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R. v. Kosch

Between
Her Majesty the Queen, and
Eva Kosch

[1998] O.J. No. 3512

Ontario Court of Justice (Provincial Division)
Brampton, Ontario

Smith Prov. J.

Oral judgment: June 24, 1998.

(15 pp.)

Criminal law -- Evidence and witnesses -- Confessions and voluntary statements -- Whether statement was made freely and voluntarily.

This was an appeal by **Kosch** from conviction for failing to stop at a red light contrary to the Provincial Offences Act. At trial it was found that **Kosch** was the operator of the motor vehicle, which proceeded through an intersection against a red light. **Kosch** injured her head in the resulting collision. She acknowledged to police at the scene of the accident that she was the driver. The trial judge found on a voir dire that the statement was made voluntarily.

HELD: Appeal dismissed. Conviction upheld. Despite **Kosch's** injuries, there was no reason to doubt that the statement was not the result of an operating mind so as to require the Crown to establish such an operating mind. The Crown discharged its burden notwithstanding the absence of the officer to whom the statement was made. There was no evidence of any threats, promises or inducements by any person in authority to render the statement involuntary. The absence of a notation by the investigating officer in his notebook did not bring his evidence into question.

Statutes, Regulations and Rules Cited:

Provincial Offences Act.

Court Note:

Charge: Red Light, Provincial Offences Act

Counsel:

P. John, for the Crown.

J. Burd, for the accused.

1 SMITH PROV. J. (orally):-- The following are extemporaneous reasons in this matter of Eva **Kosch** who is charged arising out of a motor vehicle accident which took place on the 8th day of January, 1997, at a little after 9:00 in the morning at the intersection of Main Street and Church Street in the City of Brampton. My recollection was that a number of motorists were stopped facing a red light and they were going northbound and other witnesses were going eastbound, I think, or westbound on Church Street which makes an intersection with Main Street at a slight angle; and the Crown's case was that the Defendant, Eva **Kosch** of Brampton, was coming south on Main Street and proceeded into the intersection against a red light. There was a collision and her vehicle was fairly substantially damaged and she suffered a head injury. I have no reason to disbelieve Mr. Burd that she did not remember very much about it, but she was charged with this particular offence. Her case came up for trial the first time on the 21st of March, 1997, before Justice of the Peace Chang-Alloy and the main portion of the case had to do with the identification of this lady as the operator of the vehicle that she was alleged to have been driving. Now, looking at the Crown's material that they have sent to me, I did not understand from any of the arguments that Mr. Burd was arguing that the Eva **Kosch** for whom he acted was not the same Eva **Kosch** who was named in the Information; and there seem to be some cases about that which puzzled me a little. What I understood to be the issue about Eva **Kosch** was, was she proven to be the operator of the motor vehicle and how did the Crown manage to prove it? Superimposed on that, for any appellate Court that may review what I do, there is a practice which makes me uncomfortable (but it is statutorily permitted) to allow cases to be defended without the Defendant being present in that court. It is part of the P.O.A. legislation which I would call the 'friendly court legislation' so that people can hire agents like Mr. Burd, an ex-police officer, and they do not even have to come to court. They can just continue on at work, making money and paying their taxes. The problem about that is that you have in the Highway Traffic courts a continuing difficulty about identification. Now, for instance, let me extemporaneously reflect on other types of cases, impaired driving cases. I have been involved as a criminal lawyer or judge for 36 years and I cannot remember, except a few guilty pleas for celebrities who were abroad, any impaired driving case where the Defendant was not physically present in court; and of course the Crown usually has no problem about proving that it was the Defendant operating the motor vehicle. If they do, the case does not even come to court anyway. Most prosecutors are smart enough to know that, if they cannot prove the Defendant was behind the steering wheel of a car, they cannot convict him of impaired driving or care and control in those cases. The practice, then, in the court in which the learned Justice of the Peace sits, is often that the accused person is not there. The witnesses come, no doubt look around in a puzzled fashion looking for the Defendant, but the Defendant is often not there; and so identification does become important. The fact situation in question is a little different, because sitting facing north at the red light for northbound traffic was a motor vehicle which was a Crimestoppers motor vehicle operated by a police officer. This vehicle

