

CANADA / JUDGMENT

R. v. Oliynyk, Lepage and Ferris

2006 BCSC 85

COURT

Supreme Court of British Columbia

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Oliynyk, Lepage and Ferris,

2006 BCSC 85

Date: 20060117

Docket: X065537

Registry: New Westminster

Between:

Regina

And

David James Oliynyk, Joseph Elwood Roger Lepage

and Lloyd Allan Ferris

Before: The Honourable Madam Justice MacKenzie

Reasons for Judgment

Language of the Instructions to the Jury

Counsel for the Crown

L. LeClair, N. Namazi

Counsel for the Defendant, Oliynyk

J.W. Conroy, Q.C.

Counsel for the Defendant, Lepage

P. Benning

Counsel for the Defendant, Ferris

D. Silverman

Date and Place of Trial/Hearing:

October 14, 2005

New Westminster, B.C.

- [1] The three accused are jointly charged with conspiracy to import and to traffic in cocaine. The accused Lepage originally elected under s. 530 of the Criminal Code to be tried by a judge and jury that spoke French. The accused Oliynyk and Ferris and their lawyers are unilingual anglophones, while Mr. Benning speaks both official languages of Canada. The native language of Mr. Benning's client, Mr. Lepage, is French. One of the three Crown counsel is bilingual.
- [2] Mr. Lepage speaks English. He resorts to an interpreter as required, but does not need a continuous interpretation from English to French. All the approximately 30 witnesses who will be called by the Crown speak only English. Approximately 60 interceptions of private communications will be tendered in evidence. They are all in English including the conversations alleged to be those of Mr. Lepage.
- [3] With the consent of all counsel, the voir dire was entirely in English, but Mr. Benning preserved the right of Mr. Lepage to seek to have his trial in French. Finally, the three accused opted for a bilingual trial pursuant to s. 530(5) of the Criminal Code. Mr. Lepage does not ask that all the evidence, oral and documentary, be translated into French. In any event, ss. 530.1(e) and (f) do not apply to a bilingual trial: *Regina v. Schneider* (2004), 188 (3d) 137 (N.S.C.A.)
- [4] The trial will be bilingual in the sense that if Mr. Lepage decides to testify, he will testify in French. Furthermore, Mr. Benning will have the choice of addressing the jury and presenting his arguments in French. We have a bilingual Crown counsel and I am able to preside at this trial as a judge who speaks both official languages of Canada. The only unresolved question concerns the language of my charge to the jury.
- [5] The issue is whether, as Mr. Benning maintains, my final instructions to the jury must be entirely and only in French in order to respect the language rights of Mr. Lepage. Mr. Conroy and Mr. Silverman, on behalf of Mr. Oliynyk and Mr. Ferris, ask that the charge be entirely in English. They rely on the language rights of their own anglophone clients under s. 530.

The Position of Mr. Benning

- [6] Mr. Benning relies on a principle articulated by Mr. Justice Bastarache, for the majority, in *R. v. Beaulac*, [1999] 1 S.C.C. 768, by which he interpreted the expression, "the best interests of justice", as recognizing that language rights are totally distinct from trial fairness. Mr. Justice Bastarache said that trial fairness is not a consideration at this stage, and is certainly not a criterion that once satisfied, permits depriving the accused of his language rights as conferred by s. 530 (para. 41).
- [7] I observe that in *Beaulac*, it was not a question of a bilingual trial and the circumstances were different from those here. In *Beaulac*, there was only one francophone accused who elected a trial before a judge and jury who spoke French, pursuant to s. 530 of the Criminal Code.
- [8] Mr. Benning says there is no jurisprudence that directly supports his position that I must give the entire final charge to the jury in French in the circumstances of this case. However, he submits that the following cases are relevant:
- a) *R. v. Perras*, [1998], A.J. No. 2856 (Q.S.C.)
 - b) *R. v. Potvin* (2004), 186 C.C.C. (3d) 285 (Ont. C.A.);
 - c) *R. v. Forsey* (1994), 85 C.C.C. (3d) 354 (Q.S.C.)
 - d) *R. v. Sarrazin* (2005), 195 C.C.C. (3d) 257 (Ont. C.A.).
- [9] Mr. Benning argues that the principles articulated in *Perras* must guide my decision. He asks me not to "cut the baby in two" and says it would not be fair to have the jury instructions half in English and half in French. He submits this would prejudice all the accused. Mr. Benning argues that the appropriate procedure is not to translate my instructions. Instead, what is required are instructions that correctly explain the law. Mr. Benning says he has confidence in my knowledge of the law. For him, it is not a question of giving instructions that are identical in both languages as there is no precise equivalent in both English and French. Consequently, the instructions do not need to be identical in both languages. Mr. Benning stresses that Mr. Lepage has the right to understand all my instructions to the jury without the filter or wall of an interpreter.

