**[2022] JMSC CRIM 02**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIRCUIT COURT**

**HCC 134/18 (1), CACT2019CR00212 AND CACT2019CR00279**

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|---|---|
| **BETWEEN** | **REGINA** |
| **AND** | **ANDRE BRYAN AND OTHERS** |

**IN OPEN COURT**

Jeremy Taylor QC, Senior Deputy Director of Public Prosecution, Claudette Thompson, Senior Deputy Director of Public Prosecution, Sophia Rowe, Assistant Director of Public Prosecutions, D Green

Lloyd McFarlane, Cheryl Richards, and Nicholas Kellyman for Andre Bryan

Shannon Clarke and Anike Kelly for Kevaughn Green

Kimani Brydson and Ayanna Campbell for Tomrick Taylor, Daniel McKenzie, and Owen Ormsby

Walter Melbourne for Damaine Elliston

Abina Morris and Patrice Riley for Kalifa Williams and Chevoy Evans

Denise Hinson and Kamesha Mittoo for Michael Whitely, Brian Morris, and Donavon Richards

Gavin Stewart and Shadday Bailey for Pete Miller

Akuna Noble for Dwight Hall

Cecile Griffiths Ashton for Carl Beach

Keith Bishop, Andrew Graham, and Jannoy Pinnock

Esther Reid and Davorna Wilson for Tareek James and Rivaldo Hylton

Alexander Shaw and Aston Spencer for Stephanie Christie, Andre Golding, and Andre Smith

Lynden Wellesley and Evan Evans for Fabian Johnson and Ted Prince

Roxane Smith and Deandra Bramwell for Jahzeel Blake and Jermaine Robinson

Zara Lewis and Carole Phillips for Roel Taylor

John Jacobs, Jodi Kay Anderson and Shavene Spence for Rushane Williams

Mikhail Lorne for Kemar Harrison

Sasha Kay Shaw for Joseph McDermott

Dianna Mitchell and K Atkinson for Jason Brown

Courtney Rowe, Jodi Kay Anderson and Shavene Spence for Marco Miller

Kemar Robinson for Dwayne Salmon

Cecil J Mitchell and Paul Gentles for Ricardo Thomas

**February 10 and 14, 2022**

**EVIDENCE - COMPUTER GENERATED EVIDENCE – SECTION 31G OF THE EVIDENCE ACT – EVIDENCE NECESSARY TO SATISFY SECTION 31G**

**SYKES CJ**

**The ultimate issue**

**[1]** The critical question for determination is whether the prosecution has proved beyond reasonable doubt that the recordings made on the three mobile phones by the witness is admissible under section 31G of the Evidence Act. It is common ground between the prosecution and the defence that the three mobile phones alleged to have been used by one of the witnesses in the case to record conversations between himself and persons said to be members of a criminal

organisation of which he was a member is a computer within section 31G (7) of the Evidence Act.

**[2]** There are transcripts said to have been produced by police officers who listened to the recording along with the witness. The transcripts are not documents produced by the computer but produced by the police having listened to, it is claimed, to the recordings said to have been made by the witness.

**[3]** This trial commenced on September 20, 2022. There have been many days of hearing. The dates for the purposes of this decision will be the date of the submissions on this aspect of the case (February 10, 2022) and the date of delivery of the reasons for decision (February 14, 2022).

**Computer generated evidence in Jamaica**

**[4]** The admissibility of computer generated evidence (CGE) is governed by section 31G of the Evidence Act. This provision repealed and replaced the previous section 31G. The previous section 31G, as is the current provision, was designed to mitigate the worst effects of **Myers v DPP** [1965] AC 1001 which was applied in Jamaica **R v Homer Williams** (1969) 11 JLR 185 and **R v Margaret Heron** (1983) 20 JLR 56. The essence of these decisions was that unless the maker of the document could be called then it was inadmissible regardless of how reliable the means were of producing the document. It will be recalled that in **Myers**, there is absolutely no doubt about the reliability of the records but no one could possibly identify the specific person who made the records that were relevant in that case. The impact of **Myers** and its progeny was that CGE was not admissible because in many instances the actual maker of the document could not be identified and even if identified the CGE may have been the product of multiple computers or the computer may have contributed its own stored up knowledge to the final input.

