured. When Constable Wackett arrived at the scene of the accident about 5.54 p.m., Brown was unconscious. The appellant was conscious but there was a cut on his face and the constable "noticed there was a smell of an alcoholic beverage on his breath". The appellant was taken in an ambulance to the Queensway General Hospital and later to St. Joseph's Hospital.

Evidence was then given in the absence of the jury to determine the admissibility of statements alleged to have been made by the accused. In answer to the question to Constable Wackett: "Did you have any conversation, Officer, with the accused man at the scene of the accident?", the reply was: "Just general questions as to his well-being and in connection with the accident". No evidence as to that occurrence was given by the appellant. About 6.15 p.m. the same day, the constable saw the appellant at the Queensway General Hospital, told the appellant he had observed that he had been drinking, and asked him: "How much have you had to drink?", to which the reply was: "Six pints of beer". Later in the evening of the same day Wackett saw the appellant at St. Joseph's Hospital and testified that he said to the appellant that he "was of the opinion that he had had too much to drink to be driving", to which the appellant answered: "Well, if that is your opinion, you are entitled to your opinion". Sergeant Morrisson testified that the appellant told him that he had had some beer to drink at a bar in downtown Toronto, from where he had gone to another downtown bar and had more beer. He had then gone to New Toronto, where he had met Brown in the beverage room of the Almont Hotel where the two of them had beer and were proceeding from

that place to the Woodbine race track when the accident occurred. Sergeant Morrisson testified that the appellant had admitted to having four pints of beer and two glasses of draft beer in all. The accused testified on the voir dire that he had not had anything to drink downtown but only at the Almont Hotel where he met Brown and where he, himself, had three pints of beer. All this time the accused was not under arrest and no charge had been laid against him.

The trial judge held that the evidence did not show that there was any intention on the part of the appellant to report the accident since, on the voir dire, he had no memory of doing anything except vaguely having some conversation with a police officer. Assuming that s. 110 of *The Ontario Highway Traffi Act* applied to the appellant, the trial judge held that an investigation by the police to determine whether or not a crime had been committed was not to be hampered by a ruling that there was a privilege extended by the section. He had no doubt that the statement was voluntary. He therefore admitted the statements which were repeated in evidence in the presence of the jury.

Section 110 of the Ontario *Highway Traffic Act,* as amended by s. 14 of c. 35 of the Statutes of 1954, reads as follows:

110. (1) Every person in charge of a motor vehicle who is directly or indirectly involved in an accident shall, if the accident results in personal injuries, or in damage to property apparently exceeding $100, report the accident forthwith to the nearest provincial or municipal police officer, and furnish him with such information or written statement concerning the accident as may be required by the officer or by the Registrar.

(2) Where such person is physically incapable of making a report and there is another occupant of the motor vehicle, such occupant shall make the report.

(3) A police officer receiving a report of an accident, as required by this section, shall secure from the person making the report, or by other inquiries where necessary, such particulars of the accident, the persons involved, the extent of the personal injuries or property damage, if any, and such other information as may be necessary to complete a written report concerning the accident to the Registrar.

(4) The Registrar may require any person involved in an accident, or having knowledge of an accident, the parties thereto, or any personal injuries or property damage resulting therefrom, to furnish, and any police officer to secure, such additional information and make such supplementary reports of the accident as he may deem necessary to complete his records, and to establish, as far as possible, the causes of the accident, the persons responsible, and the extent of the personal injuries and property damage, if any, resulting therefrom.

(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 statements contained therein, shall be admissible in evidence for any other purpose in any trial arising out of a motor vehicle accident.

(6) Any person who fails to report or furnish any information or written statement required by this section shall be liable to a penalty of not less than $10 and not more than $50, and in addition the Minister may suspend the operator's or chauffeur's licence and owner's permit or permits of any such persons.

Section 7(1) of the *Criminal Code,* 1953-54 Statutes of Canada, c. 51, enacts:

7. (1) The criminal law of England that was in force in a province immediately before the coming into force of this Act continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

Section 36 of the *Canada Evidence Act,* R.S.C. 1952, c. 307, provides:

36. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings.