The Position of the Crown

- [10] The Crown submits the issue is a matter of the exercise of my judicial discretion because there are no rules on the subject.
- [11] The Crown suggests a compromise that it says is fair and equitable; it is a matter, in the charge, of reviewing in the English language all the evidence given in English, and reviewing in the French language all the evidence given in French. Also, I could give other parts of the charge to the jury in both languages, but not repeat the same thing in each language. The theory of Mr. Lepage could be summarized in French because Mr. Benning intends to

present his argument to the jury in French. In summary, everything depends on the language in which the evidence or the arguments will be heard by the jury, and on the exercise of my discretion as trial judge. It is necessary to have an interpreter continuously available to Mr. Lepage and to ensure an interpreter is available to the English-speaking lawyers. According to the Crown, it would be very dangerous to accede to the argument of the defence and to formulate the charge to the jury simultaneously in English and in French. Translation requires detailed attention to the nuances and subtleties of language. In a criminal conspiracy trial where the legal language is complicated, it would be very difficult to say exactly the same thing in English and in French. This could lead to error on the part of the trial judge and confusion on the part of the jury.

- [12] For example, at the end of Mr. Benning's previous submissions about the meaning of the word "pourra," in s. 185(1)(e) of the Criminal Code, the Crown pointed out that word could have three different meanings. Consequently, if the same instructions were given in French, and then in English, there would probably be many errors and ambiguities which would confuse the jury. Such a procedure would impose a heavy burden on both the jury and the judge in a trial involving two counts of conspiracy and anticipated to last twelve weeks,
- [13] I conclude the Crown's solution to the problem is both reasonable and compatible with the jurisprudence. The application of the defence is not reasonable.

Discussion

- [14] Mr. Benning has not referred me to any decision in which the court decided to give the final charge to the jury twice, that is, to give it entirely in both languages, in a trial similar to this one.
- [15] This trial is bilingual and will be heard by a bilingual jury. The process of choosing the jury is much more complicated in such a context. Indeed, each of the persons summoned to serve as a juror may be challenged for cause on the grounds that they do not speak the two official languages of Canada. If the order anticipates a judge and a jury who speak the two official languages, it is precisely, amongst other reasons, to avoid the scenario proposed by counsel for the defence. It is not necessary that the jury hear the instructions twice. Such a situation would doubtless create confusion and impose a heavy burden on the jury. The accused have an interpreter at their disposal which obviously constitutes a necessary component of a bilingual trial.
- [16] The decisions of Forsey and Potvin do not apply in the circumstances. Forsey was decided well before the three decisions to which the Crown has referred me. But there is also *R. v. Gauvin* (1995), 169 N.B.R. (2d) 161, which addresses matters relevant in this case (at paras. 32 to 26). And there are certain important comments to consider in the jurisprudence.
- [17] For example, in *Perras*, the court said the following (at paras. 8, 12, 13, 15, 16 and 17):

¶8 Dans le cas de Madame McWilliams, qui témoignera en anglais comme elle en a le droit, il s'agit d'un élément important de la preuve de la poursuite et l'évaluation de ce témoignage serait facilitée par l'audition en anglais devant un jury bilingue. En résumé, l'on présente que la crédibilité et la sincérité d'un témoin peuvent s'évaluer plus facilement par un tribunal en mesure de comprendre la langue parlée du témoin sans passer par l'interprète.

¶12 Le législateur n'a pas énoncé de circonstances particulières d'octroi d'un procès devant un jury bilingue et laisse ainsi le soin aux juges d'exercer leur discrétion judiciaire pour accorder une telle demande.

¶13 Les principales décisions rendues par les tribunaux visent de cas où plusieurs personnes sont accusées conjointement et qu'elles demandent à être jugées dans une langue officielle différente. Bien souvent dans ces affaires, les juges sont confrontés à une analyse à deux volets, soit l'intérêt de la justice à ce que l'on procède conjointement, et l'intérêt d'un accusé à subir son procès dans la langue officielle où il est le plus en mesure de comprendre la preuve.

