

Shadowing

Audio recording of the English court interpreting exercise 12, shadowing. In this exercise you will be shadowing the speaker. You must repeat in English everything you hear as soon as you hear it.

Exercise 12

The accused, a native of Vietnam, was charged with sexual assault. In her statement to the police a few hours after the assault was alleged to have occurred, the complainant described her two assailants as "Asian", one being "fat" and "clean-shaven." The complainant later picked the accused's photo from a photo line-up. At trial, the accused appeared as slender with a moustache. The complainant identified him in court as the man she had previously described as clean-shaven and fat, but conceded on cross-examination that as he appeared in court he was not fat.

The defence called the accused's court-appointed interpreter to testify about the accused's weight at the time the attack was alleged to have taken place. Instead of translating his testimony in full as he gave it, as instructed by the trial judge and by defence counsel, the interpreter answered in English and only summarized his evidence in Vietnamese at the end of his direct examination and again after his cross-examination.

An exchange between the trial judge and the interpreter which followed his cross-examination appears not to have been interpreted at all. The accused was convicted. He appealed his conviction on the grounds that the identification evidence was flawed and that deficiencies in the translation of the evidence deprived him of the right to be actually present at his trial, contrary to s. 650 of the *Criminal Code*. The Court of Appeal upheld the conviction.

The main issue in this appeal is whether the failure to provide the accused with full and contemporaneous translation of all the evidence at trial constituted a breach of his right to an interpreter, as guaranteed by Section 14 of the Canadian *Charter of Rights and Freedoms*.

The right of an accused who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter ensures that a person charged with a criminal offence hears the case against him or her and is given

a full opportunity to answer it. This right is also intimately related to our basic notions of justice, including the appearance of fairness, and to our society's claim to be multicultural, expressed in part through Section 27 of the *Charter*. The magnitude of these interests favours a liberal interpretation and a principled application of the right to interpreter assistance under Section 14 of the *Charter*. The principle underlying all of the interests protected by the right to interpreter assistance under Section 14 is that of linguistic understanding.

In determining whether there has in fact been a breach of the *Charter*, it must be clear that the accused did not understand or speak the language being used in court and was thus actually in need of interpreter assistance. Where an interpreter was appointed and it is the quality of the interpretation provided that is being challenged, it is necessary to determine whether there has been a departure or deviation from what is considered adequate interpretation.

While the interpretation provided need not be perfect, it must be continuous, precise, impartial, competent and contemporaneous. The question should always be whether there is a possibility that the accused may not have understood a part of the proceedings by virtue of his or her difficulty with the language being used in court. Not every deviation from the protected standard of interpretation will constitute a violation of the *Charter*: The claimant must establish that the lapse in interpretation was in respect of the proceedings themselves, thereby involving the vital interests of the accused, and was not merely in respect of some collateral or extrinsic matter.

In determining whether the alleged deviation in interpretation was part of an occurrence which actually served in some way to "advance the case", one must consider whether there was an unfolding or development in the proceeding with respect to a point of procedure, evidence and/or law. Since Section 14 guarantees the right to interpreter assistance without qualification, it would be wrong to introduce into the assessment of whether the right had been breached any consideration of whether or not the accused actually suffered prejudice when being denied his or her Section 14 rights. The *Charter* in effect proclaims that being denied proper interpretation while the case is being advanced is in itself prejudicial and is a violation of Section 14.

There will be situations where the right to interpreter assistance cannot be waived for reasons of public policy. Where waiver is possible, the Crown must not only show that the waiver was clear and unequivocal and made with a knowledge and understanding of the right, but also that it was made

personally by the accused or with defence counsel's assurance that the right and the effect on that right of waiving it were explained to the accused in language in which the accused is fully conversant.

Here the accused was in need of interpreter assistance throughout his trial, since he did not understand or speak English, and there is no doubt that the interpretation of the proceedings in which the interpreter was involved as a witness fell well below the guaranteed standard.

First, the accused did not receive continuous interpretation of all the evidence at his trial, since the questions posed to and answers given by the interpreter were condensed into two one-sentence summaries and the interpreter's exchange with the judge was not translated at all.

Second, the interpretation was not precise, as the summaries failed to convey everything that had been said and the first summary was incorrect in that it referred to something which had not in fact been said.

Third, while there is no reason to doubt the actual impartiality or objectivity of the interpretation provided in this case, the practice of having an interpreter act as both a witness and an interpreter is one which should be avoided in all but exceptional circumstances.

Finally, the timing of the interpretation was unsatisfactory, in that it should have occurred contemporaneously with the asking of questions and the giving of answers.

These lapses were not trivial in nature, but rather occurred at a point when the accused's vital interests were clearly involved and the case was thus being advanced. The problems with the interpretation arose during the testimony of a witness, and the evidence given by that witness covered a topic of considerable importance to the accused, namely, the issue of identification upon which his entire defence was built. There was no clear or unequivocal waiver by the accused of his right to interpretation.

There is also no indication that the accused personally understood the scope of his right to interpreter assistance and what he was giving up, and that the waiver was made by him personally. The curative provisos of the *Criminal Code* are not applicable when an infringement of the right to interpreter assistance is in issue. While denial of a *Charter* right constitutes an error of law,

it is by its very constitutional nature a serious error of law, and certainly not one which, for *Criminal Code* purposes, can be characterized as minor or harmless, or as a "procedural irregularity."

Recourse should be had to Section 24(1) of the *Charter*, which allows a court to tailor the remedy to the particular circumstances of the violation. Since the violation of Section 14 of the *Charter* in this case occurred in the trial proper, the appropriate and just remedy under Section 24(1) is to quash the accused's conviction and order a new trial.

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