GAIO v. THE QUEEN[1]

Criminal law—Evidence—Hearsay—Confession made through interpreter

This was an application for special leave to appeal from a conviction of murder in the Supreme Court of Papua and New Guinea. G was accused of the murder of his wife, and was tried by Mann C.J., sitting without a jury.

The chief evidence against G was a confession which he made to a patrol officer. It was made through an interpreter, A, since S, the patrol officer, was unfamiliar with G's language. During the trial, S gave evidence of what G had told to him, *via* the interpreter. A did not testify as to the contents of G's statement, but merely swore that his translation had been accurate. S's evidence was challenged at the trial, but was admitted. The admission of the evidence was the sole ground of this application. The High Court (McTiernan J. dissenting) refused the application.

The obvious reason for permitting the interrogator rather than the interpreter to give evidence in cases before the Supreme Court of Papua and New Guinea was stated by Mann C.J. in an earlier case, *The King v. Gabi Kopa*,[2] where he said,

> Consequently if he (the interpreter) were the only proper witness to the conversation, there would be grave danger of inaccuracy which would place one side or the other in jeopardy. This, of course, is a common situation in the Territory where interpreters have very little understanding of the conversations which take place through them, and very little capacity to give a reliable account of them from memory. Moreover, since most of them are illiterate, or nearly so, they cannot assist their memories by taking notes. It is not at the present time practicable to employ interpreters of better educational standards simply because the fluent use of the numerous languages and dialects in the territory is for all practical purposes limited to natives. In order to overcome this practical difficulty, it has been the practice of this Court to allow the European officer who conducted the interview at which the conversation took place to give evidence of what was said between himself and the interpreter on condition that the interpreter . . . should be called as a witness to give evidence that he truly and faithfully interpreted everything that was said.[3]

Confessions themselves, in practice, constitute a well-established exception to the rule excluding hearsay. The rationale of the rule itself lies in the probable inexactness of second-hand reports, the absence of the witness from the court, and the objection to evidence which is not on oath, nor subject to cross-examination. The veracity of a confession is ensured to a greater degree than that of ordinary hearsay evidence by the assumption that a statement by a person against his own interest is more likely to be true than a neutral or a self-serving statement. Moreover, the maker of the statement is before the tribunal; he is not some absent third party.

[1] (1960) 34 A.L.J.R. 266. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Kitto and Menzies JJ.
[2] Unreported.
[3] Quoted with approval by Menzies J., (1960) 34 A.L.J.R. 266, 271.

In the case of a confession made through an interpreter, the situation is one of hearsay upon hearsay, for the court receives the evidence not at second, but at third-hand. Though perhaps influenced in the present case by the policy considerations enunciated by Mann C.J., the High Court had no difficulty in rejecting the contention that S's evidence was inadmissible, upon the authority of a number of precedents. The members of the Court did not say that the case of an interpreter was a further exception to the hearsay rule, but rather was a gloss upon the exception of confessions.

Fullagar J. (with whom Dixon C.J. concurred) was at pains to distinguish between a narration and a translation. The former is inadmissible because of possible inaccuracies, but the latter, being a literal rendition in a slightly altered medium, is not. The interpreter did not narrate to the interviewer the conversation which occurred between himself and the accused; he acted only as an intermediary in a conversation between the interviewer and the accused. In these circumstances, the possibility of inaccuracy is minimized, whereas, in a narration, additions and omissions are more likely. He emphasized this view by stating that a conversation between two persons who have no common language, through an interpreter, is not to be characterized as two separate conversations; the interpreter is not a party to the conversation and contributes nothing.

Kitto J. drew a distinction similar to that drawn by Fullagar J., and compared the function of an interpreter in overcoming the language barrier to that which 'an electrical instrument might fulfil in overcoming the barrier of distance'.[4]

Menzies J. drew the analogy between an interpreter, and a lip-reader, whose comprehension of language by visual instead of aural means was comparable to an interpreter's rendition of statements into another language. He, too, emphasized the fact that but one conversation takes place when an interpreter is interposed between the participants.

One remarkable feature of this case was the paucity of authority. In none of the few Australian cases cited in the judgments had the question been carefully considered. The earliest case was *The King v. Sunda Khan,*[5] where, in a fact situation similar to the present one, the interpreter was unable to recall the statements he had translated, but the evidence of a person present upon the occasion was admitted. In *The King v. Lau Chi,*[6] the Full Court of Queensland ruled that a police officer could give evidence of a conversation he had had, through an interpreter, with the accused, but in *The Queen v. Wong Ah Wong*[7] the New South Wales Supreme Court held that the evidence of an immigration official of conversations with the accused through an interpreter was inadmissible, being no more than an account of the narration of an interpreter. In the light of the High Court's present decision this case cannot be supported on those grounds.

