

Report on

The Use of Summaries for Video Interviews

in Criminal Proceedings

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1. INTRODUCTION

In a meeting of the Criminal Court Users' Committee on 8 March 1999, Ms Mary Yuen, Acting Chief Magistrate, reported to the Committee that John Brennan, a serving magistrate, submitted a paper on the possibilities of dispensing with the requirement of preparing a full transcript and certified translation of video-taped interview of suspects. The then Chairman of the Committee, the Honourable Mr Justice Mortimer, JA saw the need to set up a sub-committee which is to be chaired by The Honourable Mr Justice Pang to look into the matter. The terms of reference of the Sub-Committee is to examine the legal and resource implications of introducing only a summary of the video taped evidence in the place of a full transcript and certified translation.

The Sub-Committee met on 6 July 1999. Members and co-opted members were invited to submit their views on the issues. Submissions were received up to November of 2000.

A membership list appears at paragraph 6.

2. BACKGROUND

Interviews of suspects are invariably conducted in the Chinese language and most commonly in the Punti dialect. It would be rare indeed for one to encounter an interview which is conducted in English or in another foreign language.

Until very recently, the official language of the court has been the English Language. Only a small percentage of the cases heard in the Court of First Instance and the District Court are conducted in Chinese. The number of cases conducted in Chinese in the Magistrates' Courts are much higher.

A significant percentage of judicial officers and practitioners coming before the courts are monolingual and they would not understand the taped interview without an accompanying transcript and translation. It has, therefore, been the practice that the contents of the video tape has to be transcribed and then translated and certified before the tape can be received by the court as evidence. The transcription is usually done by the party which had conducted the interview. The same party would be responsible for the translation of the transcript. The English translation of the transcript would then have to be submitted for certification by the Court Interpreter Office.

To produce a full set of transcript is time consuming. It is estimated that an one-hour taped interview would require, on average, 3 working days to transcribe while the time for translation of the same would be 4 working days. Time required for the certification of the translation has not been

included and it takes an average of between 14 to 28 working days depending on the venue of trial and the complexity and volume of the material. This involves the co-ordinated efforts of at least three parties before the tape can be tendered as evidence at the trial.

Both the Police and the ICAC are strong advocates for the use of a summary of the video-recorded interviews in appropriate cases, in the place of a full transcript.

The use of summaries is modelled extensively on the current police practice in the United Kingdom. By such summaries, it is hoped that the need to prepare a full transcript and the accompanying certified translation for every case can be dispensed with and thereby achieving a substantial saving in time, and also in human and financial resources.

The proposed ways to achieve this is that a summary of the relevant parts of the video-taped interview would be prepared by the law enforcement authorities conducting the interview. Only those parts of the video tape which contains the suspect's admission would be transcribed verbatim. If the suspect indicates an early guilty plea to the charge, no further action is required.

If the case proceeds to trial, the summary would be served on the defence with an invitation either to accept it in its original form as an accurate summary of what transpired at the interview, or as the basis for the parties to negotiate for a mutually acceptable version. To give effect to the streamlined procedure, it is suggested by those advocating the scheme

that courts should not be too inclined to order a set of full transcripts without good cause shown by the party requesting for it and a blanket rejection of the summary would not be normally acceptable. Every effort should be given by the parties to come up with an agreed version which would then be formally be admitted in evidence under **section 65C of the Criminal Procedure Ordinance**. A strict time frame should be imposed on the parties in order to attain this objective.

The Sub-Committee recognizes and is sympathetic with the tremendous strain on the resources of the law enforcing agencies in producing a set of full transcript in every case involving taped interviews. A summary of what is recorded on the taped interview is useful and can replace a full transcript/translation in cases when the voluntariness of the interview is not in issue. It is much easier and less time consuming for the parties involved to refer to a summary than to the video tape itself or to the full transcript, whether at the preparation stage or at the trial itself.

Submissions by both legal professions indicate that practitioners oppose the use of summaries in place of a full transcript.

