

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO. 18/2007

**BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)**

SUZETTE McNAMEE

V

REGINA

Keith Bishop & Miss Kerry-Ann Ebanks, instructed by Bishop & Fullerton for the Appellant.

Jeremy Taylor & Miss Annette Austin for the Crown.

11th, 12th, 13th March and July 31, 2008

DUKHARAN, J.A. (Ag.)

1. The appellant was convicted on the 15th March, 2001 in the Mandeville Resident Magistrates' Court for the parish of Manchester for ten (10) counts of larceny as a servant. She was sentenced to twelve (12) months imprisonment at hard labour suspended for two (2) years on each count with sentences to run concurrently.

2. After hearing arguments on the 11th, 12th and 13th March, 2008 we allowed the appeal. The convictions were quashed, the sentences set aside and a judgment and verdict of acquittal entered.

3. We promised to put our reasons in writing and this we now do.

THE PROSECUTION'S CASE

4. The appellant was charged on informations containing over one hundred (100) counts but was tried on an indictment for (10) counts for Larceny as a servant. The prosecution alleged that the appellant being a clerk or servant employed to Shields Enterprises Limited (Shields) stole money belonging to or in possession of Harry Shields, her employer. At the end of the trial the prosecution offered no further evidence in relation to the remaining counts.

5. In outline, the case presented by the prosecution was that the appellant assumed the post of cashier at Shields in 1992. The system outlined by the prosecution was that the accounts of the company were computerized with a computer room in another room from the cashier. The cashier has a printer in the cashier's cage. There are two terminals manned by billing clerks. It is the billing clerk who takes orders from customers on a daily basis. When the order from a customer is entered into the computer it prints out in triplicate a tax invoice. The payment is made on this invoice to the cashier who stamps all of the invoices as "paid". The cashier retains a copy. If a customer wishes to return goods he must take back the goods along with his copy invoice. If a refund is to be made, the managing director or assistant manger signs the invoice indicating that a credit note is to be issued. Two clerks are authorized to issue credit notes on the computer. When a credit note is issued, it is printed out in the cashier's cage in triplicates. It is then stapled to the tax invoice by the cashier where an authorizing officer authorizes payment. The cashier is the one

who pays the amount on the voucher from her "petty cash" if it is under \$2000. Over \$2000, a request is made by the cashier and a cheque is issued and paid to the customer. The cashier is not authorized to issue credit notes.

6. On the 8th November, 1994 computer records showed that the appellant had issued a credit note. The prosecution is saying several irregularities of that nature were discovered and that the appellant used the medium of credit notes to remove cash belonging to Shields which led to the arrest of the appellant.

7. The prosecution relied mainly on computer and documentary evidence.

8. Mr. Patrick Cole gave evidence as to the functioning of the computers. The programmes were not written by him. His evidence did not reveal that there was no defect in the programming of the computers.

9. Miss Hortense Bailey, an accountant with Shields gave evidence of her responsibilities of receiving the financial records from the appellant on a daily basis. It was Miss Bailey who discovered the irregularities.

10. The defence of the appellant was a denial that she stole any money from her employer.

11. There were four (4) grounds of appeal. They are as follows:

- "(a) That the learned Resident Magistrate erred in law in relying on the evidence of the computer expert as it relates to computer generated evidence;

- (b) That the learned Resident Magistrate erred in law in not acceding to the submission of no case on behalf of the Appellant;
- (c) That the learned Resident Magistrate erred in admitting into evidence statements signed by the Appellant under very oppressive circumstances which amount to coercions;
- (d) That the learned Resident Magistrate failed to adequately discuss the strengths and weaknesses of the Appellant's case."

Mr. Bishop for the appellant sought and was granted leave to argue supplemental ground (d). He did not pursue ground (c).

SUBMISSIONS

12. In ground (a), Mr. Bishop submitted that the learned Resident Magistrate failed to recognize and adhere to the law as outlined in Section 31G of the Evidence Act, which provides that computer generated statements ought not to be admitted unless certain conditions were satisfied.

