

SUPREME COURT OF QUEENSLAND

CITATION: *R v Peniamina* [2018] QSC 283

PARTIES: **R**
v
PENIAMINA, Arona

FILE NO: SC No 679 of 2017

DIVISION: Trial Division

PROCEEDING: Ruling

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 9 November 2018

DELIVERED AT: Brisbane

HEARING DATE: 5-12 November 2018

JUDGE: Sofronoff P

ORDER: **The jury be permitted access in the jury room to the three audio recordings and three video recordings, together with the transcripts of those recordings.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – JURIES – where the accused was charged with murdering his wife – where a question arose in the course of the trial as to how the jury could use evidence led in the form of three video recordings and three audio recordings – where transcripts were produced of the audio of each of the six recordings – whether the jury ought to be allowed access to each of the six recordings together with their transcripts during the course of deliberations in the jury room

Butera v Director of Public Prosecutions (Vic) (1987) 164 CLR 180; [1987] HCA 58, cited
Driscoll v The Queen (1977) 137 CLR 517; [1977] HCA 43, cited
Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, cited
R v GT [2005] QCA 478, cited
R v H [1999] 2 Qd R 283; [1998] QCA 348, cited
R v Rawlings [1995] 1 All ER 580, cited
R v Watts [1992] 1 Qd R 214, applied

COUNSEL: D Balic for the prosecution
R East for the accused

SOLICITORS: Director of Public Prosecutions (Queensland) for the prosecution

Legal Aid Queensland for the accused

- [1] The accused is charged with murdering his wife. When he was arraigned, the accused pleaded not guilty to murder but guilty to manslaughter. The Crown did not accept that guilty plea and a jury was empanelled to try the accused on both charges.
- [2] A question has arisen during the course of the trial about how the jury can use evidence that was led in the form of three audio recordings and three video recordings and how they can use the associated transcripts with which the jury has been provided. Mr East for the defence consents to the jury's having these materials during their deliberations. For the following reasons I propose to allow that course.
- [3] The prosecution evidence fell into the following categories:
1. An audio recording of a conversation between the accused and police officers, and certain medical attendants, that took place immediately after the killing, referred to as "the field recording";
 2. Two audio recordings of conversations between the accused and an undercover police officer in a prison cell a few days after the killing;
 3. Three video recordings pursuant to s 93A of the *Evidence Act* 1977 of evidence given by two of the accused's young sons and of the evidence of one of their friends;
 4. A description of the crime scene by two police officers, with the aid of photographs that were tendered and which showed blood stains at various places in the accused's home where the killing took place;
 5. Fingerprint evidence that was led to prove the accused's and his wife's bare footprints at the scene;
 6. DNA evidence proving the provenance of the blood stains;
 7. A schedule that lists the blood stains, their character as droplets, smears or spatters, their associated DNA and any associated footprints of the accused or his wife;
 8. A pathologist's evidence about the injuries that the accused's wife suffered and about the cause of her death;
 9. A series of diagrams prepared by the pathologist showing the various injuries she found on the body of the deceased;
 10. A sketch plan of the location of the killing.
- [4] There was oral evidence from two relatives of the accused who explained his efforts to seek counsel from them and who described his mood at material times. A witness was called who, it seemed, was to give evidence about his relationship with the deceased but who, it seemed again, did not come up to proof and whose evidence can therefore be put to one side. There was eye-witness evidence from several witnesses who arrived immediately after the killing.