In *The Queen v. Wong Ah Wong* the interpreter was not before the court, whereas in the two former cases, they were present and had

[4] (1960) 34 A.L.J.R. 266, 270.
[5] (1901) 18 W.N. (N.S.W.) 29.
[6] [1947] Q.S.R. 154.
[7] (1957) 57 S.R. (N.S.W.) 582.

testified that they had given a faithful translation. It is the problem of the presence or otherwise of the interpreter before the court which gives rise to most conflict in this area. The only English cases which their Honours in the High Court cited were *Reid v. Hoskins*[8] and *Regina v. Attard*[9] in the latter of which Gorman J. refused to permit a police officer give evidence of a conversation between himself and the accused through an interpreter, because the interpreter was not before the court. His Lordship's reasons, however, were very brief.

The High Court was able to refer to some of the abundant United States authorities upon the subject. One important case is that of *Commonwealth v. Vose,*[10] where Knowlton J. considered that the interpreter, who had not been present in court, was no more than the parties' joint agent for the purpose of carrying on a single conversation between them. Fullagar J. pointed out that such an agency, if such it could be called, could only be implied in special circumstances.

In *People v. Chi Sing,*[11] and *Gulf, Colorado and Santa Fe Railway v. Guin,*[12] evidence by persons of conversations with others *via* an interpreter was rejected, upon the ground that the interpreter was not the agreed agent of both parties, but of the party giving evidence only. On the other hand, in *People v. Randazzio,*[13] evidence by a police officer of a conversation with the accused through an interpreter was held admissible, even though the interpreter was selected by the district attorney, while in *Commonwealth v. Storti*[14] an objection to a stenographer's record of a translated confession as being hearsay was described as 'frivolous'.

Thus the American cases cannot be said to clarify the position. Though the problem did not arise in the present case, it is submitted that, upon the basis of what their Honours said, the presence of the interpreter before the court is essential.

A confession through an interpreter is said to be like any other confession, because what occurs between the suspect and the interviewer is no more than one conversation. However, the assumption that there is only one conversation, upon which the remainder of the argument of the High Court rests, can only be made if, in fact, only one conversation did occur. This fact can only be established by the sworn evidence of the interpreter that he translated truly. In the absence of such evidence, the evidence of the interpreter becomes a narration, possibly not accurate, and not a translation and therefore is inadmissible. Or, to take the example of Kitto J., wherein the interpreter is compared to an electric machine, the faithful functioning of that machine cannot be accepted without further ado, but must be demonstrated to be accurate. This need for proof of accuracy in the case of an interpreter can only be satisfied by his own sworn evidence that he translated accurately.

Therefore, as Dixon C.J. said,

[8] (1855) 25 L.J.Q.B. 55. [9] (1958) 43 Cr. App. R. 90.
[10] (1892) 32 N.E. 355. (Supreme Judicial Court of Massachusetts).
[11] (1926) 152 N.E. 248 (New York Court of Appeals).
[12] (1938) 116 American L.R. 795 (Texas Commission of Appeals).
[13] (1909) 87 N.E. 112 (New York Court of Appeals).
[14] (1901) 58 N.E. 1021 (Supreme Judicial Court of Massachusetts).

> I think the translation word by word or sentence by sentence by the interpreter is not an *ex post facto* narrative statement within the rule against the admissibility of hearsay, but is an integral part of one transaction consisting of communicating through an interpreter. It is therefore enough if it is proved that what he did was to interpret faithfully.[15]

With respect, therefore, it is submitted that the application was rightly refused.

D. GRAHAM

ASHFORD SHIRE COUNCIL v. DEPENDABLE MOTORS PTY LTD[1]

Sale of goods—Implied warranty—Fitness for particular purpose—Reliance through agent on seller's skill and judgment—Sale of Goods Act 1923-1953, section 19 (1) (N.S.W.)

The appellant shire council wished to acquire a tractor for use in road construction work and the shire clerk, after consulting the shire president and other councillors, acting on their instructions, asked one B to look at a tractor which the respondents had for sale, to see 'whether it was suitable for the work required'. B had recently been appointed shire engineer but had not yet taken up his duties or become the servant of the council.

The argument in the Judicial Committee proceeded on the footing that B had called on the respondents and told their joint managing director, C, that he was there on behalf of the council and whilst inspecting the machine with C had asked about the capabilities of the tractor and whether it would do the road construction work for which it was required. He was told, *inter alia,* that 'that was the type of work that the tractor was built for—it is just the type of work to suit it'. B made no written or oral report of the conversation but told the shire clerk that he had inspected the tractor and that it seemed big enough for the work required. In reliance on B's report the shire president instructed the shire clerk to purchase the tractor, which was subsequently found to be not reasonably fit for the purposes of road construction. The appellant council claimed damages for breach of the implied condition of fitness under section 19 (1) of the Sale of Goods Act 1923-1953 (N.S.W.).[2]

[15] (1960) 34 A.L.J.R. 266.

[1] [1960] 3 W.L.R. 999; [1961] 1 All E.R. 96; (1961) 34 A.L.J.R. 89; Judicial Committee of the Privy Council: Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Morris of Borth-y-Gest. The advice of their Lordships was delivered by Lord Reid.

[2] This section is identical with Sale of Goods Act 1893, S. 14 (1) (Eng.) and Goods Act 1958, s. 19 (Vic.).

S. 19 '. . . there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be manufacturer or not) there is an implied condition that