

[2013–14 Gib LR 380]

**R. v. I. MARRACHE, B. MARRACHE, S. MARRACHE and
TURNBULL**

SUPREME COURT (Grigson, Ag. J.): December 16th, 2013

Evidence—recorded evidence—provenance—reliable provenance of recordings sufficient to make them admissible—if no evidence recordings edited; source of recordings apparent; recordings provide good evidence of identity of speakers; strong independent evidence that speakers acted on conversations; and recognition of defendant’s voice accurate

Evidence—recorded evidence—voice recognition—guidance on procedure for attempting voice recognition: (a) voice recognition exercise preferably to done by someone other than investigating officer; (b) records should be kept of time spent in contact with suspect, of date and time spent compiling any transcript, and of any annotations made on transcript; and (c) annotations not to be available to officer attempting voice recognition—guidance of limited general value

Evidence—recorded evidence—voice recognition—guidance on procedure for attempting voice recognition not followed if inappropriate because recording (a) of substantial length and good quality; (b) contained only four speakers; (c) contained strong contextual evidence of speakers’ identities; and (d) no suggestion of bad faith on part of officers involved

The defendants were charged with two counts of conspiracy to defraud.

In the course of the investigation, police were given three CDs by a lawyer which appeared to contain recordings of the second and third defendants making significant admissions of guilt while speaking to Rebecca Marrache, their sister, and Alistair Miller, her husband. The conversation included Rebecca Marrache complaining that her brothers had mortgaged a property she owned without her knowledge or consent. A recording device was also provided to the police by the first defendant, containing the same recordings as on the CDs.

Two police officers involved in the case listened to the recordings independently of each other, and both recognized the voice of the second defendant. One of the officers produced a transcript of the recording, attributing the remaining three voices to Rebecca Marrache, Alistair Miller and Solomon Marrache. The other speakers appear to have been

identified from the use of their names and the content of the conversation, rather than by voice recognition.

The second and third defendants submitted that the recordings were inadmissible as (a) there was insufficient or no evidence as to the provenance of the tapes and no evidence of their integrity; and (b) officers failed to follow the appropriate guidance from the case law when identifying the speakers, which was, *inter alia*, that (i) voice recognition should be carried out by someone other than the investigating officer; (ii) proper records should be kept of the opportunities the officer attempting voice recognition had had to hear the suspect speak; and (iii) an officer attempting voice recognition should not be provided with a transcript bearing the annotations of any other officer.

The third defendant submitted that Rebecca Marrache, possibly prompted by the first defendant, had deliberately provoked admissions from the second and third defendants, which made the admission of the evidence unfair under the Criminal Procedure and Evidence Act 2011, s.332, and it should not therefore be admitted.

Held, finding that the tapes were admissible:

(1) The concerns over provenance and integrity were insufficient to render the recordings inadmissible. There was no evidence that the recordings had been edited; the source of the CDs was Rebecca Marrache and the source of the recording device was Isaac Marrache; the recordings themselves provided good evidence of the identity of the four speakers; there was strong independent evidence that conversations accurately reflected what had happened and that the second defendant responded to Rebecca Marrache's complaints; and the recognition of the second defendant's voice by the two officers was accurate (para. 23).

(2) The concerns over procedure were insufficient to render the recordings inadmissible. The guidance from case-law was that (a) the voice recognition exercise should be carried out by someone other than the officer investigating the case; (b) proper records should be kept of the amount of time spent by the officer giving voice recognition evidence in contact with the suspect, of the date and time spent by such officer in compiling any transcript, and of any annotations on a transcript made by the listening officer as to his views on the identity of a speaker; and (c) any officer attempting a voice recognition exercise should not be provided with a transcript bearing the annotations of any other officer. Whilst this guidance had not been followed, it was of limited general value, as investigating officers are generally the most familiar with the suspect's voice, an officer may have dealings with the suspect before he had reason to make a record of it, removing annotations was unhelpful where the speakers refer to each other by name, and it was simply inappropriate in this case as this recording was of substantial length and good quality, contained only four speakers and there was only a limited number of candidates for who they could be, contained strong contextual evidence as

to the identity of the speakers, and there was no suggestion of bad faith on the part of the officers involved (para. 30; paras. 33–36).

(3) Admitting the recordings into evidence would not have an adverse effect on the fairness of the proceedings. Even if Rebecca Marrache had deliberately provoked admissions from the second and third defendants, she was not a person in authority or acting as an agent for the police. The recordings provide support for the prosecution case, and none of the defendants has brought evidence or called witnesses to challenge it (paras. 25–26).

