

CANADA / JUDGMENT

R. v. Ali

2021 BCSC 2749

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 2749 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2021 BCSC 2749

Date: 20210426

Docket: 29405

Registry: Vancouver

Regina

v.

Ibrahim Ali

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Before: The Honourable Justice Bernard

Oral Ruling on Voir Dire #2

re expert opinion of Hilda Armanious

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Place and Date of Hearing:

Vancouver, B.C.

April 19-20, 2021

Place and Date of Ruling

Vancouver, B.C.

April 21, 2021

Place and Date of Reasons for Ruling:

Vancouver, B.C.

April 26, 2021

- [1] THE COURT: These are the reasons for my ruling in relation to the proposed testimony of a witness, Hilda Armanious. They are subject to editing if a transcript is requested.
- [2] On September 7, 2018, Ibrahim Ali was arrested on a charge of first-degree murder. Following his arrest, he was interviewed by the police. The Crown seeks a determination of the voluntariness of Mr. Ali's first post-arrest interview. A voir dire was declared for this purpose and, in this voir dire, the Crown seeks to tender the expert opinion evidence of Hilda Armanious, the RCMP's Arabic-speaking civilian employee who transcribed, from Arabic to English, the police's audio-recorded interactions with Mr. Ali.
- [3] The defence opposes Ms. Armanious's qualification as an expert witness.

- [4] Mr. Ali is an Arabic-speaking Syrian Kurd who immigrated from Lebanon to Canada in March 2017. The police were aware, prior to Mr. Ali's arrest, of his very limited facility with English; thus, two Arabic-speaking police were deployed for the purpose of communicating with him in Arabic from the point of his arrest through to the end of a series of post-arrest interviews. These communications were captured in audio recordings, and those relevant to voluntariness have been tendered as evidence in the voir dire. Also tendered were Ms. Armanious's English transcriptions of the relevant recordings, through the Arabic-speaking officers who spoke with Mr. Ali: Constable Alam and Sergeant Harfouche. These transcriptions were proofread by these witnesses prior to their testimonies, and then adopted by them as accurate, albeit with some corrections by them during their voir dire testimonies.
- [5] Constable Alam, in particular, was cross-examined extensively as to the accuracy of specific parts of the transcription from Arabic to English. Indeed, it was put to him that in many instances the transcription was materially incorrect. Specific words and phrases quite different from those in the transcripts were put to Constable Alam with the suggestion that these were the words spoken. Essentially without exception, these suggestions were rejected by him.
- [6] The Crown seeks to have Ms. Armanious testify as to the accuracy of the portions of the transcript the defence has called into question in its cross-examination of the police witnesses. Specifically, the Crown seeks to qualify Ms. Armanious as an expert in the translation of Arabic to English, and English to Arabic, both spoken and written, in relation to classic Arabic and its dialects, including but not limited to Lebanese Arabic and Syrian Arabic.
- [7] At the qualifications stage, the only evidence tendered was from Ms. Armanious, who testified, inter alia, to the following: (a) she has been an employee of the RCMP since 2008; (b) she is an intercept monitor/transcriber/translator analyst, and has held this position on a full-time basis (40 hrs/wk and overtime, as needed) since 2010; (c) 95% of her work as a translator is in the translation of Arabic to English; (d) Arabic is her mother tongue; (e) she was born in Khartoum, Sudan in 1962, and lived, worked, and was schooled in Sudan until she immigrated to Serbia at the age of 20; (f) when she was 32, she immigrated to Canada with her husband and children; (g) she is fluent in Arabic and English, among other languages; (h) she spoke Arabic exclusively until she entered kindergarten; (i) she studied formal, or classic, Arabic until her high school graduation; and (j) all her other courses were taught in English (notably, she testified in English clearly and without any difficulty in understanding or being understood).
- [8] In relation to dialects of Arabic, Ms. Armanious said that she was exposed to all 22 dialects of Arabic while she lived in Sudan; that these dialects do not vary significantly from one another; and that she considers herself "without a doubt" fluent in both the Lebanese and Syrian dialects. Ms. Armanious explained that she interacts with Lebanese and Syrian people daily, and that her sister-in-law's parents are Syrian and Lebanese. She added that

there are "very, very tiny" differences between these two dialects and they are mostly related to differences in accent.