The question whether the provisions of subs. 5 of s. 88 of the Ontario *Highway Traffic Act,* R.S.O. 1927, c. 251, as enacted by 20 Geo. V, c. 47, s. 6, applied to verbal statements was left open in *Walker v. The King*[1]. That subsection, with an important amendment noted below, corresponds to subs. 5 of s. 110 of the present Act but it is unnecessary to express any view on the question in the present appeal. As was pointed out in the Walker case, by common law a confession is admissible when it is proved to have been made voluntarily in the sense that it was not induced by threats or promises. I agree with the trial judge that the statements here in question were made voluntarily. If subs. 5 of s. 110 of the present Act purported to alter this rule, its application in a trial under the *Criminal Code* is excluded by that part of s. 36 of the *Canada Evidence Act* which is underlined because s. 7(1) of the *Criminal Code* retains the old common law; but in view of

[1] [1939] S.C.R. 214, 71 C.C.C. 305.

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the amendment referred to above, I am satisfied that the Legislature never so intended. The Walker case was decided in 1939 with reference to an accident which had occurred in July 1937 before the Revised Statutes of Ontario 1937 came into force. Subsection 5 of s. 88 of R.S.O. 1927, c. 251, as enacted by Geo. V., c. 47, s. 6, was carried forward into the Revised Statutes of 1937 as subs. 5 of s. 94, but by s. 20 of c. 17 of the Statutes of 1938 the words "civil or criminal" in the ninth line of subs. 5 of s. 94 of the 1937 Revised Statutes were striken out.

The appeal should be dismissed.

The judgment of Locke, Cartwright and Judson JJ. was delivered by

CARTWRIGHT J.:—The relevant facts, the provisions of the applicable statutes and the question raised on this appeal are set out in the reasons of the Chief Justice.

The finding of the learned trial judge that the statements made by the appellant, the admissibility of which is questioned, were voluntary in the sense that they were not induced by threats or promises is supported by the evidence and could not be successfully challenged; and he was right in admitting them unless they were rendered inadmissible by the combined effect of s. 110(5) of *The Highway Traffic Act* of Ontario and s. 36 of the *Canada Evidence Act*.

As a matter of construction it is my opinion that the words in s. 110(5) "any trial" mean "any trial respecting the proceedings in which the Legislature has jurisdiction". This follows not only from the history of the subsection and particularly the amendment made by s. 20 of c. 17 of the Statutes of Ontario 1938 set out in the reasons of the Chief Justice but also from the well settled rule of construction that if the words of an enactment so permit they shall be construed in accordance with the presumption which imputes to the legislature the intention of limiting the operation of its enactments to matters within its allotted sphere.

The judgment of this Court in *Klein v. Bell*[1] makes it plain that it would be *ultra vires* of the Legislature to provide that the reports and statements made under the

[1] [1955] S.C.R. 309.

compulsion of s. 110 of *The Highway Traffic Act* should be inadmissible in criminal proceedings. At page 315 the Chief Justice said:

> Canada, of course, could only provide with reference to all proceedings over which it had legislative authority and the provincial legislature with reference to proceedings over which it had such authority.

At page 319, Rand J. said:

> I entertain no doubt that a province cannot exclude from testimony in a criminal prosecution admissions made in the course of discovery or of trial in a civil proceeding; to do so would be to legislate in relation to procedure in criminal matters which is within the exclusive jurisdiction of Parliament.

It has long been settled that statements made under compulsion of a statute are not by reason of that fact alone rendered inadmissible in criminal proceedings against the person making them; it is sufficient on this point to refer to *Walker v. The King*[1]; *Regina v. Scott*[2]; and *Regina v. Coote*[3].

It remains to consider the effect of s. 36 of the *Canada Evidence Act*. No doubt s. 110(5) of *The Highway Traffic Act* forms part of the laws of evidence in force in the Province of Ontario but, construed as I think it must be, it does not purport to render the statements made under it inadmissible in criminal proceedings. It cannot assist the appellant unless s. 36 of the *Canada Evidence Act* can be interpreted as providing that where a law in the province in which criminal proceedings are taken renders a statement made under specified circumstances inadmissible in civil proceedings it shall be inadmissible in criminal proceedings also. Parliament has power to so enact, but it does not appear to me that the words of s. 36 are susceptible of the suggested interpretation, and I am forced to conclude that even on the assumption that the statement made by the appellant would have been rendered inadmissible in a civil trial arising out of the motor vehicle accident out of which the criminal charge against the appellant arose (a question which I find unnecessary to decide) they were not rendered inadmissible on the trial of that charge.