- [5] None of this evidence was challenged. Mr East, who appeared for the accused, cross-examined to elicit some further features to aid the defence case.
- [6] The content of the field recording contained the accused's admissions about the circumstances under which he, his wife and their children lived, the pressure caused on their marriage by his wife's apparent infidelity, and the accused's admissions about the immediate events that led to his killing his wife. In the course of his candid statements to police, that have not been challenged, recanted or qualified, he explained in graphic terms the effect upon him of marital stresses and how, during an argument with his wife, the disagreement deteriorated into a violent attack by him during which he killed her.
- [7] He admitted not only killing his wife but also that he intended to kill her. That admission was not challenged and, indeed, intention was not in issue in the trial. The issue raised by the defence for the jury's consideration was whether provocation served to reduce the accused's culpability from murder to manslaughter. The evidence of the statements on the tapes were crucial to this issue.
- [8] The recording of the accused's statements to police is a little difficult to understand in places for three reasons. First, the accused's first language is not English but Samoan. He does not speak English fluently and has a limited vocabulary and he speaks with a strong accent. Second, he is very softly spoken. Third, the recording made by the undercover policeman was indistinct probably because the recording device was hidden or disguised.
- [9] The recordings of the children's evidence had its own difficulties. They too were softly spoken, particularly the youngest two of them. Moreover, some kind of electronic buzzing overbore their three recordings.
- [10] For these reasons, the parties agreed to furnish the jury with an agreed transcript of each of these recordings. I gave the jury a direction that the evidence that they were to rely upon was what they saw or heard on recordings and not the interpretation of words on the transcript. As would be expected, and as I observed, some members of the jury used their transcripts to make notes during the playing of the recordings.
- [11] As I have said, the accused did not contest the evidence that would prove that he had killed his wife or that he had done so intentionally. His defence rests upon provocation as a partial defence under s 304 of the *Criminal Code*.
- [12] The accused did not give evidence but relied upon the content of his recorded statement to police and upon other parts of the evidence to support his plea that he had acted under sudden provocation and in the heat of passion. During his conversation with police the accused asserted a number of times that he had acted in a way that, if the jury accepted it, would satisfy the requirements of the defence.
- [13] It is in those circumstances that a question arose whether the jury should have access to the audio and video recordings and the transcripts while deliberating.
- [14] The courts have generally been sensitive to permitting juries to have access to recordings while deliberating.¹ Many of the cases that deal with the use of

¹ *R v H* [1999] 2 Qd R 283 at 290 *per* McMurdo P; *R v Watts* [1992] 1 Qd R 214.

recordings by juries concern evidence of child complainants in sexual offence cases. Such cases raise special problems.² When it is the complainant's evidence alone that is in issue, or largely in issue, the strong trend of authority is that there could be a real danger that the jury might place too much emphasis upon a recording of a complainant's evidence if that evidence is available for the jury's repeated review while deliberating while the evidence of other witnesses is not available.

- [15] This is not a consideration that will arise in every case.
- [16] It must also be remembered that some of the concerns expressed by judges in older cases about the forensic problems may not be concerns that are so relevant today.³ As long ago as 1992, Williams J observed that the increasing use by investigating police of "video cameras and tape recorders" has meant that trial judges are increasingly being called upon to decide how the jury may best deal with such evidence.⁴ His Honour referred to the problem of concealed microphones resulting in recordings with background noise, the frequent need for a witness to offer evidence about what has been said in the course of indistinct parts of a recording, the not infrequent use of transcripts as aids in such cases and the common experience of jury members using transcripts as a place on which to take notes of relevant matters. As I observed in this trial and as Williams J, a very experienced judge, also observed, jurors make extensive notes on the transcripts given to them. Defence counsel often consent to the admission of transcripts into evidence. In this trial, Mr East consented to giving the jury transcripts of each of the audio and video recordings. That was understandable for the good reason that the recordings, in total, are lengthy, parts of them are difficult to understand and, most significantly, the contents were going to be relied upon to make good the defence.
- [17] Williams J said that it was his practice "wherever possible" to permit the jury to have the recording and playback equipment in the jury room. He regarded requiring the jury to return to the courtroom to listen again to the recording as not merely inconvenient but as "an unnecessary interference with the jury's freedom to debate evidence freely amongst themselves and should be avoided if at all possible".⁵ His Honour remarked that it may well be that in the minds of some or all of the jurors, a small portion of a recording may be of critical importance and the jury ought to be able to hear that small portion replayed numerous times in the jury room without feeling inhibited in asking for that to be done in open court.⁶
- [18] In the case of a transcript that has not been admitted into evidence, Williams J considered that it was difficult to justify refusing to allow a juror to take into the jury room a transcript of a recording which the juror has used and annotated to assist understanding.⁷
- [19] I respectfully agree.
- [20] In this case, the recordings, taken as a whole, are long and contain many parts in which there are long silences. The recording of the accused's statement on the night

