ON THE ADMISSIBILITY OF COMMON FORMS OF EVIDENCE IN FRAUD/CORRUPTION TRIALS

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The starting point for a consideration of the admissibility of any piece of evidence is relevance. Evidence is not admissible unless it is relevant. In *HML v The Queen*[1] Gleeson CJ observed:

> 'Information may be relevant, and therefore potentially admissible as evidence, where it bears upon assessment of the probability of the existence of a fact in issue by assisting in the evaluation of other evidence. It may explain a statement or an event that would otherwise appear curious or unlikely. It may cut down, or reinforce, the plausibility of something that a witness has said. It may provide a context helpful, or even necessary, for an understanding of a narrative.'[2]

Under the *Uniform Evidence Acts* evidence is relevant if, were it accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.[3]

The importance of the provision of particulars by the prosecution and indeed the *early* provision of particulars cannot be underestimated in trials involving allegations of fraud and corruption. An accused person is entitled to know not only the legal nature of the offence with which they are charged but also the particular, act, matter or thing alleged as the foundation of the charge.[4]

In *Johnson v Miller*[5] Evatt J said:

> 'It is an essential part of the concept of justice in criminal cases that not a single piece of evidence should be admitted against a defendant unless he has the right to resist its reception upon the ground of irrelevance, whereupon the Court has both the right and duty to rule upon such an objection. These fundamental rights cannot be exercised if, through a failure or refusal to specify or particularise the offence charged, neither the Court nor the defendant (nor perhaps the prosecutor) is as yet aware of the offence intended to be charged.'[6]

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[1] (2008) 235 CLR 334.

[2] Ibid 351.

[3] *Evidence Act 1995* (Cth) s 55.

[4] *Johnson v Miller* (1937) 59 CLR 467.

[5] Ibid.

[6] Ibid 497-498 (Evatt J).

Heydon J in *Patel v The Queen*[7] wrote of the importance of particulars. After referring to Evatt J's statement in *Johnson*, his Honour said:

> '…the importance of particulars does not lie only in relation to questions of inadmissibility for irrelevance. Particulars can also be necessary to enable the defence to make particular forensic judgments. Some concern the cross-examination of prosecution witnesses. Others concern the marshalling and deployment of its own evidence.'[8]

Particulars provide the framework within which determinations as to the relevance of a piece of evidence are made.

With those observations in mind, I turn to a consideration of several evidentiary issues that may arise for consideration in a trial involving allegations of fraud/corruption.

I AUTHENTICATION OF DOCUMENTS

At common law, a document must be proved to be what it is alleged before it is admissible. A witness could not be asked about the contents of a document until the original was produced and authenticated.[9] An inference as to the authenticity of a document could not be drawn from its form and content.[10]

There are presumptions to be made as to authenticity if a document is at least 30 years of age and is produced from 'proper custody', that is, the place where it would be expected to be found. The presumption extends to the date of execution which the document bears. In most if not all Australian jurisdictions that period has been reduced by statute to 20 years.

Under the *Uniform Evidence Acts* it remains the case that a party tendering a document must prove its provenance and authenticity. Provenance in this context means where the document comes from and authenticity means that the document is what it purports to be. Authenticity of a business record can be proved (and ordinarily would be proved) by a person involved in the conduct of the business, if that person either compiled the document, found it in the business records or recognised it as a record of the business.

If an issue arises in a trial with respect to the authenticity of a document, objection should be taken so that either additional evidence relating to the authentication of the document can be called or the question left for determination by the tribunal of fact on the whole of the evidence. If documentary exhibits are admitted without objection, they form part of the evidence upon which the Court can act subject to considerations as to the weight to be given to the document or its rational persuasive power.

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[7] (2012) 247 CLR 531.
[8] Ibid [168]-[169].
[9] *Queen's Case* (1820) 2 Brod. & B. 284.
[10] *National Australia Bank v Rusu* (1999) 47 NSWLR 309.

There has been some controversy surrounding the proposition that an inference as to authenticity cannot be drawn from the document itself. Most Australian jurisdictions have accepted that such an inference *can* be drawn from the document itself. The Full Court of the Federal Court so concluded in *Federal Commissioner of Taxation v Cassaniti*.[11]

There are provisions in the *Evidence Act 1995* (Cth) which provide for the Court to be able to draw inferences from the documents themselves as to their authenticity or identity.[12] It has been said though, that a Court should apply rigorous scrutiny in any examination of documents from which an inference is said to be available, particularly if that inference is one of authenticity in the absence of further supporting evidence.[13]

A document, by definition, can include a recording such as an electronic recording of a confession. The provenance and authenticity of a tape recording needs to be established before it is admissible. In most cases, if a suggestion is to be made that a recording has been tampered with or altered in some way, the natural place to commence such a consideration would be by viewing or listening to the recording to determine whether it shows signs of tampering or alteration which might raise questions about its authenticity, accuracy and integrity.

