NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Zwicker***, 2003 NSCA140

Date: 20031212
Docket: CAC 194363
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Sharon Lorraine Zwicker

Respondent

Judges:	Glube, C.J.N.S., Saunders & Hamilton, JJ.A.
Appeal Heard:	November 20, 2003, in Halifax, Nova Scotia
Held:	Appeal dismissed, as per reasons of Hamilton, J.A.; Glube, C.J.N.S. and Saunders, J.A., concurring.
Counsel:	William D. Delaney, for the appellant Curtis C. Palmer, for the respondent

Reasons for judgment:

[1] The Crown appeals the January 16, 2003 decision of Provincial Court Judge Claudine MacDonald in which she decided that admission of the statutorily compelled statement given by Ms. Zwicker pursuant to s. 258(1) of the Nova Scotia **Motor Vehicle Act**, R.S.N.S. 1989, c. 293, that she was the driver of her car at the time it was involved in an accident, would breach Ms. Zwicker's rights under s. 7 of the **Canadian Charter of Rights and Freedoms**, Being Part I of the **Constitution Act, 1982** and that the appropriate remedy was to exclude the statement under s. 24(1) of the **Charter**.

[2] The facts were put before the trial judge as an agreed statement of facts:

> On November 1, 2001, at approximately 7:30 p.m., at the intersection of two public highways in East Kingston, Kings County, Nova Scotia, a motor vehicle of which the accused was the registered owner failed to yield the right of way at the intersection and collided with another motor vehicle which had the right of way.
>
> As a result, the second motor vehicle was damaged and the driver slightly injured. The motor vehicle of which the accused was the registered owner failed to stop at the accident scene as required by law.
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> On February 7, 2002, the accused was served with a notice pursuant to s.258(1) of the Motor Vehicle Act. The next day, she informed the peace officer who had served the notice upon her that she had been the driver of the vehicle at the time of the accident.
>
> Other than having been statutorily compelled, the accused's statement was freely and voluntarily made and there was no infringement of her s. 10(b) Charter right.

[3] Sections 258 (1) and (2) of the **Act** provide as follows:

> Identifying person in charge of vehicle
>
> 258 (1) When a motor vehicle is operated in violation of any of the provisions of this Act or of the regulations made under this Act, the registered owner of the vehicle on the request of the Registrar or of any peace officer shall, within forty-eight hours of the request, supply the Registrar or the peace officer

> with the name and address of the person in charge of the vehicle at the time of such violation.
>
> (2) A registered owner, who refuses, fails, neglects or is unable to supply the name and address of the person in charge of the vehicle within forty-eight hours after being so requested, shall be liable on summary conviction to the penalty prescribed for the offence of the driver.

[4] Ms. Zwicker was charged with failing to stop at the scene of the accident contrary to s. 97(1)(a) of the **Act** and failing to yield the right of way to a vehicle already in the intersection when making a left turn contrary to s. 122(3) of the **Act**.

[5] In her decision the trial judge stated the issue before her as follows:

> The issue in this case, as set out in Mr. Palmer's, brief is whether the accused's statutorily compelled confession is admissible against her or whether it should be excluded on the principle against self-incrimination in the context of a statutory duty....
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> I guess another way of putting the issue is whether or not the defence in this case has shown, on a balance of probabilities, that there has been a breach of Ms. Zwicker's right under Section 7 of the Charter and if, indeed, there has been such a breach what the appropriate remedy ought to be.

[6] After deciding that admitting the statement would breach Ms. Zwicker's s. 7 **Charter** right and should be excluded under s. 24(1) of the **Charter**, the Crown offered no further evidence and the trial judge acquitted Ms. Zwicker on both charges.

[7] The Crown appeals on the following grounds:

> 1. That the Provincial Court Judge erred in law in ruling the admission of a statement made by the Respondent in response to the demand of a peace officer made under s.258(1) of the Motor Vehicle Act violated the respondent's right against self-incrimination guaranteed by s.7 of the Canadian Charter of Rights and Freedoms;
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> 2. That the Provincial Court Judge erred in law in ruling the Respondent's admission respecting the identification of the driver

> of the motor vehicle at the time the offences were alleged to have been committed should be excluded from evidence under s.24(1) of the Charter.

