IN THE SUPREME COURT OF NEW ZEALAND

SC 80/2010
[2011] NZSC 130

CHALA SANI ABDULA

v

THE QUEEN

Hearing:	25 March 2011
Court:	Elias CJ, Blanchard, Tipping, McGrath and William Young JJ
Counsel:	D L Stevens QC for Appellant D B Collins QC Solicitor-General, H W Ebersohn and R A Kirkness for Crown
Judgment:	1 November 2011

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS

(Given by McGrath J)

Introduction

[1] This appeal raises an issue that is central to fairness in the administration of criminal justice. It concerns the right of accused persons who do not speak English to hear and understand the case being presented against them. They are dependent on effective interpretation of what is said in court if they are to understand the

proceedings and have a real opportunity to present a full defence to the criminal charges they face.

Background

[2] The appellant, Mr Abdula, was tried jointly with a Mr Ahmed on a charge of rape. The complainant was an 18 year old woman who had been walking home early on a Sunday morning while intoxicated. She approached a group standing outside bakery premises and asked to use the toilet. One of the group, Mr Ahmed, took her inside to a disabled persons' toilet where he forced her to remove her clothing and sexually assaulted her. The complainant's evidence was that a second man then entered the toilet and raped her. She did not get a good look at him but heard one of the two men then present threaten her in English. There was evidence that the appellant had some command of English while Mr Ahmed had virtually none. A third man then intervened and the complainant was able to leave the toilet and walk away from the bakery to a bus stop where persons she came across paid for a taxi to take her home.

[3] After speaking with her flatmate, she called the police and later that morning was medically examined with vaginal cervical swabs being taken. Testing indicated the presence of semen which, on analysis, was consistent with having originated from the appellant or a close relative of his. DNA profiling results on the clothing worn by the complainant were "50 million million" times more likely to occur if the DNA originated from the appellant than from another randomly chosen male.

[4] The appellant, in a statement to the police, denied that he had raped or had sexual intercourse with the complainant. He admitted engaging in other sexual activity with her, which he said was consensual. As a result of that activity, he had ejaculated on her hand. The appellant's defence was that part of the fluid on the complainant's hand was later transferred to the areas from which swabs were taken. There was evidence indicating this was possible and the defence case was that this explained why the appellant's DNA was found in those areas.

[5] The issues at the trial were straightforward. They principally concerned the nature of the sexual activity that had taken place, whether or not it was consensual and how the appellant's DNA came to be associated with the complainant. The time during which the disputed events occurred was short. The scope and nature of the dispute concerning the relevant events would have been apparent to the appellant and his counsel prior to trial. The defence case required cross-examination of the complainant concerning the nature of the sexual activity and cross-examination also of the technical witnesses to establish the possibility of transfer of the appellant's DNA to the complainant by a means other than sexual intercourse. The appellant did not give evidence. He relied on his police statement to support his version of the sexual activity that had taken place. The outcome of the trial was that the appellant was convicted of rape and Mr Ahmed of being a party to that rape. Mr Ahmed was also convicted of unlawful oral sexual connection in respect of the separate incident. It is in this factual context that the adequacy of the interpretation assistance provided to the appellant during his trial must be assessed.

Interpretation during the trial

[6] The appellant and Mr Ahmed were tried together by Judge Behrens and a jury. They had the assistance of a single interpreter at the trial. An interpreter had been brought to New Zealand from Australia for the trial to interpret for Mr Ahmed between the English and Oromo languages. Oromo is one of the official languages in Ethiopia, from where both accused came. Initially there were no plans to provide an interpreter for the appellant because he had some understanding of English. When asked by the Judge at the commencement of the trial whether he could also interpret for the appellant, the interpreter agreed to do so. He told the Judge that he had previously interpreted in two trials in New Zealand and had also interpreted for two people at once.

[7] The interpreter sat in the dock, between the two accused, for the whole of the first week of the trial. During that week the Crown opened, counsel for each accused made opening statements, and the Crown called all its evidence. Counsel for Mr Ahmed then opened and called evidence, and counsel for the appellant opened his case. The interpreter then had to return to Australia. The trial continued the

following week with a different interpreter, who is a taxi driver in Wellington and does not appear to have formal qualifications. There was no complaint concerning the standard of his interpretation.