In *Butera v DPP (Victoria*)[14] the High Court extended the best evidence rule from documents bearing written language to covert recordings of conspiratorial conversations of drug traffickers. The best evidence rule requires a party relying upon the words in a document for any purpose other than identifying it to adduce primary evidence, that is the original, of its contents. However, over 50 years ago now, Lord Denning in *Garton v Hunter*[15] said that the best evidence rule had largely 'gone by the board long ago'.[16] The only remaining application was if an original document was available in a party's hands, it had to be produced– a copy would not suffice. As Lord Denning said, 'nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence'.[17]

In *Butera* it was explained that it was not the tape itself that was the admissible evidence but what was recorded on it. By using sound reproduction equipment to play the tape, the Court received the evidence of the conversation which was to be proved. The plurality in *Butera* considered the admissibility of copies of recordings and said that the best evidence rule was not applicable to exclude evidence derived from tapes which are mechanically or electronically copied from an original tape. Provided the provenance of the original recording, the accuracy of the copying process and the provenance of the copy are proved, there is no reason why the

[11] (2018) 266 FCR 385, [65].
[12] *Evidence Act 1995* (Cth) ss 58, 183.
[13] *Commissioner of the Australian Federal Police v Zhang (Ruling No 2)* [2015] VSC 437.
[14] (1987) 164 CLR 180 ('*Butera*').
[15] [1969] 2 QB 37.
[16] Ibid 44.
[17] Ibid.

copy could not be played to the Court to produce admissible evidence of the conversation or sounds.[18]

Enhancements of recordings have also been considered to be admissible as evidence of the sounds so recorded. In *Director of Public Prosecutions v Selway (No 9)*[19] Cummins J said:

> 'The modern trial is not a Luddite exercise, and the use of modern technology is permissible provided the critical criteria are satisifed of the provenance of the material, and equally importantly the critical criterion is satisifed that the defence has full and proper locus to test and challenge that technology.'[20]

Before I move on to consider business records it is useful to revisit the rule against hearsay.

II THE RULE AGAINST HEARSAY

Whether evidence of a statement made out of Court by a person not called as a witness at a trial is hearsay depends upon the use sought to be made of that evidence[21]. In *Subramaniam v Public Prosecutor*[22] the Privy Council stated the hearsay rule as follows:

> 'Evidence of a statement to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made…' [23]

If what is relevant is the fact the statement was made, rather than the truth of what is said, it will not be hearsay.

Whether an out-of-court statement is admissible will depend upon what fact the statement intends to prove. Identifying the purpose behind the tender and assessing that purpose in the context of the issues in dispute in the trial will assist in determining whether the evidence offends the rule against hearsay.

An example of the importance of identifying the purpose of the tender comes from *Kamleh v The Queen*[24]. In that case, evidence was led at trial of statements made by a co-offender (Z) to a witness. Z was not jointly charged and did not give evidence in the trial. The appellant was convicted of two counts of murder. The two deceased persons occupied a unit in North Adelaide. Their bodies were discovered in that unit by cleaners. They had each died as a result of gunshot wounds. The evidence established that the deaths occurred between 1.16 am and 4 am on 3 April 2000. There was a substantial body of evidence that proved that the appellant

[18] *Butera* (n 14) 186-187.
[19] [2007] VSC 247.
[20] Ibid [15].
[21] *Walton v The Queen* (1989) 166 CLR 283, 301.
[22] [1956] 1 WLR 965.
[23] Ibid 970.
[24] [2005] 79 ALJR 541.

and Z had been together in the days leading up to the killings and in the early hours of the morning of 3 April 2000. Evidence was led from a witness that Z had said to him that he had turned up the television set while in the room where the killings took place. Other evidence established that the television set had been turned up to full volume when the bodies were discovered. The prosecution tendered the evidence of the statement of Z for the purpose of showing that Z knew that the television had been turned up to full volume. That knowledge was likely to have been available only to somebody who was present in the unit at the time the victims met their death. That evidence tended to prove that Z was present in the unit at the time of the death. That, in turn, tended to prove that the appellant was present. Gleeson CJ and McHugh J said:

> 'Such evidence did not offend against the hearsay rule. The evidence was not tendered or used to prove the truth of what [Z] said to Mr Simoniuk. It was not tendered to prove that the television set had been turned up. Rather the fact that [Z] said what he did about the television set was relevant because it disclosed a state of knowledge on his part which had a tendency to prove that he was in unit 22 at the time of the killings. Thus, it had a tendency to prove a fact relevant to a fact in issue, because of other evidence which showed that he was in the presence of the appellant at all relevant times.'[25]

The purpose behind the tender of the evidence will dictate whether it offends the rule against hearsay. If the evidence is not relied upon as evidence of the truth of the statement, the question which naturally arises is, what is its purpose? How is the fact the statement was made, relevant to the issues in dispute at trial if reliance upon the truth of the statement is not its purpose? Asking these questions of the party seeking to rely upon the evidence will properly focus attention on the true purpose of the tender and may reveal that despite what is said the true purpose of the tender is to elicit inadmissible hearsay evidence.

