

SUPREME COURT OF QUEENSLAND

CITATION: *R v Murray* [2011] QSC 170

PARTIES: **R**
v
MURRAY, Allen James
(defendant)

FILE NO/S: SC No 596 of 2010

DIVISION: Trial Division

PROCEEDING: Application pursuant to s 590AA of the *Criminal Code Act* 1899 (Qld)

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: Delivered ex tempore 3 May 2011

DELIVERED AT: Brisbane

HEARING DATE: 27 April 2011; 28 April 2011; 3 May 2011

JUDGE: Atkinson J

ORDER: **The transcripts of the records of interview with the defendant and the police are to be given to the jury during the playing of those and for them to have with them when they consider their verdict in the jury room.**

CATCHWORDS: EVIDENCE – MECHANICAL RECORDS – where the defendant applied for the jury not to be given transcripts of the records of interviews between himself and police on the grounds that it was unwarranted and would lead to unfairness to him – whether or not the transcripts of the interviews should be given to the jury

Criminal Code Act 1899 (Qld)

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

Williams v R [1982] Tas R 266, cited

COUNSEL: T A Fuller SC for the prosecution
C J Cassidy for the defendant

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

[1] The defendant seeks to have transcripts of his various interviews with the police withheld from the jury on the basis that it is unwarranted and would lead to unfairness to him. Tape recordings of police records of interview are commonly admitted as evidence of the conversations or other sounds recorded on the tape: see *Butera v Director of Public Prosecutions (Vict.)* (1987) 164 CLR 180.

- [2] It is not the tape recording but the sounds produced by playing it over which is the evidence which is admitted. The tape recording proves what was recorded when that interview took place. The transcript of such a tape is not independent evidence of the conversation, but an aid to the jury in understanding while we listen to the tape recording.
- [3] Mason CJ and Brennan and Deane JJ held in *Butera* at 188:
- “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.”
- [4] The High Court in reaching that decision referred with approval to the words of Everett J in *Williams v R* [1982] Tas R 266 at 280:
- “To deny the jury the benefit of reading with their eyes the same words as they hear with their ears seems to me to put the law into an ill-fitting straightjacket.”
- [5] Counsel for the defendant conceded that there is a judicial discretion to give the jury a copy of the transcript as an aide-memoire and that in some circumstances the discretion could extend to allowing the jury to take a copy of the transcript into the jury room. The prosecution in this case intends to place six recorded conversations before the jury for their consideration. All of those conversations were between the defendant and the police. They took place on 22 and 24 May 2009.
- [6] The recorded conversations are: (1) a conversation commencing at 3.51 pm lasting for about 21 minutes and comprising eight pages of transcript; (2) a conversation commencing at 4.24 pm lasting about 26 minutes; (3) a conversation commencing at 5.10 pm lasting about 6 minutes and covering some five pages of transcript; (4) an interview commencing at 5.14 pm lasting about 56 minutes and covering about 37 pages of transcript; (5) an interview commencing at 7.35 pm and lasting for 34 minutes and covering some 31 pages of transcript; and (6) a conversation commencing at 12.36 pm on 24 May 2009 and lasting for about 23 minutes and covering 24 pages of transcript.
- [7] The defendant told police that when he entered the bathroom of the house where the deceased was working as a cleaner for the defendant, the deceased attacked him with a hammer. He said he took the hammer from the deceased and hit the deceased a number of times. The defendant provided both a description of what occurred and exculpatory matters giving rise to the potential defence of self-defence and the partial defence of provocation.
- [8] Counsel for the defendant submitted that the defendant was distraught, crying, sobbing, coughing and making bodily gestures and sounds consistent with being physically ill. His general demeanour, he submitted, was consistent with someone being in shock and highly upset by what had occurred.
- [9] I have listened to the portions from the audiotapes which the defence counsel asked me to listen to and also watched and listened to portions from the videotape record

of interview. I have observed that the defendant was at times sobbing and crying and occasionally coughing and making sounds consistent with someone being physically ill, which can also be observed in the videotape.

