

IN THE HIGH COURT OF JUSTICE

Saint Vincent and the Grenadines

35/2011

CROWN

V

ODINGA FOSTER

FOR

MURDER

Before: the Hon. Justice Kathy Ann Waterman Latchoo

Crown: Assistant DPP Mr Colin John, Crown Counsel Mr K. Nelson Defence: Ms Kay Bacchus-Browne

Date: June 3, 2015

RULING ON ADMISSIBILITY OF ELECTRONIC COMMUNICATION

Background

The Crown led the following evidence: the deceased Agassi Fraser, age 18, left home on the morning of October 8, 2009 at about 11 a.m. He did not return. The following day his mother Barbara Fraser received a telephone call; she did not recognize the male voice. The caller told her that he had her son; that he had found him on the beach with the caller's girlfriend Niasha Smith and the caller was going to kill her son but the victim begged for his life, saying that he should call his parents who would give him anything he asked for. The caller asked for \$6,000, then, in the same breath, changed it to \$60,000. The mother said okay. The caller said he would call back later but never did.

The mother made a report to the police. The body of Agassi Fraser was discovered the following day near a river in Amos Vale. The accused Odinga Foster, his cousin, was arrested and charged in August 2010 for the kidnapping and murder of Agassi Fraser.

The Crown opened its case on the basis that the accused was engaged in financial improprieties at his place of employment, the Kingstown Co-operative Credit Union, and was fired. The accused needed money to pay back his employer and devised a plan to kidnap the deceased for money, and such was the underlying motive for the murder. On the Crown's case, at the time of the kidnapping, the amount owed by the accused was a little over \$6,000. The Crown relies upon the witness Brando Lockhart who testified that the accused told him of the plan to kidnap the deceased for money to settle his debt to the credit union.

During cross-examination of the Crown's witness Barbara Fraser, defence counsel Ms Bacchus Browne asked questions of the witness pertaining to electronic communication between the deceased and someone named Niasha Smith, Counsel asked similar questions of Shameika

Chance, the girlfriend of the deceased. Both testified that the deceased had shown them a picture of a young woman on his laptop and on his mother's computer and identified the image as Niasha Smith. Neither witness had ever met or seen Niasha Smith.

Defence counsel sought to further cross-examine on the content of the electronic communication. The Court indicated to counsel that it would permit no questions describing the nature or content of the out-of-court statements unless counsel could show how such out-of-court statements avoided the hearsay rule.

Submissions

Defence counsel at first submitted that the electronic statements were an exception to the hearsay rule because they fell into the *res gestae* category, and cited a single case, **Ratten v the Queen** 1972 AC 378. Counsel was under the impression that the utterances of the unknown caller could be relied upon testimonially via the *res gestae* principle, and counsel submitted that the electronic correspondence should be viewed similarly. Counsel subsequently amended that submission to contend that the statements or correspondence 'were evidence of the state of mind or intent of the deceased, and relied on'. **Blastland** 1986 AC 41.

The relevance of the state of mind of the deceased, counsel contended, was that he intended to meet Niasha Smith. Such was relevant because it pointed to an alternative version of how the deceased met his death. The unknown caller said that he met the deceased on the beach with Niasha Smith.

The Crown replied that the electronic conversations were hearsay and inadmissible, and further, that the origin or attribution of the statements was doubtful. After some ventilation of the issue, in answer to the Court, the Crown stated that if the provenance of the correspondence could be established, the correspondence could be viewed as original evidence and its purpose would be limited; it would be admissible for the mere fact that the correspondence existed but not for the proof of truth of any fact in issue. Defence counsel maintained that the correspondence could be

acted upon to indicate the deceased was going to meet Niasa Smith for sexual congress providing a motive for someone other than the accused to kill him.

Voir Dire

A necessary first step was to see whether there was sufficient evidence to link the deceased with the electronic correspondence. The Crown itself was uncertain of the precise source of the print outs, which it had obtained from the police and disclosed to the defence.

