



Summary of Judicial Decision

HKSAR v Gutierrez Alvarez, Keishu Mercedes (“the Applicant”) CACC 320/2016; [2020] HKCA 184

Decision : **Applications for leave to appeal against conviction and sentence were refused**

Date of Hearing : **6-7 November 2019**

Date of Judgment : **25 March 2020**

Background

1. The Applicant, a Spanish-speaking Venezuelan female, was convicted after trial before Barnes J (“the judge”) and a jury of a single count of trafficking in a dangerous drug, namely 1,995 grammes of a solid containing 1,664 grammes of cocaine and was sentenced to 25 years’ imprisonment.
2. On the offence date, the Applicant arrived at Hong Kong International Airport from São Paulo in Brazil, via Abu Dhabi in the United Arab Emirates, with packets of cocaine strapped to her lower legs. Upon arrest, she said that she had no knowledge of what the packets were.
3. The prosecution contended that the Applicant had declined to participate in controlled delivery and had never mentioned at that stage any duress that she was allegedly acting under.
4. In a video-recorded interview (“VRI”), the Applicant claimed that she had been tricked into leaving Venezuela to attend a job interview in São Paulo, Brazil where an African male called “Mikael” detained her against her will, during which time she was threatened, beaten and raped. She was then told to take some “stuff” to Hong Kong under threat that her family would be killed if she did not cooperate.
5. At trial, the defence applied for a permanent stay of proceedings on the basis of (a) a fair trial being not possible and (b) the trial being an abuse of process amounting to an affront to the public conscience. Evidence was adduced by the prosecution and the defence, but the Applicant did not give evidence on the issue. The judge refused the stay application.
6. On the general issue, the Applicant did not testify but relied on her VRI to contend that she had committed the offence whilst under duress.
7. On 6 October 2016, the Applicant was unanimously convicted of the charge and was sentenced to 25 years’ imprisonment. The Applicant lodged an appeal against both conviction and sentence. There were 4 grounds of appeal against conviction and Ground 4 concerned a



constitutional challenge against the lack of a dockside recording of the interpreter's translation of proceedings to the Applicant.

Issue in dispute

8. Ground 4 is a constitutional challenge whether the lack of a separate recording of dockside interpretation amounted to a breach of the fair trial right (Articles 10 and 11(2)(a) and (f) of section 8, Hong Kong Bill of Rights Ordinance, Cap. 383 ("BORO")).
9. Ground 4 was contended as follows:-
 - (a) systemic challenge - without recording of dockside interpretation, the appellate court has no means of verifying whether the interpretation was in fact correct, and no conclusive way, therefore, of determining whether she had a fair trial (paragraph 21), and
 - (b) the court interpreter's interpretation was in fact deficient that on many occasions throughout the trial the court interpreter allegedly had difficulty following and interpreting the submissions of counsel and the exchanges between judge and counsel (paragraph 23); the Applicant's English was not proficient enough to follow the proceedings and she had particular difficulty during the judge's directions to the jury (paragraph 24); however, the Applicant had made no complaint as to the court interpreter's ability to communicate with her in communicable, intelligible Spanish (paragraph 22).
10. Ground 1 against conviction averred that the judge had wrongly refused to grant the Applicant a permanent stay of proceedings. The ground was predicated on the assumption that the applicant's assertions about her kidnapping and rape, resulting in her being forced to commit a crime she would not otherwise have committed, were credible. Since they were credible, the prosecution had a duty to investigate her claims. If there was a failure to do so, the court should have stayed the proceedings as an abuse of the process of the courts.
11. It was averred in Grounds 2 and 3 that the trial counsel had failed to cross-examine the prosecution witness and had failed to give the Applicant adequate or sufficient advice to enable her to make an informed decision as to whether to give evidence at trial. The Applicant acknowledged that Grounds 2 and 3 involved no complaint of trial counsel being flagrantly incompetent (paragraphs 110, 112 and 114).
12. Regarding the appeal against sentence, two grounds were put forward:



first, that the judge had failed to take into account as a mitigating factor that the Applicant had offered assistance to the authorities; secondly, that no consideration had been given for the applicant's lesser involvement in the offence.

Department of Justice's Summary of the Court's rulings

(full text of the judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127215&QS=%2B&TP=JU)

13. The Court of Appeal ("CA") held that neither the common law right to interpretation nor BORO encompasses the right of a defendant to demand a recording of the trial proceedings, let alone a dockside translation of exchanges between an interpreter and the defendant, as a component of the right to a fair trial. Articles 10 and 11(2)(f) of BORO do not guarantee a system of translation verification. (paragraphs 28-29)
14. Most importantly, the CA set out, among a relatively comprehensive list of relevant principles, factors and assumptions tailored to the Hong Kong criminal justice context, that the test for determining whether interpretation is constitutionally compliant is whether it is sufficient to give the defendant an adequate understanding of the case against him, so as to enable him effectively to put forward his defence, and the onus is on him to show there is a real risk of prejudice to his defence as a result of the poor quality of the interpretation. (paragraphs 32-54, 56-64, 67-69, 75, 78-79, 84-85)
15. The CA set out the following matters of principle emerged from the relevant authorities:-
 - (a) First, the test for determining whether interpretation complies with a defendant's right to have interpretation under Article 11(2)(f) of BORO is whether the interpretation is sufficient to safeguard the fairness of the trial by giving the defendant an adequate understanding of the case against him, so as to enable him effectively to put forward his defence. (paragraph 32)
 - (b) Secondly, sufficiency does not mean perfection. The essential focus in respect of a complaint about interpretation is not so much on what is interpreted, but on whether what was interpreted gave the defendant an adequate understanding of the proceedings to enable him effectively to play his part in them. (paragraph 33)
 - (c) Thirdly, it is for an appellant to show that the standard of



interpretation fell below the standard required, and impacted on either his understanding of the case or his conduct of his defence. (paragraphs 34-35, 85)

