

5/12/2003

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**

**CRIMINAL APPEALS NOS. 32 AND 33 OF 2002**

**INDICTMENT NO. 37 OF 2002**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**RESPONDENT**

**AND**

**MARK CAMPBELL and  
DOMINIQUE OLIVER WILLIAMS**

**APPELLANTS**

**BEFORE:**

**The Rt. Honourable Mr. Justice E. Zacca, President  
The Honourable Mr. Justice I, D. Rowe, J. A.  
The Honourable Mr., Justice M. Taylor, J.A.**

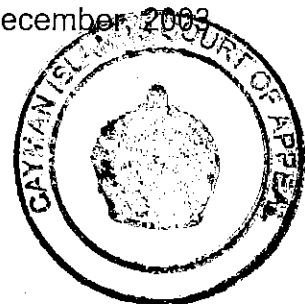
Frank Phipps, QC., and Clyde Allen instructed by Woodward Terry & Company for the Appellant (Campbell), Mr. Phillip St. John Stevens and Lawrence Aiolfi instructed by Walkers for the Appellant (Williams) and Scott Wilson, Crown Counsel for the Crown.

**HEARD:** July 30-31, 2003

**DELIVERED:** 5<sup>th</sup> December, 2003

**JUDGMENT and REASONS**

**ROWE, J.A.**



1. The appellants were charged with the offence of conspiracy to export ganja contrary to section 305 of the Penal Code (1995 Revision) and section 3(1)(b) of the Misuse of Drugs Law, Law 13 of 1973. It was alleged in the particulars of offence that the appellants between 1 October 2000 and 30 September 2001, on

Grand Cayman, conspired with each other and with other persons to export ganja. Each appellant was convicted before Graham, J. and a jury on **28 October 2002** and were each sentenced on **1 November, 2002** to seven (7) years imprisonment. The appellant Williams was indicted under the first name of "Dominique", however he has often been referred to in court documents as "Dominic".

2. The appellant Campbell gave as his grounds of appeal (a) that the verdict was unreasonable and (b) that his conviction was based on inadmissible evidence. Appellant Williams challenged his conviction on the basis that it was unsafe and unsatisfactory and complained that his sentence was manifestly excessive.

**THE RELEVANT FACTS:**

3. Clarence Buchanan was the mastermind behind a corrupt scheme to export ganja from Grand Cayman via Cayman Airways to the United States. The prosecution relied primarily on the evidence of Vincent McElroy, (McElroy), a former employee of Cayman Airways assigned to the Owen Roberts Airport, to prove its case against the appellants. McElroy had been granted immunity from prosecution on condition that he would testify truthfully as a Crown witness in the prosecution of the appellants on charges contained in Information 5036/01 and 5037/01 before the Magistrate and in the Grand Court and that all signed statements given by him to the Police would contain truthful information. The statements by McElroy referred to in the immunity letter were (a) the cautioned

statement given to the Royal Cayman Islands Police (RCIP) on 3 September 2001; and (b) statements given to the RCIP on 3, 10, and 18 September, 2001.

4. McElroy's evidence was that in November or December 2000 the appellant Williams whom he had known for more than 10 years and with whom he played football and basketball from time to time, approached him and suggested that he should use his position with Cayman Airways to facilitate the shipment of ganja on Cayman Airways planes destined for Miami and in return McElroy would be paid \$25,000.00. He rebuffed the initial approach which the appellant Williams made to him but Williams kept calling him on cellphone No. 916-7302, (which although in the name of his girlfriend was used by McElroy), and tried to convince him to accept the proposition. McElroy could tell that it was the appellant Williams who was calling as telephone No. 916-1805 would be displayed when the telephone rang. He recognized the voice of the appellant Williams and so they had conversations.
  
5. In about January 2001, said McElroy, he met appellant Williams as they played basketball, and he agreed with the proposal from the appellant Williams. Appellant Williams who had mentioned the appellant Campbell in his conversations with McElroy, decided to set up a meeting including appellant Campbell and one "Clarence" who would be bringing the ganja to the airport. McElroy met with the appellants and Clarence Buchanan at the Blue Parrot Club. The four men discussed and agreed what flight numbers would be used and what dates would

be used. Clarence was introduced to McElroy as the person who would bring ganja in bags to the airport.