**[5]** Jamaica began taking steps to mitigate these problems in 1995 when the Evidence Act was amended. The amendment introduced section 31 A – J and these provisions provided the comprehensive code for admitting CGE. The provisions

reflected a distrust of CGE. The mountain to climb to get to the summit of admissibility was like climbing Mount Everest with only a backpack. Subsequent judicial interpretation of the statute confirmed the cumbersome nature of the provisions. This was exemplified by **McNamee v R** RMCA 18/2007 (July 31, 2008) and **Robinson and another v Henry and another** [2014] JMCA Civ 17. It should therefore not be surprising that in the twenty-year career of these provisions not many criminal cases in which there was reliance on them reached the Court of Appeal.

**[6]** The repealed section 31G is produced so that nature of the problem with the provision can be appreciated. The repealed section 31G reads:

> *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 d the data from which the document was 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.*

**[7]** The mere reading of these provision indicates why there were so few successful applications for computer generated evidence to be admitted. Even in civil cases where the standard of proof is on a balance of probabilities, unless there was agreement between the parties there were not many cases in which reliance was placed on CGE.

**[8]** Parliament again took up the challenge in 2015 and enacted a new section 31G which reads in relevant part:

*31G. (1) Subject to the provisions of this section, in any proceedings, a statement in a document or other information produced by a computer shall not be admissible as evidence of any fact stated or comprised therein unless it is shown that -*

*(a) there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer; and*

*(b) at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents.*

**[9]** This new section 31G is, in essence, section 69 of the Police and Criminal Evidence Act (PACE) 1984. What is cited below is the relevant parts of section 69

as it was in 1984. The original section 69 was repealed by the Youth Justice and Criminal Evidence Act 1999. Section 69 provided in the relevant portion that:

> *(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact therein unless it is shown-*
>
> *(a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer and;*
>
> *(b) that at all material times the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and*
>
> (c) *that any relevant conditions specified in rules of court under subsection (2) below are satisfied.*
>
> *(2) Provision may be made by rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required.*

**[10]** The adoption of the now repealed section 69 was deliberate. At the time of the 2015 amendment to the Evidence Act, the House of Lords had considered the provision in two important cases. It may reasonably be concluded that the legislature was suggesting that the interpretation adopted by the House of Lords was to be adopted or at the very least, should be considered when interpreting the new section 31G.

**[11]** The two cases are **DPP v Shephard** [1993] AC 380 and **DPP v McKeown** [1997] 2 Cr App R 155. In **Shephard**, the defendant was convicted of theft. The evidence against her came from a store detective who testified that she had examined the store's till rolls (that is paper rolls used in cash registers) of the date on which the theft was alleged to have occurred and there was no record of the items found in the defendant's possession being purchased. It was agreed that for the evidence

in relation to the till rolls to be admitted, section 69 (1) (b) (section 31G (1) (b) of the Jamaican statute) had to be satisfied.

**[12]** The defendant's appeal was dismissed. The Court of Appeal certified the following point of law:

> *"Whether a party seeking to rely on computer evidence can discharge the burden under section 69(1) (b) of the Police and Criminal Evidence Act 1984 without calling a computer expert, and if so how?"*

**[13]** The point was certified after the Court of Appeal had emphatically rejected the proposition that section 69 of PACE would only be satisfied by evidence from someone familiar with the operations of computers or by a certificate issued under the relevant provision of PACE. The certification point is of no moment here and will not be addressed further.

