Privy Council Appeal No. 41 of 1992

Radhakrishnan Kunnath *Appellant*

v.

The State *Respondent*

FROM

THE COURT OF CRIMINAL APPEAL OF MAURITIUS

REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 10TH JUNE 1993, DELIVERED THE 27TH JULY 1993

Present at the hearing:-

LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY
LORD SLYNN OF HADLEY
MR. JUSTICE GAULT

*[Delivered by **Lord Jauncey of Tullichettle**]*

The appellant is an uneducated peasant from Kerala in Southern India whose native language is Malayalam. In April 1988, while working as a cleaner in a Bombay guesthouse, he was prevailed upon by his employer and a friend of the latter to travel to and deliver in Mauritius a bag to an individual whose identity was to be disclosed to him on his arrival in the island. For performing this service he was to receive a paltry reward on returning to India. The appellant was provided with air tickets and flew to Mauritius on 15th April 1988. His nervous conduct attracted the attention of customs officers at the airport who then searched the bag and found in a false bottom thereof some 790 grammes of heroin. The appellant maintained that he was unaware that the bag contained heroin.

When the appellant was asked questions in English at the airport he was unable to understand but when the questions were repeated in Hindustani he was able to reply in that language. Hindustani is a mixture of Hindi and Urdu words. On 16th April a statement was taken from him
[30] after caution by a Chief Inspector of the Anti Drug and

Smuggling Unit with the assistance of a Supreme Court interpreter in Hindi. The appellant spoke in what the interpreter described as broken Hindustani, being Hindustani which was not very grammatical, interspersed with English and Malayalam words. The interpreter translated the appellant's account into English which was then transcribed in English by the Chief Inspector. No translation of the Malayalam words took place. On occasion the interpreter was required to put a question to the appellant several times because he did not understand it. On other occasions the interpreter had difficulty in understanding the appellant's answers. The interpreter then translated the English transcription into Hindustani and the appellant was asked whether he wanted to correct, add or alter anything. He replied in the negative and thereafter signed the English transcription of his statement, which contained a detailed account of the circumstances in which he came to be in Mauritius. On 19th July 1988 the appellant gave a further statement identifying photographs of his employer in Bombay and the latter's friend above referred to.

The appellant was thereafter charged with certain contraventions of the Dangerous Drugs Act 1986 including being a drug trafficker within the meaning of section 38(2) thereof. He was tried in the Supreme Court before Boolell J. on three days in July 1989 during which the proceedings were conducted in English. The appellant was represented by very experienced counsel and an interpreter who had solemnly affirmed was present throughout the trial. This interpreter translated (i) to the accused the charge at the beginning of the trial and a minor amendment thereto on the third day, and (ii) to the court the accused's statement from the dock. The interpreter translated not a word of the evidence, he translated only on instruction of the presiding judge, and was under the impression that he could only do so when given such instructions. It does not appear that either the appellant or his counsel at any time indicated their assent to the evidence not being translated. Indeed the first two sentences of the accused's statement from the dock were in the following terms:-

> "Two or three gentlemen deponed in Court. I have not understood what they said."

The remaining twelve short sentences of the statement dealt only with events in India and did not at all address the evidence which had been given by the Mauritian witnesses.

On 11th August 1989 Boolell J. gave judgment finding the appellant guilty of the charges laid against him and sentencing him to death in accordance with the provisions of section 38(4) of the Act of 1986. It was accepted that this sentence was incompetent in view of the decision of this Board in *Mohammed Mukhtar Ali v. The Queen* [1992] 2 A.C. 93. The appellant's appeal tc the court was translated by the interpreter.

The appellant appealed to the Court of Criminal Appeal on a number of grounds of which the only one relevant to this appeal was "the failure to ensure that the appellant understood the evidence adduced at his trial and was in a position to rebut the evidence resulted in the miscarriage of justice". The Court of Criminal Appeal rejected this ground of appeal and concluded that there had been no such miscarriage of justice as would warrant a quashing of the conviction. In reaching this conclusion the Court of Criminal Appeal referred to section 10(2)(f) of the Constitution of Mauritius which provides that:-

> "(2) Every person who is charged with a criminal offence:
>
> (f) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence, and, except with his own consent, the trial shall not take place in his absence unless he so conducts himself ..."