[8] Early on in the trial the Judge intervened, expressing concern over whether the interpreter was keeping up. The interpreter said he was having some trouble. At the Judge's request, Crown counsel repeated his opening address, this time waiting until interpretation of each passage had been concluded before continuing. The prosecutors thereafter explained to each Crown witness how the interpretation process would work and that the process would be slow. There were a number of interventions by the Judge during the week in relation to interpretation. These included directions to witnesses to wait until translation of questions had been completed before commencing to answer them, and to counsel to read out documents and provide copies to the interpreter to facilitate their interpretation. On occasion, presumably at the interpreter's request, the Judge required repetition of questions. It is common ground that no complaint was made during the trial over the adequacy or effectiveness of the interpretation.

The appeal

[9] The appellant appealed against his conviction.[1] One of the grounds of appeal was that the standard of interpretation at his trial did not meet that required to comply with his right to an interpreter under the New Zealand Bill of Rights Act 1990. The Court of Appeal admitted affidavits on behalf of the appellant from, amongst others, the appellant himself, his partner, and his junior counsel, Ms Fairbrother. The Crown replied with affidavits, including one from the interpreter, and one from the appellant's senior counsel, Mr Nisbet.

[10] In his affidavit, the appellant said it was apparent to him that the interpreter was not coping. Often the appellant could not hear the interpretation, and sometimes the next evidence commenced before the interpreter had finished interpreting that already given. At times, there had been incorrect interpretation of words in English which the appellant understood. The interpreter had also described some evidence as

1 *Abdula v R* [2010] NZCA 332.

relating to Mr Ahmed when the appellant thought it had related to him. The appellant said he had to correct the interpreter when he did this. This is relevant to the level of understanding the accused had about what was being said at the trial.

[11] Mr Nisbet said he had regular contact with the accused, his partner and supporters during the trial. He checked regularly with the appellant that he was understanding matters and "he confirmed that all was okay". Both counsel for the appellant were concerned over the accuracy of interpretation. The appellant did not, however, raise with them during the trial any issues about the quality of interpretation, nor did he indicate at any stage he was having difficulty in understanding the evidence or procedure.

[12] One reason why senior counsel made every effort to ensure the appellant understood what was going on was that he realised that the accused was a person who wanted to please and never complained. Mr Nisbet said he was not surprised to learn subsequently from his affidavit that the appellant had at times struggled to understand everything the interpreter was saying. Mr Nisbet also said that much of the interpreter's time was spent ensuring that Mr Ahmed understood the evidence and the court process. He said that "[t]his could have been to the detriment of Mr Abdula's understanding of the evidence being led".

[13] Ms Fairbrother said that the interpreter did not speak at a volume that everyone in the courtroom could hear. At times, the witness and counsel were speaking while the interpreter was still interpreting. It seemed to Ms Fairbrother at the time that there was "a potential problem with an interpreter who was softly spoken sitting between two men in the dock and seeking to interpret for them both". The appellant was, however, asked by Ms Fairbrother, in English, whether he was happy with the interpreting and he told her he was. In any event, no other interpreter was available.

[14] The interpreter himself made an affidavit on which he was cross-examined, by video link, in the Court of Appeal. He confirmed he had obtained the NAATI 2 level qualification of the National Accreditation Authority for Translators and Interpreters in Australia following his successful completion of a one-year diploma

course of part-time study at a university. Although he was not a member of the professional body, the Australian Institute of Interpreters and Translators, the interpreter said that he considered himself bound by its code of ethics.

[15] The interpreter also described the procedure he followed at the trial:

> When witnesses were giving evidence at the trial of Mr Abdula, the lawyer would ask the question and wait for me to interpret. I would then interpret. After that the witness would answer and the lawyer would wait for me to answer. I would then interpret. When I was finished the lawyer would ask the next question. When the lawyers and the Judge were talking it was done point by point. After each point I was given time to interpret.

[16] The interpreter's evidence was that the times during the trial when more than one person was talking in court were rare. In cross-examination, he accepted that at these times his consecutive approach to interpretation became one in which he was speaking simultaneously with counsel or witnesses. If during this he missed what someone was saying, he asked them to repeat it, as required by the code of ethics. He said that very few parts of the proceedings were interpreted simultaneously. He later added that it was "maybe ten per cent", it was for a "very ... insignificant time" and "very short". He did not, however, accept that he failed to interpret some of what was said in Court or that there was any part of the trial he did not interpret.

[17] The interpreter also accepted that at times he had difficulties with matching in Oromo technical terms expressed in English in the evidence of the forensic professional witnesses. He instanced the term DNA. He said that in these cases, when he could not give a matching word, he explained the concept involved to the accused.