The Court held a *voir dire*¹ into the provenance of the electronic communication. Two witnesses testified, Jacqueline Jack, the secretary of Barbara Fraser, and police inspector Adolphus Delplesche. Jacqueline Jack testified that the user name of the deceased was "DonRizio"² and he used a laptop and his mother's computer in the office of the construction company, which was on the same compound as the family residence. She had seen a photograph of a young woman on the office computer screen which was shown to her by the deceased. He identified her by the name Niasa Smith. She had observed in real time an electronic conversation between the deceased and someone using the name "Diva" and that name was associated with Niasa Smith.

¹ Martin 1987 43 WIR 201

² Barbara Fraser had also testified that DonRizio was the username the deceased employed.

She said she printed out a record of electronic conversations she found on the office computer and laptop and handed them over to the police. She could not recall which police officer and when she handed over the record. She identified documents shown to her in court as the record she handed over. She was able to identify two conversations she observed in real time because the deceased had called her attention to the conversation. One conversation, on October 6, 2009, two days before the deceased disappeared, concerned "Diva" inviting the deceased to meet her at a beach, Salt Pond or Canash. There was some discussion as to how and when but no specific arrangements were concluded. The other conversation earlier in October involved "Diva" saying she had to give her grandmother insulin.

Ms Jack testified that the deceased kept his laptop in no particular place in the office or in the residence. He also used his mother's computer in the office. He did not sign off or log off when he used the laptop or computer. She did not need to access any password in order to make the print-outs from the laptop.

Mr Delplesche testified he collected print-outs from Ms Jack. He identified the documents shown as the print-outs he collected, though one bundle was a copy.

Several factors are relevant when assessing whether electronic correspondence can be attributed to a particular person. These factors may include usernames; dates and time; distinctive characteristics of the communication; and testimony of witnesses with knowledge of the communication.

In the instant case, the appearance of the correspondence reveals the usernames "DonRizio" and "Diva". Ms Jack observed in real time two exchanges of messages between the deceased and someone operating the username "Diva". The email address appears as ni_asha@live.com

In another conversation on October 2, 2009, the deceased says he is sick with a cold. Ms Jack testified around that time the deceased had a cold. She did not observe that conversation in real time.

The print-out contained correspondence beginning on October 1, 2009 and ending about an hour before the deceased left home. The correspondence contained sexually explicit details, with "Diva" expressing her desire for the deceased.

In the last conversation, pleasantries were exchanged and there was no correspondence about a meeting or plan to meet. Ms Jack did not observe any of those other conversations in real time.

The Crown was granted leave to recall Ms Jack to adduce evidence that the accused and the deceased were as close as brothers and that on at least one occasion she saw the accused using the laptop of the deceased. She had seen the accused visit the premises of the deceased on several occasions.

Editing of transcript

After the voir dire was concluded, the Crown submitted that only the portions of the transcript which Ms Jack observed in real time could be attributed to the deceased. Mr John contended that it was far too easy for someone (including the accused) to tamper with or fake the correspondence. The last line in the correspondence from "DonRizio" on October 2009 at

10.20 p.m. (22:20:02) reads: "Were (*sic*) Agassi?" It was implausible, the Crown added, that the deceased would be asking for himself; and such indicates how easy it was for anyone to access his username and send an electronic message.

The defence replied that it was fanciful to suggest that the correspondence had been doctored or was faked. There was no evidence to indicate that the correspondence was faked and no expert evidence was adduced to raise any inference that tampering had occurred, or even to explain how such might be effected. It was also not in dispute that after the deceased disappeared that friends and relatives were accessing his laptop to find clues to his disappearance. The defence stated that if the correspondence were to be admitted, then the entire document should be so admitted with no editing. Editing would result in an artificial picture, the defence contended, and the sequence or context of the correspondence would be disrupted.