**[14]** There is an interesting point which ought to be made. This is Lloyd LJ's response to counsel for the Crown submission. The learned Lord Justice picked up on counsel's submission which was that section 69 (like section 31 G of the Jamaican statute) required that it be 'shown' (the actual word used in the statute) that the computer was operating properly. Lloyd LJ referred to his own decision when he was sitting as judge of the Divisional Court's decision in **R v Governor of Pentonville Prison, ex parte Osman** (1990) 90 Cr App R 281, 307. He said, in relation to computer records in the context of section 69 of PACE, at page 307:

> *Where a lengthy computer printout contains no internal evidence of malfunction, and is retained, e.g. by a bank or a stockbroker as part of its records, it may be legitimate to infer that the computer which made the record was functioning correctly.*

**[15]** The point here is that apparently the word 'shown' in section 69 of PACE, in the opinion of Lloyd LJ, is satisfied if an examination of the document does not show any internal evidence of malfunction. This point was not expressly addressed by Lord Griffiths in the House of Lords and there is no case showing that this dictum by Lloyd LJ has been doubted.

**[16]** The importance of this is that 'shown' may permit an examination of the CGE itself to see if it has any internal evidence of malfunctioning of the computer at the material time.

**[17]** Lord Griffiths held that under the section 69 'anyone who wishes to introduce computer evidence to produce evidence that will establish that it is safe to rely on the documents produced by the computer.' His Lordship took this position because the legislation said:

> *"a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein* ***unless it is shown****." (Emphasis added.)*

**[18]** Lord Griffiths indicated that the duty 'cannot be discharged without evidence by the application of the presumption that the computer is working correctly expressed in the maxim omnia praesumuntur rite esse acta [all acts are presumed to have been done rightly] as appears to be suggested in some of the cases. Nor does it make any difference whether the computer document has been produced with or without the input of information provided by the human mind and thus may or may not be hearsay.' In other words, there must be evidence that the computer was working properly at the material time and this evidence cannot be supplied by the application of the omnia praesumuntur presumption. It is this court's view that this would have been the natural point in Lord Griffiths' reasoning to say that Lloyd LJ's comment was not supported. The learned Law Lord was addressing the expression 'unless it is shown.' Had the Law Lord thought that Lloyd LJ was incorrect, what better place to address that issue?

**[19]** In coming to these conclusions, Lord Griffiths examined and overruled the reasoning and conclusion in **R v Spiby** (1990) 91 Cr App R 186. In that case the Court of Appeal of England and Wales had to consider the admissibility of a print out from a hotel showing telephone calls between two persons. At the trial, the manager of the hotel gave 'gave evidence that he was familiar with the function of the Norex machine, how it was supposed to work and what it was supposed to do. He was able to intercept it and obtain a charge for any particular call, perhaps

made after a guest had paid his bill. He did not profess to be a computer engineer, but he said that in the time that he was there and the relevant time in regard to these matters, the machine was working satisfactorily. No-one complained about their bills, and the actual print-outs, if one looked at them internally, within the information contained within them, were apparently sensible and as one would expect' (page 189 of **Spiby**). The recorder admitted the evidence as an item of real evidence. It was said section 69 of PACE did not apply. Lord Griffiths held that **Spiby** was wrongly decided so far as it held that section 69 did not apply. Lord Griffiths said it did. Regarding the evidence of the hotel manager, Lord Griffiths stated that 'there was satisfactory evidence given by the sub-manager of the hotel who was familiar with the operation of the computer and could speak to its reliability' (page 386 of **Shephard**).

**[20]** Put another way, the conviction could have been upheld notwithstanding the error because section 69 applied and the evidence from the sub-manager satisfied the statute despite the fact that he was by no means a computer expert and did not pretend to be familiar with the programming and intricacies of the computer's operation.

**[21]** In **Shephard**, Lord Griffiths held that the store detective's evidence was sufficient to meet section 69 (1) (b) because it showed that she was clearly familiar with the computer's operations and could speak to its reliability.

**[22]** His Lordship added at page 387:

> *Documents produced by computers are an increasingly common feature of all business and more and more people are becoming familiar with their uses and operation. Computers vary immensely in their complexity and in the operations they perform. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case**. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness***

> ***who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.*** (emphasis added)

**[23]** His Lordship also noted at page 387:

> *The computer in this case was of the simplest kind printing limited basic information on each till roll. The store detective was able to describe how the tills operated, what the computer did, that there had been no trouble with the computer and how she had also examined all the till rolls which showed no evidence of malfunction either by the tills or the central computer.*

**[24]** It appears from this passage that Lord Griffiths accepted the proposition that it is possible to infer that the computer was working properly if it can be said that an examination of the CGE did not reveal any evidence of malfunction. The conviction was upheld.

