



The Law Officers of the Crown v Daniel de Kock
Royal Court
23rd May 2016

JUDGMENT
22/2016

Decision on issue of providing an interpreter for trial

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between: **THE LAW OFFICERS OF THE CROWN** **Prosecution**

-and-

DANIEL DE KOCK **Defendant**

THE DEPUTY BAILIFF'S DECISION ON ISSUE OF
INTERPRETER

Hearing date: 8 March 2016

Judgment handed down: 23 May 2016

Before: Richard James McMahon, Esq., Deputy Bailiff, sitting alone

Advocate for the Prosecution: Advocate R J Calderwood

Advocate for the Defendant: Advocate C M Fooks

VOIR DIRE

1. A request has recently been made on behalf of the Defendant in this matter, Daniel de Kock, that an interpreter in the language of his native tongue, Afrikaans, be provided for him for the trial that is listed to commence next Tuesday.
2. When the request was made, I turned to paragraph A7.69 in *Blackstone's Criminal Practice 2016* to see what guidance there was on the law relating to the right to an interpreter and translation services. As a matter of Guernsey law, the starting point is the Human Rights

(Bailiwick of Guernsey) Law, 2000, which gives domestic effect to, in particular, Article 6, paragraph (3)(e) of the European Convention on Human Rights. That subparagraph provides-

“Everyone charged with a criminal offence has the following minimum rights:

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in Court.”

The principal language used in this Court is English. The question therefore is whether or not Mr. de Kock has surmounted the hurdle of establishing for the purposes of Article 6(3)(e) that he cannot understand or speak the language of English.

3. The commentary continues that it is the Court rather than Counsel who bear the responsibility for ensuring that a Defendant who needs an interpreter gets appropriate assistance. For that reason, I have this afternoon conducted a short inquiry in order to consider whether the threshold has been passed. I heard first briefly from Camilla Le Maitre, who was a colleague of Mr. de Kock, but more importantly I heard from Mr. de Kock himself.
4. Ever since the request was first made a few days ago, I have been giving careful and anxious thought to whether the request should be granted. It has been made very late in the day. These proceedings have been ongoing since 2014. Mr. de Kock was unrepresented by Counsel for a period of time in 2015 and attended Court and addressed me in English without, it seemed, any difficulty. But the lateness of the request is not in itself a reason for rejecting it; that is clear from the case of Cuscani v. UK (2003) 36 EHRR 11.
5. In the decision of the European Court of Human Rights, reference was made to the traditional approach in England and Wales in the case Lee Kun (1916) 11 Cr App R 293, where the Chief Justice, Lord Reading, in the Court of Appeal, set out the principle that is stated at paragraph 32 of the judgment in Cuscani and I quote-

“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 the opinion that by reason 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 accused’s interests which has distinguished the administration of justice in our criminal courts, and therefore it is better to adopt it.”

6. That statement of principle was confirmed more recently by the Judicial Committee of the Privy Council, not in a Guernsey case but in a case from somewhere else, Kunnath v. The State where Lord Jauncey said-

“Their Lordships have no doubt that the course advocated by Lord Reading CJ in Rex v. Lee Kun is a highly desirable one and should be followed wherever a foreign defendant, not fully conversant with the language of the proceedings, is represented by counsel.”

At paragraph 39 of that judgment, the Court said-

“... the ultimate guardian of the fairness of the proceedings was the trial judge who had been clearly apprised of the real difficulties which the absence of interpretation might create for the applicant.”

It further observes that the domestic courts have already taken the view that in circumstances such as those in the instant case judges are required to treat an accused's interests with scrupulous care. So the lateness of the application does not obviate the need for this Court to satisfy itself as to whether there could be a violation of Mr. de Kock's convention right in Article 6(3)(e) by refusing his request for interpretative assistance.

7. A more wide-ranging analysis of the law as it applied in Canada was given in a case of *Tran*, which is also referred to in that paragraph of *Blackstone's*, albeit that the correct *Tran* is from 1994 and is found in the second volume of the Supreme Court Reports at page 951. The provision in that case related to Section 14 of the Canadian Charter of Rights and Freedoms, which provides-

"A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter."

In other words, the right is broadly similar to the right set out in Article 6(3)(e) of the European Convention on Human Rights.

8. I have found the exposition of principle set out in the judgment of the Supreme Court in that case, delivered by the Chief Justice, Laymer, to be of particular assistance. It starts with reference to the two cases of *Lee Kun* and *Kunnath*, to which I have just referred, and explains that the constitutional right – and this is at page 977 – touches on the very integrity of the administration of criminal justice. It was about linguistic understanding, but caution is urged at page 978 that this principle should not be elevated to the point where those with difficulty communicating in or comprehending the language of the proceedings, be it in English or French, are given, or seem to be given, unfair advantages over those who are fluent in the Court's language. Ultimately the purpose of the right to interpreter assistance is to create a level and fair playing field not to provide some individuals with more rights than others.
9. The framework is then described at page 979 in this way-

"First, it must be clear that the accused was actually in need of interpreter assistance - i.e., that he or she did not understand or speak the language being used in court. Although the ultimate burden of proof in establishing the required level of need rests, of course, on the party asserting that he or she has suffered a violation of his or her s. 14 rights, it is important to appreciate that the right to interpreter assistance is not one which must necessarily have been invoked or asserted in order to be enjoyed. As part of their control over their own proceedings, courts have an independent responsibility to ensure that those who are not conversant in the language being used in Court understand and are understood. Accordingly, unless the issue of interpretation is only being raised for the first time on appeal and/or there is some question as to whether the right is being asserted in bad faith, establishing "need" will not normally be an onerous step."