The rule against hearsay continues to exist because it is considered that hearsay evidence is unreliable. There is an unfairness in depriving the party against whom the hearsay is tendered of the opportunity of cross-examining the maker of it. There are many exceptions to the rule against hearsay which have their genesis in an acceptance of the likely reliability of the evidence because of the circumstances in which the statement is made. I will mention a few which may commonly arise in a criminal trial.

A *Res Gestae statements*

Res gestae statements are contemporaneous statements about an event. For example, in *Ratten v R*[26] the appellant was convicted of murdering his wife by shooting her. His defence was that the gun discharged accidentally. The evidence established that the deceased was alive at 1:12 pm. A woman with a hysterical voice had telephoned for police at 1.15 pm from the residence. Police returned that call at 1:20 pm by which time the deceased was dead. The

[25] Ibid [16] (Gleeson CJ and McHugh J).
[26] [1972] AC 378.

evidence of receiver of the telephone call inferentially amounted to an assertion by the deceased that she was frightened by something her husband was doing or saying. The statement was made in circumstances of spontaneity such that the risk of concoction could be disregarded thus tending towards it being reliable. The evidence of the receiver of the call was held to be admissible.

Statements such as those accompanying the act of recognition of a suspect at an identification parade fall within this exception to the rule against hearsay. Another example is the content of telephone calls to a residence where police are executing a search warrant in relation to the sale of illicit drugs. The act of calling and the explanation for the purpose of the call are admissible under this exception. The explanation for the call throws light on the nature of the act of calling which is said to make this reliable.

Another example are statements disclosing the maker's contemporaneous statement about their intention or state of mind or emotion. An example would be a statement as to a person's contemporaneous physical sensation.[27]

Res gestae utterances are often made in circumstances where it is an instinctive reaction to an event. The fact that it is an instinctive reaction makes it is less likely to be concocted or a distorted recollection and thus a reliable source of evidence. That does not mean however that statements made in circumstances where they are unlikely to be concocted are for that reason alone, admissible.[28]

B *Admissions and confessions*

Evidence of an out-of-court confession is hearsay. The rationale for the exception to the rule against hearsay respecting admissions is that 'what a party himself admits to be true may reasonably be presumed to be so.'[29] Police interviews will often contain a confession or a statement against the person's interest, that is, a fact/facts which tends to establish or point to guilt. They might also contain exculpatory statements or mixed statements both pointing to guilt and exculpatory.

Silence in the face of an accusation might be admissible as an implied confession. In *R v Grills*[30], Isaacs J said:

> 'It is an elementary rule of law, going to the very foundation of justice, that no man shall be adjudged to be guilty of a crime upon evidence of another person's previous assertions. It matters not whether the assertion was made in the absence or the presence of the accused, as a mere assertion it cannot be regarded as any proof of the culpability of the accused or any confirmation of his accusers. But it is evident that upon

[27] JD Heydon, LexisNexis Australia, *Cross on Evidence* (online at 7 March 2024) [37145].
[28] *Pollitt v The Queen* (1992) 174 CLR 558, [121] (Brennan J).
[29] *Nicholls v The Queen* (2005) 219 CLR 196, 266 (Gummow and Callinan JJ), citing *Slatterie v Pooley* (1840) 6 M & W 664 151 ER 579.
[30] (1910) 11 CLR 400.

> such an assertion being made, and equally whether in the accused's absence or presence, he may admit its truth, and if he does, then it becomes evidence against him of his guilt, not because another has said it, but because of the admission. It is then equivalent to his own statement and is receivable in that character. And it is further manifest that the acknowledgment of its correctness may be made in an infinite variety of ways. There may be express and unqualified admission, or there may be a guarded admission, or there may be no direct but merely an implied acknowledgement or there may be conduct, active or passive, positive or negative, from which, having regard to the ordinary workings of human nature, a total denial may be considered by reasonable men to be precluded, because, if innocence existed, an unequivocal or a qualified denial would in such a situation be expected.'[31]

If silence in the face of an accusation is relied upon as an admission it needs be established that the accused heard the statement and would be expected, in the circumstances, to have denied it if it were untrue.

