38/78

SUPREME COURT OF VICTORIA

R v GAUDION

Brooking J

3 April 1978 — [1979] VicRp 7; [1979] VR 57

EVIDENCE – TRANSCRIPT MADE OF A TAPE-RECORDED INTERVIEW – TRANSCRIPT PROVED TO BE CORRECT – WHETHER TRANSCRIPT ADMISSIBLE IN EVIDENCE.

During the course of a trial, Counsel for the accused objected to the reception of a transcript made of a tape recorded interview had with the accused. Evidence had been led by the Crown as to the taping of the interview, the making of the transcript and of the transcript having been checked against the original recording.

HELD: Viewing the matter from the standpoint of principle, a transcript, proved or admitted to be correct, of a tape recording is admissible if the tape recording itself would, if tendered, be received. This follows from the nature of a tape recording.

BROOKING J: On Friday 31 March 1978 Chief Superintendent Standfield gave evidence that on 5 March 1975, he and Chief Superintendent Child interviewed the accused; that the interview was recorded on tape and that he subsequently had a transcript made of the recording; that he checked the transcript against the original recording and that the transcript produced was the transcript so checked. He did not say in terms that he found the transcript to be correct when he so checked it, but no doubt this evidence can be given. Mr Walker objected to the reception of the transcript and referred to *Driscoll v R* [1977] HCA 43; (1977) 137 CLR 517; (1977) 15 ALR 47; 51 ALJR 731. He further submitted that it might well be that there was no need to have a transcript to assist in understanding the tape, and I think that he went so far as to submit that quite apart from any question of unfairness, such as was considered in *Driscoll,* a transcript may be received only where it may, having regard to the difficulty of understanding the recording, be regarded as an aid to understanding. In the discussion the question of admissibility was debated as well as the question of discretion. I consider that I must deal with both questions, partly because it is my duty to satisfy myself that the evidence tendered is admissible and partly because it is not possible to give proper consideration to the exercise of the discretion to exclude admissible evidence without first forming a view on the ground on which the law holds the evidence to be admissible.

The recording was played in full during the learned prosecutor's opening. The recording is, in my judgment a clear one. There are some few places where what is said is not as distinct as one would wish, but viewed as a whole the recording may be described as a very good one in point of intelligibility.

I shall deal first with the question of admissibility and then with the question of discretion. In considering admissibility, I shall first look at the question from the standpoint of principle and then turn to the authorities. Viewing the matter from the standpoint of principle, I am of opinion that a transcript, proved or admitted to be correct, of a tape recording is admissible if the tape recording itself would, if tendered, be received. This I consider follows from the nature of a tape recording.

The original recording is not a document but a physical object. (*R v Matthews and Ford* [1972] VicRp 1; (1972) VR 3). I do not fail to notice that Mason J has, in an *obiter dictum*, doubted the correctness of *Beneficial Finance Corporation Company Limited v Conway* [1970] VicRp 39; (1970) VR 321. (See *Australian National Airlines Commission v The Commonwealth* [1975] HCA 33; (1975) 132 CLR 582; (1975) 6 ALR 433; 49 ALJR 33, at p344). Nor do I fail to notice that since *Matthews and Ford* was decided, the case of *R v Stevenson* (1971) 1 WLR 1; [1971] 1 All ER 678, which was there considered, has received further consideration in *R v Robson* [1972] 2 All ER 699; [1972] Crim LR 316; [1972] 1 WLR 651; 56 Cr App R 450.

The information recorded on a tape is so recorded by means of the pattern impressions on it, and for that information to be apprehended through the organ of hearing, the tape, or a re-recording, must be played, using a loud speaker or earphones. This playing is the means of ascertaining what are the pattern impressions that exist on the original tape. These pattern impressions are the features of the original tape that make the tape relevant and admissible. The tape itself is of no use to the tribunal of fact unless the information recorded on it by the pattern impressions is released in some way. The playing of the original tape to the tribunal of fact is not the exclusive means by which the features of the tape may be made known to that tribunal.