13. Mr. Bishop further submitted that every aspect of 31G must be satisfied and that all four (4) subsections must be satisfied beyond reasonable doubt. It must be looked at conjunctively. Counsel was critical of the evidence of Mr. Patrick Cole who gave evidence as to the proper working of the computer. It was his submission that Mr. Cole did not write the programmes nor was there any evidence that it was properly programmed. He further argued that there was no evidence to indicate that there was no error in the preparation of the

data from which the documents were produced. There was no evidence that each computer station was working properly.

14. In sum, Mr. Bishop submitted that the evidence was inadequate to satisfy the provision of Section 31G and that the prosecution had failed to establish a vital ingredient in the case against the appellant. In support of these submissions, Mr. Bishop cited the case of **R v Cochrane** 1993 CLR 48.

15. In ground (b) Mr. Bishop relied on his submission in ground (a) as well as the fact that the prosecution had failed to prove that only the appellant had the opportunity to remove money from her employer. Counsel submitted that the credit notes exhibited by the prosecution failed to link the appellant with any wrongdoing. The appellant's cashier number was 21 and none of the credit notes exhibited bears the cashier number as 21. Some of the credit notes bears the sales representative as number 21. Mr. Bishop further submitted that the prosecution failed to establish that the sale representative number goes with the cashier number. In addition, two other persons who were authorized to prepare credit notes were not called to give evidence for the prosecution. Counsel further submitted that because of the uncertainty of the evidence the learned Resident Magistrate erred when he called on the appellant to answer the charges.

16. In ground (d) it was submitted that the learned Resident Magistrate failed to make a specific finding on each count. Mr. Bishop further submitted that the

learned Resident Magistrate also failed to properly assess the case for the defence.

17. In response to ground (a) Mr. Taylor for the Crown agreed that Section 31G must be looked at conjunctively but asked the court to draw the overall inference that the computer was programmed and working properly when the irregularities were discovered. It was his submission, however, that Section 31G must be given a purposive construction rather than a strict pedantic construction. A purposive construction means that the law would be flexible in relation to the protean nature of technology. A strict pedantic construction would mean that would have the unintended consequence of making the law difficult and unworkable.

18. In response to ground (b) it was submitted by Counsel for the Crown that the no case submission advanced on behalf of the appellant was properly rejected and that there was enough evidence before the learned Resident Magistrate to establish a *prima facie* case against the appellant.

19. In relation to ground (d) it was submitted that the learned Resident Magistrate dealt adequately with the evidence of the appellant as well as her credibility.

ISSUES

20. Section 31G of the Evidence Act sets out in clear terms the conditions that must be satisfied before a document produced by a computer is admissible as evidence in any proceedings. Section 31G states:

"31G. A statement contained in a document produced by a computer which constitutes hearsay shall not be admissible in any proceedings as evidence of any fact stated therein unless–

- (a) at all material times–
 - (i) the computer was operating properly;
 - (ii) the computer was not subject to any malfunction;
 - (iii) there was no alterations to its mechanism or processes that might reasonably be expected to have affected the validity or accuracy of the contents of the document;
- (b) there is no reasonable cause to believe that–
 - (i) the accuracy or validity of the document has been adversely affected by the use of any improper process or procedure or by inadequate safeguards in the use of the computer;
 - (ii) there was any error in the preparation of the data from which the document was produced;
- (c) the computer was properly programmed;
- (d) where two or more computers were involved in the production of the document or in the recording of the

data from which the document was derived—

- (i) the conditions specified in paragraphs (a) to (c) are satisfied in relation to each of the computers so used; and
- (ii) it is established by or on behalf of the person tendering the document in evidence that the use of more than one computer did not introduce any factor that might reasonably be expected to have had any adverse effect on the validity or accuracy of the document.”

It is therefore clear that all subsections must be satisfied before a computer generated document is admissible in evidence. The requirements of the section have to be looked at conjunctively. Failure of the prosecution in satisfying all or any of the requisite conditions can pose a difficulty, particularly when the prosecution is relying heavily on computer generated documents. This was illustrated in the case of **R v Cochrane** (supra). In that case a building society inadvertently over-credited C’s account, and P sought to show that a number of withdrawals made in quick succession were made before the society discovered its mistake and debited C’s account with the amount of the excess credit. C was convicted of theft by the fraudulent use of his cash card, and appealed to the Court of Appeal on the issue of whether the judge should have admitted evidence in the form of computer print-outs or till rolls. It was held, allowing the appeal and quashing the conviction, that the central issue revolved around the workings of two computers: first, the branch computer where the cash — point

machines were situated; secondly, the society's mainframe computer to which requests were directed by the branch computer, and which carried out the identification procedure, based on the enquirers PIN number, necessary to any enquiry or withdrawal. None of the witnesses for the prosecution even knew in which town the mainframe was located. They knew nothing of its operation, and none could say that it was operating correctly at the relevant times. Thus there was a clear gap in the evidence as to how the entries on the cash-point till rolls came into existence.

