Case Name:

R. v. Douglas

Between
Her Majesty the Queen, and
Ryan Douglas and Michael Bryan

[2014] O.J. No. 1957

2014 ONSC 2573

Court File No. CRIMJ(F)1884/12

Ontario Superior Court of Justice

C. Conlan J.

Heard: April 7-23, 2014.
Judgment: April 24, 2014.

(48 paras.)

Criminal law -- Rights of accused -- To interpreter -- Application by two accused for mistrial allowed -- Accused allegedly ingested cocaine and brought it into Canada from Jamaica, claiming they did so under duress from thugs who threatened their families -- In relaying accused's answers, interpreter added words, omitted words and wrongly interpreted some words and sometimes paraphrased what accused said -- Some of accused's testimony was lost due to deficiencies in translation services -- Not every juror heard same evidence as some were conversant in Jamaican Patois and recognized poor translation -- Deficiencies in translation amounts to violation of accuseds' s. 14 charter rights -- Mistrial was only reasonable remedy.

Criminal law -- Procedure -- Trials -- Mistrial -- Application by two accused for mistrial allowed -- Accused allegedly ingested cocaine and brought it into Canada from Jamaica, claiming they did so under duress from thugs who threatened their families -- In relaying accused's answers, interpreter added words, omitted words and wrongly interpreted some words and sometimes paraphrased what accused said -- Some of accused's testimony was lost due to deficiencies in translation services -- Not every juror heard same evidence as some were conversant in Jamaican Patois and recognized poor translation -- Deficiencies in translation amounts to violation of accuseds' s. 14 charter rights -- Mistrial was only reasonable remedy.

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- Right to an interpreter -- Remedies for denial of rights -- Specific remedies -- Application by two accused for mistrial allowed -- Accused allegedly ingested cocaine and brought it into Canada from Jamaica, claiming they did so under duress from thugs who threatened their families -- In relaying accused's answers, interpreter added words, omitted words and wrongly interpreted some words and sometimes paraphrased what accused said -- Some of accused's testimony was lost due to deficiencies in translation services -- Not every juror heard same evidence as some were conversant in Jamaican Patois and recognized poor translation -- Deficiencies in translation amounts to violation of accuseds' s. 14 charter rights -- Mistrial was only reasonable remedy.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 14, s. 24(1)

Counsel:

Ms. Larmondin and Mr. Dykstra, for the Crown.

Ms. Sayed, for Mr. Douglas.

Ms. Goldlist, for Mr. Bryan.

REASONS FOR DECISION ON THE DEFENCE APPLICATION FOR A MISTRIAL

C. CONLAN J.:--

INTRODUCTION

1 Ryan Douglas and Michael Bryan were tried jointly before a Jury on a single-count Indictment alleging the offence of importing cocaine.

2 The allegation was that the two accused ingested cocaine and brought the substance in to Canada via an airplane from Jamaica on April 30, 2011.

3 The primary defence for each accused was duress -- that their families had been threatened by thugs (my word) in a hotel room in Montego Bay, Jamaica, which threats caused them to succumb to swallowing the pellets of cocaine before flying to Toronto Pearson International Airport.

4 Part-way through the Crown's cross-examination of the first accused to testify at the trial, Mr. Bryan, an issue arose as to the competence of the interpretive services that were being provided.

5 The following procedure was being followed. The accredited interpreter (qualified under the new model and previously experienced in Court several times over the last two years) was sitting beside Mr. Bryan and the witness box. Questions from the lawyer were posed to Mr. Bryan in English. The interpreter was then relaying to Mr. Bryan what the lawyer had said, and then Mr. Bryan was responding to the question, speaking with a thick accent, followed by the interpreter allegedly repeating what Mr. Bryan had said.

6 We were in a small Courtroom at the Brampton Courthouse. The witness box was located just a few feet from the jurors.

7 The Defence brought an Application for a mistrial, alleging that the interpretive services being provided were incomplete and inaccurate.

8 The Crown resisted the Application. Although the Crown acknowledged certain shortcomings in the interpretive services that had been provided during the testimony at trial of Mr. Bryan, the Crown submitted that a mistrial was not a necessary or reasonable remedy in all of the circumstances.

9 A voir dire was held on the mistrial Application brought by the Defence. One witness testified for Mr. Bryan -- Damian Brown, the second interpreter (unaccredited) who was sitting in the Courtroom throughout the entirety of the testimony of Mr. Bryan and who reportedly first notified all counsel during the lunch recess of his concerns as to the competency of the interpretive services that were being provided.