[18] As to the loudness of his voice, the interpreter said he had been instructed by the Judge that he was to interpret for the accused. The Judge did not require that he speak loudly enough to be heard by everyone in the courtroom because it was the accused who had to know what was going on. He was aware he was sitting between two accused and that he had to ensure that both could hear him. He said that he spoke loudly enough for both to hear him at all times, even when he was turning or leaning towards one or the other. He had also asked for some things to be repeated, and had himself repeated what he had said if either accused appeared not to

understand, and occasionally when the appellant requested it. He believed that he had made no distinction between the two accused in his interpretation.

[19] A recognised independent organisation called Interpreting New Zealand had arranged for the interpreter to interpret at the request of the District Court. There were no Oromo language interpreters in New Zealand and only two on the database of the relevant Australian Government agency. Both held the same qualification. The interpreter was one of those two, so there were no others better qualified in Australasia. The Court of Appeal thought it unreasonable to expect the District Court to bring someone to New Zealand from further afield.

[20] In relation to the trial itself, the Court accepted that the appellant would have been reluctant to complain about any inadequacies in interpretation. Weighing heavily against that, however, was the absence of any expression of concern by counsel or the trial Judge. The Judge had the responsibility to ensure that interpretation was adequate and was well placed to discharge that responsibility. The Court did not accept the evidence of the appellant's partner, a New Zealander, that at the time she had concerns but was overwhelmed by the process.

[21] Finally, the Court of Appeal emphasised that there was no evidence that the defence of the appellant was hindered by any shortcomings in interpretation. For these reasons the Court of Appeal also rejected the appellant's submission that the interpreter was not qualified to interpret at the trial.[2]

The protected rights

[22] The issues arising in the appeal concern whether the manner of interpretation at the trial breached rights protected by the Bill of Rights Act and in particular:

> **24 Rights of persons charged**
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> Everyone who is charged with an offence—
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> ...

[2] At [55]–[61].

> (g) shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

and:

> **25 Minimum standards of criminal procedure**
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> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
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> (a) the right to a fair and public hearing by an independent and impartial court:
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> ...
>
> (e) the right to be present at the trial and to present a defence:
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> ...

The rights under ss 24(g) and 25(e) are closely linked to the overarching right of a person charged to a fair trial under s 25(a).

[23] In ascertaining the content of the right of a defendant in a criminal trial to assistance from an interpreter, it is helpful to look at the development of that right under both common law and human rights jurisprudence. A convenient starting point is the English decision in *R v Lee Kun*.[3] In a trial for murder, where the Chinese accused did not understand English, none of the evidence was translated. The Court of Criminal Appeal accepted the application of the common law principle that, other than in exceptional circumstances, a trial for felony had to be conducted in the presence of the accused, so that he might hear the case against him and have the opportunity to answer it. The principle required that, as well as being present, the accused had the capacity to understand the proceedings. It followed that the evidence at the trial had to be interpreted in cases of an unrepresented person charged with a criminal offence, who did not speak or understand the language of the court, and the accused could not waive compliance with the rule requiring translation:[4]

> It is for the Court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance

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3 *R v Lee Kun* [1916] 1 KB 337 (CA) per Lord Reading CJ.

4 At 341.

> or timidity or disregard of his own interests, he makes no application to the Court.

The Court was, however, satisfied that, in the particular circumstances, no substantial miscarriage of justice had occurred,[5] and the appeal was dismissed.

[24] In 1993, the principles set out in *Lee Kun* were applied by the Privy Council in *Kunnath v The State*.[6] The Privy Council was required to consider the effect of provisions in the Constitution of Mauritius equivalent to ss 24(g) and 25(e) of the New Zealand Bill of Rights Act.[7] It held that the constitutional principles were intended to produce a result no less favourable than those under the common law. The requirement that an accused be present at trial was not concerned merely with corporeal presence. The defendant should be able to understand the proceedings and decide both what witnesses to call (or not), and whether personally to give evidence (and, if so, on what matters). The Privy Council set out the relevant provisions of the Constitution and added that:[8]

> A defendant who has not understood the conduct of proceedings against him cannot ... be said to have had a fair trial.

[25] In *Kunnath*, the defendant had made plain in his statement to the Court at the trial that he had not understood what witnesses had said. The Privy Council noted that although an interpreter was present, the Judge knew he was not translating the evidence to the accused. The trial was accordingly being conducted without his presence and the accused had been deprived of a fair trial, resulting in a miscarriage of justice. Once it became clear that the accused lacked an understanding of what witnesses had said, the Judge should have ordered a retrial. The Privy Council allowed the appeal and set aside the conviction. The case establishes that a trial judge has responsibility for ensuring effective use is being made of an interpreter present in court to ensure the accused's fair trial rights are met.

