

Tape Recordings, Transcripts and Exhibits

Commentary

Tape Recordings and Transcripts

Where tape recordings are admitted into evidence, the actual evidence consists of the sound produced by playing the tape rather than the tape itself. The transcript of such a recording is not, ordinarily, evidence – it is rather an aid to listening, and the jury should be instructed accordingly – see *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 at 188; *R v Beames* (1979) 1 A Crim R 239; *R v Soloman* (2005) 92 SASR 331 at 349 - 352.

There is no requirement that the preparation of a transcript of a tape recording in which English is spoken requires expertise. Nor is there support for the view that comparing voices, through the repeated playing of recordings, requires expertise before evidence may be given that the same voice is heard on different occasions – see *R v Soloman* (2005) 92 SASR 331 at 350.

A translation of a tape recording from a language other than English is in a different category. In this case, expert evidence may be given by an interpreter as to the content of a tape recording – see *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 at 191; see also Benchbook Direction No 21. However, where the translation is lengthy, it may be appropriate to admit the transcript itself into evidence.

An interesting question arises as to what approach should be taken in directing juries about a translation. May the jurors bring to bear their own knowledge of the language? The better approach would seem to be that a translation should be regarded as expert evidence and, in the absence of any challenge to it, ought not to be rejected. Consequently, the jury should be told to act upon the translation, because of the need for all jurors to consider the same evidence – see Benchbook Direction No 21 Interpreters in Criminal Proceedings.

Whether a transcript should be allowed into a jury room is a matter for the exercise of discretion – see *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 at 190.

In *R v Watts* [1992] 1 Qd R 214, a case where the tape recordings were long (5 hours) and indistinct, the Court of Appeal concluded that it was a proper exercise of discretion to admit the transcripts as evidence *and* to allow them to go to the jury room.

In *R v Lake, Carstein and Geerlings* (2007) 174 A Crim R 491, the Court of Appeal ruled that there were sound practical reasons for allowing the jury to retain the transcripts of conversations recorded by telephone intercept. There were numerous telephone conversations, and it was not practicable to replay the tapes repeatedly.

In *R v Le* (2007) 173 A Crim R 450, the Court of Appeal considered the exercise of discretion where the jury had requested to be provided with the transcripts during their deliberations. Considerations relevant to the exercise of discretion include the length of the tapes, the quality of the recording and the extent to which there are passages that are difficult to hear or understand without replaying the passages repeatedly.

In the matter of *R v Peniamina* [2018] QSC 283, the question arose as to whether the jury should have access to the audio and video recordings, and their accompanying transcripts, while deliberating in circumstances where the defendant did not give evidence, but relied upon the content of his recorded statement to police and upon other parts of the evidence to support his plea that he had acted under sudden provocation and in the heat of passion. Sofronoff P directed that the jury should have access to the transcripts, emphasising in particular the length of the audio recordings which contained long silences, that the defendant was softly spoken, and that he had a foreign accent. His Honour also remarked that the jury had been annotating the transcripts as they listened to the evidence, and that it would be “difficult to justify refusing to allow a juror to take into the jury room a transcript of a recording which the juror has used and annotated to assist understanding” – see *R v Peniamina* [2018] QSC 283 at [18], citing *R v Watts* [1992] 1 Qd R 214 at 225.

In the course of his reasons, Sofronoff P made the following observations on access to tape recordings:

- The courts have generally been sensitive to permitting juries to have access to recordings while deliberating.
- Many of the cases that deal with the use of recordings by juries concern evidence of child complainants in sexual offence cases, which raise special problems.
- When it is the complainant’s evidence alone that is in issue, or largely in issue, the strong trend of authority is that there could be a real danger that the jury might place too much emphasis upon a recording of a complainant’s evidence if that evidence were available for the jury’s repeated review while deliberating while the evidence of other witnesses is not available.
- Concerns expressed by judges in older cases about the forensic problems may not be concerns that are so relevant today. This may be due to:
 - The increasing use of technology by investigating police where the use of concealed microphones results in recordings with background noise.
 - The tendency of jurors to make extensive notes on the transcripts given to them.
 - Defence counsel often consenting to the admission of transcripts into evidence.

Any audio or video recordings played during a trial (and any related transcripts) should be marked to ensure they are part of the record.

Suggested Directions

A direction as to the use which may be made of a transcript should be given immediately prior to the provision of the transcript to the jury.

It may be useful to obtain counsel’s submissions about the jury taking the transcript into the jury room when the transcript is first made available to the jury.

If the jury is permitted to keep the transcript in the jury room, the direction may also be repeated when summing-up.

Transcripts of Tape Recordings in English

You are about to hear a tape recording of [a conversation said to have been had between the defendant and the interviewing officer], and transcripts will be provided for your assistance. However, it is important for you to remember that it is the sounds you hear on the tape recording that constitute the evidence. The transcript itself is not evidence: it is merely an aid to your understanding. It is what you hear in court that matters: so if you hear something different from that which appears in the transcript you should act on what you have heard, not on the transcript.

Transcripts of Tape Recordings in Languages Other than English

Where the transcript is an expert translation:

You have heard the evidence of [X], an expert, who translated the tape recording which you are about to hear. A transcript of his/her translation has been produced. It may be that some of you are familiar with the language which is contained in the tape recording, but it is important that you all act on the same evidence. You should, therefore, accept the English translation contained in the transcript and act upon it rather than embark upon your own translation.

Transcripts of Edited Tape Recordings

Where a tape recording has been edited so as to excise inadmissible material, care should be taken to ensure that any transcript of that recording which is provided to the jury has also been edited: *R v Khaled* [2014] QCA 349.

Where it is obvious from the recording that it has been edited, it may be necessary to give a direction along these lines:

You may notice, as you listen to the recording, that it has been edited in some respects. That has been done to remove parts of the recording that are irrelevant to the issues you must decide. It is very common for recordings to require editing in this way before they are used in a trial. I direct you that you are not to speculate about the parts that have been edited out. I also direct you not to draw any inference adverse to the defendant merely because irrelevant material has not been placed before you. To do so would not only be wrong, it would be utterly unfair.

Such a direction should not be given in every case where a recording has been edited. It should only be considered where the editing is so obvious that there is a real risk the jury might speculate about the nature of the edited portions.

For the special need for caution in relation to the tape recordings and transcripts of an affected child witness, see Benchbook Direction 10 Evidence of Affected Children.