received secondary collision damage as a result of the initial collision between what was termed the **Kosch** vehicle and, I think, the Fielding vehicle or the one whom she is alleged to have struck. Police departments are bureaucracies, I know that. They are bureaucracies, they have rules, and one of the rules is that if a police vehicle is involved, an ordinary police officer in the marked car cannot investigate it. It has to be a sergeant or above. And so Constable Sullivan of the Crimestoppers unit who was there could not investigate it and the first officer on the scene, Constable Stansbury, could not investigate it for the same reason. They were both constables. A sergeant had to be called and thus it was that onto the stage walks Sergeant Paradis. Sergeant Paradis did not arrive immediately. As a matter of fact, by the time he arrived, I think I recall the evidence correctly, the lady had been taken out of her van, had been removed to Peel Memorial Hospital and so it was necessary for Sergeant Paradis (after some initial conversation and investigation at the scene) to go over to Peel Memorial Hospital. He apparently went into a cubicle there and asked who he, I suppose, had been led to believe would be Mrs. **Kosch** if she was the driver of the van and she said, "yeah". Despite what is in the transcript, it is there. I saw it. At page 34 of the transcript of the proceedings taken on October 21, 1997, which was the second occasion it came on, Ms. John asked the witness Richard Paradis, who is the police sergeant, question -- at line 14 -- "and I understand that when you spoke to Eva **Kosch** -- and I had questioned you on the voir dire -- how did you determine that she was driver? You indicated that you put a question to her, is that correct?" Answer, "yes". Question, "and that question was?" Answer, "well, I asked her if she was driving the vehicle." Question, "and did she make a response to you?" Answer, "yes, she did." Question, "and what was that response?" Answer, "she said, 'yeah.'" There is no doubt in my mind that the learned Justice of the Peace was entitled to take that into account if he was satisfied, after holding a voir dire, that her response was a voluntary one. Now, a threshold issue in that issue of voluntariness is, "was it her statement?" Was it the statement of an operating mind? To use the civil law by way of an analogy, was there a problem about "non est factum," the Latin phrase which means, 'it is not really my signature, because I did not have an operating mind to go along with the hand that held the pen. Or I was dead drunk and I did not know what I was signing. I was so badly injured that I did not know what I was doing.' Now, there is no doubt about it that this woman hit her head in the accident. There is evidence in the transcript about that. And there is no doubt about it that she was in some pain at the hospital -- Sergeant Paradis perceived that -- but there is not a jot nor a tittle of evidence which establishes that this woman was so badly injured that it was not her statement. I do not accept the point being made by the Defence that there was some affirmative duty on the Crown to call evidence that she had an operating mind. In fact, I would go so far as to say that everybody is assumed to have an operating mind unless there is something to indicate otherwise such as drunk standing there, falling down, wetting his pants, flailing about on the floor. We have all been in court and heard of cases like that. This lady had a head injury and it was no doubt painful, but there is simply no support for the notion -- and it is entirely speculative and, with the greatest respect, something that is conjured up by the Defence -- that there was some necessity for the Crown to show an operating mind here. Apart from that, the Crown ran into a problem which I suspect was administrative and it was that Constable Stansbury was at the scene, initially having been assigned the call, I suppose, and he could not investigate it because he was not a sergeant. When the ambulance people came, he apparently assisted in extricating the lady from her van -- that is what I gathered -- and he did have some conversation with her. Now, is the rule that everybody who even has some conversation with the person whose statement is being voir dired -- does the Crown have to call that person? In the best of all worlds, the Crown would like to call everybody, but that can be carried really too far and I am about to refer to some cases that establish that the point is not really settled and it is not carved in stone that you

