13/87

SUPREME COURT OF VICTORIA — FULL COURT

R v NARULA and ORS

Young CJ, Murray and Vincent JJ

4-8, 11-12 August, 27 October 1986

[1987] VicRp 55; [1987] VR 661; (1986) 22 A Crim R 409

CRIMINAL LAW – EVIDENCE – ADMISSIBILITY OF A TRANSCRIPT OF A TAPE RECORDING.

The transcript of a tape recording is admissible in evidence if:-
(i) the accuracy of the transcript can be proved;
(ii) the voices on the recording are properly identified;
(iii) the evidence is relevant; and
(iv) the tape recording itself, if tendered, is admissible.
***R v Gaudion* [1979] VicRp 7; [1979] VR 57, affirmed.**
***Conwell v Tapfield* [1981] 1 NSWLR 595, not followed.**

VINCENT J: (With whom Young CJ and Murray J agreed) *[After setting out the facts and dealing with grounds of appeal not relevant to this Report, His Honour continued]*: … **[17]** It was argued for some time in the law that questions of relevance and admissibility merged into a single principle, referred to as the best evidence rule. The classic statement of this principle was made by Lord Hardwicke in *Omychund v Barker* [1744] EngR 927; 26 ER 15; (1744) 1 Atk 21 at 49:-

> "there is but one general rule of evidence, the best that the nature of the case will allow".

The concept evolved that all evidence was to be measured against this principle and that if it failed to meet that standard, was then to be excluded. The bulk of legal authors and authorities support the view that this rule of evidence has long ceased to apply to the modern law. Lord Denning in *Garton v Hunter* [1969] 2 QB 37; [1969] 1 All ER 451; [1969] 2 WLR 86 stated:-

> "the old rule that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded. That old rule has gone by the board a long time ago. The only remaining instance of it that I know is that if an original document is available in one's hands, one must produce it. One cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility."

Gowans J in *Hindson v Monahan* [1970] VicRp 12; [1970] VR 84 and 89 agreed that:-

> "the so-called 'best-evidence' rule...has long since ceased to be accepted."

However, clear echoes of the principle can be found in three cases dealing with the question of the admission into evidence of transcripts of tape recorded conversations. In the first of these, *R v Migliorini* (1981) 53 FLR 221; (1981) 38 ALR 356; [1981] Tas R 80; (1981) 4 A Crim R 458 Cosgrove J regarded transcripts as *prima facie* inadmissible because they were secondary evidence; **[18]** however, he decided to admit them in the exercise of his judicial discretion for reasons of convenience and fairness.

A more determined stance against the admission of transcripts was taken by the NSW Court of Appeal in *Conwell v Tapfield* [1981] 1 NSWLR 595 where it was held that a transcript of a tape recording was inadmissible. In that case Street CJ, whose view was supported by Glass JA, considered that the question of the admissibility of a transcript of a recorded conversation, whether or not the conversation was conducted in the English language, was to be answered by the application of what he referred to as "the best evidence rule", as the following passage at p598

indicates:-

> "Upon the first aspect of this question, namely whether it is proper to adduce evidence of a sound recording of a conversation, no challenge has been raised in the present appeal, and I entertain no doubt that a sound recording of a conversation is properly admissible in evidence. This has been recognized throughout all of the cases as reference to the judgment in *R v Gaudion* [1979] VicRp 7; [1979] VR 57, discloses. It is the second aspect of the question, that is to say by what means can this be placed before the court, that has given rise to differing expressions of opinion. In my view the question is to be answered by the application of the best evidence rule. What is the best evidence of the sounds entrapped in the record? It seems to me that there can be only one answer to this question, namely, the best evidence is the reproduction of those sounds as sounds when the record is played by appropriate sound reproducing equipment. Much of the confusion that has crept into the cases stems from the fact that normally it is the human voice that is recorded and, when reproduced, this is commonly done in writing. But if, say, the relevant evidence was a screech of tyres before a collision and that had been recorded, there would be no denying that the best method of placing this evidence before the court would be by playing the record. There is not the slightest difference in basic principle where the recorded sound is the human voice."

[19] The learned Chief Justice stated that where problems arise because the recording is not reasonably audible or intelligible or the conversation is conducted in a foreign language, it may be necessary for expert evidence to be given as to what is discernible upon careful listening to the recording or after enhancement of the sounds upon it, however, this would not actually involve a transcription being admitted into evidence. He did, however, decide that in the absence of a jury where the danger of misuse was considerably reduced, for example in committal proceedings or upon a trial by judge alone, for reasons of convenience there was no reason to prevent the use of transcripts.