[8] The Crown has not satisfied me that the trial judge erred.

[9] In reaching her decision the trial judge relied primarily on the decision of the Supreme Court of Canada in **Regina v. White**, [1999] 2 S.C.R. 417. The essence of the Crown's argument is that the trial judge erred by applying **White** rather than distinguishing it.

[10] In **White** the Court held that a statutorily compelled accident report given by Ms. White to the police pursuant to s. 61 of the then applicable British Columbia **Motor Vehicle Act**, R.S.B.C. 1979, c. 288, breached Ms. White's s.7 **Charter** rights and that the statement was not admissible at her trial by virtue of s. 24(1) of the **Charter**.

[11] Section 61 of their statute provided as follows:

> Accident reports
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> 61. (1) Where a vehicle driven or operated on a highway, either directly or indirectly, causes death or injury to a person or damage to property causing aggregate damage apparently exceeding $200, the person driving or in charge of the vehicle shall report the incident to a police officer or to a person designated by the superintendent to receive those reports, and shall furnish the information respecting the incident required by the police officer or designated person.
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> (2) Where the incident occurred
>
> (a) in a city or city municipality the report shall be made to a police officer of the city or city municipality, or to the designated person, as soon as possible and in every case within 24 hours after the incident;
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> (b) in a municipality other than a city or city municipality the report shall be made to a police officer of the municipality, or to the designated person, as soon as possible and in every case within 24 hours after the incident; or
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> (c) elsewhere than in a city, city municipality or municipality the report shall be made to the officer or constable of the Royal Canadian Mounted Police

stationed nearest to the place where the incident occurred within 48 hours after the incident.

(3) Where a person required to make a report under subsection (1) is incapable of making the report, and

(a) there was another occupant of the vehicle at the time of the incident capable of making the report, the occupant shall make the report; or

(b) there was no other occupant capable of making the report, the investigating officer shall make the report.

(4) The person receiving a report under this section shall secure from the person making it, or by other inquiries where necessary, the particulars of the incident, the persons involved, the extent of the personal injury or property damage and other information necessary to complete a written report of the incident, and shall forward the written report to the superintendent within 10 days after being advised of the incident.

(5) The written report referred to in subsection (4) shall be in a form prescribed by the superintendent.

(6) Every report made under this section is without prejudice and for the information of the superintendent and the municipal or Royal Canadian Mounted Police, and shall not be open to public inspection, except that a person involved in an incident, or his authorized representative, is entitled to obtain on request the names of any drivers involved, the licence number, the name of the registered owner of any motor vehicle involved and the name of any witness.

(7) The fact a report has been made under this section is admissible in evidence solely to prove compliance with this section, and the report is admissible in evidence on the prosecution of any person for the offence of making a false statement therein, but neither the report nor any statement contained in it is admissible in evidence for any other purpose in a trial or proceeding arising out of the incident referred to in the report.

(8) Notwithstanding subsections (6) and (7), a peace officer may, where giving evidence in a proceeding, refer to a report prepared by him under this section to refresh his memory. (Underling mine)

[12] There are differences between the facts of **White** and this appeal. The question is whether these differences are such that the law established in **White** does not apply to this appeal.

[13] The differences are:

A. The sections of the two statutes being considered are different. Section 258 of our **Act** is entitled "Identifying person in charge of vehicle" and is specific in only requiring the owner of a vehicle to provide the name and address of the driver within 48 hours of an accident. In contrast s. 61 of the British Columbia statute is entitled "Accident Reports" and requires the driver of the vehicle to report an accident and gives the police substantial control as to the nature and amount of information to be included in the accident report as found in **White** at ¶ 80. Section 61(4) of the British Columbia statute directs the police to obtain the particulars of the accident, the persons involved, the extent of the injury or property damage and other information necessary to complete a written accident report.

B. As a result of the differences in the statutory provisions, the nature of the information provided by Ms. White and Ms. Zwicker differed as did the manner in which this information was provided to the police. Ms. White gave three statements to the police. The first statement was given when she phoned the police the morning following the accident saying she wanted to report the accident. The second was given in her home when the police arrived one-half hour after her phone call to obtain the information for the accident report. The third was given outside her home after the police read Ms. White her rights under s.10(b) of the **Charter** and told her that she was not required to say anything and that anything she said could be used against her following her account of the accident, and following her being left alone to phone a lawyer. In this appeal the police served a notice on Ms. Zwicker pursuant to s.258(1) of our **Act** and the next day she informed the police that she had been the driver of the vehicle at the time of the accident.