10 No further evidence was adduced by either the Defence or the Crown on the voir dire.

11 On April 23, 2014, after hearing submissions by counsel and taking a recess to contemplate the issue to be decided and to review the jurisprudence filed, I granted the Defence Application and declared a mistrial, with written reasons to follow. These are those reasons.

THE LAW

12 There was little dispute among counsel about the governing test.

13 Section 14 of the *Canadian Charter of Rights and Freedoms* ("Charter") provides a constitutional right to the assistance of an interpreter for a party or witness who does not understand or speak the language in which the proceedings are conducted or who is deaf.

14 Although there is no requirement or even an expectation that the interpretation be perfect, "[t]he minimum constitutional threshold to meet the obligation under s. 14 of the Charter 'must be high' requiring interpretation that is continuous, precise, impartial, competent and contemporaneous": *R. v. Dutt*, [2011] O.J. No. 4105 (S.C.J.), at paragraph 16, citing *R. v. Tran* (1994), 92 C.C.C. (3d) 218 (S.C.C.), at pages 246-250 and 259.

15 As Justice Hill observed at paragraph 17 of the decision in *Dutt*, *supra*, s. 14 of the Charter is connected with other important protections under our justice system, including the right of an accused to make full answer and defence, the right to a fair trial, access to justice and equality before the law.

16 As expressed by Chief Justice Lamer for a unanimous Supreme Court of Canada in *R. v. Tran* [1994] S.C.J. No. 16 at paragraph 90, once poor interpretation is found beyond the relatively narrow limits of imperfection tolerable, it is not appropriate for the Court to second-guess and speculate as to whether there has been a breach of s. 14 of the Charter. Irrespective of whether the poor interpretation actually affected the accused's right to make full answer and defence, something which could rarely if ever be known with certainty, the accused is entitled to the minimum constitutionally-protected threshold afforded by s. 14.

17 Generally, the appropriate remedy under subsection 24(1) of the Charter for a breach of s. 14 is a re-hearing of the proceeding in which the violation occurred: *Tran*, *supra* at paragraph 99.

18 As set out by Justice Major on behalf of the majority of the Supreme Court of Canada in *R. v. Burke*, [2002] S.C.J. No. 56, at paragraph 75, the test on the declaration of a mistrial is whether such a remedy is necessary to prevent a miscarriage of justice. Injustice to the accused should be balanced against other relevant factors, such as the seriousness of the offence, protection of the public and bringing the guilty to justice.

19 As expressed by the majority of the Supreme Court of Canada at paragraph 125 of its decision in *R. v. Rose*, [1998] S.C.J. No. 81, certain irregularities in the course of a trial which are found to have jeopardized fairness to the accused may be remedied in ways short of the granting of a mistrial, such as via curative instructions to the jury.

20 In other words, in the case at bar, before granting a mistrial, I should ask myself whether the real danger or reasonable possibility of prejudice to or impairment of the rights of these accused to have a fair trial, if I so find that risk of prejudice or impairment exists, can be cured by some remedy short of a mistrial.

21 The Defence carried the burden of proof on this Application. The standard of proof was on a balance of probabilities. That standard applied to both the alleged violation of s. 14 of the Charter and the remedy sought.

ANALYSIS

22 The Crown agreed in submissions that there were deficiencies in the interpretive services that had been provided during Mr. Bryan's testimony at trial, although the degree of those shortcomings was disputed.

23 The Crown, in submissions, described Mr. Brown, who testified for the Defence on the voir dire, as "straightforward" and "unbiased" and competent.

24 I agree with that assessment of the evidence of Mr. Brown on the voir dire. I found him to be a reliable and credible witness. He testified without any hint of favour for the Defence. He spoke apologetically in having to be critical of the services provided by the other interpreter.

25 Mr. Brown was well-spoken and articulate. He was able to provide specific examples of the deficient interpretation. He did not exaggerate his evidence, for example, in drawing legal conclusions as to the significance of the poor interpretation.

26 Now 33 years old, Mr. Brown lived in Jamaica until he was 25 years old. He worked as a Youth Ambassador for the United Nations. He also worked for three years as an interpreter for the United States Peace Corps. He described Jamaican Patois as being similar to "broken English".

27 I accept the uncontradicted evidence of Mr. Brown that the interpreter, at times, omitted words spoken by Mr. Bryan in his testimony; that the interpreter, at times, added words that were not spoken by Mr. Bryan; and that the interpreter, at times, wrongly interpreted words spoken by Mr. Bryan.

28 I accept the uncontradicted evidence of Mr. Brown that the poor interpretation was exacerbated when Mr. Bryan spoke quickly and passionately, such as when he described the alleged threats made against his family -- an issue critically important to the defence of duress, the crux of the trial.