In *R v Salahattin*[32] McInerney and Murray JJ considered the common law liberty of a person to refuse to answer questions put by police or to make any statement to any other person. In the context of that liberty, they considered the circumstances of Salahattin, who failed to deny an accusation made by his co-offender to police, in Salahattin's presence, that Salahattin had financed the buying of a quantity of heroin located by police during the execution of a search warrant. McInerney and Murray JJ said:

> '…an allegation is not admissible unless the circumstances are such as to leave it open to conclude that the accused 'having heard the statement and having had the opportunity for explaining or denying it, and the occasion being one upon which he might reasonably be expected to make some observation, explanation or denial, has by his silence, his conduct or his demeanour or by the character of any observations or explanations he saw fit to make, substantially admitted the truth of the whole or some part of the allegation made in his presence' ..or that he has so conducted himself as to show consciousness of guilt…' (citations omitted).[33]

In *R v BEC*[34] the appellant was charged with sexual offending against a child. The complainant's mother gave evidence that after the complainant returned from a trip with the appellant, she saw that some of her underwear was covered in 'white stuff'. She said to the appellant, 'If I didn't know any better, I would swear [complainant] was getting abused'. She went on to say that the appellant 'just looked at me oddly and walked out of the house'. In that case, Livesay AJA considered a series of cases in which silence as an admission had been considered

[31] Ibid 422.
[32] [1983] [1983] 1 VR 521.
[33] Ibid.
[34] [2023] QCA 154.

admissible and the directions that were necessary to have been given to the jury. From that judgement the following can be distilled as necessary to address:[35]

1 whether the accused heard and understood all the statement/s;
2 whether the facts contained in the statement were within the accused's personal knowledge;
3 if the allegations were untrue, would the accused, in the circumstances, be expected to deny or contradict them;
4 whether an inference can be drawn from the failure of the accused to deny what was asserted in the statement that he/she remained silent because he/she accepted the truthfulness of the allegations made in his presence.

C *Business records*

The rationale behind the hearsay exception with respect to business records is that because the statements are made in documents being used by a business, that in itself provides a strong incentive for accuracy. Things recorded or communicated in the course of a business concerning the activities of that business are by their very nature likely to be correct.

Any significant organisation depends for efficiency and profitability on the keeping of proper records made by persons who have no interest other than to record matters relating to the business as accurately as possible. People in that business depend upon those very records to carry on the business' activities. People in that business do so because the records are likely to be accurate.

For example, consider hospital records which are business records – a doctor or nurse makes a note of the symptoms a patient has complained of and the treatment they received. Another doctor who comes to examine that same patient goes to the records to find out how they had previously presented and what treatment they received. The records are likely to be a far more reliable source of information than the memory of the first doctor or nurse who attended the patient. When a business keeps similar records of thousands of people the records are likely to be far more a reliable source of truth than memory.

Most business records these days are kept by computers, which involve less human involvement than for written records. Whilst errors can occur, they do appear to be the exception and tend to occur when data is being fed into a computer system. Businesses tend to use techniques to identify and eliminate error. Business records recorded by a computer system are likely to be reliable.

Not all documents retained by a business are business records. Resort to the statutory provision is necessary to determine whether a particular record is a business record. The provisions in the various Evidence Acts are in very similar terms to the provision in the *Evidence Act 1977* (Qld).

[35] Ibid.

By way of example, the provision in the *Evidence Act 1944* (Fiji) is as follows:

> In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if—
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> a) the document is, or forms part of, a record relating to any trade or business and compiled, in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and,
> b) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he or she supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he or she supplied.[36]

The term 'trade or business' is defined to include any public utility or undertaking carried on by any city or town council or by any other board or authority established under the provisions of any Act, and any of the activities of the Permanent Secretary for Posts and Telecommunications.

What then is a business record? Effectively, for a document to be admissible as a business record, it must be an internal record kept in an organised form accessible in the usual course of business, actually recording the business activities themselves. It does not include the product of the business itself.[37] For example, the magazine produced by a publisher is not a business record; it is the product of the business.

Documents by which activities of a business are recorded, such as business operations, internal communications and communications between the business and third parties, will amount to business records.[38] It is the recording of the business activities in the course of carrying on the business which is critical.

Determining whether a document is a business record requires a consideration of the type of document it is and what it records, that is, the contents of the document. A record suggests some degree of permanence.

Business records could include in addition to the financial records or books of account that are kept by a business:

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[36] *Evidence Act 1944* (Fiji) ss 4(a)-(b).
[37] *Hansen Beverage Co v Bickfords (Australia) Pty Ltd* [2008] FCA 406, [133].
[38] *Roach v Page (No 15)* [2003] NSWSC 939, [5]-[6] (Sperling J).

1 a valuation of the assets of a business for insurance purposes if it is kept in the course of or for the purposes of the activities of the business;
2 invoices;
3 terms of a contract between a customer and business; and
4 customer communications.