Cases cited:

- (1) *R. v. Flynn*, [2008] 2 Cr. App. R. 20; [2008] Crim. L.R. 799; [2008] EWCA Crim 970, distinguished.
- (2) *R. v. Robb* (1991), 93 Cr. App. R. 161; [1991] Crim. L.R. 539; 135 S.J. 312, considered.

Legislation construed:

Criminal Procedure and Evidence Act 2011, s.332: The relevant parts of this section are set out at para. 24.

J. McGuinness, Q.C. for the Crown;
J. Cooper, Q.C. for the first defendant;
D. Lovell-Pank, Q.C. for the second defendant;
C. Finch for the third defendant;
Ms. A. Cotcher, Q.C. for the fourth defendant.

1 **GRIGSON, Ag. J.:** “The Rebecca tapes” is a convenient but inaccurate headline. “Rebecca” is Rebecca Marrache, the sister of Isaac, Benjamin and Solomon Marrache. It was she who, in a letter of complaint sent to the Registrar of the Supreme Court, referred to Exhibit PB/1 as “personal tape recordings.”

2 The prosecution seeks to put in evidence what was said in those recordings. It is alleged that in those recordings both Benjamin Marrache and Solomon Marrache make significant admissions. If admissible, these admissions provide strong support for the prosecution case. Mr. Lovell-Pank, Q.C., on behalf of Benjamin Marrache, and Mr. Finch, on behalf of Solomon Marrache, oppose the application.

3 On February 9th, 2010, when officers were securing the offices of Marrache & Co., a barrister, Charles Salter of Stephen Bullock & Co., approached Sgt. Bruce and Det. Const. Barker. He told them he had material relevant to their enquiry at his chambers. Later, Det. Const. Barker attended those chambers where he was given three compact discs (CDs).

4 During the first month of the investigation both Det. Sgt. Tunbridge and Det. Insp. Lynch listened to the recordings on those discs. They did so independently of each other. Each states that he recognized the voice of one of the speakers as Benjamin Marrache. Each has made a witness statement detailing the opportunities they have had to hear Benjamin Marrache speak. In the *voir dire* those statements were admitted as their evidence-in-chief. There was no significant challenge to their evidence.

5 Mr. Lynch, who was the senior investigating officer, began by sampling the material but later, when he had more time, listened to all of the recordings through headphones.

6 Mr. Tunbridge, who was—and is—the officer in charge of the investigation under Mr. Lynch, listened to the recordings in the first month of the investigation and eventually transcribed the recordings. It took him a week, and he completed this task on August 19th, 2011. Where necessary, he translated dialogue from Spanish into English.

7 Although his evidence is that it was only the voice of Benjamin Marrache that he recognized, nonetheless on the transcript he attributes the other three voices to Rebecca Marrache, Alistair Miller and Solomon Marrache. He has never spoken to Alistair Miller. He has spoken to Rebecca Marrache perhaps twice, and then on the telephone. I assume that these attributions are based on the contents of the recording and his knowledge of other evidence in the case.

8 Isaac Marrache was interviewed by the police in May 2010. In the course of those interviews, he produced copies of letters which purported to have been written by Rebecca Marrache to her brother, Benjamin. The letters are typed. They are not signed. In these circumstances they are of no evidential value in the resolution of this issue. He also referred to “covert tapes” given to him by his sister Rebecca.

9 Although what Isaac Marrache said in interview is technically only evidence for or against him (and he adopts a neutral attitude in respect of this issue), it is accepted as a matter of inference that neither Benjamin or Solomon Marrache knew that these conversations were being recorded. It must follow that it was either Rebecca Marrache, her husband, or both acting together who were responsible.

10 As a consequence of something said by Isaac Marrache in interview on May 12th, 2010, Mr. Tunbridge collected a packet from the Post Office. It was addressed either to him or to the Police. It contained an Olympus recording device. That Isaac Marrache was responsible for sending the Olympus recorder to the police is the only sensible inference.

11 The evidence of Anthony Provasoli was that he was a barrister and a member of the ADC. He told the court that by a letter dated February 16th, 2010, Rebecca Marrache made what she described as a “professional

complaint” against Charles Salter in person and against Stephen Bullock & Co. She complained that the handing to the police by Charles Salter of the “personal tape recordings” was contrary to her express instructions and a breach of his professional duty to her. In his response, Charles Salter accepted responsibility for what he had done.

12 That Rebecca Marrache was the original source of the three CDs is a reasonable inference. Whether or not Charles Salter was in breach of his professional duty is not relevant to this issue. I make no finding, although the evidence of Mr. Provasoli was that Charles Salter had no option but to act as he did, a view apparently shared by the Attorney-General.

13 It is convenient to state here that no question of legal professional privilege arises. The privilege is the privilege not to disclose. This material has been disclosed and has ceased to be protected, if it ever were. There is no evidence as to why these recordings were made nor to what purpose they were to be put.