And continued:-

> "In our opinion, although the principle of a fair trial underlies all systems of law, we should, in such a matter, allow ourselves to be guided not so much by principles of the English common law, as exemplified in, for example, *R. v. Lee Kun* [1916] 1 K.B. 337, as by judicial interpretation given to provisions in the Constitutions of other countries which are similar to ours. We are in entire agreement with the position adopted by the full Bench of the Nigerian Supreme Court in *The State v. Gwonto and Others* (1985) LRO (Const) 890."

The Court of Criminal Appeal referred to the following paragraph in the leading judgment of Nnamani JSC, as justifying their conclusion:-

> "I think, with all respect, that the point which was missed here is that the importance of the issue of representation lies in the fact that if an accused person is represented by counsel such counsel ought to demand his client's right to interpretation or object to any irregularity such as lack of interpretation. If neither he nor the accused objects, the right is lost for all time and certainly cannot be invoked in a Court of Appeal."

The Court of Criminal Appeal also rejected the other grounds of appeal and upheld the conviction. Before the Board two main submissions were advanced on behalf of the appellant namely:-

(1) the lack of translation of the evidence to the appellant amounted to the breach of a constitutional right which vitiated the trial, and

(2) in any event apart from the Constitution the Court of Criminal Appeal had failed to consider whether there had been such a departure from proper practice as to amount to a breach of natural justice.

There may well be derived from these two constitutional rights a further requirement that, unless the accused himself consents otherwise, evidence given in a language other than his own shall be interpreted to him. It is however unnecessary for the purposes of the present appeal to decide whether such a requirement exists under the Constitution, and if so what is its precise ambit. It is convenient to deal first with the second of these two submissions because their Lordships consider it plain that, by virtue of the judge's duty to ensure that the accused has a fair trial, the judge is in any event bound to ensure that, in accordance with established practice, effective use is made of the interpreter provided for the assistance of the accused. The important facts in the present appeal are that Boolell J. was aware that an interpreter was present and instructed him to translate the charge and its subsequent amendment to the appellant. Furthermore it must have been obvious to him, as presiding judge, that the interpreter was not translating the evidence to the appellant. Finally in his statement from the dock the appellant said that he had not understood what the witnesses had said. His lack of comprehension must therefore have been fairly and squarely before the court.

In following the reasoning in the Nigerian case of *The State v. Gwonto and Others* rather than that in *Rex v. Lee Kun* the Court of Criminal Appeal were, in their Lordships' view, in error. The circumstances in *Gwonto* were fundamentally different from those in the present case in as much as no request for an interpreter had been made by or on behalf of the accused and the trial judge was unaware that they could not properly understand the proceedings. *Gwonto* is therefore of no assistance in a case where the trial judge is aware from the beginning of an accused's language difficulty.

It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the accused (*Lawrence v. The King* [1933] A.C. 699 at page 708). As their Lordships have already recorded, the basis of this principle is not simply that there should be corporeal presence but that the accused, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him (*Rex v. Kwok Leung and Others* (1909) 4 H.K.L.R. 161, Gompertz J. at page 173, *Rex v. Lee Kun* [1916] 1 K.B. 337, Lord Reading C.J. at page 341). An accused who has not understood the conduct of proceedings against him cannot, in the absence of express consent, be said to have had a fair trial.

