Butera v Director of Public Prosecutions (Vic) - [1987] HCA 58

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HIGH COURT OF AUSTRALIA

Mason C.J., Brennan, Deane, Dawson and Gaudron JJ.

BUTERA v. DIRECTOR OF PUBLIC PROSECUTIONS FOR THE STATE OF VICTORIA
(1987) 164 CLR 180
8 December 1987

Criminal Law

Criminal Law—Evidence—Tape recording of conversations in foreign language—Translation into English—Transcript—Admissibility.

Decisions

MASON C.J., BRENNAN AND DEANE JJ. The applicant was presented jointly with four other persons before the Supreme Court of Victoria on a count of conspiring to traffic in heroin. All were convicted. The Full Court, sitting as the Court of Criminal Appeal, dismissed the applicant's application for leave to appeal against conviction. The applicant seeks special leave of this Court to

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appeal against that judgment.

2. At the trial, a tape recording of a conversation among some of the alleged co-conspirators, which was mostly in Punjabi but partly in English and partly in Thai or Malay, was admitted in evidence. The tape recording had been made by installing a listening device in an hotel room and, presumably, recording what the listening device picked up of the conversation. Some parts of the conversation were muffled or indistinctly recorded and it was necessary for a person familiar with the languages used to listen to the tape repeatedly in order to determine what had been said. Two interpreters did that and produced written English translations of the conversation they heard on the tape. The tape was played over to the jury, the interpreters gave oral evidence of their respective translations and verified their respective written translations. Each of the written translations was admitted in evidence and, as a documentary exhibit, went into the jury room when the jury retired to consider their verdict. The sole ground on which special leave to appeal is sought is that the learned trial judge "erred in law and/or as a matter of discretion in receiving into evidence transcripts of tape recordings" made by the interpreters. This ground does not challenge the admissibility of the conversation recorded on the tape, of the tape recording, or of the oral evidence of the respective translations. The challenge is made solely to the admissibility of the written translations which the ground of appeal calls "transcripts".

3. The fact which the prosecution sought to prove was the conversation in the hotel room as a link in the chain of proof of the conspiracy charged. The content of the conversation could be conveyed to the court only by a translation of the conversation into English. Two facts were to be proved: first, that the conversation had taken place in the circumstances and among the participants alleged by the prosecution, and second, the content of the conversation translated into English.

4. The means by which the first of those facts was proved was by tendering the tape recording and, one assumes, proving the circumstances in which the recording had been made and the custody in which the recording had been kept until it was played to the court at the trial. Of course, a conversation can be proved by the oral testimony of anyone who heard it but that is not the only means by which a conversation might be proved. The courts have now accepted tape recordings as evidence of the conversations or other sounds recorded on the tape: see, among other cases, Reg. v. Maqsud Ali (1966) 1 QB 688 ; Papalia v. The Queen; The Queen v. Cotroni (1979) 2 SCR 256; 93 DLR (3d) 161 ; Williams v. The Queen (1982) Tas R 266 ; Walsh v. Wilcox (1976) WAR 62 ; United States v. Biggins (1977) 551 F 2d 64 ; Hurt v. State (1956) 303 P 2 d 476, which canvass the conditions on which a tape recording may be admitted in evidence. It is unnecessary now to consider those conditions but it is obvious that the provenance of the tape recording must be satisfactorily established before it is played over to the jury.

5. The reason why a tape recording of a conversation is admitted in evidence to prove what is recorded is simply that use of the technology of sound recording and reproduction adds "to our knowledge other data not discernible by the unaided senses, or can make more accurate and more usable the data already discernible": Wigmore, The Science of Judicial Proof, 3rd ed. (1937), par. 220, p 448, cited by Neasey J. in Williams v. The Queen, at p 270. Those additions to our knowledge, as Wigmore points out (ibid., p 450) are due to the use of instruments constructed on knowledge of scientific laws. A tape recording may be used to produce a form of evidence which is different from both oral testimony and documentary evidence. The rules which govern the admission in evidence of tape recordings and the procedure to be followed by a court in ascertaining what is alleged to have been recorded on them must be moulded so as to deal with the technical and logical conditions which must be satisfied before a tape recording can furnish proof of what is

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recorded.

6. The learned trial judge (Brooking J.) regarded the written translations as transcripts of the tape recording. Then, following an earlier decision (Reg. v. Gaudion (1979) VR 57) in which his Honour had held that a transcript of a tape recording is admissible whenever the tape recording is admissible, he admitted the written translations in evidence. Contrary to Reg. v. Gaudion, the Court of Criminal Appeal of New South Wales in Conwell v. Tapfield (1981) 1 NSWLR 595 held that transcripts of tape recordings were not admissible in evidence. A resolution of the conflict between these two views does not necessarily determine the admissibility of the written translations in this case. For reasons presently to be stated, the written translations cannot properly be regarded as transcripts of what is recorded on the tape, but the admissibility of the written translations can better be determined in the light of the principles governing the admissibility of transcripts.

7. What is a transcript of a tape recording? It is a document setting out words which can be heard on playing over the tape. It is not a copy of the tape, but a written record of what has been heard. Prima facie, the issue whether the recorded conversation took place should be proved by playing the tape in court if it be available, not by tendering evidence, whether written or oral, of what a witness heard when the tape was played over out of court. That is the consideration which weighed with Street C.J. in Conwell v. Tapfield when he said (at p 598):

" 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."

8. That view is clearly right, and its cogency is strengthened rather than weakened by the invocation of the traditional term "best evidence". That is not to say that the tape is itself the admissible evidence of what is recorded on it. A tape is not by itself an admissible object for by itself it is incapable of proving what is recorded on it: it is admissible only because it is capable of being used to prove what is recorded on it by being played over. By using sound reproduction equipment to play over the tape, the court obtains evidence of the conversation or other sound which is to be proved; it is that evidence, aurally received, which is admissible to prove the relevant fact.

9. If the tape is not available and its absence has been accounted for satisfactorily, the evidence of its contents given by a witness who heard it played over may be received as secondary evidence. That evidence is not open to the same objection as the evidence of a witness who repeats what he was told out of court by another person who is not called as a witness. In the latter case the credibility of the other person cannot be tested; in the former case, assuming the provenance of the tape is satisfactorily proved, no question of its credibility can arise. Nevertheless, when the tape is available or its absence is not accounted for satisfactorily, there can be no reason to admit the evidence of an out-of-court listener to the tape recording to prove what the tape recorded: it should be proved by the playing over of the tape. Prudence and convenience combine to support the application of the best evidence rule in such a case.

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10. If the oral testimony of an out-of-court listener is not to be admitted, it can make no difference that the listener has reduced what he heard to writing so that a transcript can be tendered. In Reg. v. Gaudion, Brooking J. regarded a proved transcript to be evidence of the contents of an object - the tape - which is itself admissible in evidence. But it is not the tape, it is the sounds produced by playing it over, which is the evidence admitted to prove what is recorded. The tape is a part of the machinery by which that evidence is produced. In so far as Brooking J. in Reg. v. Gaudion attributes the admissibility of a transcript to its ability to inform the court of the contents of the tape, his Honour assumes that the tape would be admissible evidence of its contents without being played over. The assumption is erroneous and, for the reasons stated by Street C.J. in Conwell v. Tapfield, this basis for admitting transcripts must be rejected.

11. It is desirable to add, however, that the best evidence rule is not applicable to exclude evidence derived from tapes which are mechanically or electronically copied from an original tape. Provided the provenance of the original tape, the accuracy of the copying process and the provenance of the copy tape are satisfactorily proved, there is no reason why the copy tape should not be played over in court to produce admissible evidence of the conversation or sounds originally recorded. There is no reason to apply the best evidence rule to copy tapes: Reg. v Matthews and Ford (1972) VR 3 ; Kajala v. Noble (1982) 75 Cr App R 149 ; Papalia and Cotroni, SCR, at pp 263-265; DLR, at pp 167-169.

12. Although evidence derived from a tape recording is not subject to some of the frailties of human testimony, it may exhibit deficiencies from which human testimony is usually free. A tape recording which is indistinct may not yield its full content to the listener on its first playing over. It may need to be played over repeatedly before the listener's ear becomes attuned to the words or other sounds recorded. This situation has led courts to receive transcripts not as evidence of the conversation or other sounds recorded but as a means of assisting in the perception and understanding of the evidence tendered by the playing over of the tape. In Williams v. The Queen, Neasey J. (at p 274) cited with approval a Canadian case Reg. v. MacLean and MacLean (No.1) (1979) 49 CCC (2d) 399 in which a trial judge held -

" that he would not permit the transcripts to be used
as evidence of the contents of the recording, but
did admit them for the use of 'the trier of the facts, after being properly instructed in that regard, for the sole purpose of following the playing of the tape in court and to assist the trier of the facts in determining what is in fact recorded thereon'."
Where the quality of the recording is such that the provision of a transcript for the use of the jury would permit them clearly to follow an indistinct recording, a transcript may be seen as an aid to listening though it is not independent evidence of the recorded conversation. As Everett J. said (at p. 280):

" To deny the jury the benefit of reading with their
eyes the same words as they heard with their ears seems to me to put the law into an ill-fitting straitjacket."
The basis on which a transcript may be provided to the jury was stated by Cooke J., speaking for the majority in Reg. v. Menzies (1982) 1 NZLR 40, at p 49. Noting that Phipson said that the relaxing of the rules of evidence tended "to effect economy, convenience and dispatch", his Honour said:

" The problem is how best to enable a jury to assess

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the contents of a tape, in the light of those aims.
It is a problem sui generis and not automatically answered by settled principles.

> If the tape is reasonably short and clearly audible there can normally be no justification for allowing a transcript as well as playing the tape. But there will be cases in which the aid of an expert is reasonably necessary. For example, there may be the use of a foreign language. Or deficiencies in the recording may make it necessary to play tapes more than once to enable a better understanding, yet the sheer length of the tapes may mean that inordinate time would be taken by replaying them to the jury. In such cases, while there should normally be at least one playing to the jury, the evidence of an expert should be admissible as an aid to the jury. He may be a temporary expert in the sense that by repeated listening to the tapes he has qualified himself ad hoc. And we see no compelling reason why his evidence should not take the form of production of a transcript which can be admitted as an exhibit. Whether the Judge allows the jury to have copies of the transcript, as distinct from merely hearing it read, must be a matter for his discretion in the particular case, bearing in mind the requirements of justice and any risk of unfairness to the accused."

The jury should be instructed that the purpose of admitting a transcript is not to provide independent evidence of the conversation but so as to aid them in understanding what conversation is recorded on the tape, and that they cannot use the transcript as a substitute for the tape if they are not satisfied that the transcript correctly sets out what they heard on the tape. In Hopes v. H.M. Advocate (1960) J.C.104; (1960) SLT 264 , the evidence (set out in a transcript) of a person who listened to an indistinct tape played over out of court was held to be "very doubtfully competent" on the ground that it was primary evidence by an ad hoc expert of the tape's content. With respect, it seems better to acknowledge that such a transcript is merely an aid to the jury's understanding of the evidence derived from playing over the tape in court.

13. However, to say that a transcript may be admitted in evidence for this limited purpose does not answer the question which arises in this case. The written translations which were tendered in this case could not assist the jury to understand what was said in Punjabi, Thai or Malay as recorded on the tape. The translations are the respective renditions in English of what the interpreters heard in repeated playings of the tape. The respective translations are the product of the expertise which the interpreters brought to the task: they became ad hoc experts as to what was recorded by repeatedly listening to the tape being played over and they were experts in the languages to be translated.

14. The tendering and playing over of the tape was the foundation for the expert evidence of the interpreters. Although the contents of a document written in a foreign language or an oral statement in a foreign language cannot be proved without a translation into English of what is written or spoken, the translation must itself be given as evidence sworn to by the person who makes the translation: Fakisandhla Nkambule v. The King (1940) AC 760, at p 771. The interpreters' evidence was contained in their respective translations of the Punjabi, Thai or Malay words recorded on the tape. The written translations were not copies of the tape in any relevant sense and they could not have been made admissible as an aid to the jury's understanding of the sounds recorded on the tape. Prima facie, the interpreters' evidence should have been given orally, as other testimonial evidence is given in a criminal trial.

15. The adducing of oral evidence from witnesses in criminal trials underlies the rules of procedure which the law ordains for their conduct. A witness who gives evidence orally demonstrates, for good

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or ill, more about his or her credibility than a witness whose evidence is given in documentary form. Oral evidence is public; written evidence may not be. Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witnesses. By generally restricting the jury to consideration of testimonial evidence in its oral form, it is thought that the jury's discussion of the case in the jury room will be more open, the exchange of views among jurors will be easier, and the legitimate merging of opinions will more easily occur than if the evidence were given in writing or the jurors were each armed with a written transcript of the evidence. And there are, of course, logistical and financial obstacles to the provision of general transcripts for each juror. If the general body of evidence is given orally, a written transcript of a part of the evidence available in the jury room tends to give an emphasis and perhaps an undue air of credibility to that part. In Driscoll v. The Queen (1977) 137 CLR 517 this problem arose with respect to unsigned records of interview which, according to police evidence, an accused had adopted orally. Gibbs J., with the concurrence of Mason and Jacobs JJ. said (at p. 542):

" The danger is that a jury may erroneously regard
the written record as in some way strengthening or
corroborating the oral testimony. Moreover the record, if admitted, will be taken into the jury room when the jury retire to consider their verdict, and by its very availability may have an influence upon their deliberations which is out of all proportion to its real weight. For these reasons, it would appear to me that in all cases in which an unsigned record of interview is tendered the judge should give the most careful consideration to the question whether it is desirable in the interests of justice that it should be excluded."

16. The general rule that witnesses must give their evidence orally is not without exception. In Smith v. The Queen (1970) 121 CLR 572, a chart had been prepared by a witness to explain complicated business transactions. The chart was admitted in evidence, though what it showed could have been described - albeit laboriously - in oral evidence. This Court (at p. 577) agreed with the view expressed by the Court of Criminal Appeal (sub.nom. Reg. v. Mitchell (1971) VR 46, at pp 59-60) that the chart was rightly admitted:

" The chart was nothing but a convenient record
of a series of highly complicated cheque
transactions which had been proved by other evidence, and was likely to be of considerable assistance to the jury. Had they all been accountants, doubtless after considerable time they could have prepared such a chart for themselves. The use of such charts and other time-saving devices in complicated trials of this kind is a usual and desirable procedure and is encouraged by the courts."

17. The practice of requiring witnesses to give their evidence orally should not be waived lightly, especially if there be a risk that writing will give undue weight to that evidence to the disadvantage of an accused person. But the practice is not immutable. If a witness writes out a proof of his evidence and swears to its truth or if a written transcript of part of the witness' oral evidence is produced, and if the task of the jury can be facilitated by admitting the document in evidence, there is no absolute bar against doing so. For example, a written document may prove more convenient than oral evidence as a foundation for cross examination upon its contents or it may be a valuable aide- memoire for the jury in a case where precise recollection of words is important. In every case, even when an accused consents to the admission of the document, the trial judge should bear in mind the overriding consideration of fairness to the accused and the risk involved in allowing the document to be taken into the jury room. A further relevant consideration is the risk that documentary evidence may impair public understanding of the proceedings.

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18. In the present case, as we were informed, over 500 pages of trial transcript were taken up in cross examination of the interpreters on the text of the written translations to which they had respectively sworn. It would have been all but impossible for the jury to appreciate the cross examination - not to speak of the difficulty of conducting the cross examination - if the translations had not been reduced to writing. It was a case in which a departure from the ordinary practice was justified and in which it was appropriate to admit the translations in evidence and permit the jury to have them in the jury room. In the circumstances of the case it may well have been preferable for the written transcript of the cross examination of the interpreters also to have been made available to the jury, in the course of their deliberations, to supplement and modify the written translations which, in effect, represented their evidence in chief. No request was made of the learned trial judge to follow that course however and, having regard to the absence of any such request and to the other circumstances of the case, it cannot be said that the trial judge's exercise of his "inclusory" discretion (cf. per Cosgrove J. in Reg. v. Migliorini (1981) Tas R 80, at p 90; 38 ALR 356, at p 362) miscarried for that reason. Nor did his Honour's exercise of that discretion occasion any miscarriage of justice.

19. The question raised by the application for special leave is important in criminal practice. Special leave should therefore be granted, but the appeal should be dismissed.

DAWSON J. The applicant was convicted of having conspired with four others to traffic in heroin. He unsuccessfully sought leave to appeal against the conviction to the Full Court of the Supreme Court of Victoria. He now seeks special leave to appeal to this Court.

2. An important part of the prosecution case against the applicant consisted of tape recordings of conversations which took place in a room at the Hilton Hotel in Melbourne. The recordings were made by means of a listening device which had been planted in the room by the police. The participants in these conversations involved those alleged to be the applicant's co-conspirators but did not include the applicant himself. However, the applicant was, according to the prosecution, referred to a number of times in the course of the recorded conversations. Despite his absence, evidence of these conversations was admissible against the applicant upon the basis that they took place in furtherance of the conspiracy between the applicant and his co-accused: Tripodi v. The Queen (1961) 104 CLR 1 .

3. The conversations were conducted for the most part in Punjabi, although some English and another language - either Thai or Malay - were also used. Apart from the fact that the conversations were largely in a foreign language, the recordings were not easy to follow. At times they were inaudible and at other times it was difficult to say who was speaking. The learned trial judge admitted in evidence not only the tapes themselves but also transcripts which consisted of translations of the tapes made by two interpreters. The Full Court appears in places to have thought the contrary but clearly the transcripts were admitted in evidence. There were variations in the two translations which were said to be of significance to the applicant.

4. No point has been raised about the receipt in evidence of the tapes themselves. It is now accepted that a tape recording is, so to speak, the auditory equivalent of a photograph. The ground upon which the applicant seeks special leave to appeal is that the trial judge was in error in admitting the transcripts in evidence, a ground which was rejected by the Full Court below in dismissing an application by the applicant for leave to appeal.

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5. In admitting the transcripts, the learned trial judge (Brooking J.) followed a previous decision of his own in Reg. v. Gaudion (1979) VR 57 in which he held that a tape recording is not a document, but a physical object containing pattern impressions which might be revealed in the form of conversation, not only by playing the tape, but also by the production of a transcript. Upon this view a transcript is merely another means of proving the configuration of the tape. Of course, in this case the transcripts did not reveal what was on the tapes, but were translations because the conversations recorded were for the most part not in English. That is something with which it will be necessary to deal in due course.

6. The trial judge also relied upon an alternative ground for admitting the transcripts in evidence in this case, namely, that they were documents prepared for the convenience of the court in understanding evidence otherwise before it in the form of the tape recordings themselves.

7. Reg. v. Gaudion was followed in Queensland in Reg. v. Beames (1979) 1 A Crim R 239 where the Court of Criminal Appeal of that State held that a transcript of a tape recording might be admitted as original evidence of sounds which have been uttered. The Court in that case adopted the view that a tape recording itself is a physical object and not a document and that the sounds which are "locked up" in the physical object may be proved by playing the recording or by production of a transcript of it.

8. On the other hand, the New South Wales Court of Appeal in Conwell v. Tapfield (1981) 1 NSWLR 595 declined to follow Reg. v. Gaudion and Reg. v. Beames. Street C.J., with whom Glass J.A. agreed, held that the best evidence rule required that the contents of the tape recording be proved by playing the tape itself and precluded proof by the production of a transcript. Cf. Reg. v. Migliorini (1981) Tas.R. 80; (1981) 38 ALR 356.

9. In Beneficial Finance Corporation Co. Ltd. v. Conway (1970) VR 321 McInerney J. examined the nature of a tape recording and concluded that, for the purposes of the rules relating to discovery, a tape recording is not a document. A contrary conclusion, also in the context of discovery, was subsequently reached by Walton J. in Grant v. Southwestern and County Properties Ltd. (1975) Ch 185 where he held that a document, the word being derived from the Latin "documentum", is something which instructs or provides information. That being so, the word extends beyond written, printed, or inscribed materials. Thus a photograph is a document. Walton J. found himself unable to draw any distinction between a tape recording and other objects classified as documents in that a tape recording appeals to the ear and the others appeal to the eye. Both may contain words in one form or another which require perception. Whether that perception is by reading or hearing did not, in his view, matter. He found the term "documentary film" an excellent example of a relevant use of the word "document", involving, as it does, reference to something which appeals to both the eye and the ear and is not written. Walton J. therefore determined that a tape recording, provided that what it records is information, is a document. A similar conclusion had been reached previously by Hoare J. in Cassidy v. Engwirda Constructions Company (1967) QWN 16 .

10. Mason J. had occasion to refer to Beneficial Finance Corporation Co. Ltd. v. Conway in Australian National Airlines Commission v. The Commonwealth (1975) 132 CLR 582, at p 594 and said that, had it been necessary to decide the question, he would have been disposed to hold that a tape recording was a document for the purposes of discovery and inspection. He expressed his preference for the decisions of Walton J. in Grant v. Southwestern and County Properties Ltd. and Hoare J. in Cassidy v. Engwirda Constructions Company. I have the same preference. The decision of McInerney J. in Beneficial Finance Corporation Co. Ltd. v. Conway was carefully examined by

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Walton J. in Grant v. Southwestern and County Properties Ltd. and he demonstrates quite clearly to my mind that the former took an unduly restrictive view of what constitutes documentary evidence. See also Senior v. Holdsworth; Ex parte Independent Television News Ltd. (1976) QB 23 .