'Evidence of a fact' in the provision would include an opinion, provided that it is one that the person would be qualified to express in person, for example, the record of a diagnosis by a physician contained in a medical record.

On the other hand, a promotional document which is descriptive of the activities of a business would be unlikely to be admissible as a business record. An advertisement on a website extolling the virtues of a business is not a record of the business.

Documents by which a business offers a product for sale (which would typically include a description of the product and price) would constitute a business record. If a business sells good or services online, the terms of the transaction will be set out on the website of the business. Those terms would amount to a business record. The part of a website which offers a product for sale with a description, product number perhaps and a price would likewise amount to a business record.

In *Pinnacle Runway Pty Ltd v Triangl Ltd*[39] screenshots of a webpage were said to fall within the 'business records' exception to the hearsay rule in section 69 of the *Evidence Act 1995* (Cth). Murphy J said:

> 'In my view the type of screenshots in issue in the present application fall within the "business records" exception to the hearsay rule in s 69. They either are or form part of the records belonging to or kept by the relevant fashion house or online retailer in the course of or for the purposes of its business, or at any time was or formed part of such a record. They contain a previous representation as to the product name, description and price made or recorded on the webpage in the course of or for the purposes of that business, and it is appropriate to infer that information was put on the website by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or was made on the basis of information directly or indirectly supplied by such a person.'[40]

There are several authorities in which it has been held an email might amount to a business record.[41] However, not every email retained by a business will amount to a business record. What is important to identify is whether the statement or representation made in the email

[39] (2019) 375 ALR 251.
[40] Ibid [100].
[41] *Blomfield v Nationwide News Pty Ltd (No 2)* [2009] NSWSC 978; *ASIC v Rich* [2005] NSWSC 471; *Aqua-Marine Marketing Pty Ltd v Pacific Reef Fisheries (Australia) Pty Ltd (No 4)* (2011) 194 FCR 479.

relates to the business (according to the Fiji legislation) or for the purpose of the business (according to the *Evidence Act 1995* (Cth)).

Emails, like letters, are often kept permanently. They are stored by a business and are therefore retained as records of the business. However not every email sent or received by an employee of a business will be for work purposes. If the representations made in the email have not been made for the purposes of the business it will not fall within the 'business record' exception to the rule against hearsay. Similar to a letter, it is not enough that an email is in the possession of a business, even if it deals with topics relevant to the conduct of the business. It is the fact that the email can be shown to be part of a store of information seen to be the records of a business that provides a sufficient acknowledgement by the operator of that business of the document's reliability as a record of facts concerning the business that justifies its use in evidence.

Documents sent from one business to a second business may amount to a business record of the recipient business as well as the original business. For example, an invoice that is sent by email from one business to a second business, kept in an electronic file of invoices sent by outsiders who have supplied goods and services to the first business, and which purports to record the supply of goods and services of the kind commonly used by the first business in the course of its activities, would be sufficient to satisfy it as a business record of the recipient business.[42] The statements contained in the invoices are created by the business issuing it not only for the purpose of its own business but also for the purposes of its intended recipient.

The *Evidence Act 1995* (Cth) (and the common law) and your Evidence Acts provide the hearsay rule does not apply to a business record if a representation recorded in a document for the purposes of the business was made by a person who had, or might reasonably be supposed to have had personal knowledge of the asserted fact or on the basis of information directly or indirectly supplied by a person who had, or might reasonably be supposed to have had personal knowledge of the asserted fact.

Attention should be focused on the particular representation relied upon by a party in determining whether the person who recorded it might reasonably be supposed to have personal knowledge of the matters dealt with. That may differ with respect to different representations in the same document. The use of the words 'have or may reasonably be supposed to have personal knowledge' tend to suggest that a Court is allowed to draw inferences not just from the form of the document but from the nature of the information contained in it in determining whether the person who recorded the information knew of the matters because of their position.[43]

It appears to have been accepted, at least in Queensland There is some dispute at common law as to it is doubtful whether 'negative hearsay' falls within the hearsay rule, that is, if a

[42] *Tubby Trout Pty Ltd v Sailbay Pty Ltd* (1992) 42 FCR 595, 598-599 (Drummond J).
[43] *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2004] NSWSC 984.

business always records a particular matter in its records is the absence of that matter proof of a negative?[44]

The *Uniform Evidence Acts* provide for the reception of evidence of what is termed negative hearsay. If the occurrence of an event of a particular kind is in question and in the course of business a system has been followed of making and keeping a record of the occurrence of all events of that kind, the hearsay rule does not apply to the evidence that tends to prove there is no record of the occurrence of the event kept in accordance with that system.[45]

Whilst legislated in Queensland that evidence a person does not have an account can be given by a responsible person familiar with the books of account of an undertaking with respect to books of account (that is, financial records), it appears to have been accepted at common law (with respect to business records) that an inference can be drawn from the absence of a record if an appropriate person has searched for the record and sworn that there is no such record.[46]