In *Rex v. Lee Kun* the Court of Criminal Appeal considered a case in which a foreigner with no knowledge of English was convicted of murder at a trial in which his counsel had made no application to have the evidence translated to him. However the evidence before the magistrate which did not differ from that of the trial had all been translated. Lord Reading C.J., after referring to divergent practices of judges in relation to translation of evidence, said at page 343:-

> "We have come to the conclusion that the safer, and therefore the wiser, course, when the foreigner accused is defended by counsel, is that the evidence should be interpreted to him except when he or counsel on his behalf expresses a wish to dispense with the translation and the judge thinks fit to permit the omission; the judge should not permit it unless he is of opinion that because of what has passed before the trial the accused substantially understands the evidence to be given and the case to be made against him at the trial. To follow this practice may be inconvenient in some cases and may cause some further expenditure of time; but such a procedure is more in consonance with that scrupulous care of the interests of the accused which has distinguished the administration of justice in our criminal Courts, and therefore it is better to adopt it. No injustice will be caused by permitting the exception above mentioned. Speaking generally, police court proceedings will have taken place and the evidence will there have been translated to the accused before he has to stand his trial on the indictment, so that at the trial he knows the case to be made against him. He can instruct his counsel upon it and he may leave his defence in counsel's hands without having the evidence again translated to explain to him that which he already knows, and there seems no reasonable objection to such a course. If there should be a substantial departure from the evidence recorded in the depositions the judge would take care, even if counsel omitted to ask it, that the variation or addition should be translated to the accused, so that he might throw any further light upon the case. The importance of the translation of any new or additional evidence cannot be doubted; ..."

The Lord Chief Justice later referred with approval to the reasoning of the judges in *Rex v. Kwok Leung and Others*.

Their Lordships have no doubt that the course advocated by the Lord Chief Justice in *Rex v. Lee Kun* is a highly desirable one and should be followed wherever a foreign accused, not fully conversant with the language of the proceedings, is represented by counsel. If it is not followed, the risk will be great of a substantial miscarriage of justice occurring. In the present case there was no preliminary hearing, as in *Rex v. Lee Kun*,

and the appellant had therefore no prior knowledge of the evidence to be given by the prosecution. He did not understand the evidence when it was given with the result that the trial was for all practical purposes conducted outwith his presence. The appellant was accordingly deprived of the opportunity of a fair trial and a substantial miscarriage of justice had occurred. The miscarriage would have been avoided if the trial judge had ensured that the evidence was translated to the appellant. Even if he had failed to take this step he should on any view have ordered a retrial as soon as the appellant made clear his lack of understanding in his statement from the dock.

Although the conclusions as to the appellant's second submission are sufficient to dispose of the appeal their Lordships consider that it is appropriate to comment briefly upon the observations of the Court of Criminal Appeal in relation to the constitutional position. Section 10(2)(f) of the Constitution requires that an interpreter shall be made available free of charge when an accused cannot understand the language used at the trial. That section further provides that, except with the accused's own consent, and subject to one other immaterial exception, the trial shall not take place in the absence of the accused. The primary purpose of the requirement that the accused shall be present at his trial is to enable him to hear the evidence against him and so be equipped to decide what course should be taken at the trial in the light of the evidence so given. Reading together these provisions it appears that the Constitution must have been intended to produce a result no less favourable to an accused than that resulting from existing common law principles. Indeed it would be surprising if a Constitution intended to protect the rights of the individual should be construed to have the opposite effect.

It was argued for the respondent that there had been no substantial miscarriage of justice in as much as the circumstances were such that a conviction would have been almost inevitable unless the appellant had succeeded in evidence in persuading the judge as to his state of mind at the time. There is no doubt that there was a formidable body of evidence against him, including his statement of 16th April 1988. Nevertheless the circumstances in which the statement was taken by an interpreter not conversant with the appellant's native tongue, and the doubt as to how accurately the English translation recorded what he said, particularly having regard to the failure to translate words spoken by him in Malayalam, lead to the conclusion that it would not be safe to apply the proviso.

Their Lordships were informed that there is no procedure for ordering a retrial in Mauritius. The circumstances of the case fall fairly and squarely within the following dictum of Lord Sumner, when commenting on the circumstances in which the Board will allow criminal appeals, in *Ibrahim v. The King* [1914] A.C. 599 at page 615:-

> "There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg. v. Bertrand* (1867) L.R. 1 P.C. 520."

For these reasons their Lordships allowed the appeal at the conclusion of the hearing and quashed the conviction. Their Lordships will make no order as to costs.