11. A document may also be tendered in evidence merely as a physical object, as, for instance, in a case of theft when the information which the document contains is of no significance other than, perhaps, to identify the document stolen. When, however, tendered as a document, it has a quite different significance. It contains that which, when perceived, conveys information. Similarly, a tape recording is also a physical object, but it does not follow that because of its physical nature the revelation of the information which it contains is no different from a description of its physical characteristics as Brooking J. appears to have thought in Reg. v. Gaudion.

12. If then a tape recording is of a documentary character such that it is discoverable, does that mean that its contents must be proved by the production of the original tape and cannot be proved by means of a copy, either in the form of another tape or in the form of a transcript? Such a rule applies to written documents, namely, that the effect of a document must be proved by the production of the original document itself and not by secondary evidence of its contents unless the absence of the original is accounted for and excused. That rule appears to have preceded the so-called best evidence rule which is said to require the best evidence to be given which the nature of the case permits: Omychund v. Barker (1744) 1 Atk 21, at p 49 (26 E.R. 15, at p 33). The failure to observe the best evidence rule in practice has led textbook writers to conclude that it no longer exists, save as a convenient and concise description of the rule relating to the proof of the contents of written documents, and that it is only in that form that it has survived. See Thayer, A Preliminary Treatise on Evidence at the Common Law, (1898), p.484 et seq.; McCormick's Handbook of the Law of Evidence, 2nd ed. (1972) pp 559-560; Garton v. Hunter (1969) 2 QB 37, at p 44 ; Kajala v. Noble (1982) 75 Cr App R 149 ; Hindson v. Monahan (1970) VR 84, at pp 89-90 . Indeed, Dixon C.J. in Commissioner for Railways (N.S.W.) v. Young (1962) 106 CLR 535, at p 544 appears to have thought that the rule excluding secondary evidence never went beyond writing. See also per Windeyer J. at pp.556-558. In Wigmore on Evidence, vol.IV (Chadbourn rev. 1972), par.1183, the author speaks of "the genesis of a still further development which would enlarge the scope of the term 'writing' to include photographs, sound recordings, and the like", but the development of which he speaks is by statute and is confined to the United States. It is clear that in the absence of such development, documents, other than written documents, ought not now to be, if they ever were, included in the rule requiring proof by primary evidence. See also Reg. v. Robson (1972) 1 WLR 651, at p 653; (1972) 2 All E.R. 699, at pp 700-701 .

13. Of course, some modes of proof are better than others, but that, save in the case of written documents, goes to weight rather than admissibility. Relevance is the ordinary test of admissibility, although in criminal cases the trial judge has a discretion to exclude relevant evidence if it operates unfairly against the accused as it does when its prejudicial effect outweighs its probative value or on grounds of public policy when it has been unlawfully or unfairly obtained. The production and playing of an original tape recording remains the best means of proof of its contents, at least where it is audible, intelligible and the words used are in the English language. Where it is inaudible or unintelligible, expert evidence of its contents may be required and it has been held that an ad hoc expertise may be acquired by a witness by playing and replaying a tape so as to become more familiar with its contents than could be done by playing it only once or twice: Hopes v. Her Majesty's Advocate (1960) JC 104; (1960) SLT 264 . See also Reg. v. Menzies (1982) 1 NZLR 40 . If a tape records a conversation which is not in English, then expert evidence in the form of a translation will be required. Even in these instances, although what was said cannot be proved

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merely by playing the tape in court, the original tape should be produced or its absence satisfactorily explained. Failure to do so may impugn the evidence given of the tape's contents and provoke, at the least, adverse comment.

14. Even when an original tape is produced and its contents are audible, intelligible and in English, it may be desirable to adduce secondary evidence of its contents as a matter of convenience. Instances of when this will occur are when the playing of the tape takes a long time or the conversation recorded can be understood only with difficulty. The production of a transcript in these circumstances provides a ready form of reference to the contents of the tape and avoids unnecessary playing and replaying of the tape. To admit secondary evidence in the form of a transcript in these circumstances is no more than an application of the well-established principle that when evidence is voluminous or complex, then abstracts, schedules or charts, proved by a suitably qualified person, may be admitted in evidence as an aid to comprehension. See R. v. Tucker &Anor. (1907) SALR 30 ; Wigmore, vol.III (Chadbourn rev. 1970), pars 790-794 and vol.IV (Chadbourn rev. 1972), par. 1230; Reg. v. Menzies, at p 49; Reg. v. Ireland (1970) 126 CLR 321, at p 336 ; Reg. v. Simmonds (1 969) 1 QB 685, at p 690. In Smith v. The Queen (1970) 121 CLR 572, at p 577 Menzies J., with whom the other members of the Court agreed, gave unqualified approval to this principle:

> "There was an objection to the use of a chart prepared by one Tuckwell. As to this I do no more than record my full agreement with the statement of the Court of Criminal Appeal as follows (1971) V.R., at pp.59-60: 'The chart was nothing but a convenient record of a series of highly complicated
> cheque transactions which had been proved by other evidence, and was likely to be of considerable assistance to the jury. Had they all been accountants, doubtless after considerable time they could have prepared such a chart for themselves. The use of such charts and other time-saving devices in complicated trials of this kind is a usual and desirable procedure and is encouraged by the courts.'"

See also Williams v. The Queen (1982) Tas R 266 ; Walsh v. Wilcox (1976) WAR 62 .

15. In this case the transcripts which were admitted in evidence were translations and it does not appear that any transcript in Punjabi, the language largely used on the tapes, was ever prepared. That, however, is no ground for objection to the admission of the translations. Had transcripts in Punjabi been prepared they would have afforded no assistance to the court until translated into English and the most appropriate form of translation would have been a document or documents which, if duly proved, could have been admitted in evidence. There is, however, no basis for requiring the translation to have taken place by the preparation of two documents rather than one. The translations which were admitted in evidence at the trial purported to be no more than secondary evidence of the contents of the tapes, duly translated, and the process involved in making the documents which constituted the secondary evidence did not necessarily involve the making of two transcripts, one in Punjabi and one in English.

16. The view that a transcript of a tape recording constitutes secondary evidence of its contents is not, I think, inconsistent with the decision of the English Court of Criminal Appeal in Reg. v. Maqsud Ali (1966) 1 QB 688. In that case transcripts in the form of translations from the original Punjabi on the tape were admitted in evidence and put before the jury. The Court said at p 702 :

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> "In the matter of the transcripts the court desires only to say this. Having a transcript of a tape recording is, on any view, a most obvious convenience and a great aid to the jury, otherwise a recording would have to be played over and over again. Provided that a jury is guided by what they hear themselves and upon that they base their ultimate decision, we see no objection to a copy of a transcript, properly proved, being put before them."

I must confess that I find difficulty in understanding how the jury in that case could have been guided by what they heard themselves, since the conversations on the tape in question were, as in this case, in Punjabi. If, however, what was said was intended to have a more general application then it is understandable. Where a tape recording of a conversation in English is played to a jury and they are given a transcript of the contents of the tape, they ought, of course, to prefer what they have heard, that being the best evidence, if there is a conflict between the transcript and the tape. But the transcript is nevertheless, in my view, evidence, albeit secondary evidence, of the contents of the tape and not merely an aide-memoire. Where the tape records a conversation which is inaudible or unintelligible to the ordinary listener or where the conversation is not in English, a transcript compiled by an expert, if necessary a translation, may, although secondary evidence, be the best available evidence of its contents.

17. A separate submission was made on behalf of the applicant that, even if the transcripts in this case were otherwise admissible in evidence, they ought to have been excluded by the trial judge in the exercise of his discretion because it was unfair to the accused that evidence of the contents of the tapes should go to the jury in a written form. Underlying this broad submission was the proposition that the transcripts were in some way a substitute for oral testimony, that is to say, they were evidence in a documentary form which should have been given orally. However, as I have explained, the tapes were of a documentary character and thus, even if played, did not constitute oral testimony. No doubt in appropriate circumstances oral testimony might be given of what is recorded by a tape recording but such evidence would merely be secondary evidence of the contents of the tape just as a transcript of the tape would be. The tape itself when played does not constitute oral testimony nor is secondary evidence by means of a transcript a substitute for oral testimony of its contents any more than a photocopy of a written document is a substitute for oral testimony of its contents. It is said that there are no degrees of secondary evidence and whilst this may be too much of a generalization (see Wigmore, vol.IV (Chadbourn rev. 1972), par.1230) it is true to say that where secondary evidence is admissible the admissibility is not confined to a particular species of evidence: Doe d. Gilbert and Others v. Ross (1840) 7 M &W 102 (151 ER 696). Of course, the form of the secondary evidence may go to its weight: Hansell v. Spink (1943) Ch 396, at p 398.

18. To be admissible a transcript must be properly proved and this will require evidence to be given that it faithfully transcribes what is on the tape and, if it is a translation, that it properly translates the language used. The person giving that evidence will be subject to cross-examination and, if the transcription or the translation, or a combination of both, is contested, then the matter may be fully aired as it was in this case. The weight given by the jury to the evidence constituted by the transcript may be much affected by such a cross-examination.

19. A more confined basis for the submission that the transcripts ought to have been excluded from evidence was that the jury may have given them undue weight in comparison with the oral testimony relating to the tapes, particularly that given under cross-examination, and the other oral evidence in the case. Reliance was placed upon Driscoll v. The Queen (1977) 137 CLR 517. In that case the prosecution had tendered in evidence a record of a police interview which, according to the police, the accused had adopted but refused to sign. Gibbs J., with whom Mason and Jacobs JJ.

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agreed, expressed the view that when such a record is tendered the trial judge should give careful consideration to the question whether it is desirable in the interests of justice that it should be excluded. He said at p 542 :

> "The mere existence of a record is no safeguard against perjury. If the police officers are prepared to give false testimony as to what the accused said, it may be expected that they will not shrink from compiling a false document as well. The danger is that a jury may erroneously regard the written record as in some way strengthening or corroborating the oral testimony. Moreover the record, if admitted, will be taken into the jury room when the jury retire to consider their verdict, and by its very availability may have an influence upon their deliberations which is out of all proportion to its real weight."

It does not seem to me that the considerations which prompted the comment of Gibbs J. in Driscoll have any application in this case. Neither the same opportunity nor the same motive for fabrication was present. The tapes from which the transcripts were taken were in evidence and available for comparison with the transcripts and there is no suggestion that the applicant was denied the opportunity to make such a comparison. The cross-examination of the witnesses who compiled the transcripts was based largely upon the discrepancies between their respective versions, for the appreciation of which the transcripts were an invaluable aid and, even though taken into the jury room, those transcripts were unlikely to have been given undue weight in comparison with the oral evidence of those witnesses or the other witnesses in the case.

20. It does not appear that the trial judge erred in allowing the transcripts to be tendered in evidence nor does it appear that any unfairness to the applicant resulted from his doing so.

21. The application for special leave should be granted, but the appeal should be dismissed.

GAUDRON J. Franco Butera ("the applicant") and four other persons were convicted of having conspired to traffic in heroin. Applications by all five to the Court of Criminal Appeal of the Supreme Court of Victoria for leave to appeal against conviction were refused. From that decision, so far as it concerns him, the applicant seeks special leave to appeal to this Court.

2. The application raises important questions of law and practice relating to the use properly to be made in a criminal trial of documents being in part a transcription and in part a translation of electronically recorded conversations.

3. The conversations to which this application relates took place in Room 806 of the Melbourne Hilton Hotel. The room was occupied by Kuldip Kumar. Kumar was convicted as a co-conspirator in the offence charged. An electronic listening device had been lawfully placed in the room. The listening device picked up the words spoken which were transmitted to a remote recorder and there entrapped on tapes. The conversations thus recorded included a lengthy conversation between Kumar and two other persons. It seems that those two other persons were Gurdas Singh Narula and Manjit Singh Namtanee who were also convicted as co-conspirators. There was also a number of telephone conversations which were recorded only as to the words spoken by Kumar.

4. The substantial issue in this application relates to the lengthy conversation between Kumar and the two other persons. That conversation was conducted mainly in the Punjabi language. At various

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times the participants used words and phrases in the English language. At one stage the participants used another language which may have been Malay or Thai. The applicant was not a participant in this conversation. However, the prosecution case was that he was referred to in the conversation. It was not disputed that evidence of the conversation was properly admissible as against the applicant, presumably on the basis that there was prima facie evidence of his involvement in the conspiracy and the conversation was an act in furtherance of that conspiracy (see Tripodi v. The Queen (1961) 104 CLR 1, at pp 5-8). What is in issue is the use made of documents, being a written translation of the words spoken in Punjabi and a transcription of the English words spoken in the conversations recorded.

5. After the conversations were recorded, but before any arrests were made, officers of the Federal Police sought the assistance of Mr Sekhon in the translation of the recorded conversations. His work of translation was interrupted when the arrests were made so that he might act as interpreter whilst an interview was conducted with Namtanee. Initially Mr Sekhon commenced to translate the recorded conversations into idiomatic English. Later he was requested by police officers to make a literal translation. Mr Sekhon made that literal translation by recording, in his own handwriting, his translation and, in so far as English was used, his transcription of the conversations. His handwritten notes were later reproduced in typescript as the result of arrangements made by officers of the Federal Police. He deposed that the typescript was an accurate rendition of his handwritten notes. He also deposed that the typewritten document accurately represented in the English language the conversations which he heard on the tapes.

6. Some time after police arrested Kumar, Narula, Namtanee, and a man called Pinrenu, who was also convicted as a co-conspirator in the offence charged, officers of the Federal Police made the tapes available to Mrs de Kretser. At the request of Federal Police she also proceeded to translate the conversations into English. She referred to her work as a "transliteration" rather than a "translation", by which I assume that she too was engaged in an exercise intended to effect a literal rather than an idiomatic translation of the language used, although, as her cross-examination revealed, her translation made considerable use of idiomatic English. Mrs de Kretser also effected her translation and, to the extent that the English language was used, her transcription by making handwritten notes. Those notes were also reproduced in typescript as a result of arrangements made by officers of the Federal Police. Mrs de Kretser checked that typescript and made handwritten amendments thereto. She deposed that the typescript as amended by her was an accurate representation, in English, of the conversations which she heard on the tapes.

7. The documents, being the typescript of Mr Sekhon's handwritten notes and the amended typescript compiled from Mrs de Kretser's handwritten notes, were tendered and admitted as exhibits in the trial. They were thus available to the jury during its deliberations. Additionally, as part of their evidence in chief, both Mr Sekhon and Mrs de Kretser read aloud the documents which they had deposed to be accurate translations into English of the conversations they had heard on the tapes. During Mr Sekhon's evidence each member of the jury had a copy of the document compiled from his handwritten notes. The trial judge (Brooking J.) declined to have copies of the document compiled from Mrs de Kretser's handwritten notes made available to members of the jury during the course of her evidence.

8. Objection was taken to the tender of the document compiled from Mr Sekhon's handwritten notes, although on a different ground from those advanced in this application. It seems that no objection was made to the tender of the document compiled from Mrs de Kretser's handwritten notes. In the particular circumstances of the trial, including the circumstance that the document compiled from

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Mr Sekhon's handwritten notes was tendered at the invitation of the trial judge, neither the failure to object to the document compiled from Mrs de Kretser's notes nor the failure to raise precisely the points now argued, should be a bar to the matter now being considered by this Court.

9. Although it seems that it was always the intention of the prosecutor to tender the documents, the document compiled from Mr Sekhon's handwritten notes was, as I have noted, tendered at the specific invitation of the trial judge. At that stage excerpts from two of seven tapes (which had earlier been admitted into evidence) had been played to Mr Sekhon in the presence of the jury. His Honour expressed his view that tender of the document was the most convenient method of dealing with the evidence saying that "it would be helpful for the jury, it seems to me, to have a copy of the document before them when it is read". Shortly thereafter his Honour stated that if the "transcript is received, then we don't have to have it read twice. It can be read once by Mr Sekhon, the jury can follow it on copies, which will be so much easier than trying to take it in now". Thereafter objection was taken to the tender, but the document was admitted and became exhibit 27.

10. The convenience of the course invited by his Honour may be doubted in light of subsequent developments in the trial. Although excerpts from two tapes had been played to Mr Sekhon before the tender of the document, and excerpts from other tapes were played to him in the course of his later evidence, it became clear in cross-examination that Mr Sekhon could not say that the tapes which had earlier been tendered were the tapes from which he had made his handwritten notes. It thus became necessary for his cross-examination to be interrupted and for the exhibited tapes to be made available to him, over two nights, in the presence of an instructing officer of the prosecutor, so that he could listen to the tapes. Thereafter he gave evidence that the conversations entrapped on them were the conversations which he heard and translated. Although no complaint was made by the applicant in relation to these matters, I have set them out in some detail because they illustrate that considerations of convenience do not always provide a satisfactory basis for the determination of questions of law which arise or may arise in the course of a trial.

11. In this Court it was argued that the documents should not have been received as exhibits in the trial on two separate grounds. First, it was submitted that where a tape recording is tendered in evidence, a transcript is inadmissible as offending the "best evidence" rule, and therefore, by analogy, a document being a translation of what is recorded on the tape is also inadmissible. Secondly, it was argued that there is a principle of "orality" underlying the rules of evidence applicable in a criminal trial, which renders inadmissible a document which constitutes a note or an aide-memoire of the evidence to be given, unless cross-examination makes it admissible.

12. It is convenient to consider first the argument based on the "best evidence" rule. The "best evidence" rule is encapsulated in the maxim that "the best evidence must be given of which the nature of the case permits". Originally the rule operated to exclude evidence which "ex natura rei supposes still a greater evidence behind in the party's own possession or power": per Chief Baron Gilbert in Evidence 1st ed. (1756) p.4 quoted in Phipson on Evidence 13th ed. (1982) par.5.02. It also operated to render admissible secondary evidence if the absence of the primary evidence was explained.

13. In recent times the "best evidence" rule has been seen as having a very limited operation. In Commissioner for Railways (N.S.W.) v. Young (1962) 106 CLR 535, at p 544, Dixon C.J. expressed the view that the rule "excluding secondary evidence did not go beyond writing and include physical objects". In Garton v. Hunter (1969) 2 QB 37, at p 44, Lord Denning M.R. said:

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> "It is plain that Scott L.J. had in mind 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 long ago. The only remaining instance of it that I know is that if an original document is available in your hands, you must produce it. You 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."

See also Kajala v. Noble (1982) 75 Cr App R 149 which concerned the admissibility of a copy of a video recording. In that case Ackner LJ. speaking for the Divisional Court endorsed the remarks of Lord Denning M.R. in Garton and stated (at p 152) that the "best evidence" rule "is limited and confined to written documents in the strict sense of the term, and has no relevance to tapes or films".

14. In Halsbury's Laws of England (4th ed., vol.17 par.8) it is said of the rule:

> "That evidence should be the best that the nature of the case will allow is, besides being a matter of obvious prudence, a principle with a considerable pedigree. However, any strict interpretation of this principle has long been obsolete, and the rule is now only of importance in regard to the primary evidence of private documents. The logic of requiring the production of an original document where it is available rather than relying on possibly unsatisfactory copies, or the recollections of witnesses, is clear, although modern techniques make objections to the first alternative less strong."

See also: Thayer, A Preliminary Treatise on Evidence at the Common Law, (1898), p 484 et seq; Wigmore on Evidence, vol.IV (Chadbourn rev. 1972) par 1175; Cross on Evidence, 3rd ed. (Australian) (1986) pars 1.88-1.92.

15. The use of electronic eavesdropping equipment for the investigation and prosecution of offences appears to have injected new life into the old rule. On the one hand it has been held that the exclusionary aspect of the "best evidence" rule prevents the receipt into evidence of a transcript of a conversation recorded on a tape where the tape is in evidence and is played on appropriate equipment to reproduce the sounds, at least where the sounds are "reasonably audible and intelligible in themselves": Conwell v. Tapfield (1981) 1 NSWLR 595, at p 599. On the other hand it has been held, as in Reg. v. Gaudion (1979) VR 57 , that the rule has no application to a tape recording and thus there is no basis for the exclusion of a transcript of the words entrapped on the tape, notwithstanding that the tape is also admitted into evidence.

16. In Gaudion, Brooking J. explained the position thus (at p 59):

> "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."

A little later his Honour excluded the operation of the "best evidence" rule saying:

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> "The original tape recording is a physical object. While the ultimate question is what sounds were in fact uttered, once a tape recording has been proved to be admissible, it is necessary to prove what is on the recording. The features or conditions 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 these features".

17. The view in Gaudion had earlier been adopted in Walsh v. Wilcox (1976) WAR 62. In that case Wright J. (at pp 63-64) stated that:

> "a typewritten transcription of a recording is 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 performed by the machine on which the recording is played".

The same view was later adopted by the Court of Criminal Appeal of the Supreme Court of Queensland in Reg. v. Beames (1979) 1 A Crim R 239 .

18. In Reg. v. Migliorini (1981) Tas R 80; (1981) 38 ALR 356, Cosgrove J. of the Supreme Court of Tasmania, after considering Walsh, Beames and Gaudion, said of a transcript of a recording (at p 90 ; pp 361-362 of ALR):

> "I find difficulty in understanding how such a reproduction can be prima facie admissible. It is secondary evidence, it is based on an interpretation ...".

However, his Honour went on to add:

> "but ... the courts have, for reasons of convenience and fairness, held that they may be admitted in the exercise of a general judicial discretion. The discretion is inclusory not exclusory".