**[25]** The second case is **DPP v McKeown; DPP v Jones** [1997] 2 Cr App R 155. These two appeals were heard together. Both cases occurred under the Road Traffic Act. Ms McKeown was convicted of driving with excessive alcohol in the breath. Mr Jones was convicted of failing without reasonable excuse to provide a specimen breath after the first specimen breath revealed that his alcohol level was over the prescribed limit. In both cases intoximeter used had an incorrectly calibrated clock and the print outs had the incorrect time. The Divisional Court quashed the convictions on the basis that the inaccuracy of the clock was fatal to the convictions. The Director of Public Prosecutions appealed.

**[26]** None of the prosecution witnesses in the cases could explain the inaccuracy of the clock. The justices accepted that the inaccuracy of the clock did not affect the accuracy of the breathalyser readings.

**[27]** In respect of section 69 Lord Hoffman said at page 163:

> *The first thing to notice is that section 69 is concerned solely with the proper operation and functioning of a computer. A computer is a device for storing, processing and retrieving information. It receives*

*information from, for example, signals down a telephone line, strokes on a keyboard or (in this case) a device for chemical analysis of gas, and it stores and processes that information. If the information received by the computer was inaccurate (for example, if the operator keyed in the wrong name) then the information retrieved from the computer in the form of a statement will likewise be inaccurate. Computer experts have colourful phrases in which to express this axiom. But section 69 is not in the least concerned with the accuracy of the information supplied to the computer. If the gas analyser of the intoximeter is not functioning properly and gives an inaccurate signal which the computer faithfully reproduces, section 69 does not affect the admissibility of the statement. The same is true if the operator keys in the wrong name. Neither of these errors is concerned with the proper operation or functioning of the computer.*

*The purpose of section 69, therefore, is a relatively modest one. It does not require the prosecution to show that the statement is likely to be true. Whether it is likely to be true or not is a question of weight for the justices or jury. All that section 69 requires as a condition of the admissibility of a computer-generated statement is positive evidence that the computer has properly processed, stored and reproduced whatever information it received. It is concerned with the way in which the computer has dealt with the information to generate the statement which is being tendered as evidence of a fact which it states.*

**[28]** It is true to say that in Ms McKeown's case the evidence before the justices was a signed certificate from the police that the device was properly working. The police officer did not profess to be a computer expert or computer programmer.

**[29]** Regarding malfunctioning computers, Lord Hoffman held at pages 163 – 164:

*The language of section 69(1) recognises that a computer may be malfunctioning in a way which is not relevant to the purpose of the exclusionary rule. It cannot therefore be argued that any malfunction is sufficient to cast doubt upon the capacity of the computer to process information correctly. The legislature clearly refused to accept so extreme a proposition. What, then, was contemplated as the distinction between a relevant and an irrelevant malfunction? It*

*seems to me that there is only one possible answer to that question. A malfunction is relevant if it affects the way in which the computer processes, stores or retrieves the information used to generate the statement tendered in evidence. Other malfunctions do not matter. It follows that the words "not such as to affect the production of the document or the accuracy of its contents" must be read subject to the overall qualification that the paragraph is referring to those aspects of the document or its contents which are material to the accuracy of the statement tendered in evidence.*

*Paragraph (a) of section 69(1) , which deals with improper use of the computer, clearly has this meaning. The statement is inadmissible only if there are reasonable grounds for believing that the improper use has caused the statement tendered in evidence to be inaccurate. It was argued that because paragraph (b) uses different language and speaks of the "production of the document or the accuracy of its contents" rather than being concerned, as in paragraph (a), with the accuracy of "the statement", it must have a different meaning. I shall not speculate on the reasons why the draftsman thought it necessary to deal with improper use of the computer separately from the question of whether it was in proper working order. But there cannot have been any difference in the purpose of the two paragraphs: in both cases the legislature was concerned with the reliability of the statement tendered in evidence as a properly processed and reproduced piece of information. On the point now in issue I think it would be quite irrational if the effect of the two paragraphs was not the same.*

**[30]** Thus the justices were entitled to convict Ms McKeown and Mr Jones. The Director's appeal was allowed and the decision of the Divisional Court was reversed.