At common law it was held that to prove a prisoner had not had an account at a particular bank, it was not necessary to produce the books which might show that he *did* have such an account. This was said to be secondary evidence which was permitted on account of the extreme inconvenience of the opposite course or producing *all* the books of account.[47]

III OTHER DOCUMENTS

A *Text messages*

Text messages and other electronic communications are considered documents. Electronic documents record not only the data that we can see as text but also other data which may prove to be evidence of all manner of things. It is an electronic message that is sent from a computer and stored on a computer. The communication is transmitted in digital format. The fact of the transmission is recorded. It has been suggested (although not determined) that the creation of an electronic communication produces two distinct original documents.

Mobile phones and laptop computers fall into the category of 'notorious scientific instruments'. In *Bevan v Western Australia*[48] the Western Australia Court of Appeal considered the admissibility of records from a mobile phone. The Court said:

> 'There is a rebuttable presumption at common law as to the accuracy of "notorious" scientific or technical instruments which, by general experience are known to be reliable. Accordingly, readings from watches, clocks, thermometers, speedometers, and "a variety of other ingenious contrivances for detecting different matters" can be received into evidence without specific proof of their accuracy. This presumption can also apply to scientific or technical processes and things such as chemical tests to

[44] JD Heydon, LexisNexis Australia, *Cross on Evidence* (online at 7 March 2024) [35220].
[45] *Evidence Act 1915* (Cth) s 69(4).
[46] *Ackroyd v The Honourable Peter Richard McKechnie (Minister for Tourism)* [1986] QSC 13.
[47] *R v Shield* (1866) 5 SCR (NSW) 213, 1866 WL 7605.
[48] (2010) 202 A Crim R 27.

detect bloodstains, recordings of radar echoes showing movements of ships and printouts of computerised data.

The presumption amounts to judicial notice of the fact that an instrument, device or process which is in general use and known to be trustworthy, is prima facie accurate. It follows that when evidence from a new type of scientific instrument or process is adduced for the first time, there must be proof of its reliability and accuracy. As and when the reliability of a new instrument becomes more generally known, the law permits the shorthand of judicial notice, and specific evidence of accuracy is unnecessary.

When specific evidence of the accuracy of a new instrument is required, this need not come from the manufacturer. It is sufficient that the expert who uses it can say that it is an instrument which is accepted and used by competent persons as a reliable aid in the carrying out of the scientific procedure in question, and that he so regards it' (citations omitted).[49]

As to mobile phones and laptop computers, the Court of Appeal said:

'Mobile phones and laptop computers are ubiquitous items which have been in common use in the community for a number of years. Most people (including school children) are very familiar with the processes of sending and receiving text messages on mobile phones, and of downloading data from computers. It is also a matter of general knowledge and experience that these processes are accurate in the sense that the data displayed (or printed out) replicates what is actually there. It follows that mobile phones and laptop computers each fall into the category of "notorious" scientific instruments.'[50]

Likewise, in *R v SDI*[51] the Queensland Court of Appeal held that printouts of a computer screen or pdf of a computer screenshot, showing what a complainant had personally seen on a computer was admissible evidence. The appellant was convicted of stalking the complainant. Exhibit 5 was a screenshot of the complainant's daughter's computer screen. That screenshot showed that the '[the appellant's first name] iPhone synched to the daughter's Gmail account. Exhibit 42 was a series of printouts from the daughter's Gmail account showing what it displayed as the search history.'[52] That search history showed such things as:

'"Pornhub.com"; "mother beats child; abuse and other signs"; "[complainant's name] Revenge"; "Can I find someone on Facebook by their phone number"; "How to pay to find someone"; "How do I find someone without paying a fee?"; "Find out where someone lives."; "How to stalk (find) people in Australia"; "Mobile phone locator"; "[XX]

[49] Ibid [29]-[31].
[50] Ibid [34].
[51] [2023] QCA 67.
[52] Ibid [20].

> Avenue, Runaway Bay"; "Porn movies and nude sex videos and teen porn videos"; "[XX] Street, Southport"; "[XX] Street, Southport"; "Sanctuary Gardens"; "What will happen if I take my children against a Family Court order?"; "What if I take my children against a court order? "; "What if I take my children against a court order?"'[53]

A forensic computer examiner gave evidence of his examination of the contents of the appellant's laptop and gave evidence of the process of synchronisation. His evidence was accepted as expert evidence establishing the search history which in turn proved what the user had typed into the search field.

The exhibits (5 and 42) were circumstantial evidence which, with other evidence, tended to establish that it was the appellant who synchronised the phone and undertook the searches.