In Williams v. The Queen (1982) Tas R 266, at pp 275, 279, 280-281, the Court of Criminal Appeal of the Supreme Court of Tasmania expressly declined to follow the reasoning in both Conwell and Gaudion, and adopted a similar view to that taken in Migliorini as to the admissibility of supplementary evidence of the contents of a tape recording based on discretionary considerations.

19. In overseas jurisdictions consideration of the admissibility of a transcript in addition to the tape recording has also resulted in at least three distinct approaches. In no jurisdiction (save perhaps Hong Kong: see Lui Kwok-wah v. The Queen (1966) HKLR 595, at p 600) has "an inclusory discretion" been identified as in Tasmania. In some jurisdictions it has been held that, although not admissible as an exhibit, a transcript may be used for certain forensic purposes.

20. In the United Kingdom it would seem that a transcript is regarded as admissible even when the tape recording is also received into evidence. In Reg. v. Maqsud Ali (1966) 1 QB 688 Marshall J., speaking for the Court of Criminal Appeal, referred (at p 700) to the receipt into evidence of both a

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transcript and tape recording in Reg. v. Howells (unreported, January 1965), likened a tape recording to a photograph and stated (at p 702):

> "Having a transcript of a tape recording is, on any view, a most obvious convenience and a great aid to the jury, otherwise a recording would have to be played over and over again. Provided that a jury is guided by what they hear themselves and upon that they base their ultimate decision, we see no objection to a copy of a transcript, properly proved, being put before them."

That case, like the present, was concerned with documents which were translations, rather than transcripts, of conversations held in the Punjabi language.

21. In Canada the question of admissibility of a transcript along with the tape recording has received differing answers. In Reg. v. Wilson (1973) 3 WWR 1 and in Reg. v. Miller and Thomas (No.3) (1975) 28 CCC(2d) 118 transcripts were held to be admissible. In Reg. v. MacLean and MacLean (No.1) (1979) 49 CCC(2d) 399 and in Papalia v. The Queen; Reg. v. Cotroni (1979) 2 SCR. 256 ; (1979) 93 DLR(3d) 161 transcripts were held inadmissible as infringing the "best evidence" rule. In Reg. v. Bradley (1980) 19 CR (3d) 336, it was held that it was a matter of discretion for a trial judge to "allow the jury to have copies of the transcript while the evidence is being adduced, with an appropriate caution, before it is given to them, that such transcript is not evidence but is only a working tool or aid" (p 359). It was also accepted in that case that there was discretion to allow the jury to "have the use of their copies of that edited transcript when they ... retire to deliberate" (p 359).

22. The position in the United States appears to be equally diverse. In California it has been held that transcripts of recordings are not subject to the "best evidence" rule: People v. Finch (1963) 30 Cal Rptr 901. It has also been held that they may be received as exhibits along with the tape recording: People v. Fujita (1975) 117 Cal Rptr 757. On the other hand in Bonicelli v. State (1959) 339 P 2 d 1063, and in Duggan v. State (1966) 189 So 2d 890 , transcripts were held inadmissible when tape recordings were in evidence as offending the "best evidence" rule. In a number of cases it has been held that a transcript, although not receivable as an exhibit, may be read to the jury, or otherwise utilized by the jury: see United States v. Slade (1980) 627 F 2d 293 ; United States v. Dorn (1977) 561 F 2d 1252 ; Springer v. United States (1978) 388 A 2d 846.

23. In New Zealand the "best evidence" rule has not been seen as supplying an answer to the question of admissibility of transcripts where the tape recording is also in evidence. In Reg. v. Menzies (1982) 1 NZLR 40, the Court of Appeal (at p 49) described the problem as "sui generis and not automatically answered by settled principles". It was there held that "(i)f the tape is reasonably short and clearly audible there can normally be no justification for allowing a transcript as well as playing the tape". In respect of tapes not clearly audible or not intelligible the Court adopted a solution based on considerations analogous to those applicable to expert evidence, allowing that a person might become a temporary expert in the sense that "by repeated listening he has qualified himself ad hoc", and that evidence might "take the form of production of a transcript which can be admitted as an exhibit". A similar idea seems to underlie the Scottish decision in Hopes v. H.M. Advocate (1960) JC 104; (1960) SLT 264 in which the Lord Justice-General(Clyde), with whom Lord Carmont agreed, rejected an argument that the transcript there in issue was primary evidence and doubted the competence of the shorthand writer as an expert. Lord Sorn was prepared to accept that a person did not need technical qualification to give evidence as an expert as to the

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content of a tape recording.

24. The cases show that there are two aspects to the question of admissibility of evidence to supplement evidence constituted by the playing of a tape recording. The first question is whether evidence may be admitted to supplement a tape recording which is intelligible when played on sound reproduction equipment. The second question is whether evidence is admissible, and if so, on what basis, when the tape recording is not intelligible, as for example because it is inaudible, or the conversation is in a foreign language.

25. Ordinarily all evidence which is relevant is admissible notwithstanding that it duplicates evidence which is sufficient to prove the matter in issue. To this rule there are certain exceptions. One exception is the "best evidence" rule. Another exception is the so-called parol evidence rule which excludes extrinsic evidence as to the contents of a document which must be proved by the document or secondary evidence thereof. The rules which exclude otherwise relevant evidence are described in Chadbourn's revision of Wigmore on Evidence vol.IV as artificial in that "they do not, as do the rules of relevancy, simply analyze the natural process of inference and belief; but they contrive a specific safeguard to be applied where experience has shown it desirable" (par.1171). Within these exclusionary rules, the learned author identifies rules excluding the testimony of an excessive number of witnesses, or of opinion when superfluous and likely to be abused.

26. It may not be entirely appropriate to treat a tape recording as analogous with a written document for the purpose of applying the "best evidence" rule. However, just as it is frequently said in application of the related parol evidence rule that a document speaks for itself, so too, and more obviously, a tape recording will speak for itself if audible and intelligible. If an audible and intelligible tape recording is in evidence, extrinsic evidence of its contents is superfluous, lacks probative value and can contribute nothing (save, possible confusion) to the determination of the matters in issue. Accordingly it should be held that extraneous evidence of the content of a tape recording is inadmissible if the tape recording is in evidence and is audible and intelligible when played on sound reproduction equipment.

27. Where a tape recording is either inaudible or unintelligible a question will arise as to whether it should be excluded in the exercise of discretion on the ground that its prejudicial value outweighs its probative value: see Harris v. Director of Public Prosecutions (1952) AC 694, at p 707 ; Kuruma v. The Queen (1955) AC 197, at p 204 ; Driscoll v. The Queen (1977) 137 CLR 517, at p 541 ; Cleland v. The Queen (1982) 151 CLR 1 . However, if it is to be admitted, evidence may be led as to the sounds entrapped thereon in the same manner that evidence may be led as to what was recorded on a document part of which has been obliterated. So too, just as evidence may be led as to the meaning in the English language of foreign language words in a document, evidence may be led as to the meaning in the English language of foreign words entrapped on a tape recording.

28. To say that evidence may be given as to the contents of a tape recording which is not audible or not intelligible does not determine the question of the receipt of that evidence in documentary form. The documents which were received as exhibits were the typewritten compilation of the working notes prepared by Mr Sekhon and Mrs de Kretser. The witnesses might, with leave, have resorted to the documents for the purpose of refreshing their memories. Cross-examination on the documents might have rendered the documents admissible. But, absent cross-examination making documents admissible, the general rule is that written statements of witnesses are not admissible as evidence of the facts and opinions therein stated unless admissible by some specific rule or made so by statute, as for example by s.55(2) of the Evidence Act 1958 (Vict.) which in certain circumstances renders

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business records admissible in criminal proceedings (see Conwell v. Tapfield, per Moffitt P., at p 602).

29. In the present case it was suggested that the documents were properly admitted as an aid to comprehension in the same manner as charts and diagrams which are proved by a suitably qualified person. The laws of evidence allow that evidence may sometimes be given other than in oral form. Thus photographs, charts, maps, diagrams and the like are admissible as a documentary representation of the relevant knowledge of a witness as to physical characteristics of an object or person. However, the documents here in question were not of that nature. Documents of similar description (but not including photographs) have been also held admissible in explanation of or as an aid to the comprehension of that which has been properly proved: Smith v. The Queen (1970) 121 CLR 572, at p 577.

30. The extent to which documents may be received as exhibits as aids to comprehension is by no means certain. It is clear that the chart considered in Smith was a record of transactions which had already been the subject of evidence, and the chart was no more than a summation of the evidence given. In Reg. v. Ireland (1970) 126 CLR 321 it appears to have been assumed that a chart was admissible if the expressions of opinion therein contained were the opinions of a suitably qualified witness. That chart appears to have been a composite of factual matters established by evidence and expression of opinion: see Reg. v. Ireland (No.2) (1971) SASR 6, at pp 10-13, where the question of admissibility of the same chart in the second trial was considered by the Supreme Court of South Australia. It would be reading too much into Ireland to take from it that opinion evidence may be given in documentary form if it will assist the comprehension of the jury. Even if it were so, the documents here in question did not consist solely of opinion evidence. Although a translation is not merely the giving of the dictionary equivalent of each foreign word used, nonetheless evidence as to meaning is not properly characterized solely as opinion evidence. It is more appropriately characterized as expert evidence. An expert may give opinion evidence but not all evidence given by experts is opinion evidence: see Phipson par.28.07; Clark v. Ryan (1960) 103 CLR 486, at pp 490-491 ; Weal v. Bottom (1966) 40 ALJR 436, at p 438. When translation evidence is given it is given as to the English words which have, as between speakers of the English language, the same effect as the foreign words in fact have as between speakers of the foreign language: cf. Chatenay v. Brazilian Submarine Telegraph Company (1891) 1 QB 79, at p 82. The position may be different in certain fields of language theory, as, for example, those deriving from the theory of structuralism.

31. In R. v. Tucker &Another (1907) SALR 30, Way C.J. held admissible tables and summaries being the result of examination of voluminous documents received in evidence. His Honour cited a number of earlier authorities in which a witness had been allowed to give evidence of the result of examination of documents put into evidence and said (at p. 32):

> "These cases, though not elaborately reviewed, came up for consideration by Knight Bruce V.C. in

Johnson v. Kershaw (1847) 1 De G &Sm 260 (63 ER

> 1059). That was a partnership dispute, and it was sought to give the result of books of account without producing them. The Vice-Chancellor said, 'If the account books had been in evidence the accountant's statement of the result of his examination of those books might be receivable.' That appears in one respect to be the crux of the whole

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matter. At the trial we had primary evidence of all the books and documents, and the tabulations ... related merely to the effect of these books and documents."

32. The cruciality of foundational evidence before charts, diagrams and summaries may be admitted into evidence as aids to comprehension was also remarked in Menzies where Cooke J. speaking for the New Zealand Court of Appeal stated (at p 49):

"The use of time-saving schedules and charts to assist the jury in complicated cases can be very desirable and is not improper, provided that the contents are proved and that the Judge is satisfied that there is no unfairness: see Smith v. The Queen (1970) 44 ALJR 467, at p 469 ; Reg. v. Simmonds (1969) 1 QB 685, at p 690 " (emphasis added).

33. In my opinion the admission of documents by reason of their assisting comprehension is conditional upon the proof in proper form of foundational evidence, as was held by Knight Bruce V. C. in Johnson v. Kershaw and by the New Zealand Court of Appeal in Menzies. Were it otherwise the rules of evidence applicable in a criminal trial would be subordinate to judicial discretion based on considerations as to what is thought to be conducive of comprehension by jurors. So much was, I think, recognized by the trial judge, who, when ruling upon the admissibility of the documents, said:

"It may be objected that the supposed principle of convenience would enable police officers in the case of an alleged oral confession to prepare their evidence in the form of a written script, to be readily grasped by the jury, with the dialogue all set out and interspersed with stage directions ... And so it may be argued that the verbal confession, if I am correct, will always be placed seductively before the jury in the all too persuasive written form and that police officers will prove oral confessions by verifying the written script of a one-act play.

This development need not be feared. The judge has always a discretion whether to permit evidence that could be given orally to be given by means of a demonstration, or by the use of a chart, or otherwise in written form, and he will not allow this to be done where it is not in the interests of justice ..."

34. As the documents presently in question were tendered by way of proof of the English meaning of the words entrapped on the tape recordings, and not in explanation of evidence already given they were not, in my view, rendered admissible by reason that they were an aid to comprehension.

35. In ruling on the receipt of the documents as exhibits, the learned trial judge expressed the opinion that he had a discretion to allow the jury to have access to a transcript of the evidence given by Mr Sekhon and Mrs de Kretser, and therefore it might not "make a great deal of difference whether the transcripts are made exhibits".

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36. Notwithstanding that a jury is generally not provided with a transcript of oral evidence, I see no reason why a trial judge, for considerations of convenience might not, in circumstances such that no prejudice will result therefrom, make a transcript of the oral evidence of a witness or witnesses available to a jury. This practice is accepted in the United States: see, for example, United States v. Carter (1971) 445 F 2d 669, at p 673 ; Government of the Canal Zone v. Scott (1974) 502 F 2d 566, at p 570 and United States v. Rice (1977) 550 F 2d 1364, at pp 1374-75 . In Canada, the Saskatchewan Court of Appeal in Reg. v. McCrea (1969) 70 WWR 663, at p 669, (judgment delivered by Culliton C.J.S.) expressed as obiter "grave reservations as to the propriety of the trial judge, on his own volition, providing the jury with the transcript of part of the evidence of a witness". However, where a request is made by the jury, the practice of providing court transcripts to the jury has not been disapproved by Canadian appellate courts: see Huard v. The King (Que.) (1949) 8 CR 337, at p 343 and Reg. v. Dorset (1980) 54 CCC(2d) 490; (1981) 1 WWR 351. In Australia, although the matter has not been directly addressed, some support for the practice in limited circumstances can be drawn from the observations of Barwick C.J. in Driscoll, at p 523 (cf. Gaudion, at p.64).

37. Considerations of convenience could lead to the making available of a transcript of evidence as to the sounds entrapped on a tape recording which although inaudible when played on ordinary sound production equipment have been rendered comprehensible by the use of other equipment or repeated playing. So too with evidence as to the English meaning of a recorded conversation conducted in a foreign language, whether that evidence is given on the basis of hearing the tape recording inside or outside the court. Considerations of convenience could also lead to the making available of a transcript of lengthy tapes, even though audible and intelligible.

38. Considerations of convenience might also allow resort to a transcript emanating from a party, if it is clear that it is an accurate record of the evidence given. A transcript might be made available during the course of evidence, including cross-examination of the witness whose evidence it is. It might also be made available during the jury's deliberations.

39. But questions of convenience are not at large: "Convenience and justice are often not on speaking terms" - per Lord Atkin in General Medical Council v. Spackman (1943) AC 627, at p 638. The discretion of a trial judge to make available to the jury a transcript of evidence given by a witness is a discretion which is circumscribed by conventional considerations of fairness. Thus, without being exhaustive, there is no discretion to make available a transcript if it would tend to unduly emphasize the evidence, or to accord to it a probative value which it does not possess. If a transcript of the evidence of one witness is made available the evidence of other witnesses on the same subject-matter should be treated in precisely the same manner. There are particular difficulties as to the making available of a transcript of part only of the evidence of a witness, as might be expected in the case of a transcript of the words entrapped on an inaudible tape recording or of evidence as to the English meaning of foreign words used in a recorded conversation. It is generally accepted that if the jury requests that the evidence of a witness be read back, it is the duty of the trial judge to ensure that so much of the evidence is read as is necessary to give a fair account thereof. Thus, notwithstanding that the jury requests part only of the evidence to be read there should also be read those parts which weaken or qualify that evidence (see, for example, the decision of the Supreme Court of Canada in Olbey v. The Queen (1980) 1 SCR 1008, at pp 1026-1028 ; (1979) 105 DLR(3d) 385, at pp 399-401). Accordingly, if a transcript is made available which represents part only of the evidence given by a witness, it will be necessary for the trial judge to adequately instruct the jury as to any matters, particularly matters elicited in cross-examination, which detract from the probative force of the evidence made available in the form of a transcript. In all cases the jury

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should be instructed in unambiguous terms that the transcript is not evidence, and is made available to them only for their convenience. This instruction should be given before a transcript is made available.

40. In the present case the trial judge might properly have allowed Mr Sekhon and Mrs de Kretser to read to the jury their translations of the words entrapped on the tapes, providing that they were able to identify the exhibited tapes as the tapes from which they had made their translations. A transcript of their evidence might then have been made available to the jury for their assistance during cross-examination of the witnesses. The transcript might properly have been made available to them during their deliberations. In these circumstances it is necessary to consider whether the receipt of the documents as exhibits made "no difference" in the sense that it can be said that no miscarriage of justice was occasioned.

41. The prosecution case against the applicant depended to a very large extent on the words spoken by Kumar in the recorded conversation. The English meaning of various Punjabi words used in that conversation was put in issue in cross-examination on behalf of the applicant and the other defendants.

42. Cross-examination elicited that in the Punjabi language meaning is sometimes a matter to be derived by inference from context. It was also established that some Punjabi words bore meanings in addition to those adopted in the translation process. For example, it was established in cross-examination that the Punjabi words translated by Mr Sekhon as "merchandise" and "fix" may also mean "things" and "small packet". The objectivity of Mr Sekhon's translation was also put in issue by the suggestion that he employed those English words because of his knowledge that police were involved in the investigation of a drug offence.

43. In Driscoll it was recognized that the receipt into evidence of an unsigned record of interview might be used by the jury erroneously to strengthen or corroborate oral testimony: see per Gibbs J. at p 542. In the present case the risk was not merely that the documents might be used to strengthen or corroborate the oral evidence of the witnesses, but that the documents themselves might be accepted as having probative value in their own right, quite apart from the oral evidence.

44. Although the jury might properly have been allowed access to transcripts of the oral evidence of the witnesses, accompanied by appropriate warning of the use to which they could be put, the receipt of the transcripts as exhibits deprived the accused of a "trial in which the relevant law (was) correctly explained to the jury and the rules of procedure and evidence (were) strictly followed": see Mraz v. The Queen (1955) 93 CLR 493, per Fullagar J. at p 514. In these circumstances it is for the prosecutor to establish that had the rules been properly applied, the jury would inevitably have convicted.

45. Because the documents were received as evidence, it is reasonable to assume that the jury may well have accorded them probative force over and above the oral testimony of the witnesses. Given the materiality of the evidence of the recorded conversation to the prosecution case against the applicant, I am not satisfied that it can be said that the receipt of the documents as exhibits did not deprive the applicant of a chance of acquittal that was otherwise fairly open to him.

46. I would grant special leave to appeal and allow the appeal.

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Orders

Application for special leave to appeal granted.

Appeal dismissed.

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Criminal Charge Book [2023] JCV Criminal_Charges_Book -
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Brown (a pseudonym) v The King [2025] SASCA 40 -
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Brown (a pseudonym) v The King [2025] SASCA 40 -
Brown (a pseudonym) v The King [2025] SASCA 40 -
Rictor v The State of Western Australia [2025] WASCA 39 (19 March 2025) (Buss P; Mazza and Hall JJA)

> 323. At a criminal trial an interpreter's evidence of an English translation of a conversation that occurred in another language should ordinarily be given orally at the trial. However, in an appropriate case (for example, where conversations are lengthy and the trial judge, counsel and the jury would be assisted by a transcript of the translation), the ordinary practice may be departed from and the verified transcript admitted into evidence and the jury permitted to have it in the jury room. See ***Butera v Director of Public Prosecutions (Vic)*** . [11]

via

[11] ***Butera v Director of Public Prosecutions (Vic)*** [1987] HCA 58; (1987) 164 CLR 180, 188 191 (Mason CJ, Brennan & Deane JJ).

Rictor v The State of Western Australia [2025] WASCA 39 -
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The State of Western Australia v Keo (pseudonym initials) [2024] WADC 49 -
Movel (a pseudonym) v The King [2024] VSCA 183 (26 August 2024) (Priest, Niall and Orr JJA)

> *Bromley v The Queen* (1986) 161 CLR 315; *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 ; *Carson (a pseudonym) v The Queen* [2019] VSCA 317; *Danny v The Queen* [2020] VSCA 8; *De Silva v The Queen* (2019) 268 CLR 57; *Flynn (a pseudonym) v The Queen* [2020] VSCA 173; *Gardner (a pseudonym) v The King* [2024] VSCA 83; *Gately v The Queen* (2007) 232 CLR 208; *McKell v The Queen* (2019) 264 CLR 307; *Pell v The Queen* (2020) 268 CLR 123; *R v NZ* (2005) 63 NSWLR 628, considered.

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DWK22 v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1403 -
R v BEC [2023] QCA 154 (01 August 2023) (Mullins P; Livesey AJA; Callaghan J)

138. A similar point had been made in *Butera v The Director of Public Prosecutions (Vic)* about a tape recording of a conversation in foreign languages concerning heroin importation. The High Court held in that case that the audio tape was admissible, though the evidence comprised the sound produced by playing the tape in open court. That was the "best evidence of the sounds entrapped in the record", not transcripts of what was heard by a witness out of court. [96] The importance of adducing evidence orally was explained: [97]

> "The adducing of oral evidence from witnesses in criminal trials underlies the rules of procedure which the law ordains for their conduct. A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form. Oral evidence is public; written evidence may not be. Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witnesses. By generally restricting the jury to consideration of testimonial evidence in its oral form, it is thought that the jury's discussion of the case in the jury room will be more open, the exchange of views among jurors will be easier, and the legitimate merging of opinions will more easily occur than if the evidence were given in writing or the jurors were each armed with a written transcript of the evidence."