- [9] Ms. Armanious estimated that the number of Arabic-to-English transcriptions she has done for the RCMP is in the thousands. As for qualifications, in order to secure her position as a transcriber, she was subjected to Arabic/English language testing, as well as a hearing test. Once employed, she received RCMP training in relation to the format for transcripts. She was qualified as a proof-reader in 2009, allowing her to "proof" other RCMP translators' transcripts.
- [10] To create a transcription, Ms. Armanious says that she first listens to the whole of the audio record for context, and then begins to type a transcript from the audio record. She says she uses headphones and high-quality audio equipment that allows her to rewind, slow the speed, and amplify the sound, as needed.
- [11] Ms. Armanious was qualified as an expert in the translation of Palestinian/Jordanian Arabic to English, in *R. v. Hamdan*, a 2017 B.C. Supreme Court case (cite not provided). Her expertise was not challenged in that case.
- [12] Ms. Armanious said she "absolutely" understands her duty of impartiality as an expert witness. She was cross-examined at length about her role in police investigations. While she agreed that her translations were helpful to investigators, she firmly maintained that she is not an investigator.
- [13] Ms. Armanious produced a two-page résumé that was entered as an exhibit. In brief, it covers her employment in Canada, first as a service delivery manager for Garda Canada from April 2000 to April 2010, and then as an RCMP intercept monitor/transcriber/translator analyst from November 2008 to the present.
- [14] The governing legal principles for the admissibility of expert evidence are not in issue. They mandate a two-stage analysis: see *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80 [Mohan]; and *White Burgess Langille Inman v. Abbott & Haliburton Co.*, 2015 SCC 23 [White Burgess].
- [15] The first stage requires a determination that the proposed evidence meets an admissibility threshold, based on whether it is: (1) relevant to the issues; (2) necessary to the trier of fact; (3) precluded by any other evidentiary rule; (4) from a properly-qualified expert who is willing and able to provide an independent, impartial, and unbiased opinion to the court; and (5) reliable (a threshold factor only where the opinion is based on novel or contested science).
- [16] The second stage engages the court's gatekeeping function, once the admissibility threshold has been met. It is a residual discretion, vested in the court, to exclude evidence that has met the admissibility threshold. At this stage, the court weighs the evidence's relevance, necessity, reliability, and absence of bias, against any potentially deleterious effects it may have. These effects include unduly prolonging the proceedings, confusing the trier of fact, and fearing the trier of fact will abdicate its role and simply defer to the inferences or

conclusions of the expert. Where there are potentially deleterious effects, the trial judge must decide whether the proposed evidence is sufficiently beneficial to warrant its admission, despite its potential for harm. The gatekeeping function is not a pro forma exercise that defaults to the trier of fact to account for frailties by discounting the weight given to the evidence.

- [17] Turning to the first stage, the first three threshold criteria are, quite reasonably, not contentious here. There is no question that what was said between the police and the accused, from his arrest to the end of the statement, is in issue and is relevant to the determination of voluntariness. As for necessity, given that the accused spoke, and was spoken to, in Arabic throughout this period, there can be no question that translation into English (the language of the court) is necessary to ascertain what was said. (N.B.: The defence raises necessity in the second stage "cost/benefit analysis"). Lastly, no other evidentiary rule has been identified by counsel, or is known to the court, which operates to preclude the admission of proposed evidence.
- [18] Accordingly, the focus here is on the fourth criterion: whether Ms. Armanious is properly qualified and willing and able to give independent, impartial, and unbiased evidence. In relation to these fourth-factor issues, the Crown relies upon the following legal principles.
- [19] First, with respect to proper qualification, the sufficiency of a witness's qualifications must be assessed using factors relevant to the nature of their specialized area of knowledge and experience. Expertise may be gained through study, training, and/or experience: see *Mohan* at para. 31; *R. v. Abbey*, 2009 ONCA 624, at para. 109 [Abbey]; and *R. v. Mills*, 2019 ONCA 940 [Mills], at para. 52.

- [20] In *Mills*, the court said:

... a witness can be qualified by the court as an expert whether his or her expertise was acquired through on-the-job experience or through formal education (or a combination thereof). Just because that specialized knowledge is gained on the job, sometimes developed through the "accumulated wisdom" of a group of people, does not, on its own, diminish its value (assuming it otherwise meets the other criteria for admission) ...

