
CANADA / JUDGMENT

R. v. Nguyen

2017 BCSC 833

COURT

Supreme Court of British Columbia

DECIDED

10 April 2017

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2017 BCSC 833 R. v. Nguyen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nguyen,

2017 BCSC 833

Date: 20170410

Dockets: 78026-3; 78026-4

Registry: New Westminster

Regina

v.

Quang Dong Nguyen

Before: The Honourable Mr. Justice Greyell

Oral Ruling on Voir Dire

Re Expert Qualifications of Andy Do

Counsel for the Crown:

P.A. Eccles

J.A. Cramer

Counsel for the Accused:

J.R. Ray

Place and Date of Trial/Hearing:

New Westminster, B.C.

March 3, 2017

Place and Date of Judgment:

New Westminster, B.C.

April 10, 2017

- [1] THE COURT: These reasons arise from a voir dire in which Mr. Nguyen objects to the Crown introducing the opinion evidence of Mr. Andy Do at the trial of this matter. Mr. Do interpreted telephone intercepts made by the police of calls allegedly made to and from a telephone the police say was used by Mr. Nguyen.
- [2] The defence says Mr. Do, the interpreter, does not meet the qualifications of an expert witness as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, and in particular the criteria of being a properly-qualified expert.
- [3] There is no issue regarding the first three Mohan criteria: relevance, necessity in assisting the trier of fact, and the absence of any exclusionary rule. The issue here is a narrow one and that is whether Mr. Do is a properly-qualified expert.
- [4] The defence says that to be properly qualified, the expert must be objective and non-partisan and should not have a personal interest when viewed objectively in the prosecution's case. The defence says Mr. Do, being an employee of the RCMP, has an interest in the outcome of this case by reason of his employment, and accordingly, is not properly qualified.
- [5] A voir dire was held to determine this issue. Mr. Do testified as to his qualifications, his employment with the RCMP, and his role in this particular investigation. I turn to review his evidence on those issues and the role he played.

Mr. Do's Testimony

- [6] Mr. Do immigrated to Canada from a refugee camp in Vietnam in 1984, when he was 11 years old. He entered school at the elementary school level and took English as a second language courses in order to familiarize himself with the English language. He testified that by the time he reached high school, he spoke English and could communicate such as to take a regular curriculum.
- [7] At home Mr. Do communicates with his parents and a number of his siblings, who speak primarily or only Vietnamese.

- [8] He plays a role in his church, which has an only-Vietnamese speaking and an only-English speaking congregation, in assisting communication between the two congregational groups. He provides simultaneous translation in both English and Vietnamese as may be required for church programs.
- [9] Mr. Do was hired by the Combined Forces Special Enforcement Unit, previously known as the Organized Crime Unit, in 2002. His primary responsibilities since that time have been to translate communications from the Vietnamese language to the English language, and vice versa. He works in a wire room, listening to live or recorded conversations and preparing both transcripts and summaries. In order to obtain his position, he went through an interview process with a Vietnamese employee.
- [10] He testified that when preparing translations, he "needed to get what was said down as accurately as possible". He would at times listen to a recorded conversation a number of times to make sure he accurately recorded verbatim what was said.
- [11] He testified that in connection with the investigation of Mr. Nguyen, he generally knew the focus of the police investigation and the target person. He said he was not influenced by the investigation or its outcome. He testified his only interest was to see that justice was served. He viewed his job was "to put it [that is, the written translation] in as pure as I have it". He testified he wore headphones while creating a transcript and would listen to a portion over and over again, if there were questions, to ensure the transcript was precise.
- [12] He agreed that words in Vietnamese could have different meanings, depending upon the context in which the words were used, and that there were differences between northern and southern Vietnamese. He testified that in the transcriptions he created in the present case, the text was straightforward: that there were no, as he put it, grey matters which would result in different meanings nor were there differences in dialect.
- [13] Mr. Do had not appeared in court prior to his testifying in this case and had not been qualified as an expert in Vietnamese translation. Mr. Do has worked for the Vancouver Police Department and the Specialized Investigation Unit of the RCMP doing wiretap translations.
- [14] He assessed a prospective new hire for Vietnamese translations for the RCMP, and has created a document to assist the agency evaluate the fluency of new hires for translation of the Vietnamese language to the English language and vice versa.

Position of the Parties

- [15] The defence relies on: the principles set out in *Mohan; Alfano v. Piersanti*, 2012 ONCA 297, particularly at paras. 100-105, 109-112; *R. v. Pearce*, 2014 MBCA 70 at paras. 97-98; *R. v. Klassen*, 2003 MBQB 253 at paras. 28-33; *R. v. Payette*, 2010 MBQB 73 at paras. 29-30; and the decision of this Court in *R. v. Sanghera*, 2012 BCSC 995, where Justice Holmes found Detective Sangha not qualified to give expert evidence concerning the interpretation and

translation from spoken Punjabi to English and from English to Punjabi. I refer in particular to paras. 22-24.