R v BEC [2023] QCA 154 -
R v BEC [2023] QCA 154 -
R v BEC [2023] QCA 154 -
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Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

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16. Dawson J acknowledged that there was a rule of evidence that the effect of a written document must be proved by production of the original and not by secondary evidence unless the absence of the original is accounted for and excused. [14] Dawson J noted that the rule appeared to predate the 'so-called best evidence rule'.

via

[14] Ibid , 194.

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240. However, at the risk of being seen as stuck in Dickensian times, I do not think this case, with the peculiarities of the Snapchat App, is the appropriate vehicle to redefine what amounts to a photograph, and therefore a document, for the purpose of the common law. That is particularly so given the absence of specific evidence about the workings of the Snapchat App and how it treats digital data. That said, I agree with Mr Hinton's submission that whether the image is a photograph or not, the best evidence rule as modified by the High Court in *Butera* applies by analogy. [228] That is, if the absence of the image is "satisfactorily explained", secondary evidence of the image and its contents can be given.

via

[228] I note that Dawson J (in the minority) in *Butera* observed that; "it is now accepted that a tape recording is, so to speak, the auditory equivalent of a photograph".

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47. Section 57 of the *Evidence Act 1929* (SA) (the Evidence Act) applies only to those circumstances in which the contemporary rule of preclusion would otherwise apply. It provides that a photographic, electronic or other similar reproduction of the original, may be received as documentary evidence in place of the original. Moreover, once admitted, the court is permitted to inform itself as it thinks fit of the accuracy of the reproduction. Section 57 of the Evidence Act recognises that automated reproductions using modern technology do not attract the same concerns about accuracy, authenticity and reliability which preclude the admission into evidence of hand-written copies when the meaning or legal significance of the words which were hand copied are in issue. It reflects the common law development noted in *Butera*. [48] If the electronic data were retrieved, a reproduction of the image made by it would be admissible.

via

[48] (1987) 164 CLR 180 , 187 .

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44. Curiously the Director suggested that questions two and three need not be answered because the decision, or at least the reasoning, in *Butera* supports the admission of the evidence because the absence of the original is satisfactorily accounted for. It can be accepted that even if the best evidence rule were extended to apply to mute images, including electronic images sent through Snapchat, that the failure to produce the actual image in this case is satisfactorily accounted for. I explain precisely why that is so below. However, there are a number of difficulties with the Director's suggestion as to how

this Court should determine this appeal, which is not a case stated. First, *Butera* extends the best evidence rule to tape recordings of conversations. If I am correct that mute images do not fall within the best evidence rule, then there is every reason to so hold rather than to dismiss the appeal on the ground that, without deciding whether the rule applies, the absence of the image is satisfactorily accounted for. Secondly, the question remains important to those circumstances in which old technology may still be used. The same question would arise if the appellant had sent similar hardcopy photographs which the complainants, inexplicably, could not find. It is, and will continue to be a frequent occurrence that images of offences will be captured by CCTV, but later lost or overridden, leaving as the only available evidence, the testimony of a witness who viewed the images. It is unnecessary to develop a jurisprudence on what is a satisfactory reason for the loss of the original mute image. A party who seeks to rely on secondary evidence of mute images, a not uncommon occurrence, should not be left in any uncertainty as to whether they need to adduce evidence explaining the absence of the original, other than for the purpose of supporting its probative weight.

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33. The Director submitted in his answer to question five that the High Court in *Butera* tacitly chose not to follow the reasoning in *Kajala* , even though it had referred to the decision in holding that electronic copies of tapes were not precluded by the best evidence rule. I cannot accept that in deciding the very question whether the best evidence rule applied to recordings the High Court decided to remain silent, and not comment on, a strong, albeit English, authority, which it had decided not to follow. The Director submitted that the High Court chose to follow *Conwell v Tapfield* [35] instead of *Kajala* . With respect, *Conwell* was approved in *Butera* on the question of whether a transcript of a conversation, reproduced in Court by replaying a recording on a device, could be provided to the jury as an exhibit to assist them to understand the evidence, being the voices heard when the tape was played. *Conwell* does not address the question whether secondary evidence can be received in the absence of the tape itself. The more obvious explanation for the absence of any discussion in *Butera* of the holding in *Kajala* is that the best evidence rule does not apply to mute images. The use of the film in *Kajala* was limited to proving the conduct of the persons on the film and the identification of the defendant. It was not used to prove words spoken by the defendant or anyone else.

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132. Gaudron J had earlier observed that though the best evidence rule had been confined to documents, the "use of electronic eavesdropping equipment for the investigation and prosecution of offences appears to have injected new life into the old rule". [137]

via

[137] *Butera v DPP (Vic)* (1987) 164 CLR 180, 203 (Gaudron J) .

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14. In *Butera* Mason CJ, Brennan and Deane JJ (the plurality) explained that the rules of evidence must be moulded to deal with the technical and legal conditions which must be satisfied before a tape recording can furnish proof of what is recorded. [12] The plurality judgment observed that the transcript would not have been admissible if the tape had not been produced, or its absence satisfactorily explained, because 'prudence and convenience combine to support the application of the best evidence rule in such cases'. [13]

via

[13] (1987) 164 CLR 180 , 184-186 .

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ASIC v Rich [2005] NSWSC 417; *Attorney-General's Reference (No 1 of 1990)* (1992) 95 Crim App R 296; *Beauregard-Smith v The Queen* (1995) 180 LSJS 188; *Blatch v Archer* (1774) 1 COWP 63; *Bristow v The Queen* (2020) 137 SASR 449; *Bromley v The Queen* (1986) 161 CLR 315; *Butera v DPP (Vic)* (1987) 164 CLR 180 ; *Commissioner for Railways (NSW) v Young* (1962) 106 CLR 535; *Conwell v Tapfield* (1981) 1 NSWLR 595; *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25; *De Sa v The Queen* [2021] SASCFC 22; *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652; *DPP (SA) v Jaunay* [2020] SASCFC 25; *DPP v Garcia* [2015] VSCA 275; *DPP v Nguyen* (1990) 156 LSJS 475; *Garton v Hunter* [1969] 2 QB 37; *Godfrey v Woolworths (WA) Pty Ltd* (1998) 103 A Crim R 336; *Gregg v The Queen* [2020] NSWCCA 245; *Hill v Zuda Pty Ltd* (2022) 96 ALJR 540; *Holmden v Bitar* (1987) 47 SASR 509; *Jago v District Court (NSW)* (1989) 168 CLR 23; *JGS v The Queen* [2020] SASCFC 48; *Kajala v Noble* (1982) 75 Cr App R 149; *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1914] AC 733; *Longman v The Queen* (1989) 168 CLR 79; *Mack v Lenton* (1993) 32 NSWLR 259; *Maks v Maks* (1986) 6 NSWLR 34; *Masquerade Music v Springsteen* (2001) 51 IPR 650; *Myers v DPP* [1965] AC 1001; *National Australia Bank Ltd v Rusu* [1999] NSWSC 539; *Omychund v Barker* (1744) 1 Atk 21; *People v Rose* (Mich Ct App, No 351282, 18 February 2021); *Police v Dorizzi* (2000) 84 SASR 403; *Police v Dunstall* (2014) 120 SASR 88; *Police v Dunstall* (2015) 256 CLR 403; *Police v Hall* (2006) 95 SASR 482; *Police (SA) v Pakrou* (2008) 103 SASR 124; *Police v Sherlock* (2009) 103 SASR 147; *Pollitt v The Queen* (1992) 174 CLR 558; *Port Jackson Steamship Co v Mayers* (1888) 9 LR (NSW) 470; *Question of Law Reserved (No 3 of 1997)* (1998) 70 SASR 555 ; *R v Ames* [1964-5] NSWR 1489; *R v Athans* [2021] SADC 1; *R v Athans* [2021] SADC 3; *R v B, P* [2016] SASCFC 30; *R v Becirovic* [2017] SASCFC 156; *R v Calabria* (1982) 31 SASR 423; *R v Cheng* [2015] SASCFC 25; *R v Christie* [1914] AC 545; *R v Collie* (1991) 56 SASR 302; *R v Edwards* (2009) 83 ALJR 717; *R v Finn* [2014] SASCFC 46; *R v Gaudion* [1979] VR 57; *R v Governor of Pentonville Prison, ex parte Osman* [1990] 1 WLR 277; *R v Howe* [1958] SASR 95; *R v Lobban* (2000) 77 SASR 24 ; *R v Matthews* [1972] VR 3; *R v N, RC* [2012] SASCFC 37; *R v Narula* (1986) 22 A Crim R 409; *R v Nikolovski* [1996] 3 SCR 497; *R v Nguyen* [2015] SASCFC 7; *R v Nicholson* (1984) 113 LSJS 125; *R v O'Leary* [1946] SASR 175l; *R v O'Sullivan and Mackie* (1975) 13 SASR 68; *R v Perry (No 3)* (1981) 28 SASR 112 ; *R v Perry (No 4)* (1981) 28 SASR 119; *R v Romeo* (1982) 30 SASR 243; *R v Sitek* [1988] 2 Qd R 284; *R v Symons* (2018) 130 SASR 503; *R v Szach* (1980) 23 SASR 504; *R v T, WA* (2014) 118 SASR 382; *R v Wakefield* [1975] 2 All ER 40; *R v Whitehorn* (1983) 152 CLR 657; *Ratten v The Queen* [1972] AC 378; *Ridgeway v The Queen* (1995) 184 CLR 19; *Saleh v Romanous* [2010] NSWCA 373; *Seiler v Lucasfilm Ltd* (1987) 808 F2d 1316; *Semple v Noble* (1988) 49 SASR 356; *Smith v The Queen* (2001) 206 CLR 650; *Southern Equities Corporation (in liq) v Bond (No 2)* (2001) 78 SASR 554; *Strickland v DPP (Cth)* (2018) 266 CLR 325; *Subramaniam v Public Prosecutor* [1956] 1 WLR 965; *Sudgen v Lord St Leonards* (1876) 1 PD 154; *Taylor v Chief Constable of Cheshire* [1986] 1 WLR 1479; *Wade v The Queen* (2014) 41 VR 434; *Walton v The Queen* (1989) 166 CLR 283; *Williams v Spautz* (1992) 174 CLR 509, considered.

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44. Curiously the Director suggested that questions two and three need not be answered because the decision, or at least the reasoning, in *Butera* supports the admission of the evidence because the absence of the original is satisfactorily accounted for. It can be accepted that even if the best evidence rule were extended to apply to mute images, including electronic images sent through Snapchat, that the failure to produce the actual image in this case is satisfactorily accounted for. I explain precisely why that is so below. However, there are a number of difficulties with the Director's suggestion as to how this Court should determine this appeal, which is not a case stated. First, *Butera* extends the best evidence rule to tape recordings of conversations. If I am correct that mute images do not fall within the best evidence rule, then there is every reason to so hold rather than to dismiss the appeal on the ground that, without deciding whether the rule applies, the absence of the image is satisfactorily accounted for. Secondly, the question remains important to those circumstances in which old technology may still be used. The same question would arise if the appellant had sent similar hardcopy photographs which the complainants, inexplicably, could not find. It is, and will continue to be a frequent occurrence that images of offences will be captured by CCTV, but later lost or overridden,

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leaving as the only available evidence, the testimony of a witness who viewed the images. It is unnecessary to develop a jurisprudence on what is a satisfactory reason for the loss of the original mute image. A party who seeks to rely on secondary evidence of mute images, a not uncommon occurrence, should not be left in any uncertainty as to whether they need to adduce evidence explaining the absence of the original, other than for the purpose of supporting its probative weight.

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113. The need to mould the applicable rules of evidence and procedure helps to explain why it is important not to confuse an image sent as a snap with a traditional "document". The concept of what is to be regarded as a "document" has been significantly expanded by legislation, and now extends to what might formerly have been regarded as a form of real evidence, such as a photograph. Photographs are now routinely admitted into evidence, usually without any concern for the best evidence rule. [100] That approach has been adopted even though the information conveyed by an item of real evidence may be just as amenable to alteration or misinterpretation as the writing in a written document. Those risks arise in connection with the contents of audio tapes, films, videos and other media for conveying images and information, including a photograph. Each of these media can be used to convey complex information, sometimes more information than the words on a page, especially where what is captured are images and sounds, including recorded speech. New technology makes it increasingly difficult to preserve the old categories and distinctions between oral or testimonial evidence, documentary evidence and real evidence. [101] Though it is common to refer to a snap as containing or comprising a photograph or a video, that is merely a convenient way to differentiate between snaps featuring a static digital image and snaps featuring a moving digital image with sound. The technology associated with producing a snap and the technology associated with producing a traditional photograph are very different. One cannot approach the proof of a snap image as if it were a photograph. The approach to the application of the rules of evidence and criminal procedure with each must also be different.

via

[101] *Butera v DPP (Vic)* (1987) 164 CLR 180, 184 (Mason CJ, Brennan and Deane JJ) : the tape recording produces "a form of evidence which is different from both oral testimony and documentary evidence".

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

143. The approach taken in *Wade* did not turn on any exception to the best evidence rule. That point does not appear to have been taken. That is perhaps unsurprising as in Victoria the best evidence rule is abrogated by s 51 of the *Evidence Act 2008* (Vic) . Nonetheless, when addressing the common law, the Court cited cases such as *Taylor v Chief Constable* and *Butera* which had referred to the best evidence rule. The ruling regarding the common law, even if *o biter*, demonstrated that the objection based on s 48(4) of the *Evidence Act 2008* (Vic) was misconceived. Relying on *Taylor v Chief Constable* and *R v Sitek* , the approach taken to the common law in *Wade* was to treat the CCTV footage as real evidence. On this approach there was not thought to be any impediment to giving oral evidence about what was seen on the missing CCTV footage. Whilst this approach to the common law of evidence by another intermediate appellate court should be followed unless this Court is convinced that the approach is plainly wrong, [154] or there is a compelling reason not to follow it, [155] the approach taken in *Wade* can only be followed to the extent that it accords with the approach taken by a majority of the High Court in *Butera* .

Athans v The Queen (No 2) [2022] SASCA 70 -
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Athans v The Queen (No 2) [2022] SASCA 70 -
Self Care v Green Forest (No 11) [2022] FedCFamC2G 257 (25 March 2022) (Baird J)

19. The issue of translations and expertise, thus admissibility, was raised squarely in the August hearing, including by Mr Parish, by reference to the decision of the High Court in ***But era*** *v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 180 . During the course of exchanges between the Bench and the Bar table in the August hearing, including in relation to other translations of other documents, I explored a course for the parties to take in relation to the particular translation of some documents, including certificates of copyright registration.

Self Care v Green Forest (No 11) [2022] FedCFamC2G 257 -
R v J Lucas; R v B Lucas (No 3) [2022] NSWSC 1809 (24 February 2022) (Button J)

11. It is certainly the case that the concept of an *ad hoc* expert has been accepted to exist. It began forty years ago in the case of *R v Menzies* [1982] 1 NZLR 40. It was approved almost thirty years ago by the High Court of Australia in the case of *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180; [1987] HCA 58 .

SBT v Colvin [2021] ACTCA 40 -
Director of Public Prosecutions v Roberts (Ruling No 4) [2021] VSC 778 (26 November 2021) (Kaye JA)

5. The principles that apply to the present application are well settled. In summary, they are as follows:

(1) Where an out of court conversation has been recorded by mechanical means, the recording is the best evidence of the contents of the conversation. If the recording is available, there is no reason to admit evidence of an out of court listener of the recording, or a transcript made by that listener, as evidence of the content of the conversation. [3]

(2) Where there are aspects of such a recording which are indistinct so as not to yield the full content of the conversation, so that it may need to be played over repeatedly before the conversation can be accurately understood, the court may receive a transcript of the conversation, not as evidence of the conversation, but rather as a means of assisting in the understanding of it. [4]

(3) In such a case, the jury must be directed that the purpose of the transcript is not to provide independent evidence of the conversation, but rather to assist the jury to follow and understand it. [5]

(4) If the quality of the recording is so poor that the jury could not make a fair and reliable assessment of the conversation, or if there is a real risk that the jury might misconstrue the words contained in the recording in a manner that would be unfairly prejudicial to the accused, the recording should not be admitted in evidence. [6]

(5) In such a case, it may be necessary to exclude the recording of a conversation where the inaudible parts of it might unfairly affect the meaning attributed to the parts of the recording that are audible. [7]

via

[3] *Butera v DPP* (1987) 164 CLR 180, 186 (Mason CJ, Brennan and Deane JJ) (*'Butera'*).

Director of Public Prosecutions v Roberts (Ruling No 4) [2021] VSC 778 (26 November 2021) (Kaye JA)

18. First, the meaning of particular words contained in those recordings will be an issue of fact for the jury to determine. In doing so, the jury will not be entitled to rely on the transcripts as a form of expert evidence. Rather, in accordance with the principles stated in *Butera* , the jury will be entitled to use the transcripts as an aid to assist it to follow the conversations. However, ultimately the question of the meaning of interpretation of words contained in the recordings will be a matter of fact for the jury to determine. As I have already mentioned, the question, which I must determine, is whether the jury could form a fair and reliable understanding of particular words contained in the recording. In other words, my role is to consider whether, based on the material before it, the jury could reasonably, and without conjecture, understand the disputed words to bear the meaning intended for on behalf of the prosecution. In determining that question, I doubt whether it would be appropriate to rely on the transcripts produced under the supervision of Detective Sergeant Thomas as a form of expert evidence, when the transcripts could not be relied on, in that way, by the jury.

Director of Public Prosecutions v Roberts (Ruling No 4) [2021] VSC 778 -
Director of Public Prosecutions v Roberts (Ruling No 4) [2021] VSC 778 -
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R v Bushell; R v Tozer (No. 6) [2021] NSWSC 750 -
R v Sinai (No 3) [2021] NSWSC 778 -
Re Roberts [2020] VSC 793 -
R v Elliott [2020] QDC 243 -
R v Elliott [2020] QDC 243 -
R v Fax [2020] QChC 30 -
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R v LP [2020] QDC 218 -
Davey v Tasmania [2020] TASCCA 12 -
Davey v Tasmania [2020] TASCCA 12 -
Davey v Tasmania [2020] TASCCA 12 -
R v Cunningham [2020] QDC 118 -
R v Cunningham [2020] QDC 118 -
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd [2020] TASFC 4 -
R v Kelly [2020] QDC 116 -
R v SXW [2020] QDC 117 -
R v HZG [2020] QDC 108 -
R v Kratzmann [2020] QDC 103 -
R v MMH [2020] QDC 70 (29 April 2020) (Smith DCJA)
Butera v DPP (1987) 164 CLR 180; [1987] HCA 58 , applied

R v MMH [2020] QDC 70 -
Grabski v Beier [2020] VSC 156 (03 April 2020) (Ginnane J)

116. This case differs from *Butera* , where the transcripts consisted of the English translation of a recording of an out of court conversation between several co-accused which occurred in a foreign language. In *Butera* , the conversation in question did not touch on the issue of credibility. In this case, credit is in issue, and the benefits of observing the relevant witnesses has both a role to play in issues of fact and issues of credit. The benefits of receiving the transcript did not outweigh the detriments as was the case in *Butera* .

Grabski v Beier [2020] VSC 156 -
Grabski v Beier [2020] VSC 156 -
Grabski v Beier [2020] VSC 156 -
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Grabski v Beier [2020] VSC 156 -
Grabski v Beier [2020] VSC 156 -
R v Athans [2021] SADC 3 -
R v Athans [2021] SADC 3 -
R v Athans [2021] SADC 3 -
R v Hawat (No 5) [2019] NSWSC 1727 -
R v Hawat (No 5) [2019] NSWSC 1727 -
YBG v The State of Western Australia [2019] WASCA 126 (28 August 2019) (Mazza JA, Beech JA, Pritchard JA)

72. In explaining why giving the jury unsupervised access to the record of the interview was irregular, Hayne J said as follows: [87]

> When the effect of the relevant provisions of the *Evidence Act* is thus understood, it becomes evident that seldom, if ever, will it be appropriate to admit the record of that evidence as an exhibit. (That is not to say that there may not be evident good sense in marking the record for

identification; but that is a step that is distinctly different from receiving the record in evidence and marking it as an exhibit.)

Moreover, when the effect of the relevant provisions is understood in the manner described, it also follows that a request by a jury for access to evidence pre-recorded in accordance with those provisions should ordinarily be dealt with in the same way as any request by a jury to be reminded of evidence that has been led at the trial. Seldom would it be appropriate to meet a request of that kind by giving the jury unrestrained access to the recording to play and replay. The reasons for not allowing access of that kind lie in the need to preserve fairness and balance in the conduct of the trial.

Replaying the evidence given by one witness, after all the evidence has been given, carries risks. First, there is the risk inherent in the form in which it is presented. As was said in *Butera* [(1987) 164 CLR 180 at 189 - 190], there is the risk that undue weight will be given to evidence of which there is a verbatim record when it must be compared with evidence that has been given orally. Secondly, there is the risk that undue weight will be given to evidence that has been repeated and repeated recently. Other risks may arise from the circumstances of the particular trial.