² *R v GT* [2005] QCA 478; *Gately v The Queen* (2007) 232 CLR 208.

³ See, eg, *Driscoll v The Queen* (1977) 137 CLR 517 at 542 *per* Gibbs J; *R v Rawlings* [1995] 1 All ER 580 at 582-583 *per* Gosforth CJ.

⁴ *R v Watts*, *supra*, at 224.

⁵ *supra* at 225.

⁶ *supra* at 225.

⁷ *supra* at 225.

of the killing is itself a lengthy recording. The accused speaks softly and with a foreign accent. There are extraneous intrusive noises on several of the recordings. For these reasons, the jury was given transcripts for their assistance with the consent of the defence. The jury has been annotating them as they were listening to the evidence. The Crown has also tendered other documents as evidence which will be with the jury, namely many photographs of the scene and of blood stains, diagrams of the locale and diagrams showing the wounds on the deceased's body as well as a lengthy explanatory schedule. None of the content of the recordings is disputed although one indistinct passage was the subject of a defence suggestion to a witness about what it might be understood to contain.

- [21] There is, therefore, no risk, in my opinion, that the recordings and the transcripts could have an influence upon the jury's deliberations which is out of all proportion to their real weight,⁸ or that the jury might give that evidence an over-emphasis and perhaps an undue air of credibility.⁹
- [22] Indeed, even in the case of a charge of a sexual offence in which the relevant recording is that of a complainant, the provision of a recording to a jury during deliberations can sometimes be justified.¹⁰
- [23] The particular problem of over-emphasis, that is, of misuse, does not arise when, as in this case, the recordings are almost the whole of the oral evidence at the trial concerning the real issue for the jury's determination.¹¹ The recordings, which the other documentary evidence tends to explain and illustrate, are at the heart of the both the prosecution and defence cases. Those recordings contain crucial admissions relied upon to prove the Crown case of murder, but the elements of which are not in dispute, and contain crucial explanations by the accused relied upon by him to prove the partial defence. That defence constitutes the real issue in this trial and consequently, insofar as the defence of provocation depends upon the state of mind of the accused himself on the night of the killing, it would disadvantage the accused, and not the Crown, to deny the jury access to this material during deliberations. I did not understand Mr East to suggest the contrary.
- [24] Whether or not, in any particular case, a jury should have unrestricted access to recordings and transcripts must depend upon whether there is, or is not, a real risk that an accused might be prejudiced by giving such access. That is very much a judgment that must be made by the trial judge who is in an advantageous position to decide the question.
- [25] The discs containing the recordings were tendered and they were marked by me as exhibits. However, I have already directed the jury that the evidence upon which they should rely is constituted by the words and images on the recordings and not the transcript, which is merely another person's interpretation of what is on the recording and furnished as an aid only. And of course, the discs are merely the media containing the evidence, not the evidence itself, but nothing practical turns upon that technicality in the circumstances of this case.¹² The jury will be given that direction again in due course.

⁸ *cf. Driscoll, supra*, at 542.

⁹ *cf. Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180 at 189, 198.

¹⁰ *Gately, supra*, at [4] per Gleeson CJ.

¹¹ *cf. Gately, supra*, at [96] per Hayne J.

¹² *cf. Gately, supra*, at [87], [91], [93], per Hayne J.

- [26] For these reasons, I will permit the jury to take with them into the jury room during their deliberations both the recordings themselves together with the transcripts of those recordings.