There is a common law presumption as to the accuracy of a scientific instrument, device or process. That presumption means that once it is proved that what was used belongs to a class of notoriously accurate scientific instruments, what is produced will be admitted into evidence without more unless the opposing party adduces evidence which displaces that presumption by suggesting inaccuracy in some way.

In *Ford v The King*[54] after reviewing the authorities relating to the common law presumption of accuracy of scientific instruments, devices and processes, the South Australia Court of Appeal said:

> '…First, it is now notorious that when powered on, mobile telephones provide date and time functions. These are ordinarily regarded as accurate without human intervention. There is no need to keep a mobile wound up or to ensure that any battery is regularly replaced. There were in this case no complicating issues such as the need for a passcode or the operation and potential effect of different time zones.
>
> Secondly, the notion that mobile telephones can be used to take, send and receive still and moving digital images, usually described as photographs and videos, is also well-recognised. That those images can be accurately stored in and then retrieved from a mobile phone in a "camera roll" or "gallery" section is also widely known.
>
> Thirdly, the accurate and reliable storage in and use on a mobile device of account information with Google or Facebook (Messenger), or other similar applications, is likewise both straight-forward and widely known.
>
> Finally, text messaging using a mobile device now comprises one of the most frequently used communication practices employed over the last two or three decades. The same may be said about other forms of electronic messaging, such as messaging using the Facebook (Messenger) application. There are others. That any mobile device using

[53] Ibid [23].
[54] [2023] SASCA 117.

these applications (assuming they have not been deleted) will accurately store both the message and the date and time the message was sent or received is widely known.

Indeed, it is difficult to see why expert evidence was required to explain the information seen in the mobile telephone, where the explanation given by the detectives formed part of a straight-forward and well-recognised use of mobile telephone technology. The use of mobile telephone technology in this way is now ubiquitous. The evidence given by the detectives could have been determined by the triers of fact themselves had they been handed the mobile telephone and given an opportunity to examine it.

Accordingly, there was no need for expert evidence to explain or vouch for these kinds of functions. Judicial notice can properly be taken of them. If they were to be challenged, the appellant had to adduce evidence calling them into question in connection with the mobile phone the subject of evidence in this case and that was not attempted.'[55]

B *CCTV footage*

Security camera footage is real evidence of what occurred.[56] A person can give oral evidence of the descriptions and actions of an offender he observed on replaying CCTV footage when it had been mistakenly destroyed. The rationale for its admission is that the evidence generated by the CCTV footage is real evidence of the acts visually captured by it. The best evidence rule does not apply to mute images.

In *R v Sitek*[57] the Queensland Court of Appeal found that a person can give admissible evidence of matters which he saw on a video film. The appellant gave a croupier at a blackjack table at a casino $3000 in $50 notes. The croupier gave the appellant chips to the value of $6000. The appellant was convicted of fraud in that he retained the chips knowing that their value was double that to which he was entitled. A surveillance operator witnessed the transaction as it took place by means of a live video transmission displayed on a monitor fed by a camera installed within the casino. She was asked to supplement that evidence by refreshing her memory from the video tape. It was said her evidence of what she saw of the transaction by means of the monitor was admissible, just as, for example, evidence of things seen through a telescope which would not otherwise be noted would be admissible. Analogous is the reception of evidence of what is heard over the telephone.

C *Snapchat*

South Australia applies the common law supplemented by its own *Evidence Act*. That means that the best evidence rule continues to apply in South Australia to the extent that it still exists.

[55] Ibid [52]-[57].
[56] *Wade v The Queen* (2014) 41VR 434,[27] (Nettle JA).
[57] [1988] 2 Qd R 284.

In *Athans v The Queen (No 2)*[58] the complainants were sent sexually explicit 'snaps' via Snapchat which by the very nature of that app are deleted shortly after being viewed. What was in issue in the trial was whether it was the appellant who sent the images and whether they were sexually explicit. The complainants described what they had seen for those few seconds before the images were deleted which included a reference to the brand written on the underwear that the person in the snaps was wearing.

Livesay J and Lovell JA approached their determination of the appeal on the basis that the snap was a document and that the best evidence rule (as modified by the High Court in *Butera*) applied by analogy.

Livesay J wrote of the unusefulness of invoking the analogy of a 'document' when considering the admissibility of oral evidence given about what was seen or heard using new technology. He said that new technology makes it increasingly difficult to preserve the old categories and distinctions between oral and testimonial evidence, documentary and real evidence.

Snapchat does not produce a permanent, easily accessible record of the image. It does not operate in the same way as a document, image or video produced by a computer or mobile device. Such documents are stored and can be easily reproduced. Livesay J and Lovell JA considered that with respect to a snap that it is difficult to apply the best evidence rule including the concepts of original and secondary evidence. Livesay J considered that the better analogy is when a photograph, audio tape or video tape has been seen, heard or viewed but then lost or destroyed without fault on the part of the complainant or prosecution. Livesay J considered that through applying the best evidence rule by analogy, secondary oral evidence could be given because there was a satisfactory explanation for the absence of the 'original' image and data: they no longer exist.