have to call everybody who came into even the remotest contact with the declarant whose statement is under consideration. May I be anecdotal in order to illustrate. Shortly after I was appointed a judge, I did a three month preliminary hearing in a cluster of cases, one of which was the Barbara Turnbull robbery. Ms. Turnbull, of course, was rendered a quadriplegic as a result of one of her vertebrae being destroyed when she was shot in a milk store robbery in Mississauga. There were about three other robberies, too, as a matter of fact and a conspiracy to take over all of the prostitution business between Toronto and Hamilton and various other ridiculous schemes that these young men had dreamed up. It was thought initially that Ms. Turnbull would die, so grave were her injuries. Homicide officers, one of who was Detective Sergeant Darcy Honer -- two very cerebral homicide detectives -- were faced with the problem of how to take an accused, who was the shooter, and was found by the jury to be the shooter, into the police station at 22 Division of Peel Police. They had taken him into custody on the fifteenth floor of an apartment building at Jane and Finch. They cleared out the whole of the building or one part of the building so as to obviate the problem the Crown is now in. They did not even want an officer walking through on the way to his locker and they cleared the whole building out; and that shows you how the principle can go overboard. To clear a building to move an accused so he does not come in contact with somebody you might have to call in a voir dire later on -- and so it was made simple in the voir dire on the preliminary hearing. There were no other people who came into contact with the accused except Honer and this other officer. The law does not require the calling of everybody who may possibly have come into contact with Mrs. **Kosch**. It has to be shown that there was some investigative contact with Mrs. **Kosch** in order to cast upon the Crown the obligation to call that officer, in this case Stansbury. There are a number of cases which I have found in a book which is from the Province of Quebec, but it is in English and it is a very good evidence guide. It is called Guide to Criminal Evidence by Mr. Justice Jean-Guy Boilard and he updates it several times a year. At page 1-4, Justice Boilard is talking about the necessity of calling these various people. He says, under paragraph 1.005(7), "other cases held the view that such an absence, like the omission to give the suspect the police caution, is but a circumstance to be considered by the trial judge when he rules whether the Crown has discharged its burden to prove, beyond a reasonable doubt, that the confession was obtained freely and voluntarily from the suspect. This is the view expressed by Sinclair, J.A., in R. v. Garfield, (1974), 21 C.C.C. (2d) 449," a decision, as it happens, of the Court Martial Appeal Court. The Court Martial Appeal Court is staffed by Justices of Appeal in Canada for serving soldiers and they deal with everything, as I recall, up to and including murder and rape. Continuing on, Mr. Justice Sinclair's quote, "the appellant's position as it seems to me is that the prosecution is obliged to call or to tender every witness who has had anything to do with an accused who makes a confession from the moment of his first contact with the police until the statement has been given. In my opinion, the proposition stated in those terms is too broad. It may well be that, in certain circumstances, such a rule ought to be followed. In others, such a rule would be unnecessary," and then Mr. Justice Boilard again, "in the final analysis, in my view, the admissibility of a statement must be considered in the light of those words of Justice Kerwin in Boudreau v. The King (1949), 94 C.C.C. 1, at page three in which Mr. Justice Kerwin said, 'the fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility, but on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and if, upon their review, the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected.'" And then at page 1-4.1, Justice Boilard writes as follows: "indeed there may be cases where the absence of a person in authority will be of little consequence if it is

