

ONTARIO COURT (PROVINCIAL DIVISION)

HER MAJESTY THE QUEEN

(Respondent)

- against -

BRUNO ROTI

(Appellant)

P R O C E E D I N G S

BEFORE HIS HONOUR JUDGE ZIMMERMAN

on the 25th day of June, 1992 at NEWMARKET, Ontario

Appearances:

D. Reeve, Esq.

Counsel for the Crown

J. Burd, Esq.

Counsel for the Accused

MR. REEVE: Your Honour, there is a matter for
either argument or judgment; that's number 18,
Bruno Roti.

MR. BURD: Good morning, Your Honour. For the
record my name is Burd, initial J. I appear on
behalf of the appellant who's not present before
Your Honour's court this morning. I don't know if
Your Honour recalls ...

THE COURT: Yes, I do.

MR. BURD: Do you have the factum, Your Honour?

THE COURT: Yes, I do.

MR. BURD: Well the only thing I'd like to add,
Your Honour, is that ...

THE COURT: Excuse me. Madam Clerk, could I have
the materials on Bruno Roti.

MR. BURD: Your Honour, I would like to add that
since the factum was submitted or this matter was
put in front of this Court, there has been a
decision from the Provincial Judge, His Honour
Judge Tallon in Central East Region, in Oshawa on
a similar issue. That was February 24th, 1992.
I'd like to submit that Judge Tallon ruled in our
favour on it, but I think it's more that the Crown
conceded the point and conceded the appeal.

I've shown the case, which I have a copy for
the Court, to the Crown. I have a copy for Your
Honour if Your Honour was interested in Judge
Tallon's decision on the point.

THE COURT: Well I've read the others but I'll
look ...

MR. BURD: Well it supports Mr. Justice Langdon,
Your Honour. But as I say, it's more the Crown

saying "I agree," than the Court actually ruling on it.

On page 8 of this transcript Mr. Russell, the Crown in that matter, and at line 6 he starts his submissions and the Court says, "Well, you're agreeing with the defence," and "Basically, yes."

The only reason I was submitting this, Your Honour, is that Mr. Justice Langdon, as he is now, but Provincial Judge as he was then, is from Peel Region as opposed to Judge Tallon who is from Central East Region, Your Honour. That's the only reason for submitting Judge Tallon's.

THE COURT: Mr. Reeve, please.

MR. REEVE: Your Honour, in viewing the transcripts it's apparent that there are two portions that relate to identification. One is the evidence of the other party involved in the collision whose evidence is unclear as to identification. The only other aspect is the evidence of the police officer who says that the defendant in this case came forward and identified himself as the driver of the car. That clearly was admitted without the benefit of a voir dire.

My friend has provided the case, decided by the Supreme Court of Canada in 1973, Irvin and The Queen, and that seems to be a pretty complete treatise on the necessity of voir dires in determining the admissibility of statements. His Honour Judge Langdon, as he then was, I don't think could have put it more succinctly or more clearly that a voir dire is required. That is my understanding of the law.

5 Clearly in this case a voir dire was not held. The Crown could well argue, and I see that a position has been taken or an argument has been put forth in the brief that I have, that this may fall into a category that it is clearly volunteered.. The Supreme Court of Canada almost 20 years ago almost has discussed that, clearly volunteered as well, and quite frankly has said that really begs the issue.

10 We look at circumstances as related by one side and say, well quite obviously it was volunteered but we haven't heard the other side, such as the case here. The defendant may well have wanted to come forward and said that's not exactly what happened. Without having a voir dire, and when I say voir dire I don't necessarily mean the necessity of the formal requirement of a voir dire, but at least by way of submission or whatever, that the other side should be heard if there is another side. Here an inquiry was not embarked into. I expect I could make an argument as well, it's incumbent upon the defence to say we require a voir dire here but I don't understand that to be the law either. I understand the law to be that it is incumbent upon the prosecution to satisfy the Court as to the voluntariness of the statement and cannot really rely upon the acquiescence or the lack of objection of the defence.

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30 So it would seem to me that as a matter of law, a voir dire was required to be held. At least an inquiry of some sort as to the

voluntariness of the statement. Without that being done, I cannot see how that evidence was properly admitted.

Having gone that far, Your Honour may well have a different point of view, I don't know, but assuming that you accept my position in that regard, the question then becomes whether there should be another trial where the voir dire is properly held to determine the admissibility or whether the appeal should simply be granted and the conviction quashed.

I note it's a very old case. I also note it took a very long time to complete. Without going into a thorough analysis of right to trial within a reasonable time, it seems to me that such a period of time has passed that it would be almost fruitless to attempt to retry the matter.

My friend has also indicated that it was his information that the Crown's witness was only here on a vacation from Italy for a couple of months. I accept that. In any event, who knows if we could find him again and have him come. At this point in time his ability to recollect obviously would be so interfered with by the passage of time. I think on a matter such as this it would be fruitless to attempt to try it again.

THE COURT: Well I took the time to read the transcripts, finally, and it certainly appears to me that the first witness, the person whose vehicle was rear-ended, was very uncertain as to his identification of the accused, Mr. Roti, as the driver of the car. The second thing that

5 struck me was that the identification of Mr. Roti by the police officer in court was admitted to having been made by him perhaps at least with some substantial assistance by reason of the fact that he had, prior to the trial, seen Mr. Burd and Mr. Roti standing together in the hallway and went up and asked, "Are you Mr. Roti?" to which the accused replied in the affirmative, so that the in court identification by the police officer was somewhat suspect by reason of that action as well.

10 On to the issue of whether or not there should be a voir dire. Where, in the circumstances such as this it may appear on the face of it to be a voluntary admission, nonetheless Mr. Roti may have been acting under a sense of compulsion to reply to the request of the police officer as to who were the drivers of the vehicles involved out of a sense of responsibility pursuant to the provisions of Section 173 or 174 of the Highway Traffic Act that where there has been an accident, a police officer makes certain inquiries and the motor vehicle operators are obliged to make replies to those inquiries; or, he may have simply been under some sense of compulsion because the police officer was the person who was asking the questions.

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25 It seems to me that the cases indicate that in circumstances such as this there should be a voir dire to determine whether or not the statement was not otherwise involuntary. And clearly in this particular case, in reading through the transcript, there was no voir dire.

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And further, reading through the transcript, there does not appear to have been any waiver by the accused or his counsel with respect to a voir dire. Now it's true that counsel didn't ask for a voir dire, but it seems to me that the Crown is under an obligation to hold a voir dire, and if not, the Court should have required that a voir dire be held.

In the circumstances I am satisfied that in this particular case that had that evidence not been admitted, there would have been no evidence that Mr. Roti was the driver of the other motor vehicle and the case should have been dismissed at that time. In those circumstances it seems me that this conviction should be quashed and I don't see that it's appropriate, in the circumstances, to order a new trial.

MR. BURD: Thank you, Your Honour. I'd like to thank Mr. Reeve as well for his time.

MR. REEVE: Thank you.

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Marjory A. Beynon
Marjory A. Beynon
Certified Court Reporter

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