- [10] It is true that my observation shows that occasionally those emotional reactions make it difficult to understand precisely what he is saying, although it is also clear from the audiotape and videotape that he is clearly being responsive to the questions asked of him.
- [11] Defence counsel submitted that the recorded conversations with the defendant were not particularly lengthy and were not unclear and that there was, therefore, no reason why the jury would need the assistance of the transcript as an aid to what was recorded on tape.
- [12] As I have said, in fact, an observation of the tape shows that occasionally it is difficult to decipher precisely what he is saying and the tapes cover some almost three hours of conversations.
- [13] The defendant submitted that to provide the jury copies of the transcripts of the recorded conversations would create the risk that the jury would give undue weight to the words spoken in the interviews without properly taking into account the context and way in which those words were spoken. It would, it was submitted, all but relieve the jury of the need to actually watch or listen to the conversations in the jury room when assessing what they accepted or rejected happened in the bathroom at the relevant time.
- [14] That is of particular importance, it is submitted, in the circumstances of the present case where there is no evidence of the events in the bathroom that led up to the killing, other than the defendant's statements regarding what happened.
- [15] Counsel for the defendant submitted that if the jury were given transcripts, the prosecutor would no doubt go through and highlight various statements that the defendant made during the recorded conversations that the prosecution will claim are important to the prosecution case.
- [16] Mr Cassidy submitted that it is of critical importance that the jury assess not only what was said, but the way in which it was said, and the state of mind and emotional state of the defendant at the time those statements were made.
- [17] He submitted that if the jury have a copy of the transcript it is all but inevitable that when they consider those statements in the jury room they would work from the transcript rather than watch or listen to the actual recordings.
- [18] To be fair to the defendant, he submitted, the jury should be required to assess the statements of the defendant from the actual recordings that accurately present the entire picture including his apparently emotional state and the way he expressed those statements. He submitted that it would be impossible for the jury to recall the defendant's exact demeanour and apparent emotional state at the time of making particular statements from the transcript. He submitted that that created unfairness to the defendant.
- [19] It appears to me that all of the concerns of counsel for the defendant can be dealt with by appropriate directions to the jury. The interviews with the police are

important not just for the prosecution case, but more importantly, for the defence case. They raise potential defences of provocation and self-defence which are not otherwise raised on the evidence.

- [20] As the prosecutor submitted, the conversations are central to the factual determinations the jury will need to make in the trial, in particular, with respect to the possible defences that the prosecution must exclude. The jury will clearly be aided in their understanding of the conversations and in their deliberations by access to the transcripts of those interviews. Rather than being a distraction the transcripts enable the jury to concentrate on the recording rather than note-taking.
- [21] What they will need to do with regard to the transcript (and they will be instructed to do this) is to correct the transcript if they do not think it accords with what they have heard, because it is what they hear and what they see rather than what they read in the transcript which is the evidence.
- [22] The interviews are relatively lengthy and it will obviously assist the jury if they have transcripts of the interviews to refer to, to assist them with their memory of what was said and their understanding.
- [23] There should be no difficulty in providing instructions to the jury to have regard to the matters to which defence counsel has properly referred, such as the way in which the words were spoken and the emotional state and the state of mind of the defendant while he was speaking to police so soon after the events in question.
- [24] The task before the jury is a difficult one and, in my view, they should be given every assistance to fully consider not only the prosecution case but, importantly, the defence case as well.
- [25] The advantages and disadvantages of providing transcripts to juries was fully adumbrated by the Queensland Law Reform Commission in its review of jury directions: *Queensland Law Reform Commission, 'A review of jury directions', (2009) No 66, Volume 1, 314–323*. It follows from that discussion that so long as appropriate directions are given, a transcript of the evidence of audio-visual recordings is of great assistance to a jury.
- [26] I propose to allow copies of the transcripts of the records of interview with the defendant to be given to the jury during the playing of those and for them to have with them when they consider their verdict in the jury room.
- [27] These transcripts are not evidence of the contents of the audio-visual recording, but rather are given to the jury as a means of assisting their understanding of that evidence.