shown that that person took no part in the interrogation of the suspect." *Andrews v. The Queen*, *The Queen v. Kacherowski* and *The Queen v. Settee*, which last case is cited up as (1974), 22 C.C.C. (2d) 193, at page 206 to 209 in the Saskatchewan Court of Appeal. His Lordship Mr. Justice Boilard also writes further on down the same page, "to sum up, for whatever reason a person in authority is not called at the voir dire, the confession may or may not be admitted. It is our view that there is no hard and fast rule governing. All depends on the facts of each case and the evidence adduced during the voir dire. If at the end of the day the trial judge is satisfied that the Crown has discharged its burden, notwithstanding the absence of a witness, then the confession is admissible. If not, it will be ruled out." Now, while I must say that the ruling on the voir dire was somewhat scattered or possibly discursive, the learned Justice of the Peace came to the correct conclusion. The evidence was as follows: (1) the Defendant had to be removed from the wreckage of her vehicle by emergency personnel; (2) during this extrication, Constable Stansbury spoke to her. Neither he nor she gave any evidence; (3) no evidence is before the Justice of the Peace that he was talking to the lady about the accident as opposed to incidental conversation about her medical condition or about her family. For reasons which I now understand today, she did not come to court and give evidence, although she no doubt had that option. Mr. Burd says, "well, she didn't remember, so we didn't have that luxury." Fourthly, there was no evidence by anyone of any threats, promises, inducements by any person in authority to the Defendant to obtain her admission that she was in fact the operator of the van or the vehicle. The person to whom the admission was given, sergeant Paradis, was put up, examined, cross-examined at length and, as a matter of fact, taken to great task because a number of things were not in the sergeant's notebook. It cannot be said that the person who interrogated the woman, if you can call it an interrogation, was hidden from cross-examination. He was there and Mr. Burd had every opportunity to cross-examine him and did. The evidence was that Paradis was the person who was in fact investigating the accident, not Stansbury who, because of his rank, was unable to investigate it. It is my view that the Justice of the Peace did not err in admitting the lady's admission that she was the driver of the vehicle. It is not necessary in every circumstance to have every police officer who was even on the scene give evidence. The Defence can call witnesses, too, and if they wanted to call Stansbury, if they thought there was a reason, they could have called him, too, I suppose, although I find it hard to understand why they would want to if they did not know what he was going to say. In any event -- and I say this carefully, because I do not want to be misunderstood -- it is not just a question of standing there and saying, "oh, well, you didn't call a witness, therefore the statement is inadmissible." It was the task of the learned Justice of the Peace to canvass the statement for voluntariness and the failure to call Stansbury by the Crown, in my view, did not hamper him in assuring himself that it was indeed voluntary. For that reason, I do not have any problem with the conviction on the red light charge. There was also evidence from, I think, Constable Sullivan that the lady went into the intersection on a red light. There was also clear evidence from Sergeant Paradis that he looked at the lights and ascertained that, when the north-south lights are red, the east-west lights are green. Now, Mr. Burd was quite incensed at the trial that the officer did not have it in his notebook and I would like to just speak about that for a moment or two. The fact is that notes are an aide memoir and Mr. Burd knows better than I (because he -- not I -- has been employed as a police officer) that you are not going to be able to remember something a year later in a traffic accident investigation unless you made some notes; but the fact is that it is not anything more than a question of weight for the Justice of the Peace in this particular case to find out that the officer had not put in his notes the business about the synchronization of the lights. It does not mean it did not happen when he says that he did it. We are not at a stage in the law yet where, at least one group of lawyers in Toronto -- present company excepted -- would like the law to be and

that is that if it is not in the notes, then the officer is lying. "He's lying, it's not in the notes," they say. Ridiculous. A Court would not be justified in finding that a person was not telling the truth because they had not made a note. What about the poor citizen who is involved in an accident, does not have a lawyer, cannot afford a lawyer, does not have the wit to go home and sit down and write it all out? Is he, when he comes to court, lying because he does not have any notes? Of course not. He is entitled to tell his recollection. Now, Paradis pledged on his oath that he did this and the Justice of the Peace was perfectly within his rights judicially to accept that evidence. I have not done a written judgment here, so I hope that I did not miss any of the points that Mr. Burd brought up, but as far as I am concerned, the appeal must be dismissed. There is nothing wrong with the conviction. So that is the decision of the Court, the appeal is dismissed. Thank you.

qp/s/mii