¶15 Dans une autre affaire semblable, une collègue de cette Cour, l'honorable Claire B. Joncas, analysait une demande de la poursuite pour que le procès se déroule devant un jury de langue française. Sur les cinq accusés, un accusé était de langue française et les quatre autres, d'origine espagnole, s'exprimaient et comprenaient mieux l'anglais que le français. Sur les vingt-cinq témoins présentés par la poursuite, vingt-deux devaient témoigner en français. Reprenant les principes reconnus qu'en matière de complot où il s'agit d'une entreprise commune, le procès conjoint est la règle, l'honorable Joncas concluait qu'il y avait lieu d'ordonner que le procès soit tenu devant un jury bilingue et elle ajoutait, et je cite:

"Furthermore, but this is not a major factor, a bilingual jury would be most apt to weigh the evidence as given by the witnesses both for the Crown and the defence in the two official languages of Canada, if they choose to testify in either language."

¶16 Également, dans *In the matter of the Constitutional Challenge against Section 530.1 e) of the Criminal Code* [Voir Note 3 ci-dessous], l'honorable juge Greenberg avait étudié la possibilité de poursuivre le procès devant un jury bilingue, le jury n'ayant pas encore été choisi au moment où la question constitutionnelle fut soulevée. Bien qu'il n'ait finalement pas rendu d'ordonnance à cet effet, il a énoncé certains favorisant l'octroi d'une telle demande.

Il mentionne:

¶17 Firstly, it would permit all witnesses who testify in French or English to be heard directly by the Court in the language of each of them, rather than by consecutive translation, which, I believe would be preferable to simultaneous translation with regard to testimony.

I agree with the decision of Judge Côté that a bilingual jury would be in a better position to evaluate the credibility of a witness by analysing his testimony without recourse to a translation by an interpreter. That is, in my view, a very important reason to choose a bilingual jury in this case. A bilingual jury is in a better position to evaluate the credibility of testimony in the language in which it was given, without recourse to an interpreter.

[18] In the case of Sarrazin, the Court of Appeal of Ontario underscored several important points. The first concerns an argument raised in para. 38: "The appellants argue that such a trial deprives them of their absolute and substantive right to be tried in the official language of their choice. It is the first time this issue has come directly before this court." The following procedure was used at trial and is described at para. 41:

He conducted that trial in the bilingual fashion described above. The Crown opened to the jury in French, but made its closing address in English. The trial judge communicated with English-speaking counsel in English and with French-speaking counsel in French. He alternated between the two languages in his communications with and instructions to the jury. Counsel for Mr. Sarrazin and Mr. Cetoute conducted the trial, examined and cross-examined witnesses, and addressed the jury, in English. Counsel for Mr. Jean did so in French. Simultaneous translation from one language to the other was available to everyone (except the judge and jury). Nine witnesses testified in French and 29 in English, and were examined in the language of choice by counsel.

The circumstances in Sarrazin were similar to this case. Indeed, the accused there were jointly charged and the characteristics of a bilingual trial were addressed. One point was made clear: the notion of a bilingual trial is not subject to a rigid definition.

[19] In the case of Sarrazin, three accused were charged with second degree murder. All the accused were francophone. Two of the accused requested a trial in English; the third sought a trial in French. The trial judge ordered a bilingual trial. In making this decision, the judge took into consideration on the one hand, the fact that the three accused were charged with having participated in a common enterprise of murder, and on the other hand, the well-settled principle that those who are accused of having conspired to commit a criminal act usually must be tried together (Sarrazin, para. 39). On appeal, the appellants argued that the bilingual trial denied them their substantive and absolute right to be judged in the official language of their choice (Sarrazin at para. 38). Mr. Justice Blair discussed the meaning of the term, "bilingual trial" and said (at para. 40):

when I use the term "bilingual trial" in these reasons, I use it to describe a trial before a judge and jury who speak both official languages of Canada but in which both English and French are used interchangeably as the working languages, depending upon who is speaking and in what context, and interpretation and translation are available if needed. I think this meaning accords more with what is generally understood by that term in daily practice: the triers and prosecutors are bilingual, but the working language of others may be either official language, and translation/interpretation services are provided, should they be required.