[26] In *Dietrich v The Queen*, judges of the High Court of Australia recognised that the right to free assistance of an interpreter, when required by an accused, was a

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5 Because the evidence against the accused at trial was the same as that at depositions which had been translated for him.

6 *Kunnath v The State* [1993] 1 WLR 1315 (PC).

7 Section 10(2)(f) of the Constitution of Mauritius.

8 At 1319.

necessary attribute of a fair trial, denial of which would result in a miscarriage of justice.[9] That principle was applied by the New South Wales Court of Criminal Appeal in *Saraya*,[10] where the poor quality of interpretation was held to be in breach of the accused's right to a fair trial. The Court said a trial will be unfair if the interpreter lacked the skill and ability to translate the questions asked by counsel at trial and the answers given by the accused.[11]

[27] In 1994, the Supreme Court of Canada decided *R v Tran*,[12] which considered the content of the right to an interpreter at a criminal trial under s 14 of the Canadian Charter of Rights and Freedoms:

> **14.** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

[28] In a unanimous judgment, the Court took a purposive approach and defined the content of the right by reference to the nature of the protected interest.[13] The primary purpose of the right was to ensure the person charged heard the prosecution case and had a full opportunity to answer it. Other purposes were to reflect basic notions of justice and fairness to an accused that were part of the integrity of the administration of criminal justice, and to respond to society's claim to be multicultural.[14] Giving effect to these purposes, the Court in *Tran* observed that the rule requiring the presence of the accused at all stages during the trial existed not only to enable the accused to make a full answer and defence to the charges, but also, and more generally, to have direct knowledge of anything that transpired in the course of proceedings that would affect the accused person's vital interests.[15]

[29] The accused accordingly had a right to know in full detail and contemporaneously what was taking place at the trial. The level of understanding protected by the right was high.[16] The Court held that prejudice, in the form of

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9 *Dietrich v The Queen* (1992) 177 CLR 292 at 300 per Mason CJ and McHugh J, at 331 per Deane J and at 363 per Gaudron J.
10 *Saraya* (1993) 70 A Crim R 515 (NSWCCA).
11 At 516.
12 *R v Tran* [1994] 2 SCR 951 per Lamer CJ.
13 At 962–963.
14 At 977.
15 At 972.
16 At 975, 977.

resulting impediments to answering the allegations or conducting the defence, was not a necessary ingredient of a breach of the right, although it might establish a breach.[17] The underlying principle was a right to linguistic understanding. In relation to breach, the Court said:[18]

> In assessing whether there has been a sufficient departure from the standard ... under s 14, the principle which informs the right – namely, that of linguistic understanding – should be kept in mind. In other words, 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.

[30] *Tran* was concerned with deficiencies in interpretation of evidence. At his trial the accused, who was Vietnamese, had called his court interpreter to give evidence about his appearance and weight at an earlier hearing. The witness interpreted his own evidence. The questions put to and answers given in English by the interpreter were not, however, translated word for word. They were condensed into short and incomplete summaries in Vietnamese of what was said at the end of examination in chief and then again in re-examination. One exchange between the Judge and the interpreter was not interpreted at all.

[31] In its judgment, the Supreme Court laid down a framework for defining the standard for compliant forensic interpretation. First, it was necessary for an accused to show the need for an interpreter. Secondly, where an interpreter had been provided and an issue arose concerning the quality of interpretation at trial, the accused had to show there had been a departure from the requisite standard. The criteria for addressing this included requirements of continuity, precision, impartiality, competency and contemporaneousness. Thirdly, the claimant had to show that the alleged lapse occurred in the course of the proceedings when a vital interest of the accused was involved.[19]

[32] The Court held that to establish a breach, the appellant had to prove on a balance of probabilities that the interpretation he received fell below the guaranteed standard. In *Tran*, where identification was in issue, the Supreme Court decided that

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17 At 974. Although the Court was discussing s 650 of the Criminal Code, it is clear that the same reasoning applies to s 14 of the Canadian Charter. See also 994–995.

18 At 990–991.

19 At 979–980.

the standard of interpretation fell below what it should have been because the interpreter's summarising of what he had said resulted in the interpretation not being continuous or precise. Nor had it been contemporaneous with the asking of questions and giving of answers in the Court's language.[20] As a result, the accused had not been adequately informed of what was said about his appearance. His rights under s 14 of the Charter had been breached. His conviction was quashed and a new trial was ordered.

[33] The Court considered the advantages of consecutive interpretation against simultaneous interpretation. The former was "generally preferable", even though it doubled the length of proceedings, largely because simultaneous interpretation was a complex and demanding task.[21] Consecutive interpretation enabled an accused to react at the appropriate times. While it was seen as the better practice, the Supreme Court did not hold it to be a requirement under the Charter right.