- [21] In relation to the ability and willingness of an expert to fulfil their duty to provide independent, impartial, and unbiased opinion to the court, this threshold requirement is not onerous and should not preclude the witness's evidence unless they are clearly unwilling or unable to fulfil their duty in this regard. It is actual bias or partiality, and not the appearance of it, that is relevant. In *White Burgess* at para. 49, the Court made the following apposite remarks:
- [49] ... For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the

party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

- [22] In support of its position that Ms. Armanious is properly qualified, the Crown cites *R. v. Chan*, 2014 BCSC 2560 [Chan]; *R. v. Bidesi*, 2015 BCSC 206 [Bidesi]; *R. v. Nguyen*, 2017 BCSC 833 [Nguyen]; and *R. v. Abdullahi*, 2021 ONCA 82 [Abdullahi].
- [23] In *Chan*, the court distinguished translating from interpretation - the latter requiring knowledge of legal proceedings and legal terminology - and, in finding a police officer properly qualified to give translation evidence, said: "There is no sophisticated knowledge or education that is required . . . to demonstrate one's proficiency in translation as opposed to interpretation."
- [24] Similarly in *Bidesi*, the court drew a distinction between translating and interpreting, and found a police officer properly qualified to translate Fijian Hindi into English without having any specific training or experience in translation.
- [25] *Nguyen* has similarities to the case at bar. The court found the proposed witness's experience, working for the police as a Vietnamese/English translator of recorded communications, was sufficient to properly qualify him to give translation evidence as an expert.
- [26] Perhaps most similar to the case at bar is *Abdullahi*. In *Abdullahi*, the trial judge found a Toronto Police Services civilian employee, whose native tongue was Somali and who had one year's experience as a Somali/English translator, was properly qualified to give translation evidence of what was said in Somali in recordings of police-intercepted communications. The trial judge said the employee "was an expert by reason of his experience, his membership in the Somali community, and his fluency in English." In upholding this ruling, the Court of Appeal noted that the witness's expertise was firmly anchored in his use of Somali as his native tongue throughout his life, as well as in the course of his employment as a translator for the police.
- [27] The defence position is that Ms. Armanious is "not truly an expert in translations, specifically the dialects used in the present case", and, therefore, not qualified to give the proposed evidence.

[28] The focus of the defence concern is in relation to Ms. Armanious's expertise in Lebanese and Syrian Arabic, the dialects spoken by Mr. Ali. The defence describes Ms. Armanious's expertise in Lebanese Arabic as "anecdotal and from experience", and says:

... even if Ms. Armanious is able to communicate to a degree in Lebanese Arabic, she may not be communicating all of the meaning intended when she translates due to her more superficial grounding in the language. It is this margin for error that the court must assess and it is this margin for error that the court can only assess if it has evidence about the differences between the dialect that she speaks natively and what the accused was speaking at various times throughout the recordings. Without this evidence, the gap in meaning could be negligible or a chasm.

[29] The defence says "there is no evidence from a trained linguist as to the degree of commonality between the various dialects of Arabic utilized in this case" and the court should infer from Constable Alam's and Sergeant Harfouche's voir dire testimony, to the effect that they took steps to determine the dialect spoken by Mr. Ali in advance of their involvement, that the various dialects of Arabic are sufficiently distinct such that the speaker of one dialect may not be able to understand the speaker of another.

[30] The defence also submits that Ms. Armanious's lack of formal training makes her competence as an Arabic/English translator impossible to objectively assess. The defence not only questions her fluency in Lebanese Arabic, but also questions her fluency in English and whether she has sufficient understanding to properly capture the meaning of words spoken in Lebanese and Syrian Arabic.

[31] While the defence acknowledges that language competence may come from "informally speaking it in social or professional settings", it is concerned that Ms. Armanious has not been fully immersed in Lebanese and Syrian Arabic, and, perhaps, in English as well.

[32] In support of its arguments, the defence cites *R. v. Olawale*, 2013 ONSC 4458 [Olawale]; *R. v. Bedford*, 2000 CanLII 2487 (ON CA), 184 DLR (4th) 727 [Bedford].

[33] In *Olawale*, the issue was qualitatively different from the issue at bar; it was whether an unaccredited Yoruba/English court interpreter (as opposed to translator/witness) was competent to act as such. During the course of the trial, the accused said he did not understand much of what the interpreter said because the interpreter spoke a dialect of Yoruba different from his. The trial judge was not satisfied that the interpretation met the criteria of continuity, precision, and competence required for compliance with the accused's s. 14 Charter right to have the assistance of an interpreter, and adjourned the trial. I am not persuaded that this case is of assistance here. It is well accepted in our jurisprudence that interpretation and translation are not synonymous: see *Chan*, *Bidesi*, *Nguyen*, and *Abdullahi*. Moreover, qualifying a proposed expert witness and assessing the competency of a court interpreter are distinctly different inquiries that do not engage the same legal principles.

