

Evidence of recordings, etc

Law

A detailed analysis and authoritative statement of the current law in this area can be found in [Gubinas and Another v HM Advocate \[2017\] HCJAC 59, 2018 JC 45](#).

See also [Renton & Brown Criminal Procedure, paragraphs 24-158.3](#) re evidence of recordings and 18-87 re the jury's right to see productions.

1. Evidence by way of recordings from security cameras, mobile phones, doorbell cameras, etc., is now common in trials. The use to which a recording can be put and the terms in which the jury are to be directed to treat it are discussed and elucidated in *Gubinas*, particularly paragraphs [53] to [67].

Provenance

2. Before a jury can rely on the contents of a recording, its provenance must be established. This is often a matter of agreement between parties, especially in relation to public space CCTV. Otherwise, it may be established using the provisions set out in [section 283](#) of the Criminal Procedure (Scotland) Act 1995, from evidence of the person who made or downloaded the recording, or from a witness who was present and can testify that they heard and/or saw the events recorded, allowing the jury to infer that it was recorded at the relevant time.

3. Once the provenance of the recording is established the recording is available as real evidence of its contents in relation to which the jury can see and decide for themselves what is represented there, irrespective of concurring or conflicting testimony. Evidence is often led from the person who recorded the incident or another witness to speak to what/who is shown and/or can be heard in the recording. Jury members are, however, free to make their own minds up about the events depicted, whether or not such evidence is given, including whether the/an accused features in the recording.

Identification of the accused

4. A video recording showing a person resembling the accused, or an audio recording in which the accused can be heard, can corroborate a single eyewitness identification or circumstantial evidence as to identity.

5. The jury is also entitled to compare the image with a photograph of the accused taken around the time of the incident and/or their appearance in court, provided the provenance of the photograph is also established.

In respect of an audio recording, the voice of the accused would require to be identified by a witness with knowledge of the accused's voice in the absence of any other basis for comparison by the jury.

6. With or without such supporting evidence, provided the recording is of sufficient quality, the jury is entitled to form its own view on who or what can be seen or heard on the recording. As the High Court in *Gubinas* said at paragraph [63], "it may assist in the assessment of testimony. It may supplement testimony concerning identity but it may also supersede it".

Evidence of the crime charged

7. Where a recording shows the events that are the subject of the charge, witnesses present at the incident can be shown the recording and asked about it - as an aide memoire, as corroboration, or, indeed, contradiction. Again, however, the jury is entitled to form its own view about what is shown in the recording and whether that amounts to the crime charged or corroborates a witness' account of that.

8. Witnesses may be asked to comment on/interpret the recording, if they were present at the scene.

9. An investigating officer may also be asked to aid the jury to the extent of providing commentary on/pointing out specific features of what is shown in the recording, even if they were not present at the time. But such a witness should not be asked to interpret/provide opinion evidence on what is shown, eg asking them to comment on whether the images are consistent with consensual sexual activity.

10. In [*Shuttleton v Procurator Fiscal Glasgow* \[2019\] HCJAC 12, 2019 JC 98](#) the court held that where the actus reus of an offence is captured on a CCTV recording and that is the only evidence of the actus reus, the recording alone constitutes sufficient evidence, providing the provenance of the CCTV recording is established. The court confirmed the fact finder would be entitled to find the actus reus established from their own viewing of the recording. Evidence of two officers viewing the recording after the event was descriptive only.

Whilst *Gubinas* addresses recordings, it did also to some extent consider the use of photographs. The court made reference at paragraphs [38] – [39], to [Hunt v Aitken \[2008\] HCJAC 57, 2008 SCCR 919](#) where the Justice of the Peace determined that a witness could not have had a clear view of what she claimed she had witnessed since it was clear from an assessment of a photograph that the view would have been obscured. Challenge was made on appeal on the basis that the JP was not entitled to draw his own conclusion from the photograph “in private.” However, the submission that the JP had turned himself into a witness was rejected by Lord Reed who concluded that the JP had been entitled to look at the photograph in order to test the witness’ testimony. Lord Reed endorsed the sentence from [Steele v HM Advocate 1992 JC 1](#) that, except where expertise was needed, the jury were entitled to make up their own minds about what the tape reveals.

Quality of recording

11. The assessment of the quality will normally be a matter for the jury. If there exists a concern as to the inferences to be drawn, that can be explored in a submission on sufficiency of evidence.

12. It is clear from the decision in *Gubinas* that the viewing of a recording by the jury during deliberations is permissible.

Possible form of direction on evidence of recordings

“You have seen/heard the CCTV/phone/doorbell camera recording.

There is no dispute that the recording [shows images taken] [is a 999 call/audio call] at [x place] on [date] at [time]. [*Where there is a dispute more might require to be said.*]

That is part of the evidence in the case. You should consider the following questions:

- What is happening in the recording?
- Who is shown/heard in the recording?
- What inferences might you be prepared to draw from what you are satisfied you see people doing/hear them saying?

Where no witness has given evidence about the recording

In this case no witness has given evidence about what or who can be seen or heard in the video/audio recording. You are entitled to form your own judgement about what and who can be seen or heard and what you can take from that. In deciding that, you can have regard to all of the evidence in the case.

Where such evidence has been given

In this case witnesses have testified about what they say is happening in the recording and what or who can be seen or heard. You have to consider if their evidence is credible and reliable on these points. You may find the testimony of a witness helpful in interpreting what or who can be seen or heard in the recording but you are not bound by what a witness says. You can have regard to the recording when deciding who did what.

You are entitled to form your own judgement about what and who can be seen or heard in the recording, and this is so even if a witness has given evidence contradicting, or inconsistent with, the judgement you form about that.”

[NOTE: The recording may or may not be essential to corroborate that the crime was committed and/or that the accused committed it. So, it may be necessary, in a given case, to direct the jury on whether their acceptance of what can be seen or heard on the recording is crucial to there being corroboration, or whether there are other sources of corroboration.]