[34] Under the European Convention on Human Rights "[e]veryone charged with a criminal offence has the ... [right] to have the free assistance of an interpreter if he cannot understand or speak the language used in court".[22] In *Kamasinski v Austria*,[23] the interpretation provided to an American who did not speak or understand German was not consecutive, but simultaneous and summarising. Questions put to witnesses were not translated. The European Court of Human Rights held that this did not of itself establish a violation of rights but was merely a factor to be considered. Overall, the evidence did not show that the accused was unable because of deficient interpretation to understand the evidence against him or have witnesses examined or cross-examined on his behalf.[24]

[35] In *Kamasinski*, in the context of a discussion of the extent of the requirements to translate written evidence, the Court said of art 6(3)(e):[25]

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20 At 1002–1003.
21 At 989.
22 Article 6(3)(e) of the European Convention on Human Rights 1950.
23 *Kamasinski v Austria* (1991) 13 EHRR 36 (ECHR).
24 At [83].
25 At [74]. Similar comments were made in *Hacioglu v Romania* (2573/03) Third Section, ECHR 11 January 2011 at [88].

> The interpretative assistance provided should be such as to enable the defendant to understand the case against him and to defend himself, notably by being able to put before the court his version of the events.
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> In view of the need for the right guaranteed by paragraph (3)(e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided.

This recognises that monitoring of indications of the adequacy of interpretation is required by the courts by reference to whether an accused understands what is happening and can make himself understood. The European Court of Human Rights will find a breach on account of inadequate interpretation if there is evidence that the accused was in fact unable to understand the proceedings in terms of the evidence against him or her, or that the accused has been hindered in the examination or cross-examination of witnesses. Failure by an accused, however, to raise concerns over the quality or scope of interpretation during the trial is a factor that will be taken into account by the Court in determining if there has been a breach.[26] Likewise, in *de la Espriella-Velasco v The Queen*,[27] the Court of Appeal of Western Australia saw it as relevant to whether the judge had sufficiently ensured that the appellant understood the proceedings that he and his counsel had queried the quality of interpretation only once.[28]

[36] In that case, the Spanish-speaking appellant appealed against his conviction for importing drugs on the ground of the inadequacy of interpretation of the evidence at his trial. He obtained a report from another interpreter, who did a comparative analysis of the transcript of the proceedings in English and a recording of what the interpreter had said at the trial. The report said there had been a multitude of errors and omissions in the interpretation, giving many examples. The Court of Appeal said that:[29]

> ... the effect of these and all the other errors or omissions identified by Ms Crespo must be evaluated in their context and the issues in the trial. Having done that, and notwithstanding the interpretation was far from perfect, I am not satisfied that it was so deficient as to mean that the

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26 *Kamasinski* at [83] and *Hacioglu* at [90].

27 *de la Espriella-Velasco v The Queen* [2006] WASCA 31, (2006) 31 WAR 291.

28 At [118] per Roberts-Smith JA and at [360] per Millar AJA.

29 At [113] per Roberts-Smith JA, Pullin JA concurring at [164], and see Millar AJA to the same effect at [375].

> appellant was effectively not present at his trial or any part of it, or denied him the opportunity to adequately respond to the prosecution case and to advance his account for the consideration of the court.

[37] Although the Court accepted that many of the criticisms pointed to substantial errors or omissions of interpretation, it was not persuaded that in the end they resulted in any unfairness to the appellant.[30] His appeal was dismissed.

[38] In New Zealand, *Alwen Industries Ltd v Collector of Customs*[31]concerned an application for judicial review of the refusal of the District Court to make an order requiring that briefs of evidence and documentary exhibits be provided in written Chinese. The operational languages of the applicant were Cantonese or Mandarin. He could not communicate with his lawyers in English without the assistance of translation. Robertson J accepted the continuing relevance of the scope of the right to an interpreter at common law, but held that the starting point had to be the language of the Bill of Rights Act and the underlying purpose of the rights involved. The Judge held that the words "assistance of an interpreter" in s 24(g) were broad and inclusive and not confined to the provision of oral translation. Once the right to assistance was triggered, the right should attach generally. There was no justification for limiting the right to assistance to the trial itself, nor for distinguishing between oral and written translations. Robertson J emphasised, however, that s 24(g) did not guarantee translation of all written documents on demand. Rather the right was a flexible one which depends on the circumstances of the case. The Court held in *Alwen* that translation was required for briefs of evidence, but not for documentary evidence which formed part of the applicant's business records. He had been content to rely on them without the benefit of translation, demonstrating that it was not necessary.