That decision was followed in Victoria by O'Bryan J in *R v Biddlestone* (unreported, 23 May 1984) who ruled that he would not permit transcripts of English language conversations to be given to the jury. He stated that, if necessary, oral evidence could be given as to the recording if it became inaudible or difficult to follow. His Honour further intimated that if both counsel had consented he would have allowed the jury to have before them a transcript of the tape.

A different approach has been adopted in a number of other cases both in Australia and the United Kingdom, where the view has been adopted that transcripts may be admitted in evidence in certain circumstances and that there is no rule of law which operates to render them *prima facie* inadmissible. In *R v Gaudion* [1979] VicRp 7; [1979] VR 57 the trial judge in the present matter held that a transcript of a tape **[20]** recorded conversation, proved or admitted to be correct, is admissible if the tape recording itself, would if tendered, be received. In that case the transcript was of an interview conducted between a police officer and the accused. The accused's counsel objected only to the admissibility of the transcript but not that of the tape recording itself. In relation to the exercise of discretion, His Honour held that admission of the transcript would not operate unfairly against the accused and that therefore there was no reason for its exclusion on this basis. Indeed he Regarded such exclusion as being potentially dangerous to the accused in a situation where the jury could possibly rely on their own incorrect recollections of the oral evidence. However, he did state that in his view the jury should be given a strong warning as to the danger of substituting the transcript for the evidence of the tape recording which was, of course, available to them.

In *Beames* [1979] 1 A Crim R 239, Queensland Court of Criminal Appeal, held that both a tape recording of an interview between police officers and the accused, and a transcript of the conversation were admissible in evidence. In this case the police officer swore to the accuracy of a transcript which he had made from the recording and it was provided to the jury when they retired. The court, which consisted of Wanstall CJ, Matthews and Dunn JJ observed that transcripts were frequently admitted in evidence but that on occasions, judges had decided that whilst a transcript may be used by **[21]** the jury as an aid to understanding a tape recording when played, it ought not to be taken into the jury room. The court considered that this matter should be dealt with by the trial judge in the exercise of his discretion. It was held that in the circumstances of that particular matter there was no miscarriage of justice by virtue of the jury retiring with a transcript.

The court reiterated the view of Brooking J in *Gaudion*, that tape recordings are admitted

as original evidence of sounds which have been uttered and are physical objects not written documents. These "locked up" sounds may be proved either by -

1. playing the recording in court; or
2. by production of a verified transcript of it.

In *Walsh v Wilcox* [1976] WAR 62 a transcript of a telephone conversation was held to be admissible because -

1. it was a type of extension of the tape recording that had the function of conveying the content of that recording and was therefore not merely secondary evidence; and
2. the transcript should be admissible on the grounds of convenience i.e. to avoid the repeated playing of the tape recording.

Finally, in relation to the particular problem presented, where a recording is made of a conversation conducted in a foreign language, there is the English decision of *R v Maqsud Ali* [1966] 1 QB 688; [1965] 2 All ER 464. This case involved a secretly recorded conversation conducted in a Punjabi dialect. The situation was additionally **[22]** complicated by reason of the fact that the dialect was quite localized in use and many words had a number of possible meanings. The vocabulary of the dialect was limited and the tape had first been translated into Urdu and from that language into English.

The Court of Criminal Appeal held that both a tape recording and a transcript are admissible in evidence and that there is no difference in principle between them. For either to be admissible it would have to be proved to be accurate and the voices properly identified. A tape recorder was said to be similar to an eavesdropper and a transcript was obviously a convenient way of conveying the substance of the conversation as recorded or translated to the jury. However, a cautionary note was added and it was stated that the court should not be taken as having indicated that, whatever the circumstances, recordings are admissible as each case depended on its own particular facts.

The decision in *Conwell v Tapfield* appears to rest substantially upon an acceptance of the proposition that a "best evidence" rule exists and has application to the type of material under consideration. With great respect to the learned Chief Justice and the other members of that court, as I have already indicated, I do not consider that the proposition is correct. However, assuming that the term "best evidence" is to be understood as still having some wider area of application than that which has been ascribed to it in such cases as *Garton v Hunter* and *Hindson v Monahan*, it is important to keep in mind that what is being considered is simply the means by which **[23]** evidence of the fact and substance of a relevant conversation is conveyed to the jury. I find great difficulty in accepting the view that the best evidence in this general sense of the recorded sounds is to be given by the playing of the tape in court while the person who made the recording gives oral evidence when necessary, or, in the case of a foreign language, an interpreter provides a contemporaneous oral translation.