Mr John provided several useful authorities , which addressed "proof of authorship , ' ' and the question of how much authenticating evidence is required for admission purposes. ³ In the article titled "Social networking as criminal evidence,' ' Floinn & Omerod (*Criminal Law Review* 2012, 7, 486-512) point out that challenges exist in authentication of social networking material and

³ Ahmad, N (2011). Electronic evidence and the rule against hearsay. *Computer and Telecommunications Law Review*, 17 (1) 18-24. See also Pendleton, A. (2013). Admissibility of Electronic Evidence-a new Evidentiary Frontier. *Bench & Bar of Minnesota*, Minnesota State Bar Association.

that courts have excluded such manipulated material for "copy and paste" practices. They also analyse the approach of both the United States and English courts to authentication.

At page 3, they refer to the risk of "authentication overkill," and state:

" Unless there is a specific allegation of unauthorized access with sufficient evidence introduced to make it a live issue at trial, we submit that a judge should not exclude SNS evidence simply because a party makes a bare suggestion of the possibility of an account being hacked. "

The authors offered this approach:

"What is involved here is the party seeking to adduce the SNS evidence having to satisfy the evidential burden. As Roberts and Zuckerman ⁴ rightly state [in their text Criminal Evidence], that burden does not require proof of anything. They note how in contrast to the probative burden, the burden of production does not require the proponent to establish any particular degree of confidence in the adjudicator's mind. The proponent simply has to persuade the adjudicator that the issue is worth considering in arriving at judgment. Tapper ⁵ is right to treat authentication as equivalent to satisfying the burden of production. There is no 'foundation fact' to be proved nor is authentication simply a relevancy determination. Shaw J was wrong, we respectfully submit, to treat authentication as requiring proof on a balance of probabilities in Robson ⁶...Authentication ought not to be an overly taxing standard. In English law, we suggest that a judge could be satisfied of authentication, sufficient to leave the evidence to the jury, for example, on testimony from a witness...that she had seen the relevant communication from that individual. Circumstantial evidence may also be sufficient "

⁴ Roberts, P. and Zuckerman A., *Criminal Evidence*, 2 edition (Oxford University Press, 2010) pp 227-228.

⁵ Tapper C, *Cross and Tapper on Evidence*, 4 ed (London: Sweet and Maxwell, 2010) p. 184.

⁶ 1972 1 WLR 651.

Conclusion

After review of the learning on the authentication of social networking material, the Court adopts the approach that authentication ought not to be an unduly onerous test. Such will add unnecessarily to the complexity and length of a trial, particularly where there is but a bare suggestion of tampering. In light of the evidence adduced on the voir dire, the Court concludes or

finds that there is sufficient circumstantial and direct evidence to support the inference that the deceased was the maker of the messages emanating from "DonRizio" to "Diva," in the string or thread of electronic correspondence.

Hearsay

Establishing the link between the deceased and the correspondence was a necessary first step in determining how the correspondence could be properly deployed. This involved scrutiny of the hearsay rules. As stated by Lord Harwich in **Blastland** (at page 54):

"Hearsay evidence is not excluded because it has no logically probative value. Given that the subject matter of the hearsay is relevant to some issue in the trial, it may clearly be potentially probative. The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination."

The danger against which this fundamental rule provides a safeguard is that untested hearsay evidence will be treated as having a probative force which it does not deserve. Where one seeks to rely on a document to prove the truth of any statement therein, the issue is one of hearsay. However, where it is the fact of the document's existence and it is not being put in to prove the truth of its contents, no question of hearsay arises.

State of mind

Blastland makes it clear that for state of mind/intent of the declarant to be admissible, as an exception to the hearsay rule, it must be relevant to some fact in issue. Statements of bare intention which have no temporal connection and do not accompany an event are inadmissible.

The Australian appellate court in **Walton v The Queen** 166 CLR 283 considered the learning on this point. In that case, the estranged husband of the deceased was convicted for her murder. The prosecution had called witnesses who testified that the day before she was killed, the deceased received a phone call and told her son, "Daddy's on the phone," and she continued speaking. The child was allowed to speak to the caller and said, "Hello, Daddy. Yeah, I am being good." The deceased told witnesses she was going to meet the accused the following day at the town centre. The accomplice of the appellant also testified that the appellant told her that he had met the deceased at the parking lot, killed her and dumped her body.