[39] In New Zealand, a person must take an oath, or make an affirmation, before acting as an interpreter in a court proceeding.[32] The form generally used commits

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30 At [117] per Roberts-Smith JA.
31 *Alwen Industries Ltd v Collector of Customs* [1996] 3 NZLR 226 (HC).
32 Evidence Act 2006, s 78.

the interpreter to truly and faithfully interpret the evidence, and all other things touching on the case, to the best of the interpreter's skill and ability.[33]

The standard of compliant interpreting

[40] Prior to considering whether the interpretation in this case met the Bill of Rights Act standard, it is helpful to consider the nature of interpretation during a trial. Interpretation is concerned with conveying the sense of spoken language and the information and ideas it incorporates into another language. At times this involves explaining the meaning of words used. A literal word for word rendering in the target language will be inappropriate where exact lexical correspondence is inapt to convey the meaning that was intended in the source language. Interpretation during a trial is a spontaneous process which allows the interpreter minimal opportunity for reflection. It can be contrasted in this respect with translation from one written text into another. Interpretation, in brief, is not a mechanical exercise. An interpreter at a court or tribunal hearing should, however, always convey, as accurately as the target language permits, the idea or concepts expressed in the words that are being interpreted.

[41] It follows from the nature of the task that even the highest quality of trial interpretation cannot achieve perfection in conveying the information and ideas into the language of the court and vice versa. As the Supreme Court of Canada said in *Tran*:[34]

> ... it is important to keep in mind that interpretation is an inherently human endeavour which often takes place in less than ideal circumstances. Therefore, it would not be realistic or sensible to require even a constitutionally guaranteed standard of interpretation to be one of perfection.

[42] The authorities clearly establish that deficiencies in interpretation at a criminal trial may or may not give rise to a breach of the rights of a person charged at common law and under the Bill of Rights Act. In New Zealand, the focus must be on the right to the assistance of an interpreter under s 24(g), and the right to be

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[33] Rupert Cross and Donald Mathieson (eds) *Cross on Evidence* (looseleaf ed, LexisNexis) at [EVA78.4].

[34] At 987.

present at the trial and present a defence under s 25(a) and (e) of the Bill of Rights Act. The common law illuminates the content and scope of those rights. The standard that must be attained for interpretation to be adequate in New Zealand is one which complies with those rights.

[43] That standard must reflect the accused person's entitlement to full contemporaneous knowledge of what is happening at the trial. Interpretation will not be compliant if, as a result of its poor quality, an accused is unable sufficiently to understand the trial process or any part of the trial that affects the accused's interests, to the extent that there was a real risk of an impediment to the conduct of the defence. This approach maintains and demonstrates the fairness of the criminal justice process which is necessary if it is to be respected and trusted in our increasingly multicultural community. Trial judges should at all times be alert to the quality of interpretation; certain omissions and irregularities may thereby be sufficiently avoided or mitigated. Where compliance is challenged, the cumulative effect of deficiencies in the interpretation must be evaluated, in the overall context of the trial, to determine whether its standard was, nevertheless, such that there was compliance with the accused's rights. That is a matter for judicial assessment in every case.

[44] The consequence of a breach of the right to the assistance of an interpreter under s 24(g) is a breach of the right to a fair trial under s 25(a). We do not accept as correct the Crown's submission that, once a breach of the right to assistance of an interpreter is shown, the court must exercise a judgment as to whether the accused nevertheless had a fair trial. Rather, a properly established breach – the failure to meet the required standard – necessarily makes the trial unfair. In those circumstances, it is axiomatic that a substantial miscarriage of justice will have occurred. There can accordingly be no resort to the proviso under s 385(1) of the Crimes Act 1961.[35]

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[35] *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77].

Was there a breach?

[45] It is not in dispute that the appellant needed, and was entitled to, interpretive assistance. The threshold for need is not an onerous one. As a general rule, an interpreter should be appointed where an accused requests the services of an interpreter and the judge considers the request justified, or where it becomes apparent to the judge that an accused is having difficulty with the English language. Once an accused has asked for assistance, it ought not to be refused unless the request is not made in good faith or the assistance is otherwise plainly unnecessary.

[46] In the appellant's case, the decision to provide assistance, even though the appellant had initially made a statement in English with some help, was the correct one. Courts must be alive to the risk that a person, who appears to have a good command of English in ordinary conversation, may have difficulty understanding the more formal language of the courtroom.[36] Language ability varies depending on the particular context and a person with limited command of English is likely to have less fluency and comprehension in English when placed in a stressful situation.