- [34] In Bedford, the trial judge found that the proposed evidence of five of the seven witnesses presented by the defence as experts in sadomasochism, did not meet the Mohan threshold for admissibility because of irrelevance, a lack of objectivity, and bias (in relation to two). The defence alleged the trial judge erred in excluding the evidence of these five witnesses. On appeal, the court found that none of the seven so-called experts should have been qualified to give opinion evidence because they all fell short of satisfying the threshold admissibility criteria of relevance, necessity, and proper qualifications. The appellate court found none of these witnesses had anything relevant to say, given that sadomasochism was not on trial. The appellate court also identified the necessity factor as a significant problem, because these proposed expert witnesses were simply expressing personal opinions based on their own experiences, literature, and anecdotal material.
- [35] As with Olawale, I am unable to see how Bedford advances the defence's position in the case at bar regarding the qualifications of a translator, in circumstances where there is no question that the evidence is relevant and necessary. As to the factor of qualifications, it is the cases of Nguyen and Abdullahi that are apposite.
- [36] In my view, the essential qualifications for translation and for expert testimony in that regard, are: (a) fluency in the language to be translated; and (b) fluency in the language into which it is to be translated. Fluency in this context (and virtually all others) does not mean the translator must speak each language perfectly; such would be an impossible standard to meet or, indeed, to measure. Virtually no person knows, speaks, and understands any language perfectly. Pointing out a proposed expert's relatively minor and inconsequential errors in syntax, grammar, tense, and spelling in the language of the court (English) should not, as a general rule, undermine a translator's qualifications, and they do not do so here. This is particularly so where the proposed expert has demonstrated their fluency in English at the qualifications stage of their testimony, as Ms. Armanious has done here.
- [37] As for Arabic, Ms. Armanious's fluency in both formal Arabic and the Sudanese dialect is not in question. She was born, raised, and educated in Sudan; Arabic is her mother tongue and she has been exposed to its various dialects throughout her life. As for Lebanese Arabic and Syrian Arabic, she considers herself fluent in these dialects. She says they are very similar to one another and to classic Arabic. Importantly in this regard, she has heard the audio recordings in issue, in which Lebanese and/or Syrian Arabic is spoken by Mr. Ali and the police, and has asserted that she has no difficulty in understanding what was said.
- [38] It is noteworthy that it is not solely Ms. Armanious's personal exposures and experiences that are relied upon to qualify her as having an expertise in Arabic/English translation, although that alone may, indeed, be sufficient; she is also a professional translator who has been employed in that capacity on a full-time basis for the past 10 years and has performed thousands of translations from Arabic to English.

- [39] Having due regard for all the foregoing, including the cases cited by the Crown, I am satisfied that Ms. Armanious's qualifications meet the threshold for admissibility of her proposed testimony.
- [40] I turn next to the question of impartiality, lack of bias, and independence of Ms. Armanious. For this factor the defence, as the party opposing the admission of her evidence, bears the onus of establishing that there is a realistic concern that Ms. Armanious is unwilling or unable to comply with her duty as an expert witness: see *R. v. McManus*, 2017 ONCA 188, at para. 66.
- [41] The defence characterizes Ms. Armanious as a police witness who has worked in an investigative capacity for the police and actively assisted the police in the interrogation of suspects. In support of this position, the defence cites the caution in *McManus* as follows:
- [67] While an interest in or connection with the litigation does not automatically render the proposed expert evidence inadmissible, the court must consider whether the relationship or interest would result in the expert being unable or unwilling to carry out his or her primary duty to provide fair, non-partisan, and objective assistance . . . There is a heightened concern with police expert witnesses to ensure their ability to offer impartial expert evidence [again, citations omitted] . . .
- [42] In *McManus*, the expert witness in question was a police officer who investigated the accused in relation to the charges before the court, and had a strong interest in seeing the accused convicted. On appeal of the trial judge's ruling permitting that officer to testify as a witness, the court found that:
- a) there was a realistic concern that the officer was unable to comply with the duty of an expert to provide independent, impartial, and unbiased evidence; and
 - b) this realistic concern had not been rebutted by the Crown to satisfy the fourth Mohan criterion for admissibility.
- [43] *McManus* is distinguishable from the case at bar. Ms. Armanious is not a police officer, let alone one who was an investigator in the matter at bar. There is no similarity between the compelling concerns in *McManus* as to the ability of the police expert to provide independent, impartial, and unbiased testimony, and the ability of Ms. Armanious to carry out her duty as an expert witness here. Ms. Armanious is a civilian employee of the police; she is a translator, not an investigator. While she may work for the police, she does so only as a translator, and while her translation work may assist the police in carrying out their investigative duties, her role is not investigative. The heightened concern as to impartiality, independence, and lack of bias that applies to police investigators, particularly those who investigate the case in which they are tendered as an expert witness, does not arise here.
- [44] The defence has submitted that Ms. Armanious's duty as an expert may be compromised by her vested interest in defending her translations as found in the transcript she created from the audio recordings and which has been entered as an exhibit in the voluntariness voir

dire. The implication, I think, is that Ms. Armanious might be prepared to lie in her testimony rather than admit to any error in her translation. In this regard, there is simply no evidence to support the suggestion that Ms. Armanious has any particular stake in defending her translation, let alone one that might motivate her to give untruthful testimony to the court.