- [20] Mr. Justice Blair concluded that considering the circumstances of the case before the trial judge, he had exercised his discretion correctly in ordering such a trial.
- [21] Mr. Justice Blair also discussed the effect of ss. 530 and 530.1 of the Criminal Code as following the principles in Beaulac (Sarrazin, at paras. 44 to 46). He then said the following (at paras. 52-55):
- [52] Since sections 530 and 530.1 provide the statutory framework for the linguistic rights of an accused at trial, Parliament must have been directing its mind to something relating to the trial process. What it intended to provide for, in my opinion - where circumstances warrant - is a trial process where the judge or judge and jury are bilingual (s. 530) and in which the working language of the trial is both French and English, depending upon who is speaking (s. 530.1(a)-(e)), with interpretation and translation services available to be utilised where needed (s. 530.1(f)-(h)).
- [53] Two decisions at the trial level provide some useful insight into what Parliament had in mind in providing for a trial in both official languages. In *R. v. Gauvin*, supra, Deschênes J. (as he then was) canvassed various factors underlying the rationale behind s. 530. Gillese J. (as she then was) did the same thing in *R. v. Le*, [2000] O.J. No. 4218 (Sup. Ct.). The following may be gleaned from those decisions:
- a) A bilingual judge and jury permits witnesses to testify in the official language of their choice but to be understood without the filtering process of interpretation;
 - b) documents and exhibits can be understood by the triers in the language in which they come before the court;
 - c) the accused can retain counsel who speaks either English or French and who will have the right and ability to use either language for all purposes throughout the trial;
 - d) should the accused decide to testify, he or she can do so in either official language, and "tell [the] story directly without the wall of interpretation" (*Le*, para. 53);
 - e) the presiding judge speaks both official languages, thus recognizing the right of the accused to have the presiding judge speak the language of his or her choice;
 - f) the triers of fact are able to weigh the evidence as given by witnesses for both the Crown and the defence in the two official languages;
 - g) the need for translation of all exchanges between counsel and the judge - often lengthy throughout a trial, and frequently complex, rapid and difficult to decipher - is greatly diminished;
 - h) importantly, addresses to the jury can be given by counsel for the accused in the language of choice [See Note 6 below]; and,

i) there may be situations where several accused, whose official language is not the same, must be tried jointly for reasons that can't be avoided (Gauvin, at para. 28).

[54] These factors all buttress the view that Parliament intended to provide for more than simply bilingual triers with its addition of the phrase "if the circumstances warrant, [before a judge or judge and jury] who speak both official languages of Canada". The something more Parliament intended to provide was the option of a bilingual trial, in the sense outlined above.

[55] I note that, although the precise point here raised was not in issue, this Court has implied in at least two cases - one post-dating Beaulac - that a bilingual trial may be ordered in appropriate circumstances: see *R. v. Beaulieu*, [1995] O.J. No. 3093 (Lacourcière, Arbour and Labrosse JJ.A.), and *R. v. Potvin* (2004), 69 O.R. (3d) 641 at paras. 23-25 and 37 (Labrosse, Weiler and Charron JJ.A.). Moreover, Beaulac itself was a case in which a bilingual trial was ordered.

[22] Then Mr. Justice Blair addressed an essential question regarding the requirements articulated in Potvin (at para. 57):

Potvin makes it clear that the judge and prosecutor must not only speak and understand the official language chosen by the accused; they must use it: paras. 32-33. However, I do not read this as requiring the judge and prosecutor to use that language exclusively if circumstances warrant a bilingual trial, without severance, where multiple accused in a common enterprise or conspiracy case have elected to be tried in different official languages.

[23] The argument of Mr. Lepage is similar to that in Sarrazin except that here, all counsel have agreed to a bilingual trial. They did not in Sarrazin. However, each of the accused maintains that he must not be required to hear my charge, or any part of it, in the official language that is not his own. According to the accused, this type of bilingual trial implies that certain parts of the charge be in English and certain other parts in French; and proceeding in this way would prejudice them and violate their substantive right to a trial in the language of their choice. Thus, according to them, I must give my charge to the jury twice: once completely in French - and formulating specifically in French a review of all the elements of proof which are presented in English; and a second time completely in English. I disagree and adopt the reasoning in Sarrazin (at para. 61):

The linguistic rights provided by ss. 530 and 530.1 are important and fundamental rights in the context of the administration of justice and the preservation of minority linguistic and cultural rights. Like all rights, however - even Charter as opposed to statutory rights - they are not absolute. They must be balanced against other values and principles in society if the circumstances warrant such a balancing exercise. There is no principle of law that an accused's statutory language rights under ss. 530 and 530.1 trump severance considerations in all cases, in my view.