[47] The appellant submits he did not receive assistance from the interpreter to the standard required to meet his protected rights. The complaint is focused on the qualifications of the interpreter and the quality of his interpretation. Mr Stevens QC made a number of detailed criticisms of the interpretation at the appellant's trial. They fall into two categories. The first comprises criticisms directed at showing that the interpreter was not sufficiently qualified or experienced to interpret at a criminal trial. The second category comprises perceived instances of inadequate quality in the service he provided at this trial.

[48] Counsel argued that a higher qualification than the NAATI 2 level was required to interpret criminal trial proceedings involving serious charges or complex evidence. He referred to the Ministry of Justice's instructions for court managers, which recommend that interpreters be qualified at the equivalent of the NAATI 3

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[36] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington, 2005) at [22.8.5].

level. The Ministry's circular, however, describes that standard as one which "ideally all interpreters used by the courts would meet".

[49] Following a request from the District Court for assistance in obtaining an interpreter in Oromo, Interpreting New Zealand approached the Translating and Interpreting Service of the Australian Department of Immigration and Citizenship. It proposed the person who became the interpreter for the first week of the trial. He had been accredited at the NAATI 2 level in 2006 on completion of an interpreting course. While the Service normally aimed at providing interpreters with the NAATI 3 level qualification, that level was not available in the Oromo language in the NAATI testing programme. As indicated, the interpreter accordingly held the highest formal qualification available in Australasia.[37] Complaint is also made that he was not a member of the professional body in Australia, but there is no basis in the evidence for concluding that this affected his ability to do interpretation work competently. The interpreter had joined the Service in January 2008 and undertaken numerous interpreting assignments for it since. He had interpreted a dozen times in magistrates' courts in Melbourne and twice for short criminal cases in New Zealand.

[50] Interpreting New Zealand trains bilingual speakers of English and one or more languages as interpreters and provides their services to government, including the Justice sector. While it is clearly desirable that programmes for training court interpreters as part of a professional group should be further developed and enhanced, it is not yet the case in New Zealand that only those holding particular qualifications are recognised as competent to interpret at trials of accused who are not versed in the English language. Overseas, the Supreme Court of Canada said in *Tran* that there are no universally accepted standards for assessing competency.[38] The Court proposed that where there was legitimate reason to doubt the competency of a particular interpreter, there should be an inquiry into the interpreter's qualification. In *de la Espriella-Velasco* the Court went further, proposing that it would ordinarily be prudent for interpreters to state their qualifications at the outset

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[37] There is no institutional framework regulating competence or qualification of interpreters in New Zealand: Diana Clark "Passage to Professionalism" in *Interpreting in New Zealand: the pathway forward* (Office of Ethnic Affairs, Wellington, 2009) at 24.

[38] *Tran* at 988. There are similar cautionary observations in *de la Espriella-Velasco* at [14] per Roberts-Smith JA.

before being sworn in.[39] In our view, on this point the *Tran* approach is desirable as part of the means by which the court discharges its duty to ensure at all times that the interpretation being provided is in compliance with the accused's rights.

[51] It is also the responsibility of the judge throughout the trial to ensure the interpreter is discharging the responsibility competently, both by facilitating the process and observing whether it appears to be working satisfactorily. There will be occasions where a concern about the inadequacy of the interpretation emerges during a trial and the judge must take steps to preserve the integrity of the process.

[52] Mr Stevens also pointed to the limited trial experience of the interpreter. It is true that he had limited experience in court proceedings, but he had tribunal experience. We see nothing in this point that creates concern over the interpreter's competence. In the end, the appellant has not shown that the interpreter's qualifications made him an inappropriate person to interpret at this trial. The issue of whether the appellant's rights were breached must rather turn on the evidence of what happened at the trial.

[53] The appellant's complaint in relation to the trial concerns deficiencies arising from the manner of interpretation, and in particular problems said to arise from the interpreter's soft voice and the lapse from time to time into simultaneous interpretation. Linked to this criticism is the appellant's contention that the low volume of the interpreter's voice and his concentration on the needs of Mr Ahmed resulted in there being gaps in interpretation. The evidence indicates that the interpreter's approach was primarily one of consecutive interpretation, as he described it, at [15] above. At times, for short periods, the interpretation became simultaneous, with counsel and witnesses resuming speaking before the interpreter had completed interpretation. There were different views expressed on the extent to which this occurred.