- [45] For the foregoing reasons, I find that the defence has not met its burden of establishing a realistic concern of bias, partiality, or lack of independence. As has already been observed, the threshold of admissibility for this factor is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it: see *White Burgess*, para. 49. I am satisfied that the threshold has been met here.
- [46] I turn next to Stage 2, at which the court may exercise its discretion to exclude an expert's evidence if satisfied that the risks of admission outweigh its benefits. As has already been observed, the sorts of risks that are contemplated are compelling ones such as unduly or needlessly prolonging the proceedings, adding unnecessary complexity and confusion, usurping the role of the trier of fact, and fear of abdication of the trier of fact's role.
- [47] I am not persuaded that any risks exist here, let alone ones that would outweigh the benefits of the proposed evidence. As observed in *Abbey* at page 92, the sort of risks contemplated at this stage will not inevitably arise in every case where expert evidence is offered. The court must "go beyond truisms" and "come to grips" with the actual risks that arise in the circumstances of the case before the court. Here, there is no concern of confusion, complexity, or impenetrable jargon, and no risk that the trier of fact will abdicate its role in this judge-alone voluntariness voir dire, or that the expert will opine on the ultimate issue. As for unduly protracting the proceedings with unnecessary evidence, I am satisfied that risk is far outweighed by the potential probative value of the proposed evidence.
- [48] The translation evidence is necessary to understand what Mr. Ali said, and what was said to him. It is virtually the polar opposite of the sort of evidence that the trier of fact is equipped to decide for themselves and that would bring no added benefit to the process. As the court observed in *Abbey* at paragraph 94: "[o]pinion evidence that is essential . . . to understand and evaluate material evidence will register high on the 'benefit' side of the scale" in the cost/benefit analysis at Stage 2.
- [49] The defence questions the necessity of the proposed expert and its protraction of the proceedings, apparently on the basis that translation evidence has already been tendered by the Crown through Constable Alam and Sergeant Harfouche. However, the accuracy of that evidence has been called seriously into question by the defence in its cross-examination of these witnesses, particularly the evidence of Constable Alam. In these circumstances, I am satisfied that any defence objection to the tendering of the proposed translation evidence by the Crown is misplaced.

- [50] Even if there were a real concern that the proposed evidence would cause protraction of the trial, it would not be undue given the importance of the proposed testimony which, on balance, far outweighs the additional trial time required. That said, the Crown's estimate of its direct examination is one day. While the length of the cross-examination is unknown, it is evident from cross-examinations of the other translation witnesses that it is the accuracy of relatively few passages of a lengthy transcript, which remains contentious; accordingly, there is no reason to believe the cross-examination should be protracted.
- [51] The defence has also submitted that tendering Ms. Armanious as a witness would somehow undermine the basis upon which the translation transcripts were admitted: that is, the tendering of them through Constable Alam and Sergeant Harfouche as parties to the translated and transcribed verbal interactions with Mr. Ali. Moreover, the defence says that the court "cannot reconcile the original basis for the admission of the officers' testimony with contradictory evidence from Ms. Armanious".
- [52] The defence has cited no authority for such propositions, and I do not share its concerns. As to the former, expert translation evidence is not precluded simply by virtue of having tendered translation evidence through a party to the verbal exchange. As to the latter, the courts are routinely tasked with finding facts in circumstances where there are differences in the evidence of multiple witnesses in relation to the same subject or issue.
- [53] For these reasons, I decline to exercise the court's discretion to exclude the proposed evidence of Ms. Armanious at Stage 2 of the admissibility inquiry.
- [54] In summary, the proposed evidence of Ms. Armanious meets the threshold for admissibility and is not excluded at Stage 2 of the analysis. I am satisfied that Ms. Armanious has expertise in the translation of the Arabic language to the English language, and the English language to the Arabic language, both in the spoken and written word, for classic Arabic and its various dialects including but not limited to those dialects spoken by Lebanese and Syrian populations. She is, therefore, qualified to give opinion evidence in this voluntariness voir dire as to what was said in Arabic between the police and the accused, Mr. Ali, as captured in audio recordings from the point of his arrest on September 7, 2018, to the end of Mr. Ali's first post-arrest interview with Sergeant Harfouche.

"Bernard J."

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