29 I accept the uncontradicted evidence of Mr. Brown that the interpretation was not always verbatim but rather sometimes mere paraphrasing.

30 I accept the uncontradicted evidence of Mr. Brown that there were instances, even if few, where the poor interpretation altered the meaning of the expression used by Mr. Bryan.

31 I accept the uncontradicted evidence of Mr. Brown that, on at least two occasions, Mr. Bryan corrected the interpreter on what he actually said. My trial notes reflect the same.

32 I accept the uncontradicted evidence of Mr. Brown that, at times, the interpreter spoke as if Mr. Bryan had referred to himself in the third person when he in fact had not. I noticed the same thing.

33 I accept the uncontradicted evidence of Mr. Brown that some of the testimony of Mr. Bryan was lost in the poor interpretation, including at the critical juncture of when Mr. Bryan was describing what had occurred in the hotel room regarding the alleged threats and him being forced to swallow the pellets. Again, duress was the key issue at trial.

34 Besides the uncontradicted evidence of Mr. Brown, I have my own observations during the testimony at trial of Mr. Bryan. The interpreter was clearly struggling. I made a specific note, for example, of Mr. Bryan having used the word "risk" which was not interpreted or repeated by the interpreter. On another occasion, I made a specific note that comments made by Mr. Bryan about not being able to run from the hotel room, critical on the key issue of duress, were not initially interpreted or repeated by the interpreter. On yet another occasion, I noted specifically that the interpreter changed the translation of an expression in Patois spoken by Mr. Bryan from "throw away" to "kill", in the context of an alleged threat made against Mr. Bryan's father, also critical on the key issue of the defence of duress. As I learned from Mr. Brown, the expression used by Mr. Bryan was "dash wey", meaning "kill", although the interpreter initially said "throw away". These are just examples.

35 Finally, I am very concerned about Exhibit A at trial, the first and only note from the jury that I received. The note was given to me during the testimony of Mr. Bryan. The note asked that I direct the interpreter to stop paraphrasing and start interpreting verbatim.

36 Obviously, one or more than one member of the jury is/are conversant enough in Jamaican Patois to recognize that the interpretation was poor. I now have good reason to conclude that, in essence, not every one of these twelve ladies and gentlemen has heard the same evidence.

37 Nobody knows for certain whether the right to make full answer and defence and the right to a fair trial have been compromised for either accused. But I am persuaded on balance that, collectively, the above deficiencies in the interpretation have amounted to a violation of each of the accused's rights under s. 14 of the Charter.

38 Regarding Mr. Douglas, remember that this was a joint trial. The accused were jointly charged. The testimony of Mr. Bryan related, in part, to Mr. Douglas. The two accused are inseparable for the purposes of this Application.

39 As to remedy, I disagree with the Crown that something short of a mistrial will suffice in these circumstances.

40 The trial was way too far along to stop and start again with the same jury.

41 If we chose to repeat the testimony of Mr. Bryan with another interpreter, no instruction from me to the jury would have cured the real risk of them (i) using the earlier testimony as a prior consistent statement by Mr. Bryan to bolster his credibility (not normally admissible) and/or (ii) using

the earlier testimony as a prior inconsistent statement (which would never have existed but for the poor interpretation).

42 If we chose to play-back portions of the evidence of Mr. Bryan for the jury, with another interpreter present, as suggested by the Crown in submissions, the jury would potentially be confronted with multiple interpretations of the same evidence, only causing confusion. Besides, play-backs would be out of context and potentially misleading.

43 Taking into account the balancing exercise required, as per *R. v. Burke*, *supra*, and notwithstanding the seriousness of the offence, I am persuaded on balance that a mistrial is the only reasonable alternative to remedy the violations of the constitutional rights of the accused as provided for under s. 14 of the Charter.

CONCLUSION

44 For the foregoing reasons, the Defence Application for a mistrial is granted.

45 A final observation, I wish to make. I was advised that no other Jamaican Patois accredited interpreter could be found to replace the one who assisted Mr. Bryan, except a lady who works on weekends.

46 That is not much assistance to the Court.

47 I am shocked that, in a jurisdiction like Brampton, with the diverse population and the **criminal** caseload including narcotics matters involving Pearson International Airport, the availability of accredited Jamaican Patois interpreters is so slim.

48 I appreciate that the recommendation from the Office of the Chief Justice of the Ontario Superior Court of Justice regarding the use of accredited interpreters only for certain types of proceedings, including the one here, could not have been satisfied instantaneously, however, the pace of change appears to be moving at the speed of molasses. Perhaps we can look forward to some speedier progress in the days ahead, otherwise, justice will be sacrificed.

C. CONLAN J.