[54] There is a direct conflict between the evidence of the interpreter and the appellant, supported by his partner, who was in court during the trial, over whether the interpreter spoke too quietly in a situation where he was interpreting for two

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[39] At [74] per Roberts-Smith JA.

accused (whisper interpreting), and over the extent of effective interpretation and repetition when there was over-speaking by counsel and witnesses. We accept that there were some occasional difficulties of this kind during the trial. The issue is whether, bearing in mind what was done to counter them, their extent was such that it might have caused the appellant to fail to understand any part of the proceedings. It is for the appellant to establish on the balance of probabilities that this was the case.

[55] There are two important features of the present case that provide assistance on this issue. The first is the steps taken by the trial Judge to achieve and maintain the standard of interpretation. Judge Behrens regularly took the initiative in ensuring that the interpretation process was working. We were taken to a number of instances in the transcript of the Judge giving directions to counsel and the interpreter. These included directions to witnesses to wait between question and answer, and requiring that documents be read out or passed to the interpreter to facilitate translation of their contents. As well, and following the Judge's lead, counsel told witnesses to wait until questions had been translated before they commenced to answer them. In this context, the trial proceeded very slowly in order for the interpreter to keep up and witnesses were repeatedly informed of the need for him to be able to do so. It is also clear that on a number of occasions the interpreter sought and obtained repetition of the questions or evidence before translating and that the Judge encouraged this. All this indicates that the Judge, throughout the trial, remained aware of his responsibility to ensure that there was effective interpretation that ensured the accused understood the evidence given and that, when he sensed there was a breakdown in communication, he addressed it.

[56] The other circumstance which provides assistance in resolving the conflict in the evidence is the absence of any objection during the hearing to the interpretation, which would have drawn to the Judge's attention that the appellant was having difficulty understanding what was said. The appellant and his partner said he was reticent about complaining, the latter suggesting that this was due to cultural inhibitions. This, however, does not adequately explain the appellant's failure to indicate to his counsel that there was any problem when directly approached by them during the trial. He told them he was happy with the interpreting. Mr Nisbet's

evidence was that at no stage did the appellant indicate that he had difficulty understanding the evidence or the trial procedure. Importantly, the appellant also had the opportunity during breaks, when conversing informally with the interpreter, to raise any issues he had with him. The logical inference from his silence is that at the time the appellant was satisfied with the level of understanding that the interpretation provided for him.

[57] We have not overlooked that in cross-examination the appellant said that he thought that there had been "maybe ten per cent" simultaneous interpretation. That estimate, however, is likely to be unreliable given that in the course of cross-examination he also spoke of the very small and "insignificant" time during which others were speaking during interpretation.

[58] Finally, it is relevant to whether the accused comprehended what was being said in Court that this was a straightforward trial in which the issues were clear and no doubt well understood by the appellant at the outset. The appellant of course understood English to some extent.

[59] Having regard to all the evidence and circumstances, and bearing in mind that the standard to be met is high but not one of perfection, we do not accept that the appellant has shown that the interpretation provided at his trial fell below the standard required by the Bill of Rights Act. The preponderance of the evidence rather points strongly to the appellant having been provided with an interpreter who met his need sufficiently to understand the nature and detail of the case against him. There is no appearance of any instance of misinterpretation that resulted in the appellant being left with an inadequate understanding of what was being said at the trial. His failure to raise any matter indicates that the accused understood sufficiently what was being said, was able to follow the trial and, in conjunction with counsel, was able to make intelligent decisions concerning his defence. At the hearing in this Court, counsel was unable to point to any way in which errors or omissions in interpretation might have impeded the conduct of the appellant's defence at his trial.

[60] We accept, however, that the approach followed in this case, which we understand is not unusual, did not at times reflect best practice. Consecutive interpretation at all times is highly desirable. It enables an accused to react in response to what is said in court immediately and without being distracted by the voices of counsel and witnesses speaking at the same time as the interpreter. It avoids the very real risk that the interpreter will fall behind and miss passages of evidence. The interpreter should also at all times speak in a voice loud enough for all in the courtroom to hear. This meets the needs of all present in court who are likely to require interpretative assistance. It will also help the judge to ensure that interpretation does not become the subject of simultaneous over-speaking. Finally, an audio recording should be made of all criminal trials in which there is an interpreter providing assistance for an accused person. The recording, which would be transcribed or released to the parties only by order of the court if and when necessary, would be the appropriate and best means of resolving issues arising on appeal about the accuracy and general competence of interpretation. In our view, these practices are not only in themselves highly desirable in criminal trials, but they are also likely to prevent lapses in the standard of interpretation that might otherwise tend to lead to breaches of the rights of accused persons.

Result

[61] The appeal is accordingly dismissed.

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