- [24] The court concluded (at para. 69) that ss. 530 and 530.1 of the Criminal Code allowed an order for a bilingual trial when the circumstances justify it, according to the framework of s. 530(5) of the Code. The Court of Appeal upheld the refusal of the trial judge to order separate trials. According to the Court, this refusal was justified in the exercise of the discretion of the trial judge, and the trial judge had exercised that discretion taking into account all the relevant factors - specifically linguistic rights.
- [25] The procedure followed by the trial judge in Sarrazin is described at para. 41 of the reasons of the Court of Appeal. We have already proceeded in that manner because counsel and I considered it appropriate in this case. In Sarrazin, the court approved that procedure to implement the bilingual aspect of the trial. To proceed in this way means there is no violation of the right of any of the accused to a trial in the official language of his choice. In Potvin, it was clearly established that the judge and prosecutor must not only speak and understand the official language chosen by the accused; they must use it. However, the court in Sarrazin, did not read this as requiring the judge and prosecutor to use that language exclusively if circumstances warrant a bilingual trial, without severance, where multiple accused in a common enterprise or conspiracy case have elected to be tried in different official languages.
- [26] The circumstances in Gauvin were very similar to those in the present case. In Gauvin, the facts, (described at para. 16), were the following:

À la suite de plusieurs conférences préparatoires au process, certains faits ont été portés à mon attention:

1. Le Ministère public est représenté par deux procureurs dont un est bilingue et l'autre unilingue Anglophone. Il se peut que les deux procureurs de la couronne soient appelés à jouer un rôle important lors du process qui pourrait durer deux mois.
2. Les quatre accusés sont représentés par trios avocats bilingues et un unilingue Anglophone.
3. Plus de deux cents témoins pourraient être convoqués dont la majorité sont de langue anglaise.
4. Des centaines de documents seront déposés en preuve. Un nombre considérable de ces documents sont rédigés dans la langue anglaise.
5. Des services d'interprétation simultanée et consécutive seront disponibles durant le procès.

Deschênes J. decided in those circumstances that the court was justified in ordering that the accused be tried before a judge and jury who spoke the two official languages of Canada (in this case, I have already made such an order). I also note that there was in this case a challenge for cause on the grounds of the linguistic competence of a person in speaking the two official languages of Canada.

- [27] The Crown underscored the important feature of this case that much of the evidence consists of intercepted conversations of the three accused which are all in English. The Crown says words were carefully chosen to conceal their real meaning and to conceal the motivation of the speakers. It is for the jury to analyze and weigh this important evidence, and to evaluate the nuances and subtleties of language that can change the meaning of the words spoken.
- [28] Consequently, it is important, to have a fair and equitable trial, that the jury evaluate the electronic interceptions in the language in which they are spoken. This requirement is as important for the Crown as for the three accused.
- [29] The application made by Mr. Benning is not reasonable in this case. Fundamentally, the goal of the administration of justice in criminal matters is to ensure as far as possible a fair and equitable trial for each of the accused. Here, the trial is bilingual. In the context of such a trial, there must be a balance between the linguistic rights of the three accused and the interests of the administration of justice.
- [30] As the trial judge, I must recognize the important linguistic rights of Mr. Lepage, and those of the two other accused and try to avoid errors of law.
- [31] The Crown suggests that the testimony of the anglophone witnesses be given in English, and that the testimony of any francophone witnesses - and there will be very few, if any - given in French. Mr. Benning would have the choice of addressing me or the jury in French or English.
- [32] The Crown also suggests that my final instructions be in English where they concern the testimony given in English, and in French where they concern testimony given in French. My instructions on the law could be given in both languages, but without repeating the same thing in both languages. I would have the discretion to address the jury in either language. I agree with the suggestion of the Crown. It is consistent with the manner in which the trial judge in Sarrazin conducted that trial. I conclude that the procedure suggested by the Crown is logical and reasonable.
- [33] In conclusion, I dismiss the applications of the accused and observe again that a fair and equitable trial is not necessarily a perfect trial: *R. v. Harrar*, [1995] 3 S.C.R. 562.

"A.W. MacKenzie, J."

The Honourable Madam Justice A.W. MacKenzie

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