- [16] The Crown says Sanghera and the other cases cited by the defence do not apply in the circumstances of this case where the function of the proposed expert is directly related to accurately translating the intercepted calls. That is, the Crown says Mr. Do has no vested interest in the outcome of the case. His sole interest was to ensure the accuracy of the translation.
- [17] Further, the Crown says Sanghera, to the extent it applies to this case, has been distinguished by at least two other subsequent decisions of this Court which have ruled evidence of witnesses in a similar position to Mr. Do have been qualified as experts to give evidence.
- [18] The Crown relies on *R. v. Thim*, 2015 BCSC 1677; *R. v. Bidesi*, 2015 BCSC 206; and *R. v. Chan*, 2014 BCSC 2560.
- [19] In *Chan*, Justice Gropper determined the issue before her was:
- [2] whether Detective Khosa is properly qualified to give expert evidence translating the content of intercepted calls from the recording to a transcript and whether Detective Khosa is disqualified from being an expert in this trial due to bias.
- [20] Justice Gropper concluded that the detective in that case was a properly-qualified expert and accepted his expertise as an expert translator. She distinguished Sanghera on several grounds. She referred to the Interpretation Working Group's report to the benchers of the Law Society of British Columbia in July 2006 and said at paras. 18 to 21:
- [18] At page 3, the Working Group describes its mandate and says:

the Working Group decided to focus solely on legal interpretation and not examine issues surrounding legal translation. In reaching this decision, the Working Group noted that interpreters have [a] unique and highly specialized task of having to work as a real-time aid to communication. Conversely, translators work with written materials and accordingly there is more time to scrutinize their work; if a party does not agree with a translation provided by the opposing party, an additional translator can always be retained

The Working Group further decided that "legal interpretation" included both court interpretation and "law firm" interpreting (i.e., interpreting communications between a lawyer and a client outside of court, for example, at the lawyer's office).

- [19] The report quotes from the decision of *R. v. Tran*, [1994] S.C.J. No. 16, at page 6:

[It is useful to address] the difference between translation and interpretation. Translation has the natural advantage of benefiting from third party proofreading thereby having greater opportunity to have potential errors eliminated. Interpretation is done on the spot and in real time, not allowing much room for revision.

- [20] The report also refers to the code of conduct that accredited and certified interpreters have to abide by and to the certification programs available to court interpreters, at page 7. In bullet 1, the accredited pool of interpreters include those who have graduated from the Vancouver Community College Court Interpreting Certificate Program which is a nine-month part-time study and 210 classroom hours plus home study, assignment and practicum. Those students must first complete the Community Services Interpreting Program before they can enter the Court Interpreting Program. The Community Services Interpreting Program is the certificate that Detective Khosa holds.
- [21] Knowledge of legal proceedings and legal terminology is also important for a court interpreter to accurately relay to the individual for whom the translation is being provided a full understanding of what is occurring.
- [21] Justice Gropper drew a distinction between simultaneous translation and interpretation. She found at para. 22 that Holmes J. in Sanghera did not distinguish between interpretation and translation. At paras. 26-27 she pointed out that the detective was not being qualified as a court interpreter and that he was not required to have the certification required of a court interpreter. She said his certification was sufficient, along with his experience and education, to perform translations:
- [27] The test in Mohan does not require an expert to meet the test of independent objective indicia of competence. The test is that the evidence must be given by a witness who is shown to have acquired special or particular knowledge through study and experience in respect of the matters in which he undertakes to testify. I consider that Detective Khosa's experience and study are sufficient to qualify him as an expert in the translation from Punjabi to English and from English to Punjabi orally and in writing.
- [22] In Bidesi, Justice Butler reached a similar conclusion. It would appear Justice Butler did not have the benefit of Gropper J.'s reasoning in Chan, as he did not refer to Chan. Justice Butler concluded at para. 21 that he "need not follow Sanghera" as it was distinguishable. He set out a number of what he found to be distinguishing features in the case before him. In particular, he referred to the following at paras. 21(3) and (4):
3. In Sanghera, Det. Cst. Sangha was offered as a witness to confirm the preparation of a transcript which had been translated by another unnamed person. In other words, he was not giving his own opinion as to the translation of Punjabi to English but was attempting to confirm the reliability of a translation made by someone else. It is difficult to understand how the evidence of Det. Cst. Sangha could have been accepted. The translation which the court in Sanghera was being asked to accept was made by someone other than the witness before the court. The opinion which was being offered to the court by the police officer was not his own opinion, and there was no evidence before the court as to the qualifications of the unnamed person. By contrast, the translation which the Crown seeks to admit in evidence in this case was performed by Cst. Cieslar.

4. In Sanghera, Det. Cst. Sangha's task was to listen to the verbal exchanges and confirm for the court that a prior translation of the conversation was accurate. In other words, what he was purporting to do included elements of both interpretation and translation. The decision recognizes the duality of the witness's task. Indeed, Holmes J. states that her decision concerns the "interpretation and translation of verbal exchanges". This situation arose because, as I have noted, Det. Cst. Sangha did not perform the translation set out in the transcript. Instead, he was asked to interpret the conversation as he was in the witness stand, and then confirm the accuracy of the translation in the transcript. The court expressed concern that the translation of verbal exchanges demands more than language proficiency. As a result, the court rested its decision in part on the fact that a qualified interpreter would be required to convey "as accurately as possible the tone, tenor, and nuance of the original".

Contrary to the situation in Sanghera, Cst. Cieslar was not being asked to interpret language in the immediate way that a court interpreter must do. The element of simultaneous interpretation of the taped conversation was removed from the process because the translation had been performed by Cst. Cieslar at her leisure outside of the courtroom and reduced to the transcript. In these circumstances there is not the same need for a qualified interpreter. The task performed by Cst. Cieslar was much more akin to translation. While the intent of her task was to produce a transcript that is accurate and conveys the correct meaning, there is less justification in comparing her qualifications against those of a certified court interpreter.

[23] I find these paragraphs to be very similar to the facts in the case at bar.

[24] I accept the reasoning as set out in Chan and Bidesi. Given the weight of authority, coupled with Mr. Do's qualifications and the manner in which he approached his task, that is to ensure the accuracy of the transcription, and by his lack of a vested interest in the outcome of the investigation, I conclude he is qualified to give opinion evidence regarding the translations of the Vietnamese to the English portions of the recorded conversations, and any text messages between December 15, 2012, and May 27, 2013, which I understand to be the relevant dates.

"Greyell J."

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