6. At the meeting, the appellant Williams did most of the talking. The appellant Campbell was agreeing with what was being discussed but he did not say much. Clarence did not say anything. McElroy agreed to participate in the plan. At the end of the meeting telephone numbers were exchanged between the persons attending the meeting. Either Williams or Campbell made a telephone call to someone in Miami to indicate the dates when the shipments would be made. McElroy said early in his testimony that the call to Miami had been made by the appellant Campbell but said in the end that he could not be sure which of the two appellants made the call.
7. McElroy said he knew his work schedule three months in advance and he provided this schedule to the appellant Williams at the Blue Parrot Club.
8. The system used in the export of the ganja was that McElroy would speak to appellant Williams and advise him the most convenient time for Clarence to bring the ganja and Clarence would arrive at the suggested time. The first exportation was made sometime between January and February 2001.
9. Clarence would arrive with 2 duffel bags and an empty, "bogus", ticket holder. He would hand this ticket holder to McElroy who would then process the bags with a final destination to Heathrow London on American Airlines, via Cayman Airways

to Miami. McElroy, using the Security Code of an innocent employee of Cayman Airways, would assign the bags of ganja to a passenger who had checked in with only carry on luggage. McElroy would give the baggage tags to Clarence, who would then exit the airport. Thereafter, McElroy would telephone the appellant Williams and advise him that the bags were on the flight to Miami.

10. McElroy explained that in transit luggage normally remained for a few hours in Miami before being loaded on to the onward aircraft and that gave the conspirators the opportunity for the duffel bags with the ganja to be intercepted and removed from the in transit area in Miami.
11. McElroy testified that about two weeks after the first shipment, the appellant Williams telephoned him and they met outside the Gym at John Gray High School where appellant Williams gave him US\$3,000.00 and promised to give him the remainder soon.
12. According to McElroy's testimony, in March 2001 the appellant Williams called McElroy and told him that he wanted to make another shipment. McElroy told Williams when he would be on duty and Clarence brought the ganja. A similar procedure to the first shipment was followed. A few hours after the shipment left Grand Cayman, appellant Williams telephoned McElroy in a calm voice and advised him that the shipment had been picked up in Miami.
13. The third incident testified to by McElroy occurred in April and the same methodology was employed. In about July or August 2001 a fourth shipment was

attempted said McElroy. This time McElroy had called appellant Campbell who had in turn contacted Clarence to bring the ganja to the airport. However, said McElroy, he observed Customs Officers with dogs at the back of the airport. He then called appellant Campbell at 6.30 a.m. and alerted him to stop Clarence. McElroy explained that although it was not customary for him to call appellant Campbell, he had Campbell's telephone number programmed in his cell phone and so he had called Campbell and he recognized the voice as that of the appellant Campbell.

14. There was a meeting at the request of the appellant Campbell and McElroy on the evening of the aborted shipment. McElroy said that appellant Campbell telephoned and asked for a meeting at Shooters in the Seven Mile Shopping Centre. At that meeting appellant Campbell offered to pay McElroy \$35,000.00 for another shipment. McElroy said he caviled at the suggestion and complained that he had not been fully paid by appellant Williams for earlier shipments. He had been promised \$25,000.00 for the first 3 shipments but had only received \$3,000.00. According to McElroy, defendant Campbell assured him that he was different and McElroy would be paid.
15. As one would expect, Mr. McElroy was cross-examined at some length. In answer to Mr. Phipps, representing the appellant Campbell, McElroy stated that he had confessed his involvement in the conspiracy to Cayman Airways official Forsythe about a week before his arrest. He had known the name Mark Campbell and had seen him around but prior to the Blue Parrott meeting they had not sat

down together. Mr. Campbell, he said, did not verbalize during the meeting but nodded in acceptance of the arrangements for getting the ganja on the aircraft. McElroy said he had been arrested and charged with the conspiracy. On 23 August 2002, he was granted the conditional immunity letter, which included a promise that he would not be further, prosecuted for his involvement in the alleged conspiracy. McElroy agreed that on 1 October 2002, he wrote a letter to the Clerk of Courts; exhibit 2, in these terms:

"I hereby wish to inform you in writing to the following effect. After carefully considering the matter in testifying in the case of Dominic Williams and Mark Campbell, I have decided that because of immoral and religious beliefs and principals (sic) and because I don't believe (sic) my testimony will be creditable in the case, I therefore cannot testify in the above mentioned case. This letter was written on my own free will and choice".

16. Mr. McElroy answered Mr. Phipps to say that the contents of the letter were true but he added that there were rumours about threats to his life and he got scared and decided to write the letter. He repeated this explanation in re-examination.
17. Mr. Rudolph Miles, an employee of Cable & Wireless gave evidence for the prosecution. He described his responsibilities with the company. At one time he was fraud manager and at the time of testifying he was the investigation manager

for the telephone company providing telephone services in Grand Cayman. He was familiar with the Customer Directory of the company and he provided telephone records to show that:

- (a) Tel. No. 916-5774 was a cell phone registered to Clarence Buchanan since December 1999;
- (b) Tel. No. 916-1805 was registered to Shirley Williams;
- (c) Tel. No. 949-9261 was registered to Joy Campbell.

Mr. Miles testified that the information in relation to these telephone numbers was downloaded from a Computer, which contained customer information, and the Computer was working normally.

18. An important Crown witness was Alan Darvill. He described himself as the Office Manager for the Drugs Task Force a position that he had held for 2 years. His background was that of a British armed forces officer in which capacity he obtained experience in the processing of computer documentation. He did not regard this as a specialty. Mr. Darvill said that he obtained a disk of information from Rudolph Miles of Cable & Wireless and he processed and analyzed the disk. Mr. Darvill explained that when a telephone call is made using either a land line or a cell phone, the computer records the telephone number from which the call is made, the telephone number to which the call is made, the time at which the call commenced and the time at which the call terminated. He said that he looked at the computer print-out and prepared a spread sheet indicating what was

shown on the disk for a series of telephone numbers. A copy of the disk had been provided to defence attorneys some days before the evidence was given.

19. The computer records provided information, which was received in a series of exhibits. Graham J., placed the exhibits before the jury but did not descend to particulars, making the familiar observation that the jury had heard the evidence and as it was fresh in their minds, it did not require repetition. We will give an example of some of the material that Mr. Darvill produced in his evidence in exhibit 3 and at pages 184 through 190 of his evidence as it appears in the Record for the period between 1 January and 30 August 2001. The telephone records show traffic of this nature; 15 calls went from the appellant Campbell's telephone number (that was programmed into Mr. McElroy's cell phone) to Cayman Airways; 14 calls from Cayman Airways to Campbell's telephone number; 21 calls from Campbell to McElroy's telephone number; 56 calls from Campbell to Buchanan. There were 15 calls from Campbell's 9261 number to Buchanan and 14 return calls from Buchanan. There were 74 calls from appellant Williams' cell phone to McElroy's cell phone and 14 calls to Buchanan's cell phone; 260 calls from Williams' cell phone to Campbell's cell phone; 45 calls from Buchanan's cell phone to Campbell's; another 41 from Buchanan's cell phone to Campbell's and 72 calls from Campbell to Buchanan. There were 45 calls from Buchanan's home to Campbell and 56 calls from Campbell to Buchanan.

20. Police Officer Jonathan Evans testified that that he carried out investigations, commencing in August 2001, to determine how Clarence Buchanan was exporting ganja from the Owen Roberts airport via Cayman Airways. Over defence objections, the prosecution led evidence that on September 4, 2001, Officer Evans went to 58 Webster Estates, Grand Cayman, and was given information from local Police officers identifying the family home of Mark Campbell. Officer Evans said that when the Police party arrived at 58 Webster Estates it was obvious that several persons lived there. Appellant Mark Campbell was not present. The Police searched a room of that house and there Officer Evans found a "Martinizing Dry Cleaning Receipt" in the name of M. Campbell dated 26 October 2000. On this receipt was written the Tel. No. 916-1392. On that same day Officer Evans reviewed a cell phone recovered from the residence of the appellant Williams. He observed a telephone number that had been saved on that telephone to be "916-1392" and the name "Mark".