The Department of Justice would accept a summary only when there is other evidence to support the charge and when the summary is up to the Department's required standard. In cases where the only evidence is the admission, they would require a full transcript. The Department also expressed its concern over the statutory implications.

The Legal Aid Department expresses a strong view that the current practice of providing a full transcript should be maintained. The Department's concerns are that if no transcript is provided, a defendant who is in custody can only give instructions to his legal representative after viewing the video tape. The Correctional Services Department may not have sufficient facilities to cope with an abrupt increase in the demand for the use of video-viewing facilities by the persons detained. This may result in a delay of the proceedings. At present, persons in remand are not allowed to use of video facilities on their own and are only allowed access to such when accompanied by their legal representative.

3. LIMITATIONS ASSOCIATED WITH THE USE OF A SUMMARY

3.1 Practical Problems

There exists a number of practical and procedural difficulties when summaries are used for mixed or inculpatory statements.

It is common ground that a summary must be an accurate and adequate representation of the contents of the video interview before it can be relied on by the parties. It must be in English and certified if it is to be of any use to monolingual judicial officers, practitioners and jurors where appropriate. Further more it must be a version that has to be agreed by the defence.

It becomes inevitable that the summary of a lengthy interview will bear the emphasis desired by the party producing it. This may not be deliberate but there may be an unintended tendency of the person preparing the summary to include or highlight the parts of the interview which is useful to his case. To seek an agreement from the defence on such a summary may prove to be difficult and legal practitioners may be more inclined to apply for a full transcript in order to adequately protect the interest of the accused and to a certain extent, their own reputation.

3.2 Statutory Constraints

3.2.1 In the Court of First Instance

Cases to be tried in the Court of First Instance have to go through Committal Proceedings, the procedure of which is laid down in the **Magistrates Ordinance. Section 80B of the Ordinance** provides :

“80B. Service of documents on accused

(1) Not less than 7 clear days before the return day, or such shorter period as the accused may consent to, the prosecutor shall serve on the accused—

....

(c) copies of documentary exhibits; and

.....

(2) A statement of a witness of which a copy is served under subsection (1) shall—

(a) be signed by the person who made it;

(b) contain a declaration by the witness to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that wilfully making a statement which he knows to be false or does not believe to be true may render him liable to prosecution for a criminal offence;

(c) if in a language other than English, be accompanied by an English translation and, if in a language other than Chinese, be accompanied by a Chinese translation;

(d) if made by a person under 21, give his age;

(e) purport to have been read over to the person who made the statement in the language used by that person in making the statement or to have been read by that person.

(3) A documentary exhibit of which a copy is served under subsection (1) shall, if written in a language other than English, be

accompanied by an English translation certified under section 27 of the Evidence Ordinance (Cap.8) and, unless the magistrate on cause shown otherwise directs, if written in a language other than Chinese, be accompanied by a Chinese translation.”

It appears that serving only a summary of the video-taped interview on the accused is not sufficient compliance with the statutory requirement quoted above. Unless one can successfully argue to the contrary, the video tape is an exhibit to be used by the prosecution at the trial and is caught by the term “documentary exhibits” under **section 80B(1)(c)** above. The term “document” is defined under **section 3 of Interpretation and General Clauses Ordinance, Cap.1** as :

“... any publication and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks or by more than one of these means.”

The meaning of “publication” is further provided under **section 3(b)** of the same Ordinance :

“... any record, tape, wire, perforated roll, cinematographic film or other contrivance by means of which any word or ideas may be mechanically, electronically or electrically produced, reproduced, represented or conveyed...”

That being the case the requirement that the video exhibit should be accompanied by an English translation of the transcript and certified under **section 27 of the Evidence Ordinance** must be met.

In his paper Mr Brennan referred to **section 29A of the Evidence Ordinance** which deals with Certified transcripts of Tape Recordings and

he concluded by observing that there is no need for a transcript of any video interview which has been conducted in Chinese or in English to be certified. While his view is correct, the problem however remains with the compliance of **section 80B of the Magistrates Ordinance**. A summary cannot be sufficient compliance of the statutory requirements for committal proceedings.

