

REPUBLIC

V

Chen Jian Ping

Date of Hearing: 12 March 2016
Date of Submissions: 14 March 2016
Date of Judgment: 15 March 2016

*Mr. Livai Sovau of the Office of Director Public Prosecutions
for the Republic*

Mr. Vinci Clodumar for the defendant

Judgment

INTRODUCTION

1. The defendant is charged with making a false declaration contrary to section 243(4) (a) of the Customs Act 2014. He has challenged the admissibility of the cautioned interview conducted by the police and him on the 14 October 2015 at the Police station. A voir dire hearing was conducted. The onus is on the prosecution to prove that the cautioned statement was obtained voluntarily or fairly and the standard of proof is that of proof beyond reasonable doubt.
2. The grounds for challenging the admissibility of the cautioned statement as submitted to the court by Mr. Clodumar are that:
 - a) The defendant was not informed of his arrest and the reason for his arrest at the point of arrest at the Nauru International Airport.
 - b) The defendant was not informed of his right to legal representation at or prior to the interview
 - c) The defendant was not cautioned properly of his right to remain silent.
3. The defendant was arrested by the police at the customs office and escorted to the police station by Sergeant Iyo

Adams and Senior Constable Goodman Gioura. At the police station with the assistance of Mr. Kevin Chin who acted as translator for the police, Sergeant Iyo gave evidence that he explained to the defendant the allegations against him and his legal rights.

4. A cautioned interview was conducted. Present at the interview were Sergeant Dan Botelanga the witnessing officer, Sergeant Iyo Adam the interviewing/recording officer who conducted the interview, Mr. Kevin Chin who translated for the police and the defendant.
5. The interview was conducted by way of Sergeant Iyo Adam asking the questions in English and Mr. Kevin Chin translating the questions to the defendant in Chinese and translating the defendant's answers given in Chinese back to Sergeant Iyo Adams in English.
6. The prosecution called two witnesses Sergeant Dan Botelanga who witnessed the interview and Sergeant Iyo Adams who conducted the interview and kept records of the interview. Mr. Kevin Chin who interpreted at the interview was not called by the prosecution to give evidence.

WHETHER OR NOT THE INTERPRETER SHOULD HAVE BEEN CALLED BY THE PROSECUTION TO GIVE EVIDENCE.

7. This point has not been raised by the prosecution or defence during the submissions. But it is the duty of the court to address issues that arise on the evidence and make a ruling on such issues even if not addressed by counsels. I do so in this case.
8. In the Book Criminal Law in Nauru (Part one) written by Gibson on the topic on evidence, the learned author said

"In Circumstances in which an 'interpreter' is used to ask questions and record answers, only the 'interpreter' is permitted to give such evidence" citing the case of R v Attard (1959).¹ The learned author further said "Therefore, an 'interpreter should adopt the notes to refresh his/her memory in court."²
9. In the case of *R v Attard*³,

¹ Criminal Law in Nauru, 9 April 2008

² Criminal Law in Nauru, 9 April 2008

³ *R v Attard* (1959) 43 CrAppR90 at page 92 paragraph 2

"The prisoner does not know, understand or speak English at all. There were present at an interview, at the first stage, the prisoner and the detective-superintendent. At a further stage the detective-superintendent thought it right to get the services of an interpreter in order that there might be no mistake with regard to what was said. Thereafter the interview went on in this way: a question was put by the superintendent in English that was then translated into Maltese, and that having been done, the prisoner answered the question in Maltese. The answer was then translated into English by the interpreter, and then the superintendent having put the question in English and having got through the interpreter the answer in English, made note of what was said to him by the interpreter. There may have also been in the course of the interview statements made by the prisoner in Maltese which were not the direct result of questions put to him through the interpreter by the superintendent, and those statements, too, were translated in English by the interpreter, and the superintendent, having heard them, made a note of them"⁴

10. The defence in the Attard case submitted that:

"the evidence of the superintendent is inadmissible as being hearsay. He spoke only English and the prisoner Maltese only, and the only person who spoke and understood both languages was the interpreter. The prisoner understood neither the questions put to the interpreter in neither English nor the subsequent translation into English of his own answers. Consequently, these questions and answers were not statements made in the presence and hearing of the prisoner. The only valid witness with regard to the interview is the interpreter."⁵

