S/1

NO. 154

R. -v- SARI KOPA (HAGEN). 12/2/60.

REASONS FOR JUDGMENT.

This was a case in which the accused was charged first with unlawfully attempting to kill and secondly with unlawful wounding. Mr. O'Connell appeared for the Crown and Mr. Tannetti, District Officer, for the Defence. During the course of the hearing Mr. Tannetti raised an objection to evidence being given by Mr. Duffy, a Patrol Officer at Tapini, as to a conversation between himself and the accused. The conversation took place through an interpreter who spoke in the local language of the accused which was not understood by Mr. Duffy. Mr. Duffy spoke to the interpreter, LALAN, in Pidgin which was not understood by the accused.

LALAN, the interpreter, is not an educated man and he simply applied his mind to the task of interpreting without either forming any precise impression of what was being said or any real understanding of the significance of the conversation. Consequently if he were the only proper witness to the conversation there would be grave danger of inaccuracy which would place one side or the other in jeopardy. This of course is a common situation in the Territory where interpreters have very little understanding of the conversations which take place through them and very little capacity to give a reliable account of them from memory. Moreover since most of them are illiterate or nearly so, they cannot assist their memories by taking notes.

It is not at the present time practicable to employ interpreters of better educational standards simply because the finest use of the numerous languages and dialects in the Territory is for all practical purposes limited to natives.

In order to overcome this practical difficulty it has been the practice of this Court to allow the European officer who conducted the interview at which the conversation took place to give evidence of what was said between himself and the interpreter on condition that the interpreter (or if more than one interpreter was employed, that each interpreter) should be called as a witness to give evidence that he truly and faithfully interpreted everything that was said. If the

Defence (for it is usually the Defence which is concerned in this way) wishes to challenge the accuracy of the interpretation this is regarded as a matter for cross-examination and the European officer and the interpreters can be and frequently are cross-examined as to ambiguities or possible misunderstandings which can so easily take place in such circumstances.

The established practice of this Court is consistent with the second ruling of the Court of Criminal Appeal of Queensland reported in R. v. Lau Chi & Ors. (1948 42 Q.J.P.R.13). This ruling is to the effect that if an interpreter is called and swears that he faithfully repeated in one language to the police officer what the accused said to him in the other language, the evidence of the police officer as to the statements of the accused would be admissible.

The other ground upon which the Court of Criminal Appeal in Lau Chi's case admitted the police officer's evidence, that is that the accused should be taken to have accepted the interpreter as his agent, can scarcely have any fair application in the Territory to cases involving natives who are interviewed by police officers using official interpreters. It would take positive evidence to satisfy the Court that the native accused when approached by an officer with an interpreter had any idea that he could raise any objection or that he had any choice on the question of interpretation, so that it would be fair to hold him bound by his apparent consent.

The difficulty in the present case is that there are some other authorities, including the recent English case of R. v. Attard (1959 Cr.App.R.90) which have held that the evidence of the police officer in these circumstances would amount to evidence of what the interpreter had told him that the accused had said to him and was therefore hearsay evidence and inadmissible. This view was expressed also in R. v. Wong Ah Wong & Ors. (1957 S.R.(N.S.W.) 552). (See also R. v. Sando Khan 1901 18 W.N. (N.S.W.) 29).

With great respect to the learned Judges who have expressed the view that this kind of evidence is inadmissible, I find myself unable to reach the same conclusion.

Mr. O'Connell, for the Crown, submitted that although in argument in Attard's case the interpreter was referred to as "a mere cypher," it did not appear from any reported case that the Court had really considered the interpreter in his true role as a mere channel of communication between the police officer and the accused, who were the true parties to the conversation. Attard's case treats the police officer as a stranger who heard

only at second-hand a report of a communication which had travelled from the accused to the interpreter. Accused would be in a similar position in relation to what he heard through the interpreter. If the Court had considered the interpreter as a mere channel between the accused and the police officer, and if the interpreter's work was proved to have been faithfully and truly performed, it would have been clear that both the police officer and the accused were competent to give evidence of the whole conversation.

I think that a physical examination of the component parts of a conversation is of assistance in clarifying the points involved. For the purpose of a scientific investigation into communications or linguistics it is probable that a conversation would be taken as commencing in the minds of the persons taking part so that the "idea" which is sought to be expressed and communicated is an essential part of the communication process. However upon a legal analysis of a conversation I think it is clear that different considerations apply. Persons are normally held to be bound by what they say and what they hear and must take the responsibility for any defect which may exist in converting the ideas into words or the words back into ideas. Nevertheless the "parties" to a conversation are the persons whose ideas find expression and communication.

From a legal point of view a statement made for example over the telephone, would commence with audible words uttered by A in one place and would proceed through the conversion of the sound waves into electrical signals which are transmitted over the wires and then reconverted to magnetic signals and finally to audible sound waves which would be heard by B. The converse applies from B to A. Judicial notice is taken of the fact that the sounds converted through magnetic and electrical processes and back again into sounds are accurately reproduced at the other end, but if this were not so well understood and accepted it would be necessary for expert evidence to be called to prove the accuracy of each of these two stages of translation. Were it otherwise neither A nor B could give evidence of the telephone conversation for neither spoke in the presence or hearing of the other nor did either hear the sounds actually made by the other. The only way to prove the conversation would be to call a bystander from each end to say what was uttered in his hearing and then piece the two halves of the conversation together. This sort of evidence could scarcely ever be obtained in practice.

Similar considerations apply if a recording or other

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mechanical reproduction of speech is heard.

In my view the process of translation through interpreters, of words already uttered in a different language, is precisely analogous to the translation of speech over the telephone through magnetic and electrical signals, save that in the case of interpretation the Court will not take judicial notice of the accuracy of the mechanics involved. Expert evidence (normally that of the interpreter or interpreters) is therefore required to establish this point. Once the accuracy of the vehicle or channel of communication is established as a fact, I think that the best evidence as to what was said by the accused in the other language is given by the officer who heard and understood it in its translated version.

For like reasons I think that any witness who heard and understood any part of a conversation either directly or through any means of communication which appears to be or is proved to be accurate, may give evidence of the portion of the conversation which he heard, but at the end of the evidence the entire conversation including the fact of communication must have been proved. The interpreter must therefore be called but in my view he is not the only witness whose evidence of the conversation is admissible.

In the present case the position was carried one step further because the Patrol Officer who was acting in the capacity of a police officer at the time, conducted his part of the conversation in Pidgin but gave evidence of it in English. This did not affect the principles involved beyond requiring that the witness first qualify himself as an expert having the capacity to translate accurately between English and Pidgin and verifying the English version which he was giving as a precise and accurate translation of what was said to him and by him in Pidgin.

NOTE:

Reasons given orally at Tapini 12/1/60.
The above note supersedes that dated 21/1/60.

C.J.