

S.C.C. No. 02629

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Matthews and Freeman, J.J.A.

BETWEEN:

QUOC DUNG TRAN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

) Kevin G. Coady
) for the Appellant

)
) Robert E. Lutes
) for the Respondent

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) Appeal Heard:
) September 22, 1992

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) Judgment Delivered:
) September 22, 1992

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THE COURT:

Appeal dismissed from conviction for sexual assault per oral reasons for judgment of Freeman, J.A.; Jones and Matthews, J.J.A. concurring.

Publishers of this case please take note that Section 486(3) of the Criminal Code applies and may require editing of this judgment or its heading before publication. The subsection provides:

(3) Subject to subsection (3.1), where an accused is charged with an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 271, 272, 273, 346 or 347, the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

The reasons for judgment of the Court were delivered orally by:

FREEMAN, J.A.

This is an appeal from conviction on a charge of sexual assault contrary to s. 271(2) of the **Criminal Code** on the grounds that the identification evidence was flawed and that deficiencies in the translation of evidence deprived the appellant of the right to be actually present at his trial.

The complainant, N.B., is a fifteen year old girl who cannot be named by order of the County Court. She claims to have been kissed and fondled by two Asian men while waiting in the lobby of an apartment building for a drive home from babysitting. The appellant is a native of Viet Nam and it is common ground that his command of English was insufficient to permit him to follow proceedings without a translator.

The complainant picked the appellant's photo from a photo lineup shown her by the police. In her statement to police officers she had described her assailant as fat and clean-shaven. Evidence before the County Court portrayed the appellant as slender with a mustache. In her testimony she stated she had seen the appellant previously; she did not mention that in her statement to police. She identified the appellant in court.

These facts were before the trial judge, The Honourable Ian Palmetter, Chief Judge of the County Court. He instructed himself as to the frailty of identification evidence and distinguished the facts in **R v. Quercia** (1990), 75 O.R. (2d) 463 (Ont. C.A.).

He accepted the identification evidence of the complainant. It was not contradicted. Mr. Tran did not testify.

The standard to be applied by this Court is set out in **Yebe v. R.** (1988), 36 C.C.C. (3D) 417 AT P. 430.

We have re-examined and to some extent reweighed and considered the effect of the evidence. The verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

The translation issue arose with respect to the court appointed translator's own evidence when he was called as a defence witness. The translator was Philip Nguyen, who had on previous occasions acted as a court appointed Vietnamese translator. In his brief testimony he stated in English that Mr. Tran was about five pounds heavier when he first made his acquaintance the previous year. He translated summaries of his evidence at the end of direct examination and cross-examination. The trial judge asked him several questions to clarify how long he had known Mr. Tran, and those were not translated while he was on the witness stand.

No objection was taken at trial to the adequacy of the translation. Part of the impugned translation related to Mr. Nguyen's questioning by Mr. Tran's own lawyer. No affidavit has been filed by Mr. Tran to suggest that he did not understand the nature of the evidence against him.

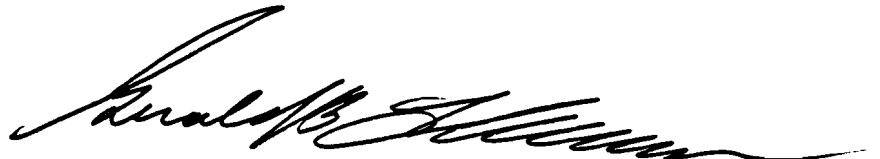
There is no doubt that Mr. Tran was entitled to a full translation, and not mere summaries, of all testimony and proceedings, which should have been as nearly simultaneous with the actual testimony as possible. Translation by a witness of his own evidence is not a practice to be encouraged. There can be no doubt that Mr. Nguyen's translation of his own evidence fell short of an ideal standard. See *R. v. Petrovic* (1984), 13 C.C.C. (3d) 416 (Ont. C.A.).

Having said that, the departure from the best standard was not so serious that it

can be said to have deprived Mr. Tran of the right to be present at his trial, nor of the right to make full answer and defence. The evidence was of minor probative value, and Mr. Tran was made aware of the gist of it.

We find no merit in a further issue, that the Crown had not disclosed its intention to question a police witness as to his impression of Mr. Tran's weight change between the time of the offence and the trial. One person's casual observation as to the weight of another is a commonplace requiring no special disclosure.

The appeal is dismissed.



J.A.

Concurred in:

Jones, J.A. *Mej.*
Matthews, J.A. *M.H.*

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION

on appeal from

THE COUNTY COURT JUDGE'S CRIMINAL COURT
OF DISTRICT NUMBER ONE

HER MAJESTY THE QUEEN

- versus -

QUOC DUNG TRAN

HEARD BEFORE: The Honourable Chief Judge I.H.M. Palmeter

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: October 30, 1991

COUNSEL: John Scott, Esq., for the Prosecution
Barbara Beach, for the Defence

APPEAL ON CONVICTION