3.2.2 In the District Court

The position in the District Court is no better. Paragraph 1 of **Practice Direction 10.20** reads :

“In all cases where the prosecution applies to transfer a case to the District Court from the Magistracy, they shall on or before the date of the transfer serve on each defendant copies of the witness statement of those witness whom they propose to call at trial and copies of those documentary exhibits upon which they will seek to rely at trial.”

If the term “documentary exhibit” carries the same meaning as defined in the **Interpretation and General Clauses Ordinance**, then the contents of the tape will have to be transcribed, translated and certified as in the case of proceedings under **section 80A of the Magistrates Ordinance**. This problem can be resolved by amendment of the **Practice Directions** by specifying that full transcripts are dispensed with and that a summary of the video tape evidence be specified as one of the documents to be served by the prosecution on the accused. The parties can also be directed that they are expected to come up with an agreed summary without the need to have the transcript translated and certified.

3.2.3 Section 65C of the Criminal Procedure Ordinance

The Sub-Committee has explored the suggestion that the summaries are to be treated as agreed facts between the prosecution pursuant to **section 65C of the Criminal Procedure Ordinance** thereby dispensing with the preparation of the full transcript. It is suggested that when a summary is served on the accused and unless a response or objection is made within a prescribed period, the summary would, at the expiration of the prescribed period, be treated as an admitted fact. The problem with this approach lies with the wording of **section 65C(4)** which provides :

“(4) An admission under this section may with the leave of the court be withdrawn in the proceedings for the purpose of which it is made or any subsequent criminal proceedings relating to the same matter.”

The agreement can thus be withdrawn at anytime. Even if there is an initial agreement, it is a fact of life that legal representation may change. Lawyers get fired for various reasons. There is no existing legislative framework to bind subsequent legal representatives should a different one representative be instructed. An accused acting in person may also suffer a change of mind and wishes to retract from his previous agreement. The problem is rendered even more acute when the initial agreement is secured by default of response from the defence. There is very little the court can do except to grant leave and allow the accused to withdraw his agreement bearing in mind that the court has to take into account and safeguard the accused's interest. Without an agreed summary, the court will have to order a transcript in order to make sense of the contents of the interview. This may necessitate vacating the

hearing date and adjourning the case part-heard or have it re-fixed. Time and cost will be wasted and the court diary disrupted. Sanction by way of cost orders against the accused will have little effect because most of the accused persons are legally aided.

3.3 The Language Barrier

The procedures suggested by both the Police and the ICAC are broadly in line with the concepts contained in the UK PACE provisions and guidelines. The situation in Hong Kong is different from that in the UK and is complicated by the fact that we have two official languages. One must accept that fact that within the law enforcement agencies, the legal professions and the judiciary, not everyone is bilingual.

There is a corresponding prevalence of monolingual practitioners and judicial officers handling more serious cases which are tried in the higher courts. The result is that the majority of cases in Courts other than the Magistracies are still conducted in English.

The problems associated with the language barrier confronting monolingual judicial officers and practitioners are at once apparent when the video tape is played in court. The video is an exhibit of the proceedings and without the aid of a certified translation of the full transcript, the contents of the tape will make little if no sense at all to the tribunal. Refusal by the presiding judicial officer to view the tape when invited to do so would reflect poorly on the system. It would make a mockery of justice when the presiding judge, counsel for the prosecution, defence counsel or where the case is tried in the High Court, members of the jury or any combination of the foregoing could not understand the language of the interview. No such problem will arise if there is a certified translation available at the time when the tapes are played. Even with the assistance of a translation of a full transcript, there is invariable loss of some of the original flavours of the expressions by the

parties to the interview. Translations have deficiencies. A summary is even less acceptable.

Monolingual practitioners will not be able to effectively conduct trials involving video-taped interviews where only a summary supplied. Jurors falling into the same category will not understand what is being played back to them in court.