As alternative means is the playing to the tribunal of a re-recording. This is established by *Matthews and Ford* (*supra*). Moreover, the re-recording may have been produced either by the recording of the sounds produced on the playing of the original tape or directly by electromagnetic means without the production of sounds. In either case, the re-recording is a replica of the original tape and the playing of the re-recording is a permissible means of making known to the tribunal what pattern impressions exist on the original tape. Any means may be employed of proving what the pattern impressions on the original tape are, or if it has been destroyed, were. It only becomes a question of the reliability of the evidence (*Matthews and Ford* at p12). I am assuming always, of course, that the tape recording itself would be admissible.

The production of a transcript is only another means of proving what is on the tape. The transcript must be proved or admitted to be correct. It may be proved to be correct either by the person who made it or by a person who has checked it against the tape. Once it is appreciated that the playing of the original recording to the tribunal is merely one means of proving what it contains, it will become apparent that a transcript is admissible whether or not the original tape or a re-recording is put in evidence. The unexplained failure to put a tape in evidence may, of course, draw strong comment, and there is always the discretion to exclude admissible evidence in a criminal case.

Again leaving aside the question of discretion, whether it be the discretion to exclude admissible evidence in a criminal case or a discretion as to what exhibits the jury should have in their room, it seems to me to be misleading to treat a transcript as in all cases something which can merely be used by the tribunal as an aid to understanding the tape when it is played; for, as I have said, in my view a transcript is admissible even though no tape is put in evidence. The sense in which it is correct to say that the transcript is a mere aid is this: the ultimate question, so far as the recording, is always what sounds are recorded on the two by means of the pattern impression; and where, as will almost invariably be the case, the tape or a re-recording is put in evidence, the tribunal must guard against the danger of concentrating on the transcript to the exclusion of the tape.

The principle that one may, by any means consistent with the law of evidence, prove what is on the original recording is illustrated by the American case of *The State v Lyskoski* 47 Washington 2nd Series 102, cited in *Matthews and Ford* at p13. There a re-recording was used which could be played through a loud speaker, the original recording being capable of being heard only through earphones.

The features or condition of the recording being a relevant matter, that may be proved either by producing the original and, so to speak, exhibiting its features to the tribunal by playing it in court, or by calling a witness to give evidence of those features. I refer to *Lucas v Williams* (1892) 2 QB 113; *Cross on Evidence*, Australian edition, pp8-9, *Wigmore*, Volume 4, paras 1150 *et seq* and 1970 supplement thereto. If the tribunal hears the recording played, it proceeds by direct self-perception. If the tribunal considers a transcript produced by a witness, it is having regard to testimonial evidence. The recording is, or — according to terminology — may, when it is played to the tribunal afford, real evidence. (*R v Bragg* 73 WN NSW 436 at p437; *Phipson on Evidence* 10th edn para.5; *The Statue of Liberty* (1968) 2 All ER 195; [1968] 1 WLR 739).

In *Walsh v Wilcox* (1976) WAR 62, Wright J admitted both a tape recording and a transcript, and said of the transcript that it was merely a means of conveying the conversation recorded to some person who wants to know what words were spoken, and it is an extension of the function formed by the machine on which the recording is played. That is, in substance my own view.

Cross on Evidence, Australian Edition, p11, accepts that a transcript of a recording may be put in evidence. *[His Honour then reviewed numerous authorities, and continued]* ... The authorities support the view which I have earlier expressed on principle, namely, that a transcript of a tape-recording proved or admitted to be correct is admissible if the recording itself would, if tendered, be received. I adopt this view. It is a view which is supported by common sense and considerations of convenience. If I were trying a case without a jury and received in evidence a dozen lengthy tape-recordings of highly important conversations, all perfectly distinct, I should be appalled to find that one side was prohibited from proving and tendering for my assistance a dozen correspondingly lengthy transcripts, for otherwise I should, I suppose, ultimately be driven to spend many many hours before giving judgment sitting with pen in hand continually stopping and starting a tape-recorder and constructing for myself possibly incomplete and inaccurate transcripts of the more important portions of the tapes. That a judge should be constrained to reject a proper transcript, proved and tendered by a party, seems to me to be manifestly inconvenient and not in the least conducive to the satisfactory determination of disputes.

