** Unedited **

Indexed as:

R. v. Joseph

Between
Regina, and
Dennis Harold Joseph

[1993] Y.J. No. 157
DRS 94-06903
Action No. T.C. 92-11589

Yukon Territorial Court
Whitehorse, Yukon Territory
Lilles C.J.T.C.

Heard: June 8, 1993.
Judgment: filed July 29, 1993.
(6 pp.)

Criminal law — Motor vehicles — Driving with blood alcohol over .08 — Evidence and witnesses — Statements of accused — Voluntariness.

Voir dire in the trial of an accused charged with driving while blood alcohol was over .08. At issue was the admissibility of a form containing certain statements allegedly made by the accused. Voluntariness was at issue. The officer had no independent recollection of the circumstances. He reviewed his notes. He could only read from the form. It contained abbreviations. Some answers involved the officer's impressions.

HELD: The form was not admissible. The form was not a statement by the accused, but the officer's statement of his impressions and observations. Further, the officer could not be cross-examined as he had no independent recollection of the matter. It was never adopted by the accused and was not his complete statement.

STATUTES, REGULATIONS AND RULES CITED:

Criminal Code, R.S.C. 1985, c. C-46, s. 253(b).

Rodney Garson, appearing for the Crown.
Barry Ernewein, appearing for the Defence.

¶ 1 **LILLES C.J.T.C.**:— Harold Joseph was charged on October 17, 1992, in Dawson City in the Yukon Territory, with an offence contrary to s. 253(b) of the Criminal Code. That is the offence which is commonly referred to as "blowing over .08".

¶ 2 The Defendant pled not guilty. During the course of the trial, the Crown tendered as evidence, a police investigative report titled FORM C-256. it purported to contain certain statements made by the accused in response to Constable Lucier's questions. A copy of that form was entered as Exhibit A for identification purposes and is attached. A "voir dire" was held as regards to the voluntariness and admissibility of the alleged statements by the defendant.

¶ 3 I have made the following relevant findings of fact.

1. The Form C-256 is a standard form used by police officers or impaired driving investigations. It consists of a pre-printed form with blanks to be filled in by the officer. Some of the questions involve conclusions or observations made by the officer; other questions are specific to the defendant and it would be difficult for the Constable to answer those questions without engaging the accused in conversation or putting the questions specifically to the defendant.
2. The Form was filled out by Constable Lucier prior to the arrival of Corporal Gillen, the breathalyser operator. He sat across the desk from the accused, who would be able to see that it was a pre-printed form.
3. On arrival at the police station, the accused was presented to a telephone but declined to speak to counsel. The Form C-256 was filled out by the Constable subsequent to this.
4. Constable Lucier was acquainted with Mr. Joseph, as they played on the same hockey team. While Lucier was in uniform, Joseph was not hand-cuffed or physically restrained.
5. Constable Lucier had no independent recollection of the specific questions put to Joseph or his answers. He was trained to go through the Form with the accused and to make observations, to ask questions designed to solicit the necessary answers, and to fill in the blanks. He repeatedly spoke in terms of "I would have done this" or the accused, "would have said that". He could not testify as to exactly what his questions were, or exactly what the accused said.
6. The completed Form was not shown to the accused for correction, nor did he approve or adopt it in any other manner.
7. At the top of the Form Lucier had written "Police Warning 0541 Hrs Understood". This refers to the warnings given at Joseph's residence when he was detained. The Constable also stated that before he filled out the Form he explained to Joseph that, "he need not answer them, that they're just standard questions that we ask". This was not noted on the Form or in the Constable's notes. In light of the fact that the officer has no independent recollection of the questioning that immediately followed, I am not satisfied that this warning was in fact given.
8. No attempt was made to admit the Form C-256 as a business record or on any other basis. It was merely tendered as a statement or statements made by the accused, along with the viva voce evidence of Constable Lucier. The Crown asked for a "voir dire" to consider its voluntariness.

CONCLUSION

¶ 4 Constable Lucier has no independent recollection of any of the answers given in response to his questioning of the Defendant. He was not able to "refresh" his memory by reviewing his notes. He could only read from the Form C-256. He could not testify to the exact wording of his questions; he could only say that he would have done it in a particular way. If the statement is admitted, the Defendant will be prejudiced by his inability to cross-examine the officer, for instance, to show that a particular question posed was misleading and that he misunderstood the question.

¶ 5 A closer examination of the Form shows that the answers to some of the questions involved observations made by the officer; for example, under UNUSUAL ACTIONS was recorded "noticeably more talkative". This response involves observations made by the officer and a subjective evaluation by him. This is not admissible as a statement made by the accused. Similarly, under (IF ACCUSED IS UNDER ARREST OR DETENTION) DO YOU WISH TO HAVE A COUNSELLOR? is recorded, "declined". This is clearly not the accused's statement. At best, it is a conclusion reached by Lucier as a result of statements or actions made by the accused. The answers to other questions appear to have been abbreviated by the Constable. Again, these are not the words used

by the accused. At most, they represent the Constable's understanding or impressions of the accused's words. Perhaps some of the words recorded were actually used by the accused, but the Constable is unable to testify as to which ones. In the absence of any independent recollection by the Constable, the accused will be unable to test the accuracy of the officer's filled out Form by cross-examination.

¶ 6 All this goes to establish that what was presented to the court is not a statement given by the accused, which can be admitted if shown to be voluntary. It is the officer's statement of his impressions and observations. In any event, it is not the complete "statement" of the defendant. The completed Form was never adopted by the accused. The Form is therefore not admissible. Nor can the written inadmissible statement become admissible merely by having the officer read it into the record.

¶ 7 The circumstances of this case underscore the need to follow rigorously, the accepted procedure of taking statements in criminal proceedings. They should preferably be recorded by video or audio, but failing that, the written statement should be the verbatim questions and answers given by the accused. The statement should be given to the accused to review and to sign, indicating his approval. This was not done in this case; for the reasons already given, the Form C-256 is not admissible as evidence in this proceeding.

LILLES C.J.T.C.

DRS/DRS