C. Ms. White was charged with failure to stop at the scene of an accident contrary to s.252(1) of the **Criminal Code**. Ms. Zwicker was charged with failure to stop at the scene of an accident and failure to yield the right of way under the **Act**.

> D. A death resulted from the accident involving Ms. White. She faced a penalty if found guilty of up to five years imprisonment. Ms. Zwicker faced fines of a minimum of $25 and $100 respectively if found guilty, with imprisonment for not less than 7 days per offence in default of payment. A fine option program was available if Ms. Zwicker chose to register, which would allow her to work off her fine rather than pay it.

[14] Following the procedure approved in **White** the trial judge first considered whether the quasi criminal charges faced by Ms. Zwicker under our **Act** could deprive her of her right to life, liberty and security of the person provided by s. 7 of the **Charter**. She concluded they could since imprisonment for a minimum of 7 days could result if Ms. Zwicker failed to pay the fines.

[15] The Crown argued that the trial judge erred in this decision since the possibility of Ms. Zwicker going to jail was in its words "theoretical and remote" rather than a "real or imminent" deprivation of liberty as expressed in ¶ 38 of **White**. It argued the possibility of imprisonment for Ms. Zwicker was even more remote in light of the **Alternative Penalty Act**, S.N.S. 1989, c. 2 which the trial judge did not consider and which provides for a fine option program.

[16] I agree the likelihood of Ms. Zwicker being imprisoned if found guilty of the charges she faced is less likely than Ms. White being imprisoned if found guilty of the charge she faced. The amounts of the fines would likely be relatively small, the fine option program is available and imprisonment will follow only on default. However, the Crown has not satisfied me that the trial judge erred in deciding that there was a real possibility Ms. Zwicker could be imprisoned and hence deprived of her liberty if she were found guilty.

[17] This point has already been considered at the appellate level in this province. This court in **R. v. Sutherland** (1990), 96 N.S.R. (2d) 271, at ¶ 14 observed:

> An offence that can result in imprisonment even if it is not mandatory has the potential of depriving persons of their liberty; Reference, supra, p. 319. The Court did not express its views in relation to s. 7 of the Charter with respect to imprisonment as an alternative to non-payment of a fine. I think the possibility of imprisonment, even if not open to a judge in the first instance, makes the offence one of sufficient potential to deprive persons of their liberty, and it cannot stand unless it is in accordance with the principles of fundamental justice. The distinction between imprisonment resulting from the potential exercise of judicial

> discretion and imprisonment resulting from the potential inability of the accused to pay is not sufficient to enable me to draw a line between the two. See also Doyle, supra. pp. 28 and 29. (Underling mine)

[18] The Manitoba Court of Appeal in **R. v. Gray** (1988), 54 Man. R. (2d) 240 noted on p. 243:

> But the issue was subsequently addressed by the Saskatchewan Court of Appeal in R. v. Burt,... In his reasons , Bayda, C.J.S. concludes that as long as there is a potential for imprisonment there is a deprivation of liberty, and it matters not that the potential is a remote one. In the instant case, the prospect of the accused being locked up in jail for non-payment of a fine, without exercising his option to do community work instead, may be remote, but the potential for imprisonment is certainly there. I would conclude that s. 229(1) violates the right to liberty under s.7 of the Charter.

(See also Reference re Motor Vehicle Act (British Columbia) s. 94(2), [1985] 2 S.C.R. 486.)

[19] These cases make it clear that the possibility of imprisonment referred to by the trial judge in the context of the circumstances placed before her in the agreed statement of facts, is sufficient to amount to a loss of liberty under s. 7 of the **Charter**.

[20] The availability of the fine option program does not change the fact Ms. Zwicker could be imprisoned, for not everyone on whom a fine is imposed registers for the program and even those who do register may fail to complete the assigned work, with the result the fine remains outstanding.