14 The quality of the recordings is good. Save where these people speak at the same time, each voice is quite distinctive. One voice is that of a woman and in the course of the conversation she identifies herself as Rebecca Marrache who, as it appears, although married to Alistair Miller has retained her maiden name. Her passport is in the name of Rebecca Marrache. Each person is addressed by name. The man referred to as Alistair Miller addresses the woman as “Mrs. Marrache.” When addressed as “Benji,” the person whose voice Mr. Tunbridge and Mr. Lynch identify as being that of Benjamin Marrache responds, and not just once, but again and again. One of the voices responds when comments are addressed to “Solly.”

15 Much of the conversation centres on the mortgage of 34/4 Cornwall’s Lane to Jyske Bank, to secure an overdraft facility for Marrache & Co. In the conversation, it is alleged that this was done without Rebecca Marrache’s knowledge and consequently without her consent. It is said that she is the beneficial owner of the property, and mention is made of Laughton Properties. The person alleged to be Rebecca Marrache insists that she was not “Rebecca Miller” but “Rebecca Marrache.” The role of Leanne Turnbull is discussed, and there is mention of other employees of Marrache & Co., namely Carol Haw, Jeevan (Daswani) and Anna Moffatt. Other members of the Marrache family are named as receiving money from the firm.

16 There are no obvious breaks in the conversation suggestive of editing. The conversation sounds natural. Although at times some of the speakers are obviously upset, nothing attributed to Benjamin or to Solomon can be said to result from threats or coercion. That the discussion provoked emotion is no surprise given the topic upon which it centred.

17 There is independent evidence that—

(a) Rebecca Marrache was the beneficial owner of 34/4 Cornwall's Lane;

(b) the holding company of that property was Laughton Properties;

(c) the property was subject to a mortgage with Jyske Bank to secure increased overdraft facilities for Marrache & Co.;

(d) Leanne Turnbull was heavily involved in the provision of this facility;

(e) on January 5th, 2010, Benjamin Marrache sent instructions to Gillaine Gonzalez at Gibland to change "Rebecca Miller" to "Rebecca Marrache"; and

(f) on Benjamin Marrache's instructions, Leanne Turnbull notified Elaine Bingham, the solicitor acting for Jyske Bank, that it was Marrache & Co.'s intention to remove 34/4 Cornwall's Lane from the facility.

18 At my prompting, the two exhibits (the CDs and the Olympus device) were submitted to an expert, a Mr. George of Diligence Forensic Services. He was instructed "to establish the integrity of the Olympus . . . whether the recordings had been altered in any way" and "to establish if the working copy CDs are true reflections of the audio recordings on the Olympus." As to the first, he made no findings, as I understand it because the cost of such an investigation would be very substantial. It is for that reason that I described his report as anodyne.

19. He found that there were two more audio files in the Olympus than on the CDs but other than that the working copies of the CDs are a true reflection of the audio files on the Olympus. That does not progress this enquiry as there is no expert evidence that the Olympus was the machine used to record the conversations.

20 Insofar as the two "extra" audio files are concerned, it was the machine and everything on it which was exhibited, and that was done before the January deadline. Had objection been taken to the transcripts, the prosecution could simply have played the tracks.

21 Mr. George did report that the Olympus had an internal timing and dating system. For example "December 18th, 2009 at 11:51:07–12:49:33. 58 mins. 26 secs." He states what one might be forgiven for thinking obvious, that the accuracy of those records depends upon there being an effective battery in the machine. There is no evidence that there was, nor that there was not. External evidence suggests that these dates would be a likely time for these recordings to have been made. The recording on one disc begins with a specific reference to December 19th.

22 Mr. Lovell-Pank, Q.C., on behalf of Benjamin Marrache, submits these recordings are inadmissible. He relies on Archbold, *Criminal Pleading, Evidence and Practice*, at 14–73 (2013) and on the authority of *R. v. Flynn* (1). He argues that there is no or no sufficient evidence of the provenance of these recordings, and no evidence to establish the integrity of the tapes. He further argues that the investigating officers failed to follow the guidance set down by the court in *R. v. Flynn*. Mr. Finch adopts those submissions.

23 I conclude:

(a) There is no evidence to suggest that these recordings have been edited.

(b) The source of the CDs was Rebecca Marrache, and that the source of the Olympus device was Isaac Marrache.

(c) The recordings themselves provide good evidence of the identity of the four speakers.

(d) There is strong independent evidence that these conversations accurately reflect what had happened.

(e) There is strong independent evidence to show that Benjamin Marrache responded to the complaints made by Rebecca Marrache on the recording.

(f) In all these circumstances, I can be sure that the recognition of Benjamin Marrache’s voice by Mr. Lynch and Mr. Tunbridge is accurate.