The purpose of reading or replaying for a jury considering its verdict some part of the evidence that has been given at the trial is only to remind the jury of what was said. The jury is required to consider the whole of the evidence. Of course the jury as a whole, or individual jurors, may attach determinative significance to only some of the evidence that has been given. And if that is the case, the jury, or those jurors, will focus upon that evidence in their deliberations. While a jury's request to be reminded of evidence that has been given in the trial should very seldom be refused, the overriding consideration is fairness of the trial. If a jury asks to be reminded of the evidence of an affected child that was pre-recorded under subdiv 3 of Div 4A of the *Evidence Act* and played to the jury as the evidence of that child, that request should ordinarily be met by replaying the evidence in court in the presence of the trial judge, counsel, and the accused. Depending upon the particular circumstances of the case, it may be necessary to warn the jury of the need to consider the replayed evidence in the light of countervailing evidence or considerations relied upon by the accused. It may be desirable, in some cases necessary, to repeat the instructions required by s 21AW. Seldom, if ever, will it be appropriate to allow the jury unsupervised access to the record of that evidence.

Cooper v The State of Western Australia

YBG v The State of Western Australia [2019] WASCA 126 (28 August 2019) (Mazza JA, Beech JA, Pritchard JA)

Butera v Director of Public Prosecutions (Vic) [1987] HCA 58 ; (1987) 164 CLR 180

YBG v The State of Western Australia [2019] WASCA 126 -
YBG v The State of Western Australia [2019] WASCA 126 -
Baker v Barratt [2019] TASSC 28 (04 July 2019) (Geason J)

26. Furthermore, the transcript of the interview is not evidence. As the High Court said in *Butera v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 180 at [9] : "when the tape is available ...there can be no reason to admit the evidence of an out-of-court listener to the tape recording to prove what the tape recorded: it should be proved by the playing over of the tape" .

Torosidis v Department of Education and Training [2019] VSC 93 -
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Torosidis v Department of Education and Training [2019] VSC 93 -
Torosidis v Department of Education and Training [2019] VSC 93 -
CDK16 v Minister for Immigration [2018] FCCA 3626 (13 December 2018) (Judge Manousaridis)

58. A second matter to note relates to Rangiah J's reliance on the observation from the judgment of the plurality in *Butera v Director of Public Prosecutions (Vic)* that a "*witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility whose evidence is given in documentary form*". [166] That observation was made in the context of criminal trials and immediately after it was said that the " *adducing of oral evidence from witnesses . . . underlies the rules of procedure which the law ordains for their conduct*". [167] The adducing of oral evidence, however, is not the procedure Part 7 of the Act ordains for the conduct of the Tribunal's review of decisions. Although Part 7 of the Act entitles an applicant to give oral evidence, and confers on the Tribunal power to take oral evidence from other persons, Part 7 contemplates "*a predominantly documentary process*". [168]

via

[166] (1987) 164 CLR 180 at page 189

CDK16 v Minister for Immigration [2018] FCCA 3626 -
CDK16 v Minister for Immigration [2018] FCCA 3626 -
R v Eastman (No 50) [2018] ACTSC 321 (13 November 2018) (Kellam AJ)

11. As I have previously stated, the jury must be directed first in terms of *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180 that the evidence of what is said is what they can hear on the recordings. Further, I propose to direct the jury that they must be positively satisfied as to what words they can hear, and that if they are doubtful about a word or a phrase, then they cannot be so 'positively satisfied'.

R v Peniamina [2018] QSC 283 -
R v Peniamina [2018] QSC 283 -
Wood v State of New South Wales [2018] NSWSC 1247 -
R v Law [2018] WASC 235 (02 August 2018) (Fiannaca J)

35. Her Honour pointed out that ***R v Maqsud Ali*** ,[10] like ***Butera*** , was concerned with documents which were translations, rather than transcripts, of conversations held in the Punjabi language. Nevertheless, in my respectful opinion, the passage quoted from ***R v Maqsud Ali*** is apt where an electronically recorded video interview is lengthy. It encapsulates the rationale and approach approved by the plurality in ***Butera*** .

R v Law [2018] WASC 235 (02 August 2018) (Fiannaca J)

30. Although the circumstances of ***Butera*** were different to the circumstances of this case, the principles discussed in that case are apt to apply in any instance where a trier of fact is required to consider the contents of an electronically recorded conversation. The rationale and relevant approach for the acceptance of a transcript of an electronic recording of a conversation were explained by Mason CJ, Brennan and Deane JJ in ***Butera*** as follows (footnotes omitted, but citations incorporated): [3]

> Although evidence derived from a tape recording is not subject to some of the frailties of human testimony, it may exhibit deficiencies from which human testimony is usually free. A tape recording which is indistinct may not yield its full content to the listener on its first playing over. It may need to be played over repeatedly before the listener's ear becomes attuned to the words or other sounds recorded. This situation has led courts to receive transcripts not as evidence of the conversation or other sounds recorded but as a means of assisting in the perception and understanding of the evidence tendered by the playing over of the tape. In ***Williams v The Queen*** , Neasey J cited with approval a Canadian case ***Reg v MacLean and MacLean [No 1]*** in which a trial judge held: [4]

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'... that he would not permit the transcripts to be used as evidence of the contents of the recording, but did admit them for the use of 'the trier of the facts, after being properly instructed in that regard, for the sole purpose of following the playing of the tape in court and to assist the trier of the facts in determining what is in fact recorded thereon'.'

Where the quality of the recording is such that the provision of a transcript for the use of the jury would permit them clearly to follow an indistinct recording, a transcript may be seen as an aid to listening though it is not independent evidence of the recorded conversation. As Everett J said [in ***Williams v The Queen*** [1982] Tas R 266 at 280]:

'To deny the jury the benefit of reading with their eyes the same words as they heard with their ears seems to me to put the law into an ill-fitting straitjacket.'

The basis on which a transcript may be provided to the jury was stated by Cooke J, speaking for the majority in ***Reg v Menzies*** [[1982] 1 NZLR 40]. Noting that Phipson said that the relaxing of the rules of evidence tended 'to effect economy, convenience and dispatch', his Honour said:

'The problem is how best to enable a jury to assess the contents of a tape, in the light of those aims. It is a problem sui generis and not automatically answered by settled principles.

If the tape is reasonably short and clearly audible there can normally be no justification for allowing a transcript as well as playing the tape. But there will be cases in which the aid of an expert is reasonably necessary. For example, there may be the use of a foreign language. Or deficiencies in the recording may make it necessary to play tapes more than once to enable a better understanding, yet the sheer length of the tapes may mean that inordinate time would be taken by replaying them to the jury. In such cases, while there should normally be at least one playing to the jury, the evidence of an expert should be admissible as an aid to the jury. He may be a temporary expert in the sense that by repeated listening to the tapes he has qualified himself ad hoc. And we see no compelling reason why his evidence should not take the form of production of a transcript which can be admitted as an exhibit. Whether the Judge allows the jury to have copies of the transcript, as distinct from merely hearing it read, must be a matter for his discretion in the particular case, bearing in mind the requirements of justice and any risk of unfairness to the accused.'

R v Law [2018] WASC 235 -
R v Law [2018] WASC 235 -
R v Law [2018] WASC 235 -
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R v Law [2018] WASC 235 -
R v Law [2018] WASC 235 -
CKX16 v Minister for Immigration [2018] FCCA 1854 (10 July 2018) (Judge Riley)

18. That is consistent with the decision of the High Court in *Butera v Director of Public Prosecutions (DPP) (Vic)* (1987) 164 CLR 180; (1987) 76 ALR 45; (1987) 62 ALJR 7; (1987) 30 A Crim R 417; [1987] HCA 58 where Mason CJ, Brennan and Deane JJ said at page 184 :

> *... Of course, a conversation can be proved by the oral testimony of anyone who heard it but that is not the only means by which a conversation might be proved. The courts have now accepted tape recordings as evidence of the conversations or other sounds*

recorded on the tape: see, among other cases, Reg. v. Maqsud Ali *(14);* Reg. v. Papalia; Reg v. Cotroni *(15);* Williams v. The Queen *(16);* Walsh v. Wilcox *(17);* United States v. Biggins *(18);* Hurt v. State *(19), which canvass the conditions on which a tape recording may be admitted in evidence. It is unnecessary now to consider those conditions but it is obvious that the provenance of the tape recording must be satisfactorily established before it is played over to the jury... (footnotes omitted)*

CKX16 v Minister for Immigration [2018] FCCA 1854 (10 July 2018) (Judge Riley)

44. In *R v Cassar; R v Sleiman* [1999] NSWSC 436 at [6] and [7] , Sperling J said:

> *6. ... The Crown conceded, in the present case, that, under* Butera *, the transcripts of the telephone intercept conversations would not have been admissible (because the recording of those conversations is distinct). S ection 48(1) embodies no such restricting concept. It makes transcripts admissible according to its terms. A document that purports to be a transcript of words recorded on a tape is admissible to prove the conversations.*
>
> *7.* Butera (*supra*), Menzies *[1982] 1 NZLR 40 (quoted with approval in* Butera *) and the subsequent decision of the Full Court of the Federal Court in* Eastman *(1997) 158 ALR 107 are valuable authority for the use to which such a transcript may be put. The combined effect of s 48 (1) and those cases is, so far as is presently relevant, as follows:*
>
> > *(a) A document that purports to be a transcript of words recorded on a tape is admissible to prove the conversation: s 48(1)(c) ;*
> >
> > *(b) No oral or other evidence is necessary to validate such a transcript, it being sufficient that it purports to be a transcript of the words: s 48(1)(c) ;*
> >
> > *(c) Where a tape is indistinct, a transcript may be used to assist the jury in the perception and understanding of what is recorded on the tape:* Butera *at 187 ;*
> >
> > *(d) Where a tape is indistinct, a transcript made by an "ad hoc expert", being a person qualified only by having listened to the tape many times, may be used for this purpose. That is particularly so where the tape needs to be played over repeatedly before the words uttered could be made out unaided:* Menzies *at 49 cited in* Butera *at 188 ;*
> >
> > *(e) If there is doubt or disagreement whether the transcript accurately deciphers the sounds captured on the tape, the transcript should be used only as an aide-memoire. I take that to mean that the jury is to give priority to what they hear (or do not hear) on the tape, if that is not consistent with what appears in the transcript:* Butera *at 188 ;*
> >
> > *(f) The jury may have the transcript before them when this tape is played over in court:* Eastman *at 200;*

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(g) The jury should be informed, when the transcript is tendered, as to the use which they may make of it: Eastman *at 220;*

(h) A transcript may be rejected or its use limited pursuant to s135 to s137.

CKX16 v Minister for Immigration [2018] FCCA 1854 -
CKX16 v Minister for Immigration [2018] FCCA 1854 -
CKX16 v Minister for Immigration [2018] FCCA 1854 -
CKX16 v Minister for Immigration [2018] FCCA 1854 -
CKX16 v Minister for Immigration [2018] FCCA 1854 -
CKX16 v Minister for Immigration [2018] FCCA 1854 -
CKX16 v Minister for Immigration [2018] FCCA 1854 -
CKX16 v Minister for Immigration [2018] FCCA 1854 -
R v Trabolsi [2018] SASCFC 57 -
R v Eastman (No 43) [2018] ACTSC 186 (14 June 2018) (Kellam AJ)

90. Nettle JA listened to the recording and observed at [10] that 'although parts of it are undoubtedly very difficult to follow and other parts of it are completely indecipherable' there were parts that were not so. He stated at [14] that in his view the trial judge 'was right to admit both the decipherable and indecipherable parts of the recording; the latter being necessary for balance'. Nor did Nettle JA accept (see [15]) the argument that because Federal Agent Grant 'had to listen to the recording many times in order to decipher some of its contents, the enhanced transcript was likely to mislead the jury'. He said (at [15]-[16]):

...Rather, to the contrary, as Cooke J observed in *Reg v Menzies* in a passage which the High Court expressly adopted in *Butera v Director of Public Prosecutions (Vic)* :

> The problem is how best to enable a jury to assess the contents of a tape, in the light of those aims. It is a problem *sui generis* and not automatically answered by settled principles. If the tape is reasonably short and clearly audible there can normally be no justification for allowing a transcript as well as playing the tape. But there will be cases in which the aid of an expert is reasonably necessary. For example, there may be the use of a foreign language. Or deficiencies in the recording may make it necessary to play tapes more than once to enable a better understanding, yet the sheer length of the tapes may mean that inordinate time would be taken by replaying them to the jury. In such cases, while there should normally be at least one playing to the jury, the evidence of an expert should be admissible as an aid to the jury. He may be a temporary expert in the sense that by repeated listening to the tapes he has qualified himself *ad hoc*. And we see no compelling reason why his evidence should not take the form of production of a transcript which can be admitted as an exhibit. Whether the judge allows the jury to have copies of the transcript, as distinct from merely hearing it read, must be a matter for his discretion in the particular case, bearing in mind the requirements of justice and any risk of unfairness to the accused.

In any event, I do not see how or why the jury's use of the transcript could have been productive of a miscarriage of justice. https://jade.io/ - _ftn9 It was not suggested at trial and, despite the large amount of time since trial in which to compare the recording with the transcript, it is not even now suggested that the transcript was inaccurate. It is also clear that the jury were on notice as to the care to be exercised in considering the recording and transcript.

R v Eastman (No 43) [2018] ACTSC 186 (14 June 2018) (Kellam AJ)

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88. However, this does not mean that the material is inadmissible. The case law clearly supports the proposition that poor quality recordings do not, for that reason alone, become inadmissible. Furthermore, it is clear from the case law that enhanced tapes are admissible. In *R v O'Neill* [2007] VSCA 227, which primarily dealt with the question of transcripts being provided to a jury, the Court of Appeal (Ormiston, Buchanan JJA and O'Bryan AJA) proceeded on the basis, as is apparent from of the judgment of Ormiston JA at [9] and of O' Bryan AJA at [39] and [45] to [48] , that the provision to the jury of enhanced tapes is permissible consonant with *Butera* . The New Zealand Court of Appeal had earlier considered the matter in *R v Taylor* [1993] 1 NZLR 647, and at 651 stated:

> We therefore accept that Williamson J was correct in holding that the original and the enhanced tapes are admissible and that the written transcripts of them may be used as an aid to the jury's understanding of the tapes. It may, perhaps, bear repeating that, provided the methodology used can be effectively verified, and subject always to the overriding importance of ensuring that nothing unfair to the accused is allowed, the Courts will not exclude from the law of evidence the manifest advantages of electronic techniques and advances.

R v Eastman (No 43) [2018] ACTSC 186 -
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R v Eastman (No 43) [2018] ACTSC 186 -
R v Eastman (No 43) [2018] ACTSC 186 -
Director of Public Prosecutions v Burrell [2018] NTSC 34 -
Director of Public Prosecutions v Burrell [2018] NTSC 34 -
Director of Public Prosecutions v Burrell [2018] NTSC 34 -
AWA15 v Minister for Immigration [2018] FCA 604 -
R v Eastman (No 28) [2018] ACTSC 2 (17 January 2018) (Kellam AJ)

4. The defence has yet to be provided with the material referred to in the preceding paragraph and the defence has raised a number of issues in relation to what it contends is the poor quality of the recordings and other associated issues such as whether or not police witnesses can be considered ad hoc expert witnesses (see *Butera v Director of Public Prosecutions (DPP) (Vic)* (1987) 164 CLR 180 at 187-188) and whether or not the jury should be provided with transcript of the recordings. These and other related matters may require determination by me in the future.

R v Sparks [2017] SASCFC 171 -
Pihema v The State of Western Australia [2017] WASC 282 (04 October 2017) (Jenkins J)

16. There is no doubt that if oral evidence of admissions is admissible, an electronic recording of the admissions is admissible, unless it ought to be excluded in the exercise of a discretion to exclude otherwise admissible evidence. The prima facie admissibility of a recording of what was said to be a confession or admission was accepted by the High Court in ***Butera v Director of Public Prosecutions (Vic)*** [1987] HCA 58; (1987) 164 CLR 180 when Mason CJ, Brennan and Deane JJ said:

> Of course, a conversation can be proved by the oral testimony of anyone who heard it but that is not the only means by which a conversation might be proved. The courts have now accepted tape recordings as evidence of the conversations or other sounds recorded on the tape: see,

among other cases, ***Reg v Maqsud Ali*** (1966) 1 QB 688; ***Papalia v. The Queen*** ; ***The Queen v Cotroni*** (1 979) 2 SCR 256; 93 DLR (3d) 161; ***Williams v The Queen*** (1982) Tas R 266; ***Walsh v Wilcox*** (1976) WAR 62; ***United States v Biggins*** [1977] USCA5 772; (1977) 551 F 2d 64 ; ***Hurt v State*** (1956) 303 P 2d 476, which canvass the conditions on which a tape recording may be admitted in evidence. It is unnecessary now to consider those conditions but it is obvious that the provenance of the tape recording must be satisfactorily established before it is played over to the jury.

The reason why a tape recording of a conversation is admitted in evidence to prove what is recorded is simply that use of the technology of sound recording and reproduction adds 'to our knowledge other data not discernible by the unaided senses, or can make more accurate and more usable the data already discernible': Wigmore, The Science of Judicial Proof, 3rd ed (1937), par 220, p 448, cited by Neasey J in ***Williams v The Queen*** , at p 270. Those additions to our knowledge, as Wigmore points out (ibid., p 450) are due to the use of instruments constructed on knowledge of scientific laws. A tape recording may be used to produce a form of evidence which is different from both oral testimony and documentary evidence (184).

Pihema v The State of Western Australia [2017] WASC 282 (04 October 2017) (Jenkins J)

Butera v Director of Public Prosecutions (Vic) [1987] HCA 58 ; (1987) 164 CLR 180

Kelly v The Queen [2017] ACTCA 42 (22 September 2017) (Penfold ACJ, Refshauge and Gilmour JJ)

68. The transcript of that recording had, however, already been prepared. The transcript was also edited by removing pages 12 and 13 which contained questions 109 to 137 and the answers to them. As is customary, the jury were provided with the transcript as an aid to their understanding of the recording: *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 at 188.

Kelly v The Queen [2017] ACTCA 42 -
R v Taylor [2017] QCA 169 -
R v Taylor [2017] QCA 169 -
R v Taylor [2017] QCA 169 -
R v Phan [2017] SASCFC 70 (23 June 2017) (Kelly, Nicholson and Hinton JJ)

68. So understood, *Solomon* is an application of the principle settled in *Butera* . Further that principle was applied in ruling that Detective Wilkins' evidence of voice comparison was admissible. At paragraph 46 of his judgment the Chief Justice made plain that the admissibility of the Detective's evidence was challenged. At paragraph 75, reproduced above, he deals with the admissibility of both the transcripts produced by the Detective and the Detective's evidence of voice comparison. In relation to each the same principle – that derived from *Butera* – is applied. If there were any doubt, it evaporates upon a consideration of the succeeding paragraphs in which the Chief Justice addresses an argument advanced relying upon *Smith v The Queen* [23] (*Smith*). [24] That argument was that, just as in *Smith* the police officers were in no better position than the jury to determine whether it was the accused that featured in the CCTV footage, so Detective Wilkins was in no better position than the jury in *Solomon* to determine from listening to the tendered calls whether there was one speaker common to all. That is to say, his evidence of voice comparison was, applying the principle in *Smith* , irrelevant and inadmissible. The Chief Justice rejected the submission. He held: [25]

I agree that it would have been better if the judge had directed the jury, consistently with the reasons in *Butera,* that the transcript did not provide independent evidence of what was said or that a particular voice was the voice of the one person, but only as an aid to them in coming to their own conclusion. The judge could usefully have emphasised that they should use the transcript simply to help them understand what they heard by listening to the tapes. But the judge emphasised that the decision was a decision for the jury and the warning that he gave them about Detective Wilkins' evidence, although slightly misdirected, must have made it plain to the jury that they were not to put their faith in his opinion.

For those reasons, I am satisfied that the evidence of Detective Wilkins was admissible, and that the judge's directions on the topic were sufficient.

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R v Phan [2017] SASCFC 70 -
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R v Phan [2017] SASCFC 70 -
R v VJ [2017] QCA 26 (09 March 2017) (Margaret McMurdo P and Gotterson JA and McMeekin J,)

Butera v Director of Public Prosecutions (Vic) (1987) 164 CLR 180; [1987] HCA 58 , cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited

R v VJ [2017] QCA 26 -
Tasmania v Farhat [2017] TASSC 66 -
Nguyen v The Queen [2017] NSWCCA 4 -

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He v Huang [2016] VCC 1658 -
He v Huang [2016] VCC 1658 -
He v Huang [2016] VCC 1658 -
He v Huang [2016] VCC 1658 -
R v Connors [2016] ACTSC 137 -
King v Greyhound Racing Victoria [2016] VCAT 701 (13 May 2016) (Vice President Judge Harbison)

46. I was particularly referred to the following discussion at page 186 of the judgement in *Butera* :

> If the tape is not available and its absence has been accounted for satisfactorily, the evidence of its contents given by a witness who heard it played over may be received as secondary evidence. That evidence is not open to the same objection as the evidence of a witness who repeats what he was told out of court by another person who is not called as a witness. In the latter case the credibility of the other person cannot be tested; in the former case, assuming the provenance of the tape is satisfactorily proved, no question of its credibility can arise. Nevertheless when the tape is available or its absence is not accounted for satisfactorily, there can be no reason to admit the evidence of an out of court listener to the tape recording to prove what the tape recorded; it should be proved by playing over of the tape. Prudence and convenience combine to support the application of the best evidence rule in such a case.