There is much to be said for the view expressed by Kourakis CJ. He held that the best evidence rule, in its current form, does not preclude secondary evidence of images (or sounds) unless such evidence is led to prove the words written on those images or made by those sounds, when a fact in issue is whether a person wrote or said those words or subscribed or assented to them. He reasoned that the best evidence rule does not preclude testimonial description of documents which evidence a fact in issue that is not concerned with the meaning or legal significance of the writing or speaking of words or numbers. The testimony given at the trial of the brand of the underwear worn by the man in the snap was evidence of this kind and so was admissible.

IV CROSS-ADMISSIBILITY IN MULTI-ACCUSED CASES

The common law applies in addition to legislated rules.

As earlier indicated confessional evidence is received on the ground that it is unlikely that an innocent person will incriminate themselves in crimes or make statements which are against

[58] (2022) 300 A Crim R 389.

their own interests unless those statements are true. As this sort of confessional evidence is hearsay its admissibility falls within the exception to the hearsay rule dealt with earlier in this paper. The confessional evidence is admissible on that basis only against the maker of the statement and not against any co-accused. That is the case even if the maker of the statement exonerates his co-accused.[59]

If the prosecution wishes to tender a record of interview which contains an accused's admissions, then it must tender the whole record including any parts that are exculpatory. That must be done so that the tribunal of fact considers the whole record to understand the true sense and effect of the things said both inculpatory and exculpatory.

If a defendant gives evidence in their own defence at trial, that evidence is admissible against any co-accused who is also on trial.

Where several people commit an offence together, statements made by one offender in the absence of others may be admissible as original evidence that the offender entered into an agreement with others to do the unlawful act with which they are charged. This is not to prove the truth of what was said but to establish, from the fact that the acts were done or the statements were made, the inference that an agreement which constituted a conspiracy or common purpose had been entered into.

Such statements may also be admitted under the co-conspirators' principle which permits their admission as evidence of the truth of the statements made, even though made in the absence of the accused. Such statements are admissible on the basis that each conspirator or party to the common purpose is deemed to be the agent of the others in relation to assertions made in furtherance of the common purpose.[60]

In order to rely on such evidence, the tribunal of fact needs to be satisfied that:

1 there was a combination or common purpose or shared intention;
2 the acts done or declarations made by the other parties to the combination were said or done in furtherance of or in carrying out the common purpose;
3 that there is evidence that the offender is a participant in that common purpose.

There is a distinction to be made between evidence of the existence of a conspiracy or common purpose and participation of each particular accused in that conspiracy or common purpose. The decision of *R v Masters*[61] is instructive in this regard. The Court (Hunt CJ at CL, Allen and Badgery-Parker JJ) said:

> 'In order to establish the existence of the conspiracy, evidence is admissible of acts done or statements made by persons other than the particular accused even if he were

[59] *Baker v The Queen* (2012) 245 CLR 632.
[60] *Tripodi v The Queen* (1961) 104 CLR 1; *Ahern v The Queen* (1988) 165 CLR 87; *R v Masters* (1992) 26 NSWLR 450.
[61] (1992) 26 NSWLR 450.

not present — not (so far as the statements are concerned) to prove the truth of what was said but in order to establish, from the fact that the acts were done or the statements were made, the inference that the agreement which constituted the conspiracy charged had been entered into. That evidence is direct evidence, not hearsay; and it is admissible for that purpose even if the acts were done or the statements were made before the particular accused joined or became a participant in that conspiracy, for it does not depend in any way upon any acknowledgment or acceptance of the truth by that accused of the statements so made.

In order to establish that the particular accused participated in that conspiracy, there must first be reasonable evidence of that participation — that is, evidence independent of those acts and statements by other persons — which is admissible in the ordinary way against that accused. Once the judge has decided that there is such reasonable evidence in the case against that accused (a concept to which we will return later), the acts and statements by other persons in the conspiracy will become admissible against that accused not only as establishing the existence of the conspiracy but also, if they were done or made in furtherance of the conspiracy, as establishing his participation in it' (citations omitted).[62]

It is important to be cognisant of the difference between a narrative statement or account of some event which has already taken place and statements made in furtherance of the conspiracy or common purpose. Statements made in furtherance of a conspiracy or common purpose will usually be instructions or arrangements, or utterances of accompanying acts.

Before such evidence can be relied upon as evidence of the truth of the statement there must be reasonable evidence of the person's participation in the conspiracy or common purpose.

[62] Ibid 460.