20. Tape Recordings, Transcripts and Exhibits

20.1 Legislation

[Last reviewed: September 2024]

Nil.

20.2 Commentary

[Last reviewed: September 2024]

Where recordings are admitted into evidence, the actual evidence consists of the sound produced by playing the recording rather than the media in which the recording is held. The transcript of such a recording is not, ordinarily, evidence – it is an aid to listening, and the jury should be instructed accordingly (*Butera v Director of Public Prosecutions* [1987] HCA 58; (1987) 164 CLR 180, [188]; *R v Beames* (1979) 1 A Crim R 239; *R v Solomon* [2005] SASC 265; (2005) 92 SASR 331, [349-352]).

It is often beneficial to identify early in the trial whether the jury will be given transcripts, and if so, under what conditions. Jurors may find it helpful to know if they will keep a transcript, and can therefore make notes on it, or if it will be collected after the recording has been played. Counsel should be asked if they object to the jury being given a transcript and if the jury can retain the transcripts.

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 (*R v Solomon* [2005] SASC 265; (2005) 92 SASR 331, [350]).

A translation of a 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 recording (*Butera v Director of Public Prosecutions* [1987] HCA 58; (1987) 164 CLR 180, [191]; see also **Benchbook Chapter 21 – Interpreters and Translators**). However, where the translation is lengthy, it may be appropriate to admit the transcript itself into evidence.

A translation should be regarded as expert evidence and, in the absence of any challenge to it, ought not to be rejected. Usually, a translation of the recording will be admitted into evidence for this purpose. It follows that in the unlikely event that a juror is familiar with the language of the recording, the jury should be told to act upon the translation, because of the need for all jurors to consider the same evidence (see **Benchbook Chapter 21 – Interpreters and Translators**).

Whether a transcript should be allowed into the jury room is a matter for the judge to decide in the context of the trial (see *Butera v Director of Public Prosecutions* [1987] HCA 58; (1987) 164 CLR 180, [190-191]).

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] QCA 209; (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] QCA 259; (2007) 173 A Crim R 450, the Court of Appeal considered the decision to accede to the jury's request to be provided with transcripts during their deliberations. The court identified that the considerations relevant to the exercise of discretion include the length of the tape recording, 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 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, [18], citing *R v Watts* [1992] 1 Qd R 214, 225.

Where a tape recording has been edited 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).

Recordings containing evidence made admissible pursuant to section 93A of the *Evidence Act 1977* (Qld) are in a special category. Section 99 permits the judge to withhold the recording from the jury room if there is a risk the jury 'might give the statement undue weight' if given unfettered access during deliberations. Usually, the recordings and transcripts of such evidence will not go into the jury room (*R v H* [1999] 2 Qd R 283; *R v BEC* [2023] QCA 154, [114] ff.). Whether or not the jury are to have unfettered access to such recordings and transcripts when deliberating will depend on

the attitude of the defendant and the overarching requirement to ensure a fair trial (see the commentary in **Benchbook Chapter 4B - Where The Jury Are To Be Provided With Transcripts**, especially as to the need to direct the jury to consider all the evidence and not give disproportionate weight to the evidence in a recording).

Recordings containing evidence made pursuant to section 21A or 21AK of the *Evidence Act 1977* (Qld) should not be admitted into evidence as exhibits. Rather they should be marked for identification and be retained on the file (*Gately v R* [2007] HCA 55; (2007) 232 CLR 208, [3], [93]-[94]).

20.3 Suggested Directions

[Last reviewed: September 2024]

(For transcripts of recordings in English**)**:

You are about to hear a recording of [(for example**)** a conversation said to have been had between the defendant and the interviewing officer**]**. **Transcripts of the recording 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 the recording that matters. If you hear something different from what appears in the transcript you should act on what you have heard, and not on the transcript.**

(For transcripts of edited recordings where it is obvious the recording has been edited**)**:

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 be wrong and unfair.

(Where the transcript is an expert translation which has not been disputed**)**:

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 is exhibit X**]. Some of you may be familiar with the language which is contained in the 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.**