11. The defence in the Attard Case further submitted that:

"When there is an interview of this kind, the best person, or nearest person to the prisoner, is the interpreter, and the interpreter,...can be called to say: "I heard the detective-superintendent put the question. I then translated that question. I said this to the prisoner and the prisoner said this to me"; the interpreter being asked as a sort of intermediary between

⁴ R v Attard (1959) 43 CrAppR90 at page 91 paragraph 2

⁵ R v Attard (1959) 43 CrAppR90

the non-English-speaking prisoner and the English speaking detective-superintendent."⁶

12. The prosecution in the Attard Case

*"Pointed out that this point has not been taken before, and that the general method of taking of statements when an interpreter is necessary has been followed in this case so it is a mistake for the defence to say that this practice offends against the rules of evidence."*⁷

13. The prosecution in the Attard Case further submitted that

*"The interpreter... is not in the nature of a police officer, but a mere cypher who hears translations and then gives them back in the English language"*⁸

14. Gorman J held:

*"In my opinion, in all the circumstances here the submission made by the defence is a correct one and the evidence ought not to be given through the mouth of the detective-superintendent in the witness box."*⁹

The court ruled that the evidence of the police officer in relation to the interview was inadmissible.¹⁰

15. The court held that the submission was correct and the evidence of the police officer in relation to the interview was inadmissible.¹¹ Following the decision of Gorman J in the Attard Case the following note was issued:

NOTE

"As a result of this decision, Home Office, at the suggestion of the Director of Public Prosecutions, has sent out a circular letter to Chief Officers of Police stating that "it will be necessary in similar cases in future to ensure that the interpreter is available to give evidence to give evidence as to oral statements made by the accused, as is already done in the case of written statements. It will be desirable that, whenever practicable, the interpreter should be asked to initial

⁶ R v Attard (1959) 43 CrAppR90 at page 92-93

⁷ R v Attard (1959) 43 CrAppR90 at page 93 paragraph 1

⁸ R v Attard (1959) 43 CrAppR90 at page 93 paragraph 1

⁹ R v Attard (1959) 43 CrAppR90 at page 93 paragraph 2

¹⁰ R v Attard (1959) 43 CrAppR90 at page 90 paragraph 3

¹¹ R v Attard (1959) 43 CrAppR90 at page 90 paragraph page 1 paragraph 3.

*the record of interview made in the notebook of the police officer conducting the interview, so that it can be used by the interpreter to refresh his memory when giving evidence."*¹²


16. In Benjamin v Republic,¹³ Thompson Chief Justice observed:

*"Obviously, when a police officer has to record a statement made in a language of which he does not have adequate knowledge, he must utilise the services of an interpreter to translate the statement into a language that he does have adequate knowledge. I would respectfully agree with the High Court of Australia that in such a case, subject to it being proved that the interpretation was properly made, the statement would not be inadmissible as hearsay and would adequately comply with the judge's rules."*¹⁴

16. The decision in the Attard case and Benjamin v Republic it is clear that whenever evidence is to be given about statements taken by police with the assistance of an interpreter there is clear onus on the prosecution to call the interpreter. In this case Mr. Clodumar has taken issues that the caution was inadmissible because the defendant was not informed of the reason for his arrest, that the caution was not properly administered and that the defendant was not informed of his right to legal representation at the interview.

17. The onus of proving that none of the defendant's right was infringed is on the prosecution. The prosecution's failure to call the interpreter Mr. Kevin Chin would render the evidence of the two police officers, Sergeant Dan Botelanga and Sergeant Iyo Adam inadmissible hearsay because the two officers do not speak the language of the defendant. In the circumstances I rule that the prosecution has failed to discharge the burden imposed on them which is that of beyond reasonable doubt. For this reason I rule that the caution statement dated 14 October 2015 is not admissible.

Dated this 15 day of March 2016


Emma Garo



¹² R v Attard (1959) 43 CrAppR90 at page 93

¹³ Benjamin v Republic [1975]NRSC 9;[1969-1982]NLR(D)44(25 November 1975)

¹⁴ Benjamin v Republic [1975]NRSC 9;[1969-1982]NLR(D)44(25 November 1975) at page 3 paragraph 1

Resident Magistrate