[1] [1939] S.C.R. 214 at 217.
[2] (1856), Dears & B. 47, 25 L.J.M.C. 128.
[3] (1873), L.R. 4 P.C. 599 at 607.

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I realize that the view which I have expressed restricts the operation of s. 36 within narrow limits in so far as criminal proceedings are concerned, but the contrary view would involve the possibility of the law as to the admissibility in evidence in criminal proceedings of statements made by an accused person varying from province to province and from year to year in accordance with provincial enactments dealing with the rules of evidence in civil cases. It would, in my opinion, require plainer words than have been used to enable us to construe s. 36 as having such an effect.

I have reached the above conclusion with hesitation as it appears to be at variance with the view implicit in the reasons of Lebel J. in *Rex v. Gordon*[1], those of Gale J. in *Regina v. Pedersen*[2], and those of the Court of Appeal in *Regina v. Arnew*[3].

If, however, contrary to the opinion I have expressed, the words of s. 36 would otherwise have been apt to provide that a statement made pursuant to the obligation imposed by s. 110 should be inadmissible in criminal proceedings arising out of the same motor vehicle accident, I would agree with Mr. Bowman's submission that the words in s. 36, "subject to this and other acts of the Parliament of Canada" prevent the section having that effect.

The predecessor of what is now s. 110 of *The Highway Traffic Act* was first enacted in 1930. At that time the rule embodied in many decisions, that a statement made under compulsion of a statute is not by reason of such compulsion rendered inadmissible in criminal proceedings against the person making it, was by virtue of an Act of the Parliament of Canada, i.e., s. 10 of the *Criminal Code*, R.S.C. 1927, c. 36, part of the criminal law of the Province of Ontario, and that state of affairs is preserved by s. 7 of the *Criminal Code,* 2-3 Elizabeth II, c. 51. It follows that the protection accorded by s. 110(5) to a person making a statement pursuant to s. 110, is effective in civil but not in criminal proceedings arising out of the accident in regard to which the statement was made.

1 [1946] O.R. 845.
2 [1956] O.W.N. 212, 23 C.R. 198.
3 [1959] O.R. 446, 30 C.R. 318.

That such a conclusion has anomalous results cannot be denied. If a person in charge of a motor vehicle is involved in an accident causing personal injuries under such circumstances that he may well be guilty of criminal negligence and is confronted immediately thereafter by a police officer he is entitled, under the maxim *nemo tenetur seipsum accusare,* to remain silent and indeed it is desirable that the officer before questioning him should give him the usual warning that he is not obliged to say anything (other than to give his name and address, as required by s.221(2) of the *Criminal Code*); on the other hand it is his duty under s. 110, to furnish the officer with such information concerning the accident as the officer may require, and the information which he gives in fulfilment of this duty can be used against him if he is tried for criminal negligence. If it is thought undesirable that such anomalies should exist, they can be removed only by legislative action.

The opinion which I have formed as to the combined effect of s. 110(5) of *The Highway Traffic Act* and s. 36 of the *Canada Evidence Act* renders it unnecessary for me to examine the arguments addressed to us on the question whether the statements with which we are concerned would, in the particular circumstances of this case, have been admissible at the trial of a civil action; I wish to reserve my opinion on the questions, (i) whether under s. 110 it is the duty of a person to inform the police officer, if such information is required by the latter, as to the amount of intoxicating liquor he had consumed prior to the accident, and (ii) whether the view of the majority of the Court of Appeal or that of Mackay J.A. in *Smith Transport et al. v. Vanderyagt*[1] is to be preferred.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: Raymond & Honsberger, Toronto.

Solicitor for the respondent: F. L. Wilson, Toronto.

[1] [1957] O.R. 599, 11 D.L.R. (2d) 166.