King v Greyhound Racing Victoria [2016] VCAT 701 -
King v Greyhound Racing Victoria [2016] VCAT 701 -
Giang Truong Tran v The Queen [2016] VSCA 79 (26 April 2016) (Weinberg, Santamaria and McLeish JJA)

94. The notion that evidence of voice identification could only be given by someone who had developed what later, in New South Wales, came to be described as 'ad hoc' expertise, emerged over time. Some of the early cases dealt not so much with voice identification as such, but rather with the separate, but related, question of identifying the words spoken on an otherwise indistinct recording. [22]

via

[22] See, for example, *R v Menzies* [1982] 1 NZLR 40; and *Butera v DPP (Vic)* (1987) 164 CLR 180 .

Morgan v The Queen [2016] NSWCCA 25 -
Fitas v Mastrangelo [2015] WASC 285 (24 July 2015) (Pritchard J)
Butera v Director of Public Prosecutions (DPP) (Vic) [1987] HCA 58 ; (1987) 164 CLR 180
Fox v Percy

Fitas v Mastrangelo [2015] WASC 285 -
Nasrallah v R; R v Nasrallah [2015] NSWCCA 188 -
Nasrallah v R; R v Nasrallah [2015] NSWCCA 188 -
Nasrallah v R; R v Nasrallah [2015] NSWCCA 188 -
Nasrallah v R; R v Nasrallah [2015] NSWCCA 188 -
Huynh v Minister for Immigration and Border Protection [2015] FCA 701 (10 July 2015) (Griffiths J)

96. I respectfully agree with the following observations of Rangiah J in *CZBH v Minister for Immigration and Border Protection* [2014] FCA 1023 (***CZBH***) at [55]-[56] which, while directed at the RRT, are also apposite to the Tribunal when it conducts a review under Div 5 of Pt 5 :

> 55. The Tribunal's core function pursuant to s 414(1) is to review decisions of the first respondent or his delegates that fall within s 411(1). Its process is inquisitorial. Its task is to make the correct or preferable decision on the materials before it: *Li* at [10] per French CJ. Section 426 and the ancillary provisions dealing with the taking of oral evidence recognise that in some cases the opportunity given to an applicant to

present the evidence of witnesses in written form may not be enough. The purpose of those provisions must include assisting the Tribunal to arrive at the correct or preferable decision through the advantages that may be conferred by obtaining the oral evidence of witnesses.

56. One of the circumstances evidently contemplated by s 426 is where an applicant has been unable for some reason to obtain a written statement from a witness. Importantly, s 426 must also contemplate that obtaining oral evidence may assist the Tribunal to decide upon the credibility of a witness who has provided a written statement. In *Butera v Director of Public Prosecutions (Vic)* [1987] HCA 58; (1987) 164 CLR 180, Mason CJ and Brennan and Deane JJ held at 189 :

> A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form.

Although that statement was made in the context of considering a criminal trial conducted by a court, it is also true of oral evidence given before a Tribunal which is engaged in an inquisitorial process. In *Chen v Minister for Immigration and Ethnic Affairs* [1994] FCA 985; (1994) 48 FCR 591 at 599 and 602, the Full Court indicated that an oral hearing before the Minister's delegate may be required where issues of credibility arise. The Tribunal may find oral evidence given under oath or affirmation more persuasive than evidence given by written statement. If oral evidence is obtained by the Tribunal, it will also have the opportunity to test the credibility of the evidence given in any written statement by questioning a witness in the same way that it has the opportunity to test the evidence of an applicant.

Meade v The Queen [2015] VSCA 171 -
McElholum v Hughes [2015] ACTSC 78 -
McElholum v Hughes [2015] ACTSC 78 -
R v TK (No 2) [2015] ACTSC 87 -
R v TK (No 2) [2015] ACTSC 87 -
R v Xie (No 2) [2015] NSWSC 2116 -
R v Sterling; R v McCook [2014] NSWDC 199 (27 October 2014) (Yehia SC DCJ)

67. His opinion evidence was admitted pursuant to s 79 . In holding that the evidence was admissible, Simpson J noted that the idea of an "ad hoc expert" was endorsed by the High Court in **Butera** (1987) 164 CLR 180 , a case also involving tape recordings of conversations mainly in the Punjabi language. **Butera,** was a pre-Evidence Act case. Her Honour also referred to the decisions of ***R v Eastman*** (1997) 158 ALR 107 and ***R v Cassar and Sleiman*** (unrepo rted NSWSC 436) which were decided under rules of evidence identical to those under consideration, and where it was decided that the concept of "ad hoc expertise" continues to have application. Her Honour said: "*For myself, I believe this section 79 is sufficiently wide to accommodate the idea of an ad hoc expert*".

CZBH v Minister for Immigration and Border Protection [2014] FCA 1023 -
Kheir v The Queen [2014] VSCA 200 (05 September 2014) (Maxwell P, Redlich and Beach JJA)

59. *Menzies* and *Butera* were both cases in which expert evidence was admitted in order to interpret or explain relevant conversations that the jury would find unintelligible or incomprehensible. Several New South Wales cases adopt and accept the 'ad hoc expert' as a category of expert under s 79 ,[19] and there are also decisions of this Court which adopt the concept. These cases, like *Menzies* and *Butera,* concerned transcript of an otherwise

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unintelligible tape recording prepared by somebody who had listened to it repeatedly. The transcript was held to be an appropriate aid for the jury in their understanding of the evidence constituted by the recording itself. [20]

Kheir v The Queen [2014] VSCA 200 -
Kheir v The Queen [2014] VSCA 200 -
Kheir v The Queen [2014] VSCA 200 -
Honeysett v The Queen [2014] HCA 29 (13 August 2014) (French CJ, Kiefel, Bell, Gageler and Keane JJ)

48. In *Butera v Director of Public Prosecutions (Vict)* [40] this Court endorsed the statement of Cooke J in *R v Menzies* [41] that a person may "be a temporary expert in the sense that by repeated listening to the tapes he has qualified himself ad hoc". In issue was the admission of the transcript of a tape recording as an aid to assist the jury in its understanding of an indistinct recording. *Butera* and *Menzies* concerned the common law of evidence. The particular problem that they addressed is the subject of provision under the Evidence Act [42]. Whether the New South Wales Court of Criminal Appeal is right to consider that the repeated listening to an indistinct tape recording or viewing of videotape or film may qualify as an area of specialised knowledge based on the listener's, or viewer's, experience does not arise for determination in this appeal [43]. The respondent acknowledged that Professor Henneberg had not examined the CCTV footage over a lengthy period before forming his opinion. In this Court, the respondent does not maintain the submission that Professor Henneberg's opinion was admissible as that of an ad hoc expert.

Honeysett v The Queen [2014] HCA 29 -
Honeysett v The Queen [2014] HCA 29 -
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Honeysett v The Queen [2014] HCA 29 -
Vergara v Ewin [2014] FCAFC 100 -
Vergara v Ewin [2014] FCAFC 100 -
R v Glastonbury [2014] SASCFC 44 (29 April 2014) (Kourakis CJ; David and Parker JJ)

33. In *Butera v Director of Public Prosecutions (Vic)* [1] the High Court considered the admissibility of transcript of a tape recording of an out of court admission made by the accused. Mason CJ, Brennan and Deane JJ explained the central role played by the principle of orality in common law criminal trials in this way: [2]

> The adducing of oral evidence from witnesses in criminal trials underlies the rules of procedure which the law ordains for their conduct. A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form. Oral evidence is public; written evidence may not be. Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witnesses. By generally restricting the jury to consideration of testimonial evidence in its oral form, it is thought that the jury's discussion of the case in the jury room will be more open, the exchange of views among jurors will be easier, and the legitimate merging of opinions will more easily occur than if the evidence were given in writing or the jurors were each armed with a written transcript of the evidence. And there are, of course, logistical and financial obstacles to the provision of general transcripts for each juror. If the general body of evidence is given orally, a written transcript of a part of the evidence available in the jury room tends to give an emphasis and perhaps an undue air of credibility to that part. In *Driscoll v The Queen* this problem arose with respect to unsigned records of interview which, according to police evidence, an accused had adopted orally. Gibbs J., with the concurrence of Mason and Jacobs JJ., said:
>
> > The danger is that a jury may erroneously regard the written record as in some way strengthening or corroborating the oral testimony. Moreover the record, if admitted, will be taken into the jury room when the jury retire to consider their verdict, and by its very availability may have an influence upon their deliberations which is out of all proportion to its real weight. For these reasons, it

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> would appear to me that in all cases in which an unsigned record of interview is tendered the judge should give the most careful consideration to the question whether it is desirable in the interests of justice that it should be excluded.

The general rule that witnesses must give their evidence orally is not without exception. In *Smith v The Queen*, a chart had been prepared by a witness to explain complicated business transactions. The chart was admitted in evidence, though what it showed could have been described — albeit laboriously — in oral evidence. This Court agreed with the view expressed by the Court of Criminal Appeal (sub. nom. *Reg. v Mitchell*) that the chart was rightly admitted:

> The chart was nothing but a convenient record of a series of highly complicated cheque transactions which had been proved by other evidence, and was likely to be of considerable assistance to the jury. Had they all been accountants, doubtless after considerable time they could have prepared such a chart for themselves. The use of such charts and other time-saving devices in complicated trials of this kind is a usual and desirable procedure and is encouraged by the courts.

The practice of requiring witnesses to give their evidence orally should not be waived lightly, especially if there be a risk that writing will give undue weight to that evidence to the disadvantage of an accused person. But the practice is not immutable. If a witness writes out a proof of his evidence and swears to its truth or if a written transcript of part of the witness' oral evidence is produced, and if the task of the jury can be facilitated by admitting the document in evidence, there is no absolute bar against doing so. For example, a written document may prove more convenient than oral evidence as a foundation for cross-examination upon its contents or it may be a valuable aide-mémoire for the jury in a case where precise recollection of words is important. In every case, even when an accused consents to the admission of the document, the trial judge should bear in mind the overriding consideration of fairness to the accused and the risk involved in allowing the document to be taken into the jury room. A further relevant consideration is the risk that documentary evidence may impair public understanding of the proceedings.

(*footnotes omitted*)

R v Glastonbury [2014] SASCFC 44 (29 April 2014) (Kourakis CJ; David and Parker JJ)

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> (*footnotes omitted*)

via

[1] (1987) 164 CLR 180 .

R v Glastonbury [2014] SASCFC 44 -
R v Glastonbury [2014] SASCFC 44 -
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R v Glastonbury [2014] SASCFC 44 -
R v Glastonbury [2014] SASCFC 44 -
R v Nguon and Ream [2014] NSWDC 385 (31 March 2014) (Judge Whitford SC)

50. The practice of allowing juries access to transcripts of recordings as an aid received the apparent imprimatur of the High Court in *Butera* . This is the case upon which the Crown primarily relies in support of the use of the transcripts as an aid in this case. It has been suggested that *Butera* does not provide a general warrant for those who have listened repeatedly to recordings to proffer their opinions about the identity of speakers on the recording as admissible evidence: see eg Edmond & San Roque, at p 9. Nor does it provide a general warrant for the use of transcripts as an aid. Ultimately, the case concerned finding an appropriate balance between notions of convenience on the one hand and the dictates of justice on the other. Certainly one point of distinction between *Butera* and the present case is that it, like many of the cases which have followed it, involved the significant complication of being concerned with recordings that were substantially in a foreign language. In those circumstances the primary evidence, the recordings, is of essentially no utility to a jury and there is an inevitable need for the application of genuine expertise by translators.

R v Nguon and Ream [2014] NSWDC 385 (31 March 2014) (Judge Whitford SC)

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50. The practice of allowing juries access to transcripts of recordings as an aid received the apparent imprimatur of the High Court in *Butera* . This is the case upon which the Crown primarily relies in support of the use of the transcripts as an aid in this case. It has been suggested that *Butera* does not provide a general warrant for those who have listened repeatedly to recordings to proffer their opinions about the identity of speakers on the recording as admissible evidence: see eg Edmond & San Roque, at p 9. Nor does it provide a general warrant for the use of transcripts as an aid. Ultimately, the case concerned finding an appropriate balance between notions of convenience on the one hand and the dictates of justice on the other. Certainly one point of distinction between *Butera* and the present case is that it, like many of the cases which have followed it, involved the significant complication of being concerned with recordings that were substantially in a foreign language. In those circumstances the primary evidence, the recordings, is of essentially no utility to a jury and there is an inevitable need for the application of genuine expertise by translators.

R v Nguon and Ream [2014] NSWDC 385 -
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R v Nguon and Ream [2014] NSWDC 385 -
R v Nguon and Ream [2014] NSWDC 385 -
Wade v The Queen [2014] VSCA 13 (14 February 2014) (Nettle, Redlich and Coghlan JJA)

27. Additionally, even if there were any substance in the point, it would make no difference to the outcome of the case; as indeed counsel for the applicant ultimately conceded. At common law, security camera footage of the commission of an offence is real evidence of what occurred (albeit having some of the features of testimonial evidence). [9] Subject to considerations of reliability, prejudice and the exercise of discretion, it is permissible therefore for a witness who has seen the footage to give evidence of its contents as if the witness had been a witness to the crime. The point was explained by Ralph Gibson LJ, who gave the leading judgment in *Taylor v Chief Constable* ,[10] as follows:

> For my part I can see no effective distinction so far as concerns admissibility between a direct view of the action of an alleged shoplifter by a security officer and a view of those activities by the officer on the video display unit of a camera, or a view of those activities on a recording of what that camera recorded. He who saw may describe what he saw because, as Ackner LJ said in *Kajala v Noble* ,[11] to which I have referred, it is relevant evidence provided that that which is seen on the camera or recording is connected by sufficient evidence to the alleged actions of the accused at the time and place in question. As with the witness who saw directly, so with him who viewed a display or recording, the weight and reliability of his evidence will depend upon assessment of all relevant considerations, including the clarity of the recording, its length, and, where identification is in issue, the witness's prior
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> knowledge of the person said to be identified, in accordance with well established principles. [12]

via

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[9] *R v Ames* [1964–5] NSWR 1489, 1491 ; *R v Sitek* [1988] 2 Qd R 284; *Police v Dorizzi* (2000) 84 SASR 403, 411–4 ; *Buttera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180, 184–5 .

Col v R [2013] NSWCCA 302 -
Col v R [2013] NSWCCA 302 -
and William Christos v The Queen [2013] VSCA 202 (06 August 2013) (Nettle and Coghlan JJA and Dixon AJA)

CRIMINAL LAW – Conviction – Attempt to possess commercial quantity of border controlled drug (heroin) – Transcript and recording of covertly recorded conversation between appellant and co-accused – Whether, because transcript obtained from poor quality recording, it would be highly prejudicial to appellant – Whether judge erred in directions as to use jury could make of transcript – *R v Giovannone* (2002) 140 A Crim R 1; *Butera v Director of Public Prosecutions (Vict)* (1987) 164 CLR 180 ; *R v O'Neill* [2001] VSCA 227, applied.

and William Christos v The Queen [2013] VSCA 202 -
and William Christos v The Queen [2013] VSCA 202 -
and William Christos v The Queen [2013] VSCA 202 -
and William Christos v The Queen [2013] VSCA 202 -
R v Andros Steve Klobucar [2013] ACTSC 118 -
Honeysett v The Queen [2013] NSWCCA 135 (05 June 2013) (Macfarlan JA, Campbell J and Barr AJ)

40. In *R v Tang* [2006] NSWCCA 167; 65 NSWLR 681, Dr Sutisno (who also gave evidence in the present case) gave evidence for the Crown that after studying CCTV footage of the offence and subsequent photographs of the appellant, she could identify the appellant as the offender. Spigelman CJ (with whom Simpson and Adams JJ agreed) concluded in relation to the first limb of s 79(1) of the *Evidence Act* , that whilst there was a body of expertise which supported Dr Sutisno's evidence of common facial characteristics, the evidence did not indicate that that expertise was of such a character that it could support an opinion of identity such as that given by Dr Sutisno ([135] and [146]). His Honour thus drew a distinction between evidence of points of similarity in facial anatomy and evidence of identity. His Honour observed:

"120 As indicated above, in the circumstances of this case, the evidence of particular similarities between the two categories of photographs of the accused and the third offender was admissible. The process of identification and magnification of stills from the videotape was a process that had to be conducted by Dr Sutisno out of court. Furthermore, the quality of the photographs derived from the videotape was such that the comparison of those stills with the photographs of the appellant could not be left for the jury to undertake for itself. The identification of points of similarity by Dr Sutisno was based on her skill and training, particularly with respect to facial anatomy. It was also based on her experience with conducting such comparisons on a number of other occasions. Indeed, it could be supported by the experience gained with respect to the videotape itself through the course of multiple viewing[s], detailed selection, identification and magnification of images. By this process she had become what is sometimes referred to as an 'ad hoc expert'. (See *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180 at 195 ; *R v Leung* (19 99) 47 NSWLR 405 at 413 [37]-[68] ; *Li v The Queen* (2003) 139 A Crim R 281 at 286 [39]-[44] .) In any event, as noted above, no complaint is made of this evidence."

Honeysett v The Queen [2013] NSWCCA 135 (05 June 2013) (Macfarlan JA, Campbell J and Barr AJ)

42. *Butera* was applied in *R v Leung* [1999] NSWCCA 287; 47 NSWLR 405 to evidence of a qualified interpreter who, in translating tape recorded conversations, had become familiar with the accents and use of language of the voices on the tapes. This *ad hoc* expertise entitled him to give evidence of voice comparison ([48]).

Honeysett v The Queen [2013] NSWCCA 135 -
R v Dastagir [2013] SASC 26 -
Latorre v The Queen [2012] VSCA 280 -
Eagles v Densley [2012] VSC 355 (23 August 2012) (Cavanough J)

27. Given that the DVD as a whole was tendered absolutely and for all relevant purposes, I also agree with the Crown that there is nothing in *Butera v Director of Public Prosecutions* , [24] a case relied upon by the plaintiff in this regard, which assists the plaintiff's position.

via

[24] (1987) 164 CLR 180 .

Eagles v Densley [2012] VSC 355 -
Police v M, M [2012] SASC 83 (29 May 2012) (White J)

20. Video footage, like a tape recording, is an admissible form of evidence. In the case of audio footage, the tape is admissible as evidence of the sounds or conversations recorded on it: *Bute ra v Director of Public Prosecutions (Vic).* [6] In that case, after referring to the value of the tape as the best evidence of the conversation, Mason CJ, Brennan and Deane JJ went on to say:

> That is not say that the tape is itself the admissible evidence of what is recorded on it. A tape is not by itself an admissible object for by itself it is incapable of proving what is recorded on it: it is admissible only because it is capable of being used to prove what is recorded on it by being played over. By using sound reproduction equipment to play over the tape, the court obtains evidence of the conversation or other sound which is to be proved; it is that evidence, aurally received, which is admissible to prove the relevant fact. [7]

Later, Mason CJ, Brennan and Deane JJ said:

> But it is not the tape, it is the sounds produced by playing it over, which is the evidence admitted to prove what is recorded. The tape is part of the machinery by which that evidence is produced. [8]

via

[7] Ibid at 185-6 .

Police v M, M [2012] SASC 83 (29 May 2012) (White J)

22. It was not necessary for the High Court in *Butera* to consider the conditions of admissibility of an audio tape but Mason CJ, Brennan and Deane JJ did observe:

> [I]t is obvious that the provenance of the tape recording must be satisfactorily established before it is played to the jury. [9]

This seems to imply that the Court must be satisfied of the provenance of an audio or video tape before it admits the tape into evidence.

Police v M, M [2012] SASC 83 (29 May 2012) (White J)

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Police v M, M [2012] SASC 83 -
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Police v M, M [2012] SASC 83 -
Police v M, M [2012] SASC 83 -
F G v The Queen [2012] VSCA 84 -
Tsang v DPP (Cth) [2011] VSCA 336 -
McKegney v Roofley Pty Ltd [2011] QCAT 221 -
Chen v R [2011] NSWCCA 145 (22 June 2011) (Simpson and Davies JJ, Grove AJ)

70. The objection that was taken at trial to the admission of Detective Zimmer's opinion evidence was based upon a challenge to his expertise. The transcript of the argument (AB 381.2) reveals that the challenge itself depended upon a misconception as to the nature of the expertise upon which the Crown relied. Senior counsel repeatedly referred to the concept of "ad hoc expert". That term (it seems) derives from *R v Menzies* [1982] 1 NZLR 40. The notion of an ad hoc expert is examined and explained in *R v Leung* [1999] NSWCCA 287; 47 NSWLR 405 . See also *R v Tang* [2006] NSWCCA 167; 65 NSWLR 681; *Butera v Director of Public Prosecutions* (Vic) [1987] HCA 58 ; 164 CLR 180 ; *Li v The Queen* [2003] NSWCCA 290; 139 A Crim R 281. An "ad hoc expert" may best be described as a person who has acquired expertise in a narrow subject matter that would not ordinarily call for or warrant or be susceptible to specialised training, study or experience. A common example, as in *Leung* , is voice identification, where expertise may be acquired by repeatedly listening to tape recordings of conversations such as are here in question.

