Denial of language — grounds for occasioning an unfair trial?

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Introduction

Judicial proceedings in Australia operate primarily in Standard Australian English. As put by Sharon Davis:

> Standard Australian English is the language used in law, media, politics, and education in Australia, holding vast power . . . many Indigenous people have been forced to speak [it] at the expense of ancestral language, Kriol, or Aboriginal English.[1]

In *Ebatarinja v Deland*[2] the High Court held that in a criminal trial, "if the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial".[3] However, languages like Kriol and Aboriginal English might readily be mistaken for Standard Australian English[4] — a mistake which is particularly problematic in the courtroom because even where those languages use the same words as Standard Australian English, the meaning of seemingly identical words and phrases can differ between the languages.[5] With this in mind, to what extent do — and should — courts understand and respond to the linguistic distinctiveness of witnesses who speak Kriol and Aboriginal English?

This issue arose in *Murray v Feast*,[6] in which Solomon J of the Supreme Court of Western Australia found that Mr Murray's initial trial was unfair because the Magistrate failed to recognise his "linguistic distinctiveness". Despite information provided by Mr Murray's interpreter at trial, the magistrate mistakenly regarded Mr Murray as speaking Standard Australian English when he was actually speaking in Kriol and Aboriginal English.

This case represents a significant development of the law — it recognises that an unfair trial can be occasioned in this way even where a fulsome interpretation is provided and no material misinterpretation or misunderstanding of evidence can be identified. This article canvases *Murray v Feast* so as to provide a clear picture as to how this development of the law came about, and to illustrate the circumstances in which it might be relevant in future cases.

Background

Mr Murray was convicted of aggravated common assault in the Magistrates Court at Karratha in 2021. At trial, Mr Murray gave evidence that he is a Walmajarri man who mainly speaks Walmajarri, as well as Mardok, Manjaderra, and "mixed languages". Mr Murray gave evidence with the assistance of an interpreter. However, at the beginning of Mr Murray's evidence, the magistrate instructed the interpreter not to interpret portions of Mr Murray's evidence that appeared to the magistrate to be in Standard Australian English. Both the interpreter and Mr Murray's counsel attempted to inform the magistrate that whilst Mr Murray might appear to be speaking in English, he was actually speaking in Aboriginal English and Kriol, and that interpretation was necessary because the meaning of words and phrases can differ between the languages. Despite this, the magistrate reiterated his instructions:

> If he says it in English, then I don't need to hear it twice. Because what we have by way of interpretation was the same sentence. So let's just say it means something else in [Kriol], he just said the same words twice. I don't need any further submissions. If you want to tell us something in English, I don't need someone else telling me what he said . . . if you do use a sentence that's in English, then I can understand what you're saying because I happen to speak English.[7]

The appeal

On appeal in the Supreme Court, the appellant argued three grounds of appeal:

> *Ground 1*: The learned magistrate erred in law in failing to properly direct himself in accordance with the Mildren direction.
> *Ground 2*: There was a miscarriage of justice because the learned magistrate's direction to the interpreter to stop interpreting portions of the appellant's evidence resulted in an unfair trial.
> *Ground 3*: The learned magistrate erred in law and fact by finding that the appellant was speaking ordinary English during portions of the appellant's evidence.
> *Particulars*: The learned magistrate had no regard for the expert opinion of the interpreter that the appellant was speaking Aboriginal English and Kriol. The learned magistrate erred in assuming that words spoken in Aboriginal English and Kriol have the same meaning in ordinary English.[8]

The state conceded the third ground of appeal. However, the state argued that this error did not lead to a substantial miscarriage of justice because Mr Murray's

counsel and the interpreter "ignored" the magistrate and continued with Mr Murray's evidence through the use of the interpreter.[9] Ultimately, Solomon J upheld the appeal and set aside the appellant's conviction.

Ground 1

As to the first ground of appeal, Solomon J found that the magistrate did not err by failing to give himself a "Mildren direction". The Mildren direction seeks to "ensure fairness by drawing attention to socio-linguistic features of [a First Nations] witness that may give rise to misunderstanding".[10] Mildren directions have gained "fairly wide acceptance" and have been adopted in the *Aboriginal Benchbook for Western Australian Courts*.[11] However, Solomon J concluded that Mildren directions do not have the force of law, noting also that they have particular application in cases where — unlike this case — there is no interpreter and the case is being tried before a jury.[12]

Further, the magistrate did in fact refer to some matters relevant to Mildren directions in his ex tempore reasons, including that English was not Mr Murray's first language, that Mr Murray was from a "culturally traditional background from Halls Creek", and noting that "particular leeway should be given in terms of the evidence of Mr Murray and I have done so".[13]

Grounds 2 and 3

Solomon J dealt with the other two grounds together, noting that both related to the issue of a miscarriage of justice, a fair trial and the conduct of the magistrate in relation to Mr Murray's socio-linguistic circumstances.[14] In relation to the state's assertion that no substantial miscarriage of justice occurred because Mr Murray continued to give evidence with the assistance of the interpreter, Solomon J said that "does not of itself mean that the magistrate's remarks and treatment of Mr Murray was consistent with a fair and just hearing".[15]

Solomon J applied the principles relevant to a fair trial to the present case and found that Mr Murray's trial departed in a fundamental way from the requirements of a fair trial for two reasons:

- first (and most notably), because of the denial of Mr Murray's language and
- second, because the magistrate's attitude towards Mr Murray "had all the hallmarks of at least the impression of an unfair prejudgment of Mr Murray's character and the integrity of his testimony"[16]

Denial of linguistic distinctiveness

Solomon J's first reason for finding that the trial was unfair is novel and represents some significant development of the law in relation to a fair trial — a point his Honour made himself in the judgment:

> I am conscious that there is no clear precedent for the proposition that a trial in which a fulsome interpretation was provided was nevertheless fundamentally unfair in the way asserted in this case by Mr Murray.[17]

Indeed, as Solomon J noted in summarising the principles relevant to a fair trial, "established precedent and historic legal reasoning may not be wholly adequate to identify and remedy unfairness" and it is necessary to consider each trial on a case-by-case basis.[18] Thus, in appropriate cases, novel developments are necessary. Ultimately, Solomon J was unequivocal in deciding that this was one such appropriate case — that the denial of a First Nations person's linguistic distinctiveness, in the context of all the relevant circumstances and social realities, contributed to an unfairness which went to the root of the process:

> The stark reality is this: a criminal prosecution of a Walmajarri man proceeded in the face of the court's express denial of the linguistic distinctiveness of the accused. Unintended though it was, this cannot be regarded as fair and just. The injustice is all the more troubling because the denial of linguistic identity relates to the language and culture that evolved from antiquity in our very own landscape . . . If the court is to keep apace with community standards, it must apply the community standard reflected in the sentiments of the [Supreme Court's] Reconciliation Statement to the concrete reality of the justice system.[19]

Appearance of prejudgment

Whilst equally pertinent, Solomon J's second reason for finding that the trial was unfair is not so novel — it relates to well-established principles about reasonable apprehension of bias and prejudgment. Solomon J found that the magistrate's attitude was not consistent with requirements for an appearance of impartiality:

> . . . [the] magistrate was in substance expressing, in Mr Murray's presence, an erroneous view about the genuineness of Mr Murray's need for interpretation and therefore an erroneous view about the honesty of Mr Murray's approach to the giving of evidence generally.[20]
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> . . . it certainly cannot be said with any confidence that Mr Murray did not feel prejudged and denigrated by the magistrate's comments. It hardly needs to be said that erroneous remarks from the Bench reflecting adversely on the evidence of an accused as they begin to give their evidence is inconsistent with a fair trial. It is not difficult to imagine that the impact on an accused's capacity to give their evidence coherently in such circumstances might be severely compromised.[21]

Accordingly, Solomon J concluded that the trial represented an unacceptable and fundamental departure from the required standard of a fair trial and that this unfairness went to the root of the process. The unfairness was not ameliorated by the interpreter continuing to

interpret after the magistrate's comments — Solomon J noted that it "could not redeem this trial from the consequences of the magistrate's unintended but irretrievably unfair treatment of Mr Murray".[22] Solomon J set aside Mr Murray's conviction and noted that submissions would be sought from the parties as to whether a retrial should be ordered.

Appeals from the Magistrates Court

After finding that Mr Murray's trial was unfair, Solomon J was careful not to lay blame or undue criticism on the particular magistrate or the Magistrates Court generally. As put eloquently in the judgment:

> . . . the Magistrates Court is an extremely busy court in which some latitude must be given for the pressures that attend the administration of justice in a high-volume and necessarily fast-paced environment . . . the perch of appellate luxury makes for a comfortable and convenient position to make the sorts of observations contained in these reasons. The stark reality is that I have had some months to consider matters that the learned magistrate was required to deal with on the spot. I have no doubt at all that the Magistrates Court generally, and the learned magistrate in particular, do not lack for an appreciation of, or sensitivity to, the issues I have discussed in these reasons.[23]

In the context of the particular issues raised by this trial, it is perhaps also relevant to note (although it was not noted in Solomon J's judgment) that the learned Magistrate Gavin MacLean, who presided over Mr Murray's trial in the Magistrates Court at Karratha, is himself an Aboriginal man.

Conclusion

Murray v Feast represents a significant development in the jurisprudence surrounding unfair trials and the denial of language. It recognises that a fair criminal trial is compromised not only by the absence of interpretation, but also by the denial of an Aboriginal person's linguistic distinctiveness — even when a fulsome interpretation is provided.

The acknowledgment that linguistic identity matters speak to the intricate interplay between language, culture and the administration of justice, emphasising the importance of recognising and respecting linguistic diversity of First Nations peoples in legal proceedings.[24] In this way, the judgment calls for a nuanced understanding of the complexities involved in ensuring a fair trial, acknowledging the pressures that attend the administration of justice — especially in the lower courts.

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Footnotes

1. S Davis "Aboriginal English" *Australian Institute of Aboriginal and Torres Strait Islander Studies* 18 February 2022 https://aiatsis.gov.au/blog/aboriginal-english.
2. *Ebatarinja v Deland* (1998) 194 CLR 444; 157 ALR 385; [1998] HCA 62; BC9804989.
3. Above, at [27].
4. Above n 1.
5. See generally, D Eades "Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications" (2008) 20(2) *Current Issues in Criminal Justice* 209.
6. *Murray v Feast* [2023] WASC 273; BC202310316.
7. Above, at [25].
8. Above n 6, at [32].
9. Above n 6, at [38].
10. Above n 6, at [123].
11. Above n 6, at [102].
12. Above n 6, at [135].
13. Above n 6, at [137].
14. Above n 6, at [144].
15. Above n 6, at [142].
16. Above n 6, at [175].
17. Above n 6, at [162].
18. Above n 6, at [167].
19. Above n 6, at [174].
20. Above n 6, at [175].
21. Above n 6, at [178].
22. Above n 6, at [180].
23. Above n 6, at [181].
24. For further context, see D Eades "The Social Consequences of Language Ideologies in Courtroom Cross-examination" (2012) 41(4) *Language in Society* 471; D Eades "Judicial Understandings of Aboriginality and Language Use" (2016) 12 *The Judicial Review* 471.