The appellant contended that the out-of-court statements were wrongly admitted because they were hearsay. The appellate court agreed with the trial judge's decision to admit the out-of-court statements as proof of the intent of the deceased to go to the town centre on the day she was killed but not as proof of the identity of the caller as the accused.⁷ The trial judge correctly warned the jury that the utterances of the deceased should not be treated as evidence that she met the accused.

Wilson, Dawson, and Toohey JJ: *"In the present case the statements made by the deceased were admitted upon the basis that they constituted conduct on the part of the deceased from which her state of mind at the relevant time could be inferred. They were not admitted as hearsay evidence and it was made plain to the jury that their probative value lay in the fact of their having been made rather than in the truth of any assertion or implied assertion contained in them. To the extent that there was an element of hearsay in the evidence of those statements, it was, we think, for the reasons which we have given permissible for the trial judge to have disregarded it as he did. In his summing-up ... he described the statements in question as circumstantial evidence which might form the basis of*

7 The statements of the child were treated differently.

an inference. He said that they were 'some evidence' tending to prove the state of mind of the deceased. In our view, the trial judge rightly admitted the statements in evidence and explained to the jury the use which they might make of them."

Analysis

The electronic correspondence discloses no specific plan to meet between the deceased and "Diva." It cannot be said there was a declaration of intent to have such a meeting on the day he disappeared.

The electronic correspondence provides no rational basis on which a jury could be invited to draw an inference that such a meeting took place. To do so would be pure speculation.

The state of mind of the deceased, such as it is, displays no relevance to any fact in issue. The statements themselves do not go to proof that the deceased met Niasha Smith on a beach as suggested by the unknown caller.

Original evidence

Where a document is being relied upon, not for the truth of its contents, but for the fact of its existence, no question of hearsay arises. This as discussed in **R v Lydon** (1987) 85 Cr. App. R 221, where the English Court of Appeal relied on the learning of Cox J in **R v Romeo** (1982) 30 S.A.S.R. 24, a decision of the Supreme Court of Australia. He said:

"Sometimes it is possible to avoid the hearsay rule by showing that a statement made in a document is being used as an original and independent fact—for instance, that a person who made use of the document had certain information in his possession at a relevant time—and not as evidence of the facts stated. It is always important, therefore, whenever an objection is taken on hearsay grounds, to ascertain for precisely what purpose the evidence is being tendered. It may be hearsay for one purpose and not, and therefore admissible, for another."

The Court further relied on an excerpt from *Cross on Evidence* (6th ed. at p.464) which states:

" In these cases it seems that the writing when properly admissible at all, is relevant not as an assertion of state of facts but as itself a fact which affords circumstantial evidence upon the basis of which the jury may draw an inference as it may from any other relevant circumstance of the case. "

In **Lydon**, a gun and two scraps of paper, saying "Sean rules", were found along the route taken by a car with which the prosecution sought to link the appellant (Sean Lyndon). The ink used on the paper and the ink found on the gun were of similar appearance. The Court of Appeal held that the evidence of the paper was properly allowed and reasoned that if the jury found that that gun was used in the robbery and the pieces of paper were linked to the gun, the references to Sean on the paper could provide circumstantial evidence linking the appellant to the crime. The evidence was not being relied on to show that Sean did in fact rule. The Court noted the importance of the judge correctly directing the jury as to the weight of the evidence.

In **R v McIntosh** [1992] Crim.L.R. 651, the appellant was charged with being concerned in the importation of cocaine. A piece of paper with calculations of price and weight of a quantity of an unnamed commodity was found at the home of his former wife, where he had resided prior to his arrest. The Court of Appeal accepted that there was "no question of the document being relied on as evidence of the truth of its contents" and thus the document did not offend the hearsay rule. The document showed that somebody, not necessarily but potentially and inferentially the accused, had been working out the buying and selling prices of an unnamed commodity.