R v Murray [2011] QSC 170 -
R v Murray [2011] QSC 170 -
R v Murray [2011] QSC 170 -
Lang and Minister for Foreign Affairs [2011] AATA 279 -
R v Ainsworth [2011] QSC 418 (21 April 2011) (Ann Lyons J)

18. The law in relation to admissibility of the secondary evidence of the contents of electronic recordings was summarised by the High Court in *Butera v DPP [1]* where Mason CJ, Brennan and Deane JJ stated:

"If the tape is not available and its absence has been accounted for satisfactorily, the evidence of its contents given by a witness who heard it played over may be received as secondary evidence. That evidence is not open to the same objection as the evidence of a witness who repeats what he was told out of Court by another person who is not called as a witness. In the latter case the credibility of the other person cannot be tested; in the former case, assuming the providence of the tape is satisfactorily proved, no question of its credibility can arise. Nevertheless, when the tape is available or its absence is not accounted for satisfactorily there can be no reason to admit the evidence of an out of court listener to the tape recording to prove what the tape recorded: it should be proved by

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the playing over of the tape. Prudence and convenience combine to support the application of the best evidence rule in such a case."

via

[1] (1997) 164 CLR 180 at [186] .

R v Ainsworth [2011] QSC 418 -
R v Belford & Bound [2011] QCA 43 -
Habib v Radio 2UE Sydney Pty Ltd (No 2) [2011] NSWDC 7 (07 March 2011) (Levy SC DCJ)

35. In this regard, I do not consider the reliance by the plaintiff on ss 29(4) or 48(1) of the Evidence Act 1995 has the effect of displacing the proposition of relevance referred to in Smith and s 56(2) . The plaintiff seeks to tender transcripts prepared by or on his behalf. These are not transcripts that have been prepared or acknowledged by the defendants. The transcripts do not of themselves constitute admissions by the defendants against their own interests. They do not constitute evidence : *Butera v Director of Public Prosecutions (Vic)* [1987] HCA 58; (1987) 164 CLR 180. Strictly speaking, instead, they are only interpretations of other evidence. That other evidence, namely the recordings of the broadcasts, will itself be admitted into evidence without question or objection : *Butera* pp 185-6.

Habib v Radio 2UE Sydney Pty Ltd (No 2) [2011] NSWDC 7 (07 March 2011) (Levy SC DCJ)

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Benbrika v The Queen [2010] VSCA 281 (25 October 2010) (Maxwell P, Nettle and Weinberg JJA)

8. The sound quality of the TI and LD recordings was relatively good. The majority of the conversations were conducted in English, albeit often interspersed with some Arabic, while a small number of conversations were conducted wholly or substantially in Arabic. Where words in the transcripts were translated from Arabic to English, they appeared in the transcripts in bold text. No significant objection was made as to the accuracy of the transcripts, although, in a small number of instances, the Crown and the accused disagreed on the words that could be heard.[5] In those cases, the two different interpretations were brought to the attention of the jury as the recordings were played to them and the written transcripts made note of the two competing interpretations. [6] Each juror was also provided with a full set of the transcripts of the TI and LD conversations for the duration of the trial. The jury were instructed, however, that (in relation to conversations in English) the transcripts were merely an aid and that the evidence consisted of the actual recordings.

via

[6] *Butera v Director of Public Prosecutions (Victoria)* (1987) 164 CLR 180 .

R v Milne (No 1) [2010] NSWSC 932 -
R v Milne (No 1) [2010] NSWSC 932 -
Preston v Parker [2010] QDC 264 (24 June 2010) (Irwin DCJ)

11. Exhibit 1 has been supplemented by handwritten annotations by Mr Copley and his secretary and by documents, "A", "B" (Exhibit 2) and "C" (Exhibit 3). These were prepared by Mr Copley's secretary from listening to the recordings. The place where Exhibit 2 fits into Exhibit 1 is clearly marked with "A" and "B", respectively, on the face of Mr Preston's document. Exhibit 3 commences at the end of Exhibit 1 and immediately prior to the commencement of the SRB's official transcript. Exhibits 1-4 constitute an agreed record of the proceedings before the magistrate for the purpose of this rehearing.[10] A synopsis of the field tape was admitted as Exhibit 4. This was transcribed by Constable Parker. It has been supplemented by Mr Preston's handwriting. Ms Litchen was agreeable to it being tendered.[11] I have used this synopsis only as an aid to understanding what the conversation on the tape is. [12]

via

[12] *Butera v DPP (Vic.)* (1987) 164 CLR 180 at 188.

Preston v Parker [2010] QDC 264 -
Preston v Parker [2010] QDC 264 -
Flynn v Chief of Army [2010] ADFDAT 1 -
Flynn v Chief of Army [2010] ADFDAT 1 -
MG v The Queen [2010] VSCA 97 -
MG v The Queen [2010] VSCA 97 -
MG v The Queen [2010] VSCA 97 -
R v J, JA [2009] SASC 401 (23 December 2009) (Duggan, Nyland and White JJ)

17. The use of the video recording is simply a means of establishing what was said in the course of the interview. If the conversation is accurately recorded the videotape provides a particularly accurate method of proof of what was said. As the discussion in *Butera v Director of Public Prosecutions (Vic)* [4] makes clear, there is no reason why a recording cannot be used in order to prove what was said in the course of a conversation or other oral statement.

via

[4] (1987) 164 CLR 180 .

R v J, JA [2009] SASC 401 (23 December 2009) (Duggan, Nyland and White JJ)

22. In *Gately's* case the Court considered whether a jury could have unsupervised access to a recording made under s 21AM . This gave rise to the question whether it was appropriate to admit the recording as an exhibit. Hayne J, with whom Gleeson CJ and Heydon J agreed on this issue, held that a recording made under this section should not be tendered as an exhibit, although it would be appropriate to mark it for identification. His Honour held that the recording itself was not to be treated as an item of real evidence. It was a record "of what the child says". Distinguishing the recording from the type of recording tendered in *Butera* , His Honour said: [8]

> But the critical difference between *Butera* and cases of the kind now under consideration is that *Butera* concerned the admission of evidence of out-of-court assertions as an exception to the hearsay rule. The relevant evidence in *Butera* was what the accused person had said on an earlier occasion. In cases like the present, the affected child gives evidence of what he or she knows, saw,

> or did. The evidence that the child gives is direct evidence, not hearsay. Unless some exception to the hearsay rule is engaged, the child may not give evidence of an out-of-court assertion as evidence of the truth of its content.

R v J, JA [2009] SASC 401 -
R v J, JA [2009] SASC 401 -
R v J, JA [2009] SASC 401 -
R v J, JA [2009] SASC 401 -
R v J, JA [2009] SASC 401 -
R v J, JA [2009] SASC 401 -
R v J, JA [2009] SASC 401 -
R v J, JA [2009] SASC 401 -
R v J, JA [2009] SASC 401 -
R v J, JA [2009] SASC 401 -
Ammoun v The State of Western Australia [2009] WASCA 182 -
Ammoun v The State of Western Australia [2009] WASCA 182 -
Ammoun v The State of Western Australia [2009] WASCA 182 -
Council of the New South Wales Bar Association v Archer (No 12) [2009] NSWADT 283 -
Council of the New South Wales Bar Association v Archer (No 12) [2009] NSWADT 283 -
R v Morgan [2009] VSCA 225 (23 October 2009) (Ashley, Neave JJA and Lasry AJA)

59. In their joint reasons in *Butera v DPP (Vic)* ,[11] Mason CJ, Brennan and Deane JJ referred to Gibbs J 's statement in *Driscoll v The Queen* [12] that there was a danger that a jury might regard written material as corroborating or strengthening the oral testimony of a witness.[13] They said that the giving of oral evidence demonstrated more about the credibility of a witness than a written statement, and that:

> ... by generally restricting the jury to consideration of testimonial evidence in its oral form, it is thought that the jury's discussion of the case in the jury room will be more open, the exchange of views among jurors will be easier, and the legitimate merging of opinions will more easily occur than if the evidence were given in writing or the jurors were each armed with a written transcript of the evidence. [14]

via

[14] (1987) 164 CLR 180 , 189.

R v Morgan [2009] VSCA 225 (23 October 2009) (Ashley, Neave JJA and Lasry AJA)

50. In this Court, counsel for the applicant complained that the judge was required to instruct the jury in unambiguous terms that the transcript is not evidence, and was being made available only for the jury's convenience and as a result of its request. Citing *Butera v DPP* , [8] counsel submitted that this instruction should be given before the transcript is made available. It should have been done, counsel argued, to avoid the risk that undue weight would be given to a written record of the evidence as opposed to what the jury saw and heard when the evidence was originally given. Counsel submitted that such a direction was of considerable significance in the circumstances of this case, given that Ms Huang spoke limited English and, at times, that it had evidently been difficult to readily comprehend what she was saying.

R v Morgan [2009] VSCA 225 -
R v Morgan [2009] VSCA 225 -
R v Morgan [2009] VSCA 225 -
R v Morgan [2009] VSCA 225 -
R v Morgan [2009] VSCA 225 -

R v Morgan [2009] VSCA 225 -
Newton v Masonic Homes Inc [2009] NTSC 51 (28 September 2009)
[19] *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 at 188-189 .

Newton v Masonic Homes Inc [2009] NTSC 51 -
El-Jalkh v R [2009] NSWCCA 139 (25 June 2009) (Spigelman CJ at 1; James J at 2; Simpson J at 158)

3 The trial of the appellant commenced on 14 September 2005. The Crown case, which commenced on 14 September 2005, continued until the Crown case was closed on 29 September 2005. The evidence in the Crown case consisted of:-

1. Evidence by Michael Ralph Purchas, an Australian Federal Police officer on secondment to the Australian Crime Commission.

2. Evidence by Michael James Mullaly, who at the relevant times was an officer of the Australian Crime Commission.

3. Evidence by an alleged co-offender who had agreed to assist the Australian Crime Commission in the prosecution of the appellant. This witness was referred to in the trial by a pseudonym "Carlos". He was the principal Crown witness.

4. Miscellaneous documentary exhibits.

5. Tape recordings of a large number of conversations to some of which the appellant had been a party, which had been recorded by means of authorised listening devices or authorised telephone intercepts (all of which I will refer to as "the recorded conversations"). Transcripts of the recorded conversations prepared by a police officer became exhibits M1 and M2 at the trial but the trial judge gave directions about the transcripts in accordance with *Butera v Director of Public Prosecutions* (Victoria) (1987) 164 CLR 180 .

El-Jalkh v R [2009] NSWCCA 139 -
R v Thomas Sam; R v Manju Sam (No. 14) [2009] NSWSC 561 -
R v Thomas Sam; R v Manju Sam (No. 14) [2009] NSWSC 561 -
R v Benbrika and Ors (Ruling Nos 35.01-35.11) [2009] VSC 142 -
R v Tran [2009] QDC 82 -
R v Tran [2009] QDC 82 -
R v Bain [2009] NZSC 16 -
R v Bain [2009] NZSC 16 -
The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9] [2008] WASC 239 (28 October 2008) (Owen J)

Butera v Director of Public Prosecutions (Vic) (1987) 164 CLR 180 ..... **268**

The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9] [2008] WASC 239 (28 October 2008) (Owen J)

970 In its original formulation, the 'best evidence' rule required that a party produce the best evidence that the nature of the case would allow, and that any less good evidence would be excluded. The rule has largely passed into history, other than in the context of documentary evidence: ***Butera v Director of Public Prosecutions (Vic)*** (1987) 164 CLR 180, 194 (Dawson J) . Broadly, if a party wishes to rely on the contents of a document, the original must be produced; and secondary evidence is only admissible if the original cannot be produced and the reason for its absence is

explained. But as the author of Ligertwood A, *Australian Evidence* (1988), [7.08] observes, judges are a pragmatic breed and the rule is rife with exceptions.

R v Vandergulik (Ruling no 1) [2008] VSC 407 (29 September 2008) (Kellam J)

20. It is true that Detective Sergeant Tremain might be seen as a temporary expert as to what was said, in the sense discussed in *Butera v DPP* [5] , that is that by repeated listening to the recording he has qualified himself ad hoc, as an expert. However, the recording must still be clear enough to a jury for them to test the conclusions he has reached as to the accuracy of the transcript prepared by him upon his listening to the recording. In my view, the appropriate test is whether the recordings, (which may be indeed required to be played to the jury on several if not many occasions) are adequate in clarity and coherence to enable the jury to form a fair and reliable assessment of the conversations which were recorded. I must decide whether there is a real risk that the jury might misconstrue the conversations in a manner which would be unfairly prejudicial to one or other of the accused. I then need to decide whether in the exercise of a general discretion the recording should be excluded from evidence. [6]

via

[5] (1987) 164 CLR 180 at 187-188 .

R v Vandergulik (Ruling no 1) [2008] VSC 407 (29 September 2008) (Kellam J)

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Irani v R [2008] NSWCCA 217 (18 September 2008) (McClellan CJ at CL ; Hoeben J ; Harrison J)

31 This submission is not made out. His Honour appreciated that the factual scenario was different where a foreign language was involved (judgment 7.5). His Honour's reliance on this case was not so much for its factual similarity but because of the statements of principle set out therein which his Honour quoted in his judgment. The statement of principle in *R v Menzies* [1982] 1 NZLR 40 at 49 was quoted by his Honour. This extract, which was endorsed by the High Court in *Butera v DPP (Vic)* (1987) 164 CLR 180 was applied in *Leung and* Wong. It seems particularly apt for this case and his Honour was entitled to rely upon and apply it:

> "If the tape is reasonably short and clearly audible there can normally be no justification for allowing a transcript as well as playing the tape. But there will be cases in which the aid of an expert is reasonably necessary. For example, there may be the use of a foreign language. Or deficiencies in the recording may make it necessary to play tapes more than once to enable a better understanding, yet the sheer length of the tapes may mean that inordinate time would be taken by replaying them to the jury. In such cases, while there should normally be at least one playing to the jury, the

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> evidence of an expert should be admissible as an aid to the jury. He may be a temporary expert in the sense that by repeated listening to the tapes he has qualified himself ad hoc. And we see no compelling reason why this evidence should not take the form of production of a transcript which can be admitted as an exhibit."

Irani v R [2008] NSWCCA 217 -
Council of the New South Wales Bar Association v Archer [2008] NSWCA 164 -
Council of the New South Wales Bar Association v Archer [2008] NSWCA 164 -
Tims v Police [2008] SASC 141 -
Tims v Police [2008] SASC 141 -
Tims v Police [2008] SASC 141 -
Tims v Police [2008] SASC 141 -
SZGSG v Minister for Immigration [2008] FMCA 452 -
SZGSG v Minister for Immigration [2008] FMCA 452 -
SZGSG v Minister for Immigration [2008] FMCA 452 -
R v Benbrika & Ors (Ruling No 11) [2007] VSC 580 -
Gately v The Queen [2007] HCA 55 -
Gately v The Queen [2007] HCA 55 -
Gately v The Queen [2007] HCA 55 -
Gately v The Queen [2007] HCA 55 -
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Gately v The Queen [2007] HCA 55 -
Gately v The Queen [2007] HCA 55 -
Staehr v Police [2007] SASC 383 -
Staehr v Police [2007] SASC 383 -
Staehr v Police [2007] SASC 383 -
Staehr v Police [2007] SASC 383 -
Cesan v Director of Public Prosecutions (Cth) [2007] NSWCCA 273 -
Cesan v Director of Public Prosecutions (Cth) [2007] NSWCCA 273 -
R v. Le [2007] QCA 259 -
R v. Le [2007] QCA 259 -
R v. Le [2007] QCA 259 -
R v. Le [2007] QCA 259 -
R v. Le [2007] QCA 259 -
R v Lake [2007] QCA 209 (22 June 2007) (McMurdo P, Jerrard JA and Holmes JA,)

19. In their judgment, Mason CJ, Brennan and Deane JJ discussed the advantages of the usual procedure of adducing trial evidence orally. They raised this possible objection to the provision of transcripts:

> "If the general body of evidence is given orally, a written transcript of a part of the evidence available in the jury room tends to give an emphasis and perhaps an undue air of credibility to that part." [7]

The problem was akin, they said, to that identified by Gibbs J in *Driscoll v The Queen* [8] in relation to unsigned records of interview,

> "that a jury may erroneously regard the written record as in some way strengthening or corroborating the oral testimony. Moreover the record, if admitted, will be taken into the jury room when the jury retire to consider their verdict, and by its very availability may have an influence

upon their deliberations which is out of all proportion to its real weight." [9]

But they went on to discuss the possibility that a written transcript of a witness's oral evidence might be admitted in order to facilitate the jury's task on the basis that it could provide –

> "a valuable aide-memoire for the jury in a case where precise recollection of words is important. In every case, even when an accused consents to the admission of the document, the trial judge should bear in mind the overriding consideration of fairness to the accused and the risk involved in allowing the document to be taken into the jury room." [10]

Dawson J, in his separate judgment, observed that where tapes were lengthy, or there was some difficulty understanding the recorded conversation, the production of a transcript "provides a ready form of reference to the contents of the tape and avoids unnecessary playing and replaying of the tape." [11]

via

[7] (1987) 164 CLR 180 , at 189.

R v Lake [2007] QCA 209 -
R v Lake [2007] QCA 209 -
R v Lake [2007] QCA 209 -
R v Lake [2007] QCA 209 -
R v Lake [2007] QCA 209 -
R v Lake [2007] QCA 209 -
R v Lake [2007] QCA 209 -
R v Lake [2007] QCA 209 -
Vella v The State of Western Australia [2007] WASCA 59 -
Vella v The State of Western Australia [2007] WASCA 59 -
Vella v The State of Western Australia [2007] WASCA 59 -
Vella v The State of Western Australia [2007] WASCA 59 -
Vella v The State of Western Australia [2007] WASCA 59 -
DPP v Selway (No 9) [2007] VSC 247 -
DPP v Selway (No 9) [2007] VSC 247 -
Murdoch v The Queen [2007] NTCCA 1 (10 January 2007) (Angel Acj and Riley JJ; Olsson AJ)

> [296] By virtue of her study of the appellant and of the images from the truck stop video, and given her general skill and training, Dr Sutisno had become a so-called "ad hoc expert": *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180 ; *Li v The Queen* (supra at 286); *R v Tang* (supra) and *Attorney-General's Reference (No 2 of 2002)* (supra). She could identify similarities that would not be readily apparent to the jury from their observations of the appellant in court. However such evidence would not extend to expressing the opinion that the images were of the same person.

Thomas v Watson [2006] NTMC 98 -
Thomas v Watson [2006] NTMC 98 -
Vella v The State of Western Australia [2006] WASCA 177 -
Vella v The State of Western Australia [2006] WASCA 177 -
Vella v The State of Western Australia [2006] WASCA 177 -
Delcaro v The State of Western Australia [2006] WASCA 182 (25 August 2006) (Roberts-Smith JA)
Butera v Director of Public Prosecutions (Vic) (1987) 164 CLR 180
Carter v The Queen

Delcaro v The State of Western Australia [2006] WASCA 182 -
R v Tang [2006] NSWCCA 167 (24 May 2006)

(*Butera v Director of Public Prosecutions (Vict.)* (1987) 164 CLR 180 ; *R v Leung* (1999) 47 NSWLR 405; *R v Li* (2003) 139 A Crim R 28 cited.)

R v Tang [2006] NSWCCA 167 -
R v Drollett [2005] NSWCCA 356 -
R v Drollett [2005] NSWCCA 356 -
R v Mokbel (Ruling No 1) [2005] VSC 410 -
R v Mokbel (Ruling No 1) [2005] VSC 410 -
R v NZ [2005] NSWCCA 278 -
Director General Land and Water Conservation v Greentree [2004] NSWLEC 466 -
Director General Land and Water Conservation v Greentree [2004] NSWLEC 466 -
Director General Land and Water Conservation v Greentree [2004] NSWLEC 466 -
Director General Land and Water Conservation v Greentree [2004] NSWLEC 466 -
R v Solomon [2005] SASC 265 (20 July 2005) (Doyle CJ; Duggan and Sulan JJ)
R v Neiterink (1999) 76 SASR 56; *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 ; *Flanagan v Commissioner of the Australian Federal Police* (1996) 60 FCR 149; *Bulejcik v The Queen* (1996) 185 CLR 375, applied.

R v Solomon [2005] SASC 265 (20 July 2005) (Doyle CJ; Duggan and Sulan JJ)

75. Despite this, Mr Henchliffe submits that the evidence of Detective Wilkins was not admissible. He makes the point that Detective Wilkins had no expertise in voice comparison. But there is no suggestion in the case law that the preparation of a transcript of a conversation in which English is spoken requires expertise. Nor is there support in the authorities for the view that comparing voices, through repeated playings of recorded conversations, requires expertise before evidence may be given that the same voice is heard on different occasions. Mr Henchliffe submits that Detective Wilkins was no better placed than was the jury to listen to the tapes and make the necessary comparisons, and so his evidence was superfluous. But the decision in *Butera* is based on considerations of practicality. The evidence is admitted to avoid the need for the jury to spend as much and probably more time than did the person who produces the transcript. As long as the jury used the transcripts as an aid, and not as a substitute for the decision that they had to make, there is no reason why the transcripts could not be used by the jury to avoid what would otherwise have been a substantial practical problem. Mr Henchliffe submits that Detective Wilkins had listened to recordings that were not tendered in evidence. But as long as the jury performed their task faithfully, and treated the transcript as an aid only, it does not matter that Mr Wilkins used other material to enable him to produce the transcript. That is subject to it being open to the defence to cross-examine Detective Wilkins on that other material, as it was.