- (d) Noting an “*apparent inconsistency*” between the consideration of “*a possibility*” that the defendant may not have understood something (i.e. *R v Tran* [1994] 2 SCR 951), and establishing it “*on the balance of probabilities*” (i.e. *Abdula v R* [2012] 1 NZLR 534), CA expressed its preference to the *Abdula* test that the appellant must show, as a result of the poor quality of the interpretation, that there was “*a real risk*” of his defence being impeded. (paragraphs 36-37)
- (e) While acknowledging that there was much to recommend the principled reasoning in *Tran*, and much that is relevant to the circumstances in Hong Kong, CA considered the approach in *Tran* an “*absolutist*” one and preferred “*the more practical and less theoretical*” approach in *Abdula* and other authorities that there has to be evidence to substantiate an actual or potential prejudice to the defence because of deficient interpretation before the court would find a breach of the fair trial right. (paragraphs 38-39, 61)
- (f) CA refused to create “*a presumption of an unfair trial from the mere fact of inadequate interpretation*”, as in *Tran* and regarded *Tran* as going too far in this aspect. (paragraphs 40-42)
- (g) CA believed to be correct that it ought to be perfectly possible and feasible in most cases for an applicant to tell an appellate court, having looked at the appeal papers with the benefit of legal advice and a translator, what it was that was not translated or mistranslated, or what it was that he did not understand, that so affected the way he in fact conducted his defence. (paragraph 42)
- (h) The consequences of any deficiency must be looked at in the overall context of the particular trial and the issues it raises. (paragraphs 44)
- (i) In assessing a complaint about the quality of interpretation at trial, an appellate court must have regard to the overall context and circumstances of the trial, the complexities of the evidence, the essential issues in the case and how any alleged deficiencies in translation may have borne, or impacted, on those issues. It is not enough simply to make vague assertions about the quality of interpretation and how it might have been improved. (paragraph 48)
- (j) CA specifically noted that one factor considered of significance was the absence of any complaint by the defendant or his counsel at



trial in respect of the interpretation provided to him. (paragraphs 49-51)

- (k) It is relevant to consider at what part or section of the proceedings the complaint of deficiency in interpretation is directed and its significance to the particular issues in the case. (paragraphs 52-54, 56, 61)
- (l) The onus remains firmly on the applicant to demonstrate what of the interpretation is deficient, how it may have impinged on the conduct of his defence and how, ultimately, it affected the fairness of the trial. (paragraph 57)
- (m) Finally, the fact that an applicant was legally represented at trial, while not a conclusive answer to a complaint of a deficiency in interpretation, is part of the circumstances and context of the alleged non-interpretation or misinterpretation relevant to the consideration of how the applicant was, or may have been, affected by the deficiency in translation, e.g. if the applicant had ever informed deficient interpretation to his trial lawyers, why the informed trial lawyers decided not to raise the same to the trial judge, etc. (paragraphs 58-60)
- (n) CA made the further point that in the Hong Kong context the court must proceed on the assumption that a professionally appointed interpreter (whether full-time or not, or for interpretation of other languages than Chinese into English and *vice versa*) has accurately and faithfully interpreted whatever he or she is required to interpret unless a defendant or appellant can demonstrate otherwise. (paragraphs 62-64, 75, 78-79, 84)
- (o) CA specifically distinguished *HKSAR v Moala Alipate* [2019] 3 HKLRD 20 as “a highly exceptional, if not unique, case”. (paragraphs 65-66)
- (p) CA also made the point that interpretation is an art and not simply a matter of word for word translation. For the point of court interpretation is to ensure that the hearer sufficiently understands what is meant by the speaker. Literal, direct or word-for-word translation may at times fall short of achieving that end. CA also echoed the observations in *Tran* that “the standard for ‘on the spot’ oral interpretation will tend to be lower than translation of a written text “where reaction time is usually greater and where conceptual differences which sometimes exist between languages can be more fully accommodated and accounted for””. (paragraphs 67-68)



- (q) Whilst it would usually be necessary to convey an important witness's evidence to a defendant as accurately and faithfully as possible, CA was not prepared to say that a summary or narration of evidence, or of a submission or of an exchange between counsel and the judge, must *ipso facto* fall short of the standard required of interpretation. What is necessary is that the point being made is sufficiently understood by the receiver of the translation. What is important is that the interpretation be contemporaneous. (paragraph 69)
16. Applying the relevant principles to this case, the CA rejected Ground 4. (paragraphs 70-73, 76, 80-83 & 85-88)
17. CA found no substance in Ground 1. CA was satisfied that the present case did not even arrive at the question of whether the alleged treatment of the Applicant could amount to "human trafficking", within or without the meaning of Article 4 of BORO, because there was no credible case that the Applicant was ever a victim of such trafficking. CA found that in the absence of any credible claim of duress or human trafficking, the judge properly resolved the application for a stay on the well-established principles. (paragraph 109)
18. CA found no merit in Grounds 2 and 3 against conviction (paragraphs 110-128) and the 2 grounds against sentence (paragraphs 129-134).

**Prosecutions Division
Department of Justice**

April 2020