The law

24 Section 332(1) of the Criminal Procedure and Evidence Act 2011 states:

“In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

25 Mr. Finch relies on this provision. His submission is that Rebecca Marrache, possibly prompted by Isaac Marrache, was deliberately provoking admissions from Benjamin and Solomon. It is important to stress that even if that were so, she is not a person in authority. She was not acting as an agent for the police. The test is not “Is it unfair to admit this evidence?” The test is whether “the admission of the evidence, having regard to all the circumstances, would have such an adverse effect on the fairness of the

proceedings . . .” This evidence provides powerful support for the prosecution case. No defendant has called any evidence in the *voir dire*. Although it was Mr. Finch’s intention to call Rebecca Marrache, he changed his mind and did not do so. She and Alistair Miller are competent and compellable. If either defendant wanted to challenge the accuracy or authenticity of the tapes, he could have done so.

26 I cannot see that the admission of this evidence has any adverse effect on the fairness of the proceedings.

R. v. Flynn

27 In *R. v. Flynn* (1), the appellants, Flynn and St. John, were alleged to be members of a team of armed robbers who attacked an employee of Elonex Computers Plc at that company’s premises, in an attempt to gain access to the strong room. The robbers, of whom there were “a number,” had arrived at the scene in a Sprinter van which had earlier been “bugged” by the police. The prosecution had, and relied upon, a brief recording of a conversation which occurred in the hour before the attack took place. Two officers purported to recognize the voice of Flynn, and two different officers purported to recognize the voice of St. John. Both Flynn and St. John had given “no comment” interviews. The identifying officers had had limited opportunity to hear either man speak. There was a separate tape, made covertly, recording the voices of both men—but the officers did not seek to match the voices on that tape with the “van” conversation.

28 All the material was considered by two experts. The crucial finding was that the recording of conversation from the van was of such poor quality that it was not possible to attribute utterances to individual speakers. That opinion was based upon the experts utilising “sophisticated audit and acoustic techniques.” The officers had listened to the recording on a laptop.

29 It is to be noted:

(a) The opinion of the experts was directly contrary to the evidence of the officers.

(b) The incriminating conversation was brief.

(c) The opportunity for the officers to have listened to the suspect speaking was limited.

(d) There were “a number” of men in the van when the conversation took place.

(e) As there is no mention in the judgment of what each man was alleged to have said, it is to be inferred that nothing was said which could identify who was speaking or whom the speaker was addressing.

30 The guidance is this:

(a) The voice recognition exercise should be carried out by someone other than the officer investigating the case.

(b) Proper records should be kept of the amount of time spent in contact with the suspect by the officer giving voice recognition evidence, of the date and time spent by such officer in compiling any transcript, and of any annotations on a transcript made by listening officer as to his views as to the identity of a speaker.

(c) Any officer attempting a voice recognition exercise should not be provided with a transcript bearing the annotations of any officer.

31 The guidance is of limited value. I make the following comments:

(a) In most cases it will be an investigating officer who has contact with the suspect. Where does one find an officer not involved in the investigation who is familiar with the suspect's voice? The suspect may have had no dealings with any policeman before the relevant investigation.

(b) In general terms, officers involved in the investigation will keep records of how long they spent in the suspect's company, but an officer may meet the suspect before he has any reason to make such a record, a point illustrated by Mr. Lynch's evidence.

(c) In this case, Mr. Tunbridge has annotated the transcript he made. That involves voice recognition in respect of Benjamin Marrache, but the recording has Rebecca Marrache identifying herself and addressing "Benji," who responds. Is that to be ignored? Are the names used by the speakers to be excised from the transcript? In any event, at the time Mr. Lynch and Mr. Tunbridge first listened to the recordings, there was no transcript.

32 This guidance is simply inappropriate in a case where (i) there are a limited number of voices, and a limited number of candidates as speakers; (ii) the recording itself contains strong evidence of the identity of each speaker; (iii) there is independent evidence which suggests that the conversation was about a topic in which each identified speaker had an interest; (iv) there is no suggestion of bad faith on the part of the identifying officers; and (v) there is a good quality recording of substantial length.

33 The case of *R. v. Robb* (2) is good authority for the proposition that voice recognition of suspects by police officers is admissible and nothing in *R. v. Flynn* (1) contradicts that.

34 I accept that the guidance offered in *R. v. Flynn* has not been followed. I accept, as did Mr. Tunbridge, that there are civilian witnesses very much more familiar with the voices of Benjamin Marrache. I am

satisfied, however, that none of these criticisms as to provenance, integrity and to procedure is such as to render inadmissible evidence that is both cogent and relevant.

Orders accordingly.