**[31]** There is no reason why these two decisions should not be applied to the new section 31G.

**[32]** The final case to which reference will be made is **R v Marcolina** Case No: 98/00952/z4 (delivered on Wednesday, 28th April 1999), a decision of the Court of Appeal of England and Wales. The defendant was convicted of stealing a mobile phone to which she had access as a cleaner at her employer's premises. The

phone was never recovered. The significant evidence was an itemized bill for the phone which covered the period between the theft and when it was barred from the network. The bill showed a number of calls made to telephone numbers that were in the defendant's telephone book. Of the calls made to numbers in her telephone book the vast majority were to her brother. The bill was admitted into evidence. This decision was challenged on appeal on the basis that the evidence adduced did not meet the statutory standard. Henry LJ responded in this way:

> *However, the following facts can be extracted from his evidence.*
>
> *• 1) He had been employed by Vodaphone for over four years as the risk supervisor and his duties included identifying fraudulently used accounts and liaising with the police. This account had been used fraudulently.*
>
> *• 2) He had retrieved from the computer the records relating to this mobile telephone and produced from those records the itemized account for the relevant period. To do so he had accessed the billing records for that period.*
>
> *• 3) He was not familiar with the precise details of the operation of the computer because he had not designed it. However, he had general knowledge of the system. He had no reason to believe that the computer records were inaccurate because of improper use.*
>
> *• 4) Vodaphone is continuously audited by the DTI. No complaint has been made as to the accuracy of their records; Vodaphone has their own quality assurance department which constantly monitored the system.*
>
> *• 5) He asserted that the computer was working properly at the relevant time. In support of that assertion he relied upon the following facts:*
>
> > *• a) There was no record of any malfunction. Had there been, it would have been drawn to his attention by the billing department. In any event, the computer had ancillary equipment which would have taken over, had there been any failure or malfunction of the primary systems.*

> • *b) If there had been any malfunction, the billing records would be classed as 'in suspension'; these records were not.*
>
> • *c) The billing record itself is made without human intervention, although it is triggered by the use of a mobile phone. The system runs a series of internal checks as to accuracy and function before the call is made and the subsequent detail recorded. If there is any malfunction the records are put into suspension. The records of these call had not been suspended.*
>
> • *d) The records in relation to malfunction were kept by persons who could not reasonably be expected to have any personal recollection of them. These persons had a duty to report any malfunction. None had been reported.*

**[33]** It is reasonably clear from the evidence in these cases from the House of Lords and the Court of Appeal of England and Wales that under section 69 of PACE and now the 'new' section 31 G of the Jamaican Evidence Act, expert evidence is not needed provided that the witness can speak to the use of the computer in terms sufficiently particular to meet the legal standard. As Lord Griffiths said in **Shephard** that the 'nature of the evidence to discharge the burden of showing there was no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly' (page 387).

**[34]** These cases reflect where the interpretation of the provision had reached before it was repealed. Having examined the history of CGE in Jamaica from **Homer Williams** to the 2015 amendment this court concludes that the legislature was desirous of simplifying what had become a tortuous and agonizing process for anyone (prosecution, defence, or litigants in civil cases) seeking to rely on CGE.

**Application of law**

**[35]** The evidence of the witness is now examined. The witness testified that he provided three mobile phones with recordings to the investigating officer. These were an Alcatel, Vonino, and Samsung J 3 mobile phones. He stated that he downloaded an application called 'Call Recorder.' Each time he received a call the conversation was recorded and saved. The recording was said to be automatic. For that to happen he configured the application to record outgoing and incoming calls automatically. Once configured there was nothing further he needed to do, save, it seems, answer the call or make a call. He would send the recording to the investigating officer by the WhatsApp application.

**[36]** The witness added that when the Alcatel phone was handed over to the investigator, the recordings were still on it. He showed the investigator the file in which they were located. He next heard the recordings when they were being transcribed by other police officers. He purported to identify various voices on the recordings.