The learned trial judge in the present matter expressed the opinion that this method would be likely to produce a far inferior result with the possibility of a reduced understanding of the evidence by the jury than that likely to be obtained if the jury were to be provided with a written transcript. Therefore in terms of the communication of the conversation whether conducted in English or in a foreign language the "best-evidence" would be produced using transcripts in conjunction with the tape recordings and the oral evidence. I consider that there is a great deal to be said for this approach. There is nothing exceptional about this view as other evidence is frequently provided to the jury in a written form or is supplemented by a written or diagrammatic representation of the effect of the oral evidence. Maps, tables and diagrams have been used in this fashion and have been made exhibits. (*R v Tucker* [1907] SALR 30, tables; *R v Mitchell* [1971] VicRp 5; [1971] VR 46, charts). Given the appropriate skills, presumably a jury could make such transcripts or charts themselves if time permitted. No argument could be mounted that they would not be enabled to do so; all that is effectively done by the provision of **[24]** such material is that assistance is provided by the presentation of the evidence in a more convenient and accessible form.

Provided that care is taken to ensure that the process does not result in any distortion of the evidence itself or some possible unfairness by an undue elevation of its significance, there does

not seem to be any objection in principle to the use of such techniques. However, the necessity to take such care must be emphasized, as it must be accepted that there is some risk that the presentation to a jury for its consideration of a transcript of portion of the evidence may result in a more ready acceptance of that evidence. This potentiality was appreciated by the judges of the High Court who decided *Driscoll v R* [1977] HCA 43; (1977) 137 CLR 517; (1977) 15 ALR 47; (1977) 51 ALJR 731.

In more than one of the cases to which I have referred, the courts considered that the admissibility of transcripts depended in part upon proof of accuracy. Yet in *Maqsud Ali* as in the present matter, where a dispute as to the interpretation of a recorded conversation existed, the accuracy of one or another version was clearly in issue. The problem of resolving such a dilemma may be in many situations a very difficult one. There may be circumstances in which it would be unfair to an accused person to admit such evidence. However, this is by no means a proposition of universal application and the issue must be seen, not as one affecting the initial admissibility of the transcript but rather as requiring the consideration by a trial judge of the exercise of judicial discretion. A similar series of questions may arise as a consequence of **[25]** the possible elevation of a relatively inconsequential piece of evidence to a position of apparent importance by its reduction to a written form and its admission as a exhibit.

The argument has been raised that the manner in which these problems may be dealt with is for the jury to be provided with a play-back machine and thus enabled to listen to whatever portion of the recorded conversation that they choose. Whilst this course may certainly be the most appropriate in a number of cases, it may well be of very limited value in a variety of situations. There may be others again where the jury would be assisted by both the recording and the transcript. In dealing with these issues it is important to consider the context within which the question of the use of a transcript of a recorded conversation is likely to arise. Where the conversation is brief, in English, and the recording is clearly audible, the justification for the use of a transcript may be slight. However, where there is a substantial volume of material, or the conversation is conducted in a foreign language, or the recording is extremely difficult to decipher without special equipment or repeated playing, it may be totally unrealistic to anticipate that a jury will be able to follow and adequately assimilate the evidence, if given only in an oral fashion.

In an increasingly complex system, where trials of considerable length are commonplace and there is far greater use of interception devices by police agencies to record telephone and other conversations, the demands which **[26]** are placed upon the members of juries in criminal trials have also substantially increased. I agree with the learned trial judge that it would be absurd:-

> "to deny to the law of evidence, advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices properly identified, provided also that the evidence is relevant and otherwise admissible and that the tape-recording is admissible."

Few judges would be prepared to deal with lengthy conversations or to rely upon their recollection of verbal translations without the aid of some form of transcript, yet it has been argued that juries should be required to do so. The sheer impracticality and obvious unfairness present in that situation cannot be ignored. The trial judge in the present matter clearly directed his attention to all of the relevant issues, in a carefully reasoned ruling although no argument was presented to him in respect of most of them. I do not consider that there is any basis for a finding by this court that he misdirected himself in dealing with either the issue of the admissibility of the transcripts or the exclusion of any of them as a matter of discretion.

[His Honour then dealt with other grounds of appeal].