[21] Having properly satisfied herself that Ms. Zwicker could be deprived of her liberty as a result of the charges against her, the trial judge went on to consider whether the admission of the statement would offend the principles of fundamental justice. She concluded, following **White**, that it was the principle against self-incrimination that was at issue here. The Crown does not dispute this.

[22] The trial judge accepted, as set out in ¶ 45 of **White**, that the principle against self-incrimination does not provide absolute protection for an accused against all uses of information compelled by statute, that the protections afforded by the principle against self-incrimination are “contextually sensitive,” i.e., its

application depends on the facts. The Crown argues that while the trial judge endorsed this principle she failed to apply it properly and that the facts of this case distinguish it from **White**, thus enabling the admission of her statement.

[23] The trial judge considered the four main factors **White** identified as being relevant to a determination of whether the principle against self-incrimination will apply to prevent a statutorily compelled statement being admitted in a criminal trial: namely, whether there was coercion; whether there was an adversarial relationship; whether the statement would likely be unreliable; and whether there was a potential for abuse of power in the obtaining of the statement.

[24] Considering these factors and how they were dealt with in **White**, the trial judge concluded:

> So having said that, and it is my conclusion based on the cases that I have read and the law as I understand it to be, is that in this particular situation, Ms. Zwicker did potentially face the deprivation of life, liberty, or security of the person; that she has the right not to be deprived thereof except in accordance with the principles of fundamental justice; and that it is well established that there is a principle against self-incrimination and that that is included within the principles of fundamental justice that is referred to in Section 7 of the Charter; that in this particular case, my finding would be that if, indeed, the Crown, were to seek to introduce this statement that was compelled by statute, that that would, indeed, be a breach of Ms. Zwicker's rights under Section 7 of the **Charter**. (Underlining in original)

[25] The Crown argued that drivers choose whether to drive or not, and that accordingly anyone who chooses to drive must be taken to have consented to the application of our **Act** including s. 258, so that compliance with s. 258 is not coercive.

[26] White dealt with this very issue. In distinguishing its earlier decision in **R. v. Fitzpatrick** (1995), 4 S.C.R. 154 (which dealt with the admissibility of fishing logs and hail reports kept daily by fisher's in the regulated west coast fishing industry) the Court held that driving is not freely undertaken in quite the same way as fishing in a regulated industry. Driving may be almost a necessity of life, especially in rural areas. Hence, it concluded in ¶ 55 " the issue of free and informed consent must be considered a neutral factor in the determination of whether the principle of self-incrimination is infringed." In my view the trial judge

did not err in following **White** and deciding that the coercion factor here was also neutral.

[27] Nor has the Crown satisfied me that the trial judge erred in deciding there was an adversarial relationship in this case. The Crown submits that the absence of a use immunity provision in s. 258 of our **Act** as contrasted with the presence of such a provision in s. 61 of the British Columbia statute (which immunity was held not to be binding in a **Criminal Code** context), means that the adversarial relationship is diminished in Nova Scotia. I find the argument unconvincing. In this case, the police personally served the s. 258 notice upon Ms. Zwicker. They received her response the next day. On the facts, it was open to the trial judge to conclude that there existed an adversarial relationship.

[28] The trial judge states:

> But when the demand is made on an individual pursuant to Section 258, and in this case, according to the agreed statement of facts, a demand was made by a peace officer, at that time, the peace officer is investigating possible breaches either of the Motor Vehicle Act or of the Criminal Code. When the officers making the demands of the citizen pursuant to Section 258 to produce the driver within 48 hours, that, to me, clearly, is an adversarial relationship.

[29] I agree.

[30] The Crown argues that the trial judge also erred in her conclusion with respect to the factor of unreliable confessions. This relates to the two goals of the principle against self-incrimination referred to at ¶ 43 of **Fitzpatrick**, providing protection against unreliable confessions and preventing the abuse of state power.

[31] In **White** the Court stated at ¶ 62 that a person giving an accident report would likely suffer a significant fear of prejudice and perceive a strong incentive to lie to avoid criminal prosecution. It noted this incentive to lie would impair the effectiveness of the regulatory reporting scheme and that subsequent use immunity for such a statement would enhance the administrative efficacy of the reporting system.