**[37]** He followed the same process for the other two phones. As with the recordings on the first phone, he next heard them when they were being transcribed.

**[38]** The only additional point that needs to be made regarding the Samsung J 3 mobile phone is that he alleges that received it from Mr Roel Taylor. It was not given to him by Taylor to record conversations but he used it for that purpose.

**[39]** The next important witness on this issue is the forensic expert dealing with the extraction of information from the phones in question. He was a police officer attached to the Communications Forensics and Cybercrime Division (CFCD). He has since left the police force. At the end of this testimony, there was no challenged to his skill, competence, expertise, and ability to communicate technical information in ordinary language. His training and demonstrable competence established him as a more than capable expert. He testified that the three phones came to him and he was asked to extract the recordings in question. That he did.

**[40]** He also indicated the work process and the expected interaction between his unit and the investigator in the case. The evidence was that the extraction was done and placed on a compact disc marked 'NOT FOR COURT.' The reason for this notation was that it was a preliminary extraction which was done and handed to the investigator. Using this working copy the investigator would be expected to examine the extracted information against the backdrop of the investigations to which the extraction is related. If that is done and further refinement is needed the expectation is that the investigator would return to the forensic expert and make further requests. This was not done. What the investigator did was to take the recordings, have them transcribed, and present them to the prosecutors.

**[41]** The expert indicated that had he been asked to do further work he would have done so. The expert indicated that while small mobile devices such as phones do not have logs of the kind found on laptops and desktops which will record malfunctions of installed software, in some instances it is possible to determine whether the software on small mobile devices malfunctioned at the material time or is malfunctioning. He said he was not asked to make that determination by the investigator in this case. One way of knowing whether the software malfunctioned at the time of the recording is by it not opening or doing what was expected of it. Malfunctioning could also be detected by attempting to play the recording and if it cannot be played then that may be evidence of malfunctioning at the time of the recording.

**[42]** Turning now to the issue of transcription. As far as the transcription is concerned the witness stated that signed the transcripts. That has not turned out to be the case. The evidence from the police officers who produced the transcript of the recordings is that the witness was with them as the recordings were being played. The witness purported to identify the various voices. The officers typed that they heard and their typed transcript would indicate the speaker as identified by the witness. The actual transcripts then were produced by the police officers and not witness. The absence of his signature is therefore of no moment. At this point, the court is satisfied that there is evidence to establish the authenticity of the

transcripts meaning that the transcripts produced in court are those that the police officers did when they listened to the recordings along with the witness.

**[43]** In any event, the critical evidence here is not the transcript but the recordings. The transcript is simply an attempt to reproduce in text what is said to be on the recordings so that the recordings can be understood.

**[44]** The evidence of the witness is that he downloaded the application and configured to record automatically. From the totality of the evidence about the recordings this application was in significant use during the time that the recordings were being done. The witness asserts by inference that the application did what was expected of it repeatedly and the recordings done consistently led to the memory of the phone being full to such an extent that he returned the first phone, received a second, did more recordings until that device was full, and got a third device.

**[45]** The witness was not asked explicitly whether the application did what was expected of it but that is the inescapable inference from his evidence. He was not asked explicitly whether he observed or had any reason to think that application was not recording or was recording intermittently. The combined effect of memory of the first two devices being filled with recordings and recording being done a third phone along with the transcript is to show that the application was working without malfunction.

**[46]** There is no evidence that the witness possesses any in depth knowledge of the operation of the software he downloaded or great knowledge of minutiae of mobile phone recording mechanisms. The case law cited above does not require that expertise. Lord Griffiths' dictum cited earlier at paragraph 22 above for decision makes it plain that there is no one size fits all in terms of evidence necessary to meet the statutory standard. His Lordship indicated that computer operations will vary in complexity and in the operations they perform which means that nature of the evidence required to discharge the burden will vary from case to case. In this particular case, the application was recording conversations; that is a simple operation. There is no evidence that this application that was deployed in recording

telephone calls required any significant technical expertise. It appears that so simple was the operation of this particular software that after it was downloaded, it was configured to record automatically, and it did just that when calls came in or calls were made. This was not a complex computer operation by any measure. The 'expertise' of the witness was sufficient for this particular circumstance. In another circumstance it may not be enough. It would therefore be very unwise to seek to rely on the outcome of this particular case to conclude that in all cases of recordings all that is necessary is evidence of the kind adduced in this case.