It is suggested in that case that the courts should be generous and open-minded when assessing an accused's need for an interpreter and this happens in two situations: the first is where it becomes apparent to the Judge that an accused is, for language reasons, having difficulty in expressing him or herself, or understanding the proceedings, and that the assistance of an interpreter would be helpful; or, secondly, where an accused or Counsel for the accused requests the services of an interpreter, which is the case here, and that the Judge is of the opinion that the request is justified. This case further suggested that the safer course would always be to request an interpreter when one is required.

10. The principle that I extract from these authorities, and also my reading of Article 6(3)(e) of the European Convention, is that there needs to be an assessment of understanding and capability of expressing oneself in English. It was for that reason that I made the enquiry that I did of Mr. de Kock this afternoon by asking him in English about his life history.
11. I am satisfied from what he said that Afrikaans is his first language, he was born into a family speaking Afrikaans and that was the language of home. He was schooled in South Africa in Afrikaans but, in what we would describe as his secondary school education, he was required to take a second language. In his case, that was English and, as part of his Matric at 18, he was examined in English. He attended university in South Africa where some of the courses were taught in Afrikaans, some in English. His degree was in company administration.
12. He worked in South Africa until about 2000; he was in the finance sector. He used Afrikaans, certainly initially, for 80% of his time. An opportunity arose for him to undertake a further degree (an MBA), which was delivered by personnel from the University of Hull in England, flying in to teach in South Africa. This was in the late 1990s. Those studies were conducted in English. Mr. de Kock's wife then had an opportunity to teach in North Carolina. They left South Africa in part to take up that opportunity but also because of the uncertainties of the political situation at that time. The de Kocks had two children. They spoke Afrikaans at home. In the United States of America, Mr. de Kock studied for a doctorate. It took him roughly 5 years to complete his studies. He wrote a doctoral thesis. It involved, as doctoral theses inevitably do, a lot of research. That research involved reading English language sourced materials, some of which were of a technical nature. Before he was admitted to his doctoral degree, a viva voce was conducted with him in English. He undertook some contracting work in the United States. He and his family then returned to South Africa for 6 months, before they moved to Hartley Wintney in the South of England for Mr. de Kock to undertake employment with Barclay's Bank, during the course of which he was transferred to Guernsey, and has since switched to his employment with SG Hambros.
13. As it is put on his behalf both in his evidence and in Advocate Fooks' submissions, he thinks in Afrikaans. As Mr. de Kock put it, he recognised that there were shortcomings in his English language capability when he was interviewed by the police. He was asked a lot of questions. He felt that he was falling behind in his understanding. There are two examples in those interviews, although they relate to the same word, where Mr. de Kock needed some assistance as to what it was he was trying to say.
14. When he was asked how he has coped with following what had been happening before this Court, he acknowledged that he had been following these proceedings and that he had not really missed much, if anything. He also confirmed that, if given time for the mental translation required in thinking in Afrikaans (my words not his), he has no problem in understanding what has been asked of him. He uses his dictionary and his thesaurus a lot.
15. I am satisfied that the level of understanding of English and the ability to speak in English of Mr. de Kock is such that he does not require an interpreter for the trial. Mr. de Kock is an educated and articulate gentleman. He is probably bilingual. A native English speaker may have occasions where they do not understand everything being said to them and they have to pause, either for further explanation to be offered or alternatively to collect their thoughts sufficiently to express themselves as they wish. Because the right to an interpreter is part of an Accused's rights to a fair trial in Article 6 of the European Convention on Human Rights, it is this Court's duty to ensure that a fair trial is afforded to Mr. de Kock and indeed every Defendant who appears before it.
16. I am satisfied that the trial without the assistance of an Afrikaans to English interpreter will be capable of being run fairly, provided that everyone who asks Mr. de Kock questions (and, as is set out in Advocate Fooks' submissions, Mr. de Kock's main concern is that, should he give

evidence, that maybe where interpretive assistance is most required) acts appropriately. I am satisfied that the questions to be posed to him by Counsel and from the Bench can be dealt with in such a way, if necessary affording time for reflection, or re-putting them in a slightly different way if they are not fully understood, so that it will not push Mr. de Kock into a corner where he is unable to express himself as he wishes.

17. Having said that, I recognise that the Article 6 rights are those that have to be kept at the forefront of the Court's mind throughout the trial process, and if I reach the conclusion during the trial that Mr. de Kock's ability to understand and communicate in English was deteriorating to a level where a fair trial could only be afforded by him having an interpreter, then I have no hesitation in saying that I would stop the proceedings at that point until such time as an interpreter is available. That is the way that the authorities indicate the Court has to approach the matters: firstly, in response to a request, but only if the threshold of requirement is passed, and I am satisfied from the enquiry that I have undertaken that it is not; and, secondly, if circumstances arise during the course of the proceedings. So the request, for the moment at least, is denied for those reasons.