[32] Paragraph 62 states as follows:

> Under the Motor Vehicle Act, the prospect of unreliable confessions is very real. In particular, accident reports under the Act are frequently given directly to a police officer, i.e., to a person in authority whose authority and physical presence might cause the driver to produce a statement in circumstances where he or she is not truly willing to speak: see R. v. Hodgson, [1998] 2 S.C.R. 449, at para. 24, per Cory J. The driver who reasonably believes that he or she has a statutory duty to provide an accident report under the Motor Vehicle Act will likely experience a significant "fear of prejudice" if he or she does not speak. At the same time, there may be a strong incentive to provide a false statement, given the serious consequences which the driver may feel will flow from telling the truth, even if the truth does not in fact support a finding that a criminal offence was committed. It is reasonable to expect that this fear of prejudice and incentive to lie would be dissipated if the driver could be confident that the contents of the accident report could never be used to incriminate him or her in criminal proceedings. A rule which granted use immunity in criminal proceedings would thus serve to enhance rather than impair the effectiveness of the statutory reporting scheme, as was suggested by Esson J.A. in the Court of Appeal below. Indeed, it is possibly for precisely this purpose that the province originally enacted the use immunity set out in s. 61(7).

[33] The Crown argues the incentive to lie when complying with s. 258 of our **Act** is reduced given the limited amount of information required by that section. While the detail required is certainly less than that required under s. 61 of their statute, the consequences of providing the information required by s. 258 of our **Act** can be very significant to the owner of the vehicle and so may well affect his or her incentive to lie.

[34] The trial judge found the reasoning set out in ¶ 62 of **White** applied to the facts of this case and stated:

> So I guess to put it another way, in dealing with a situation such as this, a Section 258 demand and the statement that results from that demand, what the Court really seems to be saying is that a person would be more likely to tell the truth if there was not a possibility that the statement could be used against them or, put another way, and this is the way, I believe, that Judge Ross put in the case that was provided by defence counsel, that one would be less likely to lie if there is no possibility that the statement could be used as evidence.

[35] I am satisfied she did not err in considering there to be a greater possibility to lie if statements given under s. 258 of our **Act** are not protected by a use immunity.

[36] The Crown argues the trial judge also erred in her treatment of the possibility of abuse of power. It says the reason the Court in **White** found there was concern with abuse of power is absent here given the limited information required by s. 258 of our **Act**, name and address of person in control, and the manner in which it was obtained, by leaving a written notice with the owner. This is in contrast to the situation considered in **White** where the court stated in ¶ 66:

> Finally, it should be noted that an accident report is not at all analogous to the hail reports and fishing logs in Fitzpatrick, which La Forest J. compared to business records in so far as they were impersonal lists in which the declarant had little expectation of privacy. 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 [page449] this narrative to incriminate. I would note that, while it is well established that there is a reduced expectation of privacy in a vehicle generally, compared to the expectation of privacy in a dwelling, this fact is largely irrelevant to the analysis here. The question in this case involves the expectation of privacy that a declarant has in a confession. The fact that the confession has to do with a car is entirely incidental.

[37] I agree the potential for abuse of power is less in this case than in **White.** However I am satisfied the trial judge did not err in deciding it was still a relevant factor. Once a person is compelled by s. 258 of our **Act** to tell the police what may often be one of the essential elements of an offence, they may be more apt to believe they should provide more detail. Personal delivery of the notice under s. 258 of our **Act** gave the police a foot in the door so to speak that may lead, intentionally or unintentionally, to the police seeking more information and depriving the owner of the principle against self-incrimination.

[38] No challenge was made at trial as to the constitutionality of s. 258 of our **Act**. Therefore we need not consider the application of s. 1 of the **Charter**.

[39] The Crown's last argument is that after finding that Ms. Zwicker's **Charter** right would be infringed if her statement was admitted, the trial judge erred by not considering any remedy other than exclusion of the statement pursuant to s. 24(1)

of the **Charter**. The Crown has not satisfied me the trial judge erred in proceeding as she did. This is the same remedy the court approved in **White** in similar circumstances and the trial judge did not err in following it.

[40] For the foregoing reason I would dismiss the appeal.

Hamilton, J.A.

Concurred in:

Glube, C.J.N.S.

Saunders, J. A.