**[47]** If one examines Lord Griffiths' analysis of **Spiby** in **Shephard**, it will be noted that his Lordship said that the evidence of the hotel sub-manager would have met the statutory standard had the matter been analysed in those terms by the trial court. The importance of this point is this: the sub-hotel manager would have established his familiarity with the computer by repeated use. The issue is so much the length of time of use of the computer but the frequency of use for the relevant period under consideration. It is entirely possible to have familiarity with the operations of the computer established by short (even hours or days) but intensive use. Of course, the longer the time, the more likely it is for the familiarity to increase.

**[48]** In the present case, the witness has presented himself an intensive use of the application in a relatively short period of time. There is no evidence that he used or was familiar with this particular application before the time of the first download of it by him. The court is not saying that there is any presumption of reliability of the application and the phones. What is being said that the use of the application on the phone by the witness and the fact of recordings being made repeatedly is a short time frame is affirmative evidence that the phone and the application were working properly at the time of the recordings.

**[49]** Also regarding section 31G (1) (a) having regard to the evidence of the witness there are not reasonable grounds for believing that the recording is inaccurate because of improper use of the mobile device. The evidence is that the recording was done automatically once the call was made or received. The activation of the

recording process did not require any further human input. The intensive use made of the device and the application in the time during which the recordings were made and the absence of any evidence of failure or malfunction in the view of this court establish beyond reasonable doubt that that is no reason to think that recordings are inaccurate because of improper use.

**[50]** It follows that the court does not accept the defence's position that the statutory standard was not met. It was further submitted by Mr Alexander Shaw that the material was more prejudicial than probative. The difficulty here is that the mode of trial (bench trial) without committal proceedings means that the judge does not know the evidence that the prosecution proposes to call. Thus the judge cannot determine whether the prejudicial effect outweighs it probative value. Mr Shaw also submitted that there was some incongruity between the proposed recordings and details of the proposed evidence from the telecommunication provider. Again, that could not be evaluated because the court will not know the details until the evidence is placed before the court.

**[51]** Mr Shaw also submitted that there is no evidence that malware was not up and about during the recording process. It was also said that the court should be very mindful of the recording witness's testimony because he was an accomplice with much to gain. The court accepts that the witness is an accomplice who is, in strict legal terms, a murderer, conspirator to murder, and transported his cronies to places to commit murder. However, it does not follow that such a witness's testimony is inherently incapable of providing the evidential foundation to meet the standard of section 31G (1).

**[52]** There was further submission to the effect that the witness did not demonstrate any in depth knowledge of the application he claimed to have used to make the recordings. The court does not accept this proposition because what took place here was not a complicated process that required any great knowledge of computers. Since **Shephard**, computers, in the form of handheld devices have become ubiquitous. Applications are, today, a download-and-use-immediately

product. Many of them do not require even the slightest degree of skill other than comprehension of the instructions. Many of them are intuitive with little need for computer knowledge. From the witness's testimony, it appears that this particular application was of the download-and-use immediately variety.

**[53]** The court wishes to add one paragraph that was not in the previously circulated version of these reasons for judgment. The court examined the Court of Appeal of Jamaica's decision in **National Water Commission v VRL Operators Limited** [2016] JMCA Civ 19. The court is of the view that the case under consideration is not a case of admitting business records or hearsay documents but one of admitting direct evidence of conversations between the witness and some of the defendants that were recorded by a computer. There was therefore no need to consider section 31D or section 31F does not apply. This is not a case of admitting a statement in a document of person who is within the categories of section 31D. These recordings are not documents created or received by a person in course of trade, business, profession or other occupation or as the holder of an office.

**Conclusion**

**[54]** This court is therefore satisfied that the prosecution has proven beyond reasonable doubt that section 31 G (1) (a) and (b) have been satisfied and the recordings are therefore admissible.