R v Solomon [2005] SASC 265 -
R v Solomon [2005] SASC 265 -
R v Solomon [2005] SASC 265 -
R v Solomon [2005] SASC 265 -
R v Solomon [2005] SASC 265 -
ASIC v Rich [2005] NSWSC 650 (08 July 2005) (Austin J)

141 In my opinion the graph is admissible as expert opinion evidence by a forensic accountant, and on the principle in the *Butera* case. The information is useful and relevant, it is derived from documents that will be in evidence, and it is helpful to present the information in the form of a graph. There is forensic accounting skill involved in extracting information from the documents and displaying it in an intelligible and clear fashion; there are mathematical calculations involved in the average monthly figures; and there is judgment involved in deciding what information is useful for the purpose of assessing the Group's financial position. The information shown in the

graph was taken from primary documents and there is no room for the presentation to be influenced by extraneous information, even if Mr Carter developed his thesis about selective deferral of creditors from extraneous sources.some broad

ASIC v Rich [2005] NSWSC 650 -
ASIC v Rich [2005] NSWSC 650 -
R v Georgiou [2005] NSWCCA 237 -
R v Georgiou [2005] NSWCCA 237 -
R v Cox (No 2) [2005] VSC 224 -
R v Madigan [2005] NSWCCA 170 (09 June 2005) (Wood CJ, Cl, Grove and Hoeben JJ)
Butera v The Director of Public Prosecutions (Vic) (1987) 164 CLR 180
Domican v The Queen

R v Madigan [2005] NSWCCA 170 -
RPM v The Queen [2004] WASCA 174 -
RPM v The Queen [2004] WASCA 174 -
RPM v The Queen [2004] WASCA 174 -
K & J [2004] FamCA 359 (26 March 2004) (Nicholson CJ; Ellis and O'Ryan JJ)

57. The gravamen of the Father's submissions in relation to this ground was that the quasi-criminal character of contempt proceedings attracted a range of safeguards normally associated with summary criminal proceedings. It was accordingly submitted that a defendant should have the same rights and privileges including the right, notwithstanding Order 32 rule 10(2) of the *Family Law Rules ("the Rules")* to see and hear evidence-in-chief being given orally from the witness box. In this regard Mr McDonald relied upon *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 at 189 per Mason CJ, Brennan and Deane JJ .

K & J [2004] FamCA 359 -
K & J [2004] FamCA 359 -
WorkCover Authority of New South Wales (Inspector Maltby) v AGL Gas Networks Limited [2003] NSWIRComm 370 (11 February 2004) (Schmidt J)

86 It has long been the position that evidence at a criminal trial is usually adduced orally from a witness and that this requirement should not be waived lightly. Much of the *Evidence Act* 1995 proce eds on this basis. In *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180 at 189-190 , *Mason* CJ, *Brennan* and *Deane* JJ emphasised that the practice is not immutable and circumstances for a departure from the rule will arise, but that "In every case, even when the accused consents to the admission of the documents, the trial judge should bear in mind the overriding consideration of fairness to the accused." The undue weight which a written document might be given by a jury, also there discussed, did, of course, not here arise as a consideration.

WorkCover Authority of New South Wales (Inspector Maltby) v AGL Gas Networks Limited [2003] NSWIRComm 370 -
Li v The Queen [2003] NSWCCA 290 -
Li v The Queen [2003] NSWCCA 290 -
Li v The Queen [2003] NSWCCA 290 -
Li v The Queen [2003] NSWCCA 290 -
Li v The Queen [2003] NSWCCA 290 -
Electrolux Home Products Pty Limited v Westside Direct Pty Limited [2003] FCA 1014 -
Electrolux Home Products Pty Limited v Westside Direct Pty Limited [2003] FCA 1014 -
Reading v Australian Broadcasting Corporation [2003] NSWSC 716 -
Reading v Australian Broadcasting Corporation [2003] NSWSC 716 -
Griffith v Australian Broadcasting Corporation [2003] NSWSC 483 -
Griffith v Australian Broadcasting Corporation [2003] NSWSC 483 -
Avin Operation Pty Ltd v Clover Pines Pty Ltd [2003] VSCA 58 -

R v Cornwell [2003] NSWSC 97 -
R v BAH [2002] VSCA 164 -
R v BAH [2002] VSCA 164 -
R v BAH [2002] VSCA 164 -
R v BAH [2002] VSCA 164 -
R v BAH [2002] VSCA 164 -
Clive Elliott Jennings & Co Pty Ltd v Western Australian Planning Commission [2002] WASCA 276 (10 October 2002) (Barker J)

> O'Sullivan v Farrer (1984) 164 CLR 210

R v Giovannone [2002] NSWCCA 323 (14 August 2002) (Mason P, Hidden J and Carruthers AJ)

> 62 But there is a further reason why the ground advanced is without foundation. Despite the provisions of the Evidence Act , the transcript was admitted into evidence purely as an aide memoire and the jury were instructed to treat it in that manner (Tr p168, SU 11). This was in accordance with the common law as stated in ***Butera*** . Whether or not such directions were called for in a case, like the present, where there was a serious dispute about the accuracy of at least parts of the transcript (cf ***Eastman*** at 112-3), the appellant can scarcely complain about the manner in which the transcript was dealt with in the present trial. There was no error by the trial judge in admitting the transcript as an aid, nor was there any request for further direction in any event.

> > Haken's interpretation of passages in tape *("That his Honour erred in allowing the Crown to call evidence of the listening device tape recording as being corroborative of Trevor Haken's testimony in that the tape was the primary source of evidence and Haken's testimony was not corroborative but self-serving and should have been disallowed as an interpretation of what was meant in the recording")* (B:A)

R v Giovannone [2002] NSWCCA 323 -
R v Giovannone [2002] NSWCCA 323 -
R v Giovannone [2002] NSWCCA 323 -
Director of Public Prosecutions v Bandali Michael Debs and Jason Joseph Roberts [2002] VSC 296 (19 July 2002) (Cummins J)

> 7. In considering the admissibility of the conversations I proceed upon the basis of well known principle. Covert recordings lawfully made of incriminatory conversations are admissible if they satisfy the criteria of relevance, reliability and lack of prejudice. By reliability I mean material of sufficient provenance that a jury, properly instructed, could lawfully act upon it in proof of guilt of the crimes charged. In determining relevance, reliability and prejudice, regard may be had to other recorded conversations admissible in relation to the respective accused and to extraneous material admissible likewise. Passages and conversations are not to be considered in isolation. On the other hand, projection and speculation must be eschewed. And most fundamentally, the prosecution bears the onus of proof at all times. The basal principles are to be found in particular in *Butera v DPP of Victoria* [1] , *Smith Ashford and Schevella* [2], *R. v O'Neill* [3] and *R. v Taylor* [4] . I apply those criteria in the determination of the admissibility of the impugned conversations.

> *via*

> [1] [1987] 164 C.L.R. 180 .

Director of Public Prosecutions v Bandali Michael Debs and Jason Joseph Roberts [2002] VSC 386 -
Director of Public Prosecutions v Bandali Michael Debs and Jason Joseph Roberts [2002] VSC 386 -
Director of Public Prosecutions v Bandali Michael Debs and Jason Joseph Roberts [2002] VSC 296 -
Stoykovski v "M" [A Child] [2002] WASCA 193 (18 June 2002) (Wallwork J, Murray J, Templeman J)

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Butera v Director of Public Prosecutions (Vic) (1987) 164 CLR 180
Devries v Australian National Railways Commission

Stoykovski v "M" [A Child] [2002] WASCA 193 -
Hijazi and Hijazi v Raptis [2002] NSWSC 499 -
Hijazi and Hijazi v Raptis [2002] NSWSC 499 -
R v O'Neill [2001] VSCA 227 (14 December 2001) (Ormiston and Buchanan, Jj.A and O'Bryan, A.J.A)

> 90. A further question arises. Was there a departure from the ordinary practice set out in *Butera* and, if so, was it justified? Notwithstanding that I do not consider the trial judge ever intended to make Exhibit Q a trial exhibit and was not asked to do so by the prosecutor, nevertheless such a course could have been justified upon the basis that McCartney became an ad hoc expert of the tape's content and the product of his expertise was the transcript. Such a course would have been dangerous and should not be encouraged. As I am of the view that the trial judge did not make Exhibit Q a trial exhibit expressly or by implication it is unnecessary to consider the point further.

R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
R v Hall [2001] NSWSC 827 -
R v Hall [2001] NSWSC 827 -
Employment Advocate v Williamson [2001] FCA 1164 -
R v CL Lam, Truong, Duong and VT Lam [2001] QCA 279 (20 July 2001) (McPherson and Thomas JJA, Chesterman J,)

> [82] It is significant that at no point either at trial or upon appeal were any of the interpretations suggested by Mr Tough challenged as incorrect or even dubious. The jury were instructed to act on the evidence of their own eyes. If any rational basis existed for challenge, they could disregard his evidence. But none was suggested. Mr Byrne QC for the Crown submitted that this evidence was little different from evidence received without objection from Mr Warren, who produced blown up photographs of hands following particular slugs, and where the evidence was received without objection as an aid to the jury. Such aids may properly be

received. In *Butera* [32] the High Court recognised that transcripts of tapes, which were the interpretations of other persons of what had been said by others on tapes, might properly be regarded as aids to the jury. The evidence of Mr Tough went to the jury on a similar basis and might similarly be justified, although in my view it goes further than this, and is correctly characterised as opinion evidence. The central submission for the appellants that the jury should have been left to work out the videos for themselves should be rejected.

Crown Prosecutor's explanations during playing of tapes

R v CL Lam, Truong, Duong and VT Lam [2001] QCA 279 (20 July 2001) (McPherson and Thomas JJA, Chesterman J,)

Butera v Director of Public Prosecutions (Vict) (1987) 164 CLR 180 , followed

R v CL Lam, Truong, Duong and VT Lam [2001] QCA 279 -
R v CL Lam, Truong, Duong and VT Lam [2001] QCA 279 -
R v CL Lam, Truong, Duong and VT Lam [2001] QCA 279 -
R v Fraser Adams [2001] NTSC 32 -
The Queen v Borislav Misic [2001] NZCA 71 -
The Queen v Misic [2001] NZCA 128 -
Schokker v The Queen [2001] WASCA 84 -
Schokker v The Queen [2001] WASCA 84 -
R v Giovannone [2001] NSWCCA 22 -
R v Giovannone [2001] NSWCCA 22 -
R v Giovannone [2001] NSWCCA 22 -
R v Rees [2001] NSWCCA 23 -
R v Rees [2001] NSWCCA 23 -
R v Gillard and Preston [2000] SASC 454 -
Al Raied v Minister for Immigration & Multicultural Affairs [2000] FCA 1357 -
Al Raied v Minister for Immigration & Multicultural Affairs [2000] FCA 1357 -
R v Hannes [2000] NSWCCA 503 -
R v Hannes [2000] NSWCCA 503 -
Director of Public Prosecutions for Western Australia v Stuart Anthony Silbert as Executor of the Estate of Stephen Retteghy (Dec) [2000] WASC 209 -
Director of Public Prosecutions for Western Australia v Stuart Anthony Silbert as Executor of the Estate of Stephen Retteghy (Dec) [2000] WASC 209 -
Marsden v Amalgamated Television Services Pty Limited [2000] NSWSC 530 -
Violi v Berrivale Orchards Limited [2000] FCA 797 -
Violi v Berrivale Orchards Limited [2000] FCA 797 -
State of New South Wales v Moss [2000] NSWCA 133 -
Murcia Holdings Pty Ltd v City of Nedlands [1999] WASC 241 -
R v BURNS & ORS No. SCGRG-99-85 Judgment No. S493 [1999] SASC 493 (18 November 1999)

180. *Inter alia*, it was said that, in *Butera* the High Court went no further than to sanction the use of transcripts in cases in which, due to the length of the tapes and/or some other factor, convenience dictates the use of them. It must be shown that, absent the transcripts, it would be unreasonable to expect a jury to retain the relevant detail in their minds and quite uneconomic and burdensome to expect the jury, repetitiously, to play and replay tapes in the jury room to confirm their context during deliberations.

R v BURNS & ORS No. SCGRG-99-85 Judgment No. S493 [1999] SASC 493 -
R v BURNS & ORS No. SCGRG-99-85 Judgment No. S493 [1999] SASC 493 -
R v BURNS & ORS No. SCGRG-99-85 Judgment No. S493 [1999] SASC 493 -
WorkCover Corporation v Camarinha No. Scgrg-99-813 Judgment No. S390 [1999] SASC 390 -
R v Leung [1999] NSWCCA 287 (15 September 1999) (Spigelman CJ, Simpson and Sperling JJ)

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37 On appeal the Crown argued that Mr Fung's opinion was admissible under this section. While it was conceded that Mr Fung lacked formal qualifications derived from a specialised course of training or study, which would ordinarily be regarded as the foundation for the admission of opinion evidence under this section, it was contended that he fell into the category of "ad hoc expert" recognised in R v Menzies [1982] 1 NZLR 40 ; R v Butera (1987) 164 CLR 180 ; R v Eastman (1997) 158 ALR 107 ; R v Cassar and Sleiman, unreported, [1999] NSWSC 436 , unreported.

R v Leung [1999] NSWCCA 287 -
Kenneally v New Zealand [1999] FCA 1320 -
Kenneally v New Zealand [1999] FCA 1320 -
Kenneally v New Zealand [1999] NSWSC 869 -
Kenneally v New Zealand [1999] NSWSC 869 -
R v M [1999] QCA 269 (20 July 1999)

27. The nature of transcripts of conversations made out of court and the manner in which they may be presented to a jury was considered by the High Court in *Butera v Director of Public Prosecutions (Vic)* [18] . That decision emphasises the pre-eminence of the sound recording as the evidence. The transcript, which is someone else's interpretation of the recording may be received merely as an aid for the jury in hearing or understanding that evidence. In short courts receive such transcripts "not as evidence of the conversation or other sounds recorded but as a means of assisting in the perception and understanding of the evidence tendered by the playing over of the tape" [19] .

via

[19] Ibid per Mason CJ, Brennan and Deane JJ at 187.

R v M [1999] QCA 269 -
R v M [1999] QCA 269 -
R v M [1999] QCA 269 -
Cornwell v Riley [1999] FCA 727 (09 June 1999) (Spender, Higgins & Weinberg JJ)
Butera v Director of Public Prosecutions (Vict.) (1987) 164 CLR 180 referred to

Cornwell v Riley [1999] FCA 727 -
Corlette Pty Ltd v The Shell Company of Australia Ltd [1999] WASC 24 -
R v Cassar; R v Sleiman [1999] NSWSC 436 -
R v Cassar; R v Sleiman [1999] NSWSC 436 -
R v Cassar; R v Sleiman [1999] NSWSC 436 -
R v Cassar; R v Sleiman [1999] NSWSC 436 -
R v Cassar; R v Sleiman [1999] NSWSC 436 -
R v Cassar; R v Sleiman [1999] NSWSC 436 -
R v Cassar; R v Sleiman [1999] NSWSC 436 -
R v Cassar; R v Sleiman [1999] NSWSC 436 -
R v Cassar; R v Sleiman [1999] NSWSC 436 -
Sook Rye Son v Minister for Immigration and Multicultural Affairs [1999] FCA 7 -
Sook Rye Son v Minister for Immigration and Multicultural Affairs [1999] FCA 7 -
Goldsworthy v Radio 2UE Sydney Pty Limited [1999] NSWSC 290 -
Goldsworthy v Radio 2UE Sydney Pty Limited [1999] NSWSC 290 -
Marsden v Amalgamated Television Services Pty Limited [1999] NSWSC 87 -
Murphy v Lew [1998] 3 VR 791 -
R v Mouhalos No. DCCRM-97-38 Judgment No. D3666 [1997] SADC 3666 -
R v Mouhalos No. DCCRM-97-38 Judgment No. D3666 [1997] SADC 3666 -
Eastman, David Harold v The Queen [1997] FCA 548 (25 June 1997) (von Doussa, O'Loughlin, Cooper JJ)

We do not understand the decision to require, either as a precondition to the admission of evidence as to the contents of the recorded sounds, or as a matter of invariable procedure, that the

tape must be played over first to the jury in the manner contended for by the appellant. The point of principle identified by the majority judgments was that a transcript was not a copy of the tape, but a written record of what has been heard. Therefore, prima facie, the issue whether the recorded conversation took place should be proved by playing the tape in Court, not by tendering evidence, whether written or oral, of what the witness heard when the tape was played: see *Butera* a t 185.

Eastman, David Harold v The Queen [1997] FCA 548 -
Eastman, David Harold v The Queen [1997] FCA 548 -
Eastman, David Harold v The Queen [1997] FCA 548 -
Eastman, David Harold v The Queen [1997] FCA 548 -
Commissioner of Australian Federal Police v Propend Finance Pty Ltd [1997] HCA 3 -
Stefanovski v MURPHY and Anor [1996] 2 VR 442 (05 May 1995) (Tadgell, Ormiston and Teague JJ)

There is ample judicial support for the use of modern methods. See what was said by the High Court in Butera v Director of Public Prosecutions (1987) 164 CLR 180 and by the Court of Criminal Appeal of this court in R v Narula [1987] VR 661 . Within the Victorian courts, there has been a continuing review of modern technology as it is capable of being applied in the courts. That review extends to methods of preparing transcripts, using different kinds of equipment, reflecting a concern to use technology to reduce costs without impairing the quality of the transcript.

Glennon v The Queen [1994] HCA 7 -
Alucraft Pty Ltd (in Liquidation) v Grocon Ltd (No 1) [1996] 2 VR 377 (29 November 1993) (Smith J)

More recently in Butera v Director of Public Prosecutions (1987) 164 CLR 180 , the High Court looked at the question of the admissibility of charts when dealing with the issue of the use and admissibility of transcripts of tape-recordings. The majority of Mason CJ, Brennan and Deane JJ, stated at 190 that the general rule that witnesses must give their evidence orally is not without exception. After referring to the above passage from Mitchell v R, cited in Smith v R, their Honours said: The practice of requiring witnesses to give their evidence orally should not be waived lightly, especially if there be a risk that writing will give undue weight to that evidence to the disadvantage of an accused person. But the practice is not immutable. If a witness writes out a proof of his evidence and swears to its truth or if a written transcript of part of the witness' oral evidence is produced, and if the task of the jury can be facilitated by admitting the document in evidence, there is no absolute bar against doing so. For example, a written document may prove more convenient than oral evidence as a foundation for cross-examination upon its contents or it may be a valuable aide-memoire for the jury in a case where precise recollection of words is important. In every case, even when an accused consents to the admission of the document, the trial judge should bear in mind the overriding consideration of fairness to the accused and the risk involved in allowing the document to be taken into the jury room. A further relevant consideration is the risk that documentary evidence may impair public understanding of the proceedings.

Alucraft Pty Ltd (in Liquidation) v Grocon Ltd (No 1) [1996] 2 VR 377 -
R v Dellapatrona 31 NSWLR 123 (16 July 1993) (Hunt CJ, Cl, Abadee and James JJ)

First, it was said that only copies were played to the jury. It is clear from the evidence that the original tapes (which were micro-cassettes) were proved by their production and by the continuity of their possession since the recordings were made. The provenance of the copies was established, and it was conceded in this Court that no suggestion was made that the copies were inaccurate. The copies were thus admissible: Butera v Director of Public Prosecutions for the State of Victoria (1 987) 164 CLR 180 at 186-187 . The copies had been made on standard sized cassettes, and they were tendered in lieu of the originals because of the need to exclude inadmissible material and because of the convenience thereby gained of using a tape player with counter numbers to enable specific parts of the recordings to be identified efficiently. There was no objection to the tender of the copies, and no request was made for the original tapes to be tendered or played.

R v Dellapatrona 31 NSWLR 123 -

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R v Dellapatrona 31 NSWLR 123 -
R v Dellapatrona 31 NSWLR 123 -
Chen v The Queen [1993] HCATrans 160 -
R v Chen [1993] 2 VR 139 -
R v Chen [1993] 2 VR 139 -
Brygel v Stewart-Thornton [1992] 2 VR 387 -
Davidovic, v The Queen [1990] FCA 718 -
R v Edelsten 21 NSWLR 542 -
R v Edelsten 21 NSWLR 542 -
R v Edelsten 21 NSWLR 542 -
R v Edelsten 21 NSWLR 542 -
R v Edelsten 21 NSWLR 542 -
R v Edelsten 21 NSWLR 542 -
Van Der Meer v The Queen [1988] HCA 56 (02 November 1988) (Mason C.j., Wilson, Deane, Dawson and Toohey JJ)

> 29. There were other complaints made on behalf of the applicants but it is unnecessary to examine those complaints in detail. Contrary to the submission made by counsel for the applicants, the procedure followed at trial relating to the tapes and transcripts was not inconsistent with the decision of this Court in Butera v. DPP (Vic) (1987) 62 ALJR 7 ; 76 ALR 45 . The procedure was in any event acquiesced in by counsel for the applicants. There was criticism made of the trial judge's direction on the question of consent in regard to the charge of rape, a matter which went to Storhannus' defence. But no redirection was sought from the trial judge and the point was not taken before the Court of Criminal Appeal. A complaint that his Honour did not properly instruct the jury as to the significance they might attach to lies told by the applicants must be rejected. We are not persuaded that there was any misdirection in this regard; again, no redirection was sought and the matter was not made a ground of appeal before the Court of Criminal Appeal.

R v Robinson [1989] VR 289 -

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