Similarly, in **Roberts v DPP** [1994] Crim.L.R. 926, documents found in the appellant's office and home including bills and other accounts relating to certain premises were held to be admissible as circumstantial evidence linking the appellant to the premises on a charge of assisting in the management of a brothel. The Court of Appeal held that the fact that the document was in the possession of the appellant was a fact from which the inference could be drawn that he was concerned with the management of the premises.

In **David Donald** Cr App 5 of 2007, the Court of Appeal of Trinidad and Tobago held that the trial judge was correct to admit evidence of an airline ticket (notwithstanding its non-production in court) not for the truth of its contents but for the fact that the airline ticket was found on the person of the appellant together with his passport upon his arrest. The ticket therefore constituted circumstantial evidence upon which it was open to the jury to infer that the appellant was planning to leave the island.

In **R v Pecciarich** [1995] O.J. No. 1004, (a first-instance decision of the Ontario court) the accused was charged with distributing pornography by using his personal computer to upload computer files to a bulletin board where they could be downloaded or received by other computer users. The files bore the identification of having been uploaded by "Recent Zephyr." A print-out was made of items stored on the backup tape, and the items included various documents identified by references to "Recent Zephyr." Several photographs and other computer-related documents were also seized from the premises of the accused.

The defence contended the print-outs were inadmissible hearsay. Defence counsel argued that proof of authorship was not possible unless the documents were used in violation of the

hearsay rule, namely to prove the truth of their message that the creator was "Recent Zephyr". Sparrow J, Provisional Division, held that the use of the documents in this case to prove that the accused was "Recent Zephyr" did not violate the hearsay rule; the documents were used as "pieces of original circumstantial evidence" that the accused and the name 'Recent Zephyr' were so "frequently linked in a meaningful way as to create the logical inference that they were the same person".

Analysis

Electronic messages are admissible as evidence that the person to whom that electronic device is associated sent that message. The message would be admissible to prove that a text message was sent, by whom and to whom it was sent, when it was sent, and the words of the message, provided those words are not put forward for the proof of the contents of the message. If the words are put forward for the truth of their contents those words would have to be considered in light of hearsay exceptions.

A comment made in the form of an electronic message should not, by virtue of having been preserved in that form, gain some kind of immunity from hearsay consideration. If the text message conveys the words of another person, the text itself, by virtue of having been preserved in that form, does not avoid the designation as hearsay. If the statement is hearsay if made in court, it is equally hearsay if made in a text message or other form of electronic communication.

Conclusion

Therefore, it is the conclusion of the Court that the electronic correspondence is admissible as original or physical evidence; it is circumstantial detail showing or tending to show that the deceased engaged in correspondence with someone identifying as Niasha Smith, which is the name used by the unknown caller.

The correspondence is to be admitted in its entirety (that is, the two documents identified by Jacqueline Jack as the print-outs she handed over to the police). In the absence of any evidence to raise the inference of tampering, the Court is satisfied that sufficient-- nexus has been established between the deceased and the correspondence. Further, to edit the correspondence would result in the loss of sequential consistency and context.

The correspondence is admissible not for the proof of the truth of its contents but for the fact that such correspondence took place. It is not proof, in and of itself, that the deceased met with Niasha Smith at any time at any place. Neither is the correspondence proof that Niasha Smith existed, nor that she was on the beach with the deceased when he was abducted.

Further, the statements uttered by the unknown caller are not proof of the truth of the contents, as defence counsel first contended. It is no part of the Crown's case that the deceased was abducted by a jealous boyfriend on a beach and that confrontation led to his death. The utterances of the unknown caller are subject to the same hearsay rules as the electronic correspondence the defence seeks to rely upon.

The utterances of the unknown caller may be acted upon for the fact that they were made and not in proof of the truth of the contents or of any fact in issue. They are a circumstantial detail in the defence case. They are also a circumstantial detail in the Crown's case. Such does not convert the utterances of the caller into testimonial evidence.

The electronic statement , therefore, are admissible only to show that correspondence took place between the deceased and another person identifying as Niasha Smith. Had the name Niasha Smith not been mentioned by the unknown caller to Barbara Fraser, the electronic communication would have been entirely irrelevant.

Latchoo J