I turn now to the questions of discretion. Reliance was placed upon *Driscoll v R (supra)* 51 ALJR 731, which, was considered by the Court of Criminal Appeal in this State in *R v Davis* unreported 21st November 1977. In the present case there is no suggestion that the tape-recording does not accurately record the interview between the accused and the investigating police officers, and in my view there is nothing in the judgments of Gibbs J and Murphy J or of the Court of Criminal Appeal, which suggest that it would be unfair to the present accused to admit the transcript.

Mr Redlich either submitted or came very close to submitting that the admission of the transcript would give undue emphasis to the evidence, a matter which appears to have been successfully relied on in two American decisions cited in American Law Reports, second series, Later case service vol 5 p584; *Bonicelli v State* (1959) 339 P2d 1063 and *Basham v State* 340 P2d 461. It is true that if I admit the transcript the jury will have as an exhibit a written record of the tape-recording which was played in court, while the jury will not be entitled to have in the jury room a transcript of the evidence given orally. (Cf. the *R v Terry* (1961) 2 QB 314 at p322, *Driscoll* (*supra*) at p735 per Barwick CJ). I note that the observations of the learned Chief Justice suggest that in exceptional circumstances a jury may be permitted to have portion of the transcript. The practice of this court, as I understand it, is not to permit the jury to have any portion of the transcript, even if the jury request it, such a request being met by the reading to the jury of the evidence concerned.

The fact that the jury will, if I admit the transcript as an exhibit, have a written record of the tape-recording which was played in court does not seem to me to give rise to unfairness, for the fact of the matter is that a permanent record of a relevant conversation in the form of a tape-recording did come into existence and has been put in evidence. That permanent record can be played to the jury, it is true, but the jury will not be able to play the tape-recording over in their jury room during their retirement. Counsel on both sides agreed, in answer to my question, at an early stage of this trial, that if the jury wishes to hear any of the tape-recordings after they retired to consider their verdict, the recording should be played to them in court, and since both sides are in agreement I shall not have to consider what would otherwise have been appropriate, a matter adverted to in *Hopes v Her Majesty's Advocate*, (*supra*) at p268 per Lord Clyde.

The evanescent evidence given in the witness box differs from a tape recording. The provision of a transcript would mean that the jury would have available a permanent record in written form derived from a permanent record of another kind which was already in evidence. Tape recordings tendered by the Crown in criminal trials are often recordings either of confessions or admissions, or of speech which constitutes or accompanies the crime itself or some element of the crime itself, such as the solicitation of a bribe or the extortion of money.

Such tape recordings are therefore usually of great importance. While the omission to deal with the matter is only of very limited significance, it is, I think, of some significance that with the exception of the two American decisions to which I have referred, it does not appear to have been suggested that it was unfair to the accused that the jury should have a permanent record in the form of a transcript of an important tape recording. On the contrary in *R v Robson* [1972] 2 All ER 699; [1972] Crim LR 316; [1972] 1 WLR 651; 56 Cr App R 450; (1972) 1 WLR 651 at p656

Shaw J considered that if the jury were denied the use of the transcripts and left to their own recollection, it would be inconvenient to everyone, and potentially dangerous to the accused.

I have already warned the jury about the danger of substituting a transcript for the tape recording (transcript pp162-3) and if I admit the present transcript I shall give another warning in my charge. The accused has failed to satisfy me, as he must, that the admission of the transcript would operate unfairly against the accused, and I shall receive it in evidence, although, as I observed near the outset of this ruling, evidence will have to be given by Chief Superintendent Standfield that when he checked the transcript, as he has said, he found it to be correct.