The problems remain as long as the trial is conducted in English even though the trial judge is bilingual. Monolingual lawyers and jurors will have the same difficulties in following this aspect of the evidence when the tape is played where there is no transcript and translation before them. The court record which will become relevant in subsequent appeal and related proceedings are always kept in the language of the trial. The same is not complete if the tape is not transcribed and translated. This problematic aspect seems to have escaped the attention of those advocating for the use of a summary in the place of a full transcript.

It is only in proceedings which are conducted in Chinese that a full transcript and the accompanying certified translation can be dispensed with and replaced by a summary.

4. CONCLUSION

The result of using a summary may in fact be creating more problems than they are designed to resolve.

The Sub-Committee is sympathetic with the amount of work involved and resource implications on those who are responsible for transcribing and translating the contents of the video tape. The fact remains if they wish to rely on the evidence obtained during the interview as part of the case against the accused, they should assume the duty to ensure that such evidence is properly presented to the court within the existing legislative framework and in accordance with the established rules and procedures regardless of the language used at the trial. The use of a summary appears to be an attempt to circumvent the legal and procedural requirements of the criminal justice system.

The other concern is the problems associated with monolingual judicial officers identified earlier. The problem is not resolved by enlisting the assistance of Court Interpreters to perform translation of the tape as they are played back in court. This will create an unacceptable burden on the Court Interpreters performing the exercise.

The reluctance of the legal professions to conduct a trial without a full transcript and a certified translation is understandable. They work with the translation and not with the video tape. Regardless of the direction the courts may give to secure an agreement on the summary, the contents of the video tape will have little meaning to monolingual practitioners. The case which the defendant has to meet is contained in the certified

translation based on the full transcript and not on the summary. In this context, a summary can never replace the evidential value of the full translation.

Summaries are appropriate only where the responses of the accused at the interview is wholly exculpatory or in cases where there is an early indication of a guilty plea.

The quality of justice should not be allowed to suffer by any attempt to save cost or related resources.

5. RECOMMENDATIONS

The following recommendations are made for the Chairman's consideration :

- 5.1 The present practice is to be maintained. That is to say the law enforcement agency responsible for conducting and taping the interview has the duty to prepare a full transcript and a translation of the same. The translation will be submitted to the Court Interpreter's Office for certification and the entire is to be served on the defence in accordance with the present procedural requirements.

Consultation with the Court Interpreter's Office reveals that they have sufficient resources to cope with the certification of translations of full transcripts within the period of 42 days prescribed by **section 80A of the Magistrates Ordinance** for cases listed for committal. The same would apply to cases being transferred to the District Court. The cause of the delay, if any, appears to lie not with the certification but with the initial transcription and translation of the video tape.

- 5.2 To introduce a pilot scheme in the Magistrates' Courts where only a summary of the video interview is served on the defence according to a specific time frame. Parties are encouraged to agree on the summary by way of **section 65C of the Criminal Procedure Ordinance**. Last minute retractions from the agreement will be least disruptive in the Magistrates' Courts as the majority of the magistrates are

fully bilingual and most trials are conducted in Chinese in any event. The presiding magistrate could view the tape when circumstances call for.

- 5.3 A more ambitious scheme based on 5.2 above but which includes proceedings in the District Court. This will necessitate amendment of the existing **Practice Direction** and possible judicial interpretation of the statutory provisions referred to in paragraph 3.2.2 above.

Respectfully submitted

K.K. Pang
Chairman, Sub-Committee
May 2001

6. MEMBERSHIP OF THE SUB-COMMITTEE

Chairman: The Honourable Mr Justice Pang

Members : Mr Arthur Luk, Deputy Director of Public Prosecutions

Mrs Fanny Yu, Assistant Director of Legal Aid

Mr Mr Andrew Lam, Law Society of Hong Kong

Mr John Bricknell, Chief Superintendent Hong Kong Police

Co-opted Members :

Ms Sabrina See, Hong Kong Bar Association

Mr Andrew Macrae, SC, Hong Kong Bar Association

Mr M. J. Bishop, Assistant Director, ICAC

Her Honour Judge Maggie Poon

Mr Patrick Li, Chief Magistrate

Ms P. N. Chan, Chief Court Interpreter