21. It is to be noted that Section 31G of the Evidence Act is similar to the English Legislation, namely, Section 69 of the Police and Criminal Evidence Act of 1984. In **R v Minors, R v Harper** [1989] 2 All ER 208 Steyn, J. (as he then was), in analyzing the law within the context of the admission of computer evidence, said at p. 210:

"The law of evidence must be adapted to the realities of contemporary business practice. Mainframe computers, minicomputers and microcomputers play a pervasive role in our society. Often the only record of a transaction, which nobody can be expected to remember will be in the memory of a computer. The versatility, power and frequency of use of computers will increase. If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) will in practice be immune from prosecution."

Continuing he said:

"On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have 'bugs'. Unauthorised alternative of

information stored on a computer is possible. The phenomenon of a 'virus' attacking computer systems is also well established. Realistically, therefore computers must be regarded as imperfect devices. The legislature no doubt had in mind such countervailing considerations when it enacted Sections 68 and 69 of the Police and Criminal Evidence Act 1984."

22. In the instant case the prosecution called Mr. Patrick Cole with a view to establishing and satisfying every aspect of Section 31G. In relation to subsection (c) there was no evidence that Mr. Cole wrote the programme or that the computer was properly programmed. There was no evidence to say that (under (b) (ii)) there was no error in the preparation of the data from which the document was produced. There was also no evidence that each computer station was working properly.

23. Panton, J.A. (as he then was) in dealing with the requirements of Section 31 G in **David Chin v Regina** RMCA No 1/2000 delivered on the 31st July, 2001 at p. 24 said:

"These requisites also have to be satisfied for a statement to be admissible, where it is contained in a document produced by a computer even though that statement does not constitute hearsay. The computer evidence admitted at the trial did not satisfy the conditions specified in this Act. Accordingly by itself, it could not properly form the basis for proof of guilt."

24. It is quite clear that the learned Resident Magistrate did not consider that the requirements of Section 31G ought to have been looked at conjunctively, and that all aspects of the section must be satisfied beyond reasonable doubt.

25. In our view the evidence adduced by the prosecution was inadequate to satisfy the provisions of Section 31G. This ground therefore succeeds.

26. The determination in favour of the appellant in ground (a) would in our view be sufficient to dispose of this appeal. However, it is necessary to examine the basis of the findings of the learned Resident Magistrate as it relates to the credit notes. The learned Resident Magistrate had this to say in relation to the credit notes:

"The court find (sic) that the times that the credit notes were generated when viewed in the light of the cashier's functioning, the accounting records presented and how the company's accounting system functioned places no doubt in the court's mind that Miss McNamee generated these credit notes... I have no doubt that Miss McNamee has removed the funds from the company using the medium of credit notes..."

Is there any evidential basis for this finding by the learned Resident Magistrate?

A perusal of the credit notes which were exhibited indicates a sale representative number as well as a cashier's number to each credit note. The appellant's cashier number was 21. Not one of the exhibits has the appellant's cashier's number. There was no evidence to indicate that the sales representative number and the cashier's number were the same. The evidence shows that two

other persons were authorized to prepare credit notes, none of whom gave evidence for the prosecution.

27. The learned Resident Magistrate would be required to make a finding on each count in the indictment. The findings of the learned Resident Magistrate do not indicate how he came to make a finding on each count. Based on the accounting procedures the Resident Magistrate did not resolve the issues such as the cashier's number.

28. In our view there was no evidential basis for the learned Resident Magistrate to arrive at a verdict adverse to the appellant.

29. As stated the appeal was allowed and the convictions quashed, the sentences set aside and a judgment and verdict of acquittal entered.