21. On September 4, 2001, another Police party, in which was Officer Vasquez, searched the residence of appellant Williams and seized two cell phones, (exhibit 6), from that residence. Officer Vasquez turned on one of these cell phones, and the word "SKIN" was displayed, together with a telephone number 345-916-1805. Officer Evans was present at the interview of appellant Williams on 9 September 2001. Appellant Williams was represented by Attorney Samson at that time. As appellant Williams, who was then in custody, was presented for the interview, he was greeted by Mr. Sampson in the words, "What you saying Skin". Appellant

Williams is alleged to have responded to this greeting but his actual words were not recalled.

22. Appellant Campbell was interviewed by Officer Evans on 22 March 2002. At the beginning of the interview appellant Campbell, who was then represented by Mr. Samson, is alleged by this Officer to have given his age, his date of birth and his address as "58 Webster's Estate, Walker's Road, George Town". To all other questions he responded that he had nothing to say. On 28 August 2002 when the appellant Campbell was again interviewed he gave the same home address. The other evidence as to the address of appellant Campbell was that taken from his Driver's Licence, which was seized at the time of his arrest. The address shown in the Driver's Licence was "Box 589 GT, Webster's Estates. GT, Grand Cayman".
23. At the close of the case for the prosecution each appellant elected to remain silent and to call no evidence.

#### **THE APPEAL OF THE APPELLANT CAMPBELL.**

24. Mr. Phipps submitted that in so far as the prosecution's case against appellant Campbell rested on the evidence of McElroy, that evidence was tenuous and unreliable. McElroy, he said, could give no dates as to when the alleged conversations with appellant Campbell occurred and in relation to the Blue Parrot meeting, appellant Campbell was not alleged to have made any verbal acknowledgment of the discussions. Mr. Darvill, he said, was incapable of

supporting the evidence of McElroy, as Darvill's evidence was confused and unreliable as to the telephone numbers attributed to the several participants, to wit, McElroy, Buchanan, Williams and Campbell.

25. The second main limb of Mr. Phipps' submission was that the prosecution relied on inadmissible evidence to the prejudice of the appellant Campbell. Evidence had been led that appellant Campbell occupied the room in which the dry cleaning receipt was found. That evidence was clearly hearsay. We accept Mr. Phipps' submission that what other Police Officers told Officer Evans concerning the residence of appellant Campbell was not admissible to prove that he occupied that room. That however, in our view, was not an end of the relevance of the dry cleaning receipt. It was further argued on behalf of appellant Campbell that the Computer Records were inadmissible.
26. The prosecution's reply was that the dry cleaning receipt was circumstantially related to appellant Campbell and it identified him with telephone number 916-1392 which said telephone number was found, with the name "Mark", in the possession of appellant Williams and confirmed that number 916-1392 was in contact with telephone number 916-1805. These bits of evidence, said Crown Counsel, were corroborative of the evidence of McElroy.
27. The admissibility of the computer records affect both appellants and we will deal with it when we come to deal with the appeal of the appellant Williams.

### **THE APPEAL OF THE APPELLANT WILLIAMS.**

28. Mr. Stevens submitted that the prosecution failed to provide a link between telephone number 916-1805, ("1805"), and the appellant Williams. The prosecution failed, he said, to prove (a) that appellant Williams was known as "Skin"; (b) that the evidence of McElroy was admissible when he said he received calls to his cell phone from appellant Williams and the number "1805" was displayed; (c) that the evidence of Officer Evans was admissible when he said that he recovered a telephone from Williams bedroom and it displayed the word "Skin" together with the number 916-1805 when switched on; (d) that the diagram produced by Mr. Darvill showing calls to and from 916-1805 based upon information he received from Cable & Wireless was admissible. Finally, that the learned trial judge misdirected the jury on how to treat alleged admissions based on accusations made in the presence of an accused person.

### **ADMISSIBILITY OF THE COMPUTER PRINTOUT**

29. *The Evidence Law (1995) Revision*, defined a computer to mean any device or combination of devices used together or in succession for the purpose of storing or processing information. Section 34 of that Law made admissible in civil proceedings a statement contained in a computer document any fact therein to

which direct or oral evidence would be admissible if the document had been compiled in the ordinary course of business by someone who had relevant information. The section 35 states expressly, inter alia, that:

“In any civil proceedings a statement contained in a document produced by a computer is, subject to Rules of Court, admissible as evidence of any fact stated therein of which direct oral evidence would be admissible.”

There then followed several conditions precedent to the use of such computer documents.

30. Counsel for the appellants submitted that there is no statute law in this jurisdiction to permit computer printouts to be admissible in criminal cases. Our attention was drawn to the debate on the Bill that introduced the *Evidence Law (1995) Revision* and counsel submitted that this statute did not bring any change to the introduction of evidence in criminal cases. The Legislature clearly intended to meet technological advances in the production, storage and reproduction of information and this can be discerned from a passage from the speech of the Attorney General who piloted the Bill through the Legislature and which was helpfully provided to us by Mr. Stevens. The Honorable David Barwick said in the second reading of the Bill:

“The Bill also provides for admission of new types of evidence which have been made

available by reason of mankind's rapid progress and technology. In particular, Sir, the passing of this Bill will enable the courts to receive as evidence such things as the computations of calculating machines, the output of computers and evidence recorded by recently invented means".

The Attorney General then went on to deal with special problems concerned with criminal procedure. It seems to us, beyond a peradventure, that the Legislature was in 1995 concerned with civil proceedings and not with criminal proceedings. This intention can be gathered, too, from the express provisions of section 34 which are confined to "civil proceedings"; section 34(1) which is introduced with the words "In any civil proceedings" and section 35(1) which, too, is introduced with the words, "In any civil proceedings".

31. When the *Evidence Act of Jamaica* was amended by Act 12 of 1995, provision was made in section 31F-(1) that "Subject to section 31(G), a statement in a document shall be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible if in relation to: (a) criminal proceedings...". The Jamaican statute was passed subsequent to the decision of the Court of Appeal in *R. v. Margaret Heron* (1983) 20 JLR 36. (Zacca, P., Rowe, JA, Ross, JA). In that case Mr. Phipps had successfully argued that in the absence of statutory authority, and in the light of the decided cases, a computer print-out of the details of telephone calls was not admissible as evidence of proof

of its contents. The Court relied on the decision of the House of Lords in *Myers v. DPP* [1965] AC 1001; [1964] 2 ALL ER 881. In that case evidence was led of the process by which chassis and engine numbers were compiled by a manufacturer of cars, then the cards on which the numbers were recorded were microfilmed and the cards were destroyed. Microfilms of the chassis and engine numbers were introduced into evidence. It was not then possible to identify the workman who wrote the numbers on the cards or who did the microfilming of the cards. The microfilm evidence was held to be inadmissible. Lord Reid, in the course of his judgment at p. 884 of the All England Report said:

“The reason why this evidence is maintained to have been inadmissible is that its cogency depends on hearsay. The witness could only say that a record made by someone else showed that, if the record was correctly made, a car had left the works bearing three particular numbers. He could not prove that the record was correct or that the numbers, which it contained, were in fact the numbers on the car when it was made. This is a highly technical point but the law regarding hearsay evidence is technical and I would say absurdly technical. So I must consider whether in the existing state of the law that objection to the admissibility of this evidence must prevail”.

32. Lord Reid went on to hold the evidence contained in the microfilms to be hearsay and to be inadmissible. It does not seem to us that the facts of the present case are any different from those in Margaret Heron or in *Myers v. DPP* and we must treat as hearsay the evidence of Mr. Darvill that was obtained from computer records. However, that is not an end of the use which may be made of the evidence of Mr. Darvill as the prosecution has advanced the proposition that computer generated evidence can be used as real evidence in the case for which proposition Mr. Wilson cited the case of *R. v. Spiby*, [1990] 91 Cr. App. R. 186.
33. Mr. Rudolph Miles testified that the computer from which he provided the list of customers of Cable & Wireless was working properly. Mr. Darvill said that he received the computer disk from which he made his charts from Mr. Miles. At that stage of the trial there was considerable discussion between counsel as to how the computer disk examined by Mr. Darvill came about and the case was adjourned for a statement to be obtained in that regard. Such a statement was obtained but no evidence was given as to its contents because certain written admissions were made by both defence counsel and form part of the record in the case. The admissions were that (a) Donald Buchanan had pleaded guilty in the Summary Court to the offences of attempting to export ganja from the Cayman Islands and possession of ganja, committed on August 23, 2001; (b) that Darrel Evans had been convicted of attempting to export ganja from the Cayman Islands; (c) that the copies of the record of previous conviction of Buchanan and Evans were accurate and that (d) *The continuity of all exhibits in this case is*

agreed.(emphasis added). It was that fourth admission of the continuity of all the prosecution exhibits that was addressed before us.

34. Counsel for the appellants argued that the agreement as to the exhibits meant only that there was no challenge to the chain of custody and that the defence were not thereby agreeing that the computers that produced the information from which the computer disk was made were working properly. The prosecution submitted, on the other hand, that the whole purpose of the exercise of obtaining the admission from the defence attorneys was to obviate the necessity of calling prosecution witnesses to provide the information that the conditions precedent required in section 35(1) of the *Evidence Act [1995] Revision*, had been complied with. For the sake of completeness, we set out section 35(1):

1. In any civil proceedings a statement contained in a document produced by a computer is, subject to Rules of Court, admissible in evidence of any fact stated therein of which direct oral evidence would be admissible if it is shown:

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store and process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person;

- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
- (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities”.

The expression “continuity” as used in the admissions made by counsel has no special legal meaning. It cannot be taken to refer only to establishment of a chain of custody. According to both the Oxford English Dictionary and Webster's Dictionary the word “continuity” imports “an uninterrupted connection or succession”. Webster also gives it the meanings “continuing without essential change” and “uninterruptedness of existence”. With reference to copies of electronic records of telephone connections made by the telephone company, the concept of “continuity” is capable of bearing the meaning that the record presented in court contains the same information originally recorded and meets all

of the above mentioned requirements. The expression must, of course, be given meaning according to the context in which it was used in this case.

35. The written admission of the defence counsel, followed by the manner in which the trial proceeded thereafter, was clear evidence that the trial Court understood that the defence was admitting that the disk handed over by Mr. Miles to Mr. Darvill was produced from computers which were being regularly operated by Cable & Wireless and satisfied all the section 35(1) conditions precedent to the use of information contained in the disk. In our view, any other conclusion would render counsel's admission in relation to the exhibits to be quite meaningless and the further conduct of counsel in relation to the exhibits, to be inexplicable.

36. In Spiby's case, referred to above, the Assistant Manager of a hotel had given evidence that a Nortex machine installed in a hotel room to record telephone calls made by guests had automatically recorded telephone calls made by the appellant and a print-out from that machine showed the destination of those calls. The defence objected to the admissibility of the evidence on the basis that it did not conform to the conditions of the *Police and Criminal Evidence Act (PACE)* of 1986. The pre-conditions in sections 68 and 69 of *PACE* are similar to Section 35(1) of the. The Court of Appeal (Criminal Division), *Evidence Act (1995) Revision* applied the decisions in **Castle v. Cross** [1985] 1 ALL ER 87; **Sapporo Maru (Owners) v. Statute of Liberty**, [1968] 2 ALL ER 95, [1968] 1 WLR 739; and **Minors and Harper**, [1989] 89 Cr. App. R. 102