30/97

SUPREME COURT OF VICTORIA

NGUYEN v THE COUNTY COURT of VICTORIA and EAST

Byrne J

6 May 1997

PROCEDURE – NATURAL JUSTICE – ACCUSED WITH INSUFFICIENT COMPREHENSION OF ENGLISH TO UNDERSTAND EVERYTHING SAID AT HEARING - NO INTERPRETER – REPRESENTED BY COUNSEL – ACCUSED GAVE EVIDENCE AND WAS CROSS-EXAMINED – WHETHER A NON-ENGLISH SPEAKER SHOULD HAVE AN INTERPRETER IN ALL CASES – WHETHER ACCUSED UNFAIRLY DISADVANTAGED.

1. There is no rule of law which requires as an element of natural justice or procedural fairness that a non-English speaker should in all cases have an interpreter to translate the proceedings. The question is whether the accused will be unfairly disadvantaged in some way.

2. Where a defendant – whose facility with English at the level of court debate was insufficient to understand all that was said – was represented by and had fully instructed counsel upon a breach of a CBO, gave evidence and was cross-examined, the court was not in error in proceeding to hear and determine the charge in the absence of an appropriate interpreter.

BYRNE J: [1] This proceeding commenced by originating motion filed on 29 April 1997 seeks orders in the nature of *certiorari* against the County Court of Victoria made on 17 March 1997. The order of the County Court produced before me is in the following terms:

> "THIS IS TO CERTIFY that at the County Court of Victoria held in Melbourne the said State on the 17TH day of MARCH 1997 QUOC PHU NGUYEN was in due form of law informed against tried and convicted for PRESENTMENT ZB516 & 517 ARMED ROBBERY (1 COUNT; COUNT 1) and the said QUOC PHU NGUYEN was thereupon ordered and adjudged by the said Court to be RE: BREACH OF COMMUNITY BASED ORDER ORDER THAT THE COMMUNITY BASED ORDER BE CANCELLED. TO BE SENTENCED TO A PERIOD OF IMPRISONMENT OF 2 YEARS 3 MONTHS. ORDER THAT HE SERVE A MINIMUM PERIOD OF 12 MONTHS IMPRISONMENT BEFORE BECOMING ELIGIBLE FOR PAROLE.
> Given under my hand this 2nd day of May 1997
> Registrar, County Court, in the State of Victoria and being the officer having the custody of the records of the said Court."

The Community Based Order had been imposed by the Chief Judge of the County Court on 18 October 1996 following a plea of guilty to one charge of armed robbery. In brief, the CBO ran for a period of 2 years and required the performance of 500 hours of unpaid **[2]** community work. There were other conditions relating to submission to supervision and to testing for alcohol and drug use during that period. On 28 February 1997 the supervisor, Rosemary East, laid an information against the plaintiff, Quoc Phu Nguyen, for breach of condition of the CBO pursuant to s47(1) of the *Sentencing Act* 1991. These breaches were a failure on two occasions to perform the unpaid community work, a failure to attend for supervision on four occasions, and a failure to attend the drug and alcohol monitoring program on one occasion.

The charge came on for hearing at the Sunshine Magistrates' Court as supervising court on 11 March 1997 and was remitted by it to the County Court pursuant to s47(2)(d). Mr Nguyen was referred to a Victoria Legal Aid solicitor, Mr Richard Revill, who interviewed him without an interpreter. When the matter came on before the Chief Judge on 17 March, Mr Nguyen was represented by counsel (but not the counsel who appeared before me) instructed by Mr Revill. Mr Nguyen had on that day seen counsel alone, and later with his [Nguyen's] father. When the matter was called on, counsel admitted to the Court the breaches of condition and permitted the informant's report to be placed before the Court without any formal proof or other evidence. It is clear from the exchange between counsel and the Court regarding the performance of Mr Nguyen's obligations under the CBO that counsel appeared to be fully instructed upon the alleged

breaches. The matter proceeded as a plea with counsel making assertions from the Bar table and handing up a number of exhibits. **[3]** Mr Nguyen himself gave evidence and was cross-examined. From a reading of the transcript he appears to have answered the questions responsively and with understanding. His Honour then made orders which I have set out above.

The application before me is one to set aside His Honour's order. As originally framed, the defendant was described simply as "The Queen". By consent, this was amended by substituting as defendants the County Court of Victoria, as the court in question, and Rosemary East as a person interested to oppose the claim. Counsel announced appearance only for Ms East, who was the informant on the breach of CBO charge. No process has been served on the County Court of Victoria. Having regard to the clear view I have formed as to the merits of this application, no useful purpose would be served by adjourning this matter to enable this step to be taken, especially as it is usual for the defendant court in these cases to take no active part in the proceeding.

I was troubled in the course of argument as to the propriety of this procedure, given the rights to appeal under the *Crimes Act* 1958 to the Court of Appeal and the practice of refusing prerogative relief when an alternative procedure was available. On reflection, I am satisfied that this does not pose an obstacle for the plaintiff, because the order which is the subject of attack is the determination that the plaintiff had committed an offence under s41(1). This is not a conviction on indictment or for a relevant summary offence as is required by the *Crimes Act* 1958 s567. It may be said that the penalty imposed by the Chief Judge on **[4]** 17 March was a sentence for the indictable offence of armed robbery which was amenable to appeal with leave, but it is not necessary for me to determine that question. I am encouraged to reach the conclusion that the prerogative procedure is available by the decision of the Court of Appeal in *Dung Chi Nguyen v DPP* (unreported 20 March 1996) on a similar application and where no mention is made of any inappropriateness of the procedure.

The originating motion sets out six grounds, of which the first and the last may be immediately put aside; the first because it is not a ground for prerogative relief, the last because it was not argued. The remaining grounds in essence depended upon the inability of Mr Nguyen to understand English sufficiently to enable him without an interpreter to participate in the proceedings. They were formulated as follows:

> "2. The plaintiff was denied natural justice and a miscarriage of justice occurred as a result of Victoria Legal Aid and the Crown failing to provide the plaintiff with the assistance of an interpreter before or during his trial on 17 March 1997 for allegedly breaching the Community Based Order imposed on 18 October 1996.
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> 3. As a result of the failure of Victoria Legal Aid and the Crown to provide the plaintiff with an interpreter the learned Chief Judge was led into error in that relevant facts were not brought to the learned Chief Judge's notice.
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> 4. By proceeding (in the absence of an appropriate interpreter) to hear and determine the charge against the plaintiff, the learned Chief Judge exceeded his jurisdiction.
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> 5. The learned Chief Judge was in error in deciding (if he did so decide) that it was open to him to proceed with the hearing and determination of the charge in the absence of an appropriate interpreter."

It should be immediately noted that no person, including counsel on behalf of Mr Nguyen, asserted to the **[5]** court that there was any difficulty arising out of his competence with language and, further, it should be noted that he was able and did give evidence without an interpreter. It was put that counsel's concession that the breaches of CBO had been committed was vitiated because counsel had no informed instructions to this effect. The short answer to that is that there is no evidence to this effect. Apart from a non-specific denial of the breach in his affidavit sworn 3 May 1997, paragraphs 6 and 11, the evidence is all to the contrary. It shows that Mr Nguyen's position was one of confessing and avoiding rather than traversing the allegations of breach. There is no suggestion that counsel had difficulty obtaining instructions or that there was any great problem of comprehension or expression when Mr Nguyen was interviewed by him on 17 March, by Mr Revill on 11 March, by the police on 24 August 1995 in relation to the armed robbery without an interpreter, interviewed and assessed for the plea by Dr Lester Walton in August 1996, or when he and his sister spoke to Ms East on 13 March 1997. In any event, he was at different times assisted by his sister and his father, each of whom, it is said, spoke better English than he.

I am mindful of the fact that his own level of English is described by Marie Therese Jensen as only sufficient to satisfy all survival needs and limited social needs, and not more. Nevertheless, this does not of itself mean that he was incapable of giving proper instructions to counsel in the non-threatening environment of chambers. I therefore reject a submission based upon some want of communication leading to an erroneous admission of **[6]** guilt by his counsel.

The second submission was predicated upon an insufficient comprehension of English to participate fully at the hearing before the Chief Judge. Again, any consideration of this contention must be prefaced by the observation that no complaint of this nature was ever made before the heavier than expected sentence was passed by his Honour. I was referred to cases which underline the importance of the informed participation of an accused person in the criminal process. I do not intend by anything I say to detract from the propositions which they assert. I accept that Mr Nguyen's facility with English at the level of court debate was insufficient for him to understand all that was said. Nevertheless, there is no rule of law which would require, as an element of natural justice or procedural fairness, that a non-English speaker should in all cases have an interpreter to translate the proceedings. The question must be whether the accused was unfairly disadvantaged in some way. It might have been expected that counsel for Mr Nguyen would have perceived this if it existed.

I was referred to cases which spoke of the failure of counsel to take a point at trial as an insuperable obstacle to raising it on appeal or review: *Dung Chi Nguyen v DPP* ([1996] VSC 19; [1996] VICSC 19, CA (Vic) 20 March 1996) at page 11. I suspect that these cases are not precisely concerned with the same point as is before me. In *R v Lilydale Magistrates' Court; ex parte Ciccone* [1973] VicRp 10; [1973] VR 122 at 134, the suggestion was one of lying by or of election. The essential feature of such a case is that **[7]** the applicant has, with knowledge of the facts, abstained from exercising rights. In a case such as the present, where the suggestion is that Mr Nguyen did not have a full understanding of his position, the obstacle, as it is called, may take on a different characteristic. In a case such as the present, I would not be minded to apply such a principle automatically without regard to all the circumstances and without regard to the fundamental objective of the criminal process. Nevertheless, where counsel makes no complaint and, above all, where the trial judge perceives no unfairness, I should be reluctant to conclude that the process has miscarried: *R v Lee Kun* (1916) 1 KB 337 at 342-3; (1915) 11 Cr App R 293. I repeat that counsel conducting the plea appeared, from my reading of the transcript, to be competent and fully instructed, and His Honour had the opportunity of assessing this matter independently by his observation of Mr Nguyen in the witness box. There is, to my mind, no substance in this complaint.

Associated with this, it was put in support of ground 3 that the absence of an interpreter led to error in that relevant facts were not brought to the Chief Judge's notice. These facts I was told were that Mr Nguyen frequently attended the place of his unpaid work, that he denied that he had failed to attend his workplace, and that there were occasions when he did attend and was sent home. The evidence of this is scanty. The complaint that the failure to put these matters before the court was due to some want of instruction to counsel appearing for Mr Nguyen is without substance for the reasons I have already mentioned. The application before the court is one for **[8]** prerogative relief. My task is not to revisit the merits of the plea nor to express any view as to the appropriateness of the sentence. I mention this not to hint any concern about this matter, but to explain why it is that I have not entered upon a consideration of much of the material which appeared to be directed to that. I conclude that this is not case where prerogative relief should go, and the application therefore will be refused.

APPEARANCES: For the Applicant: Mr D Perkins, counsel. Kuek & Associates, solicitors. For the second respondent: Mr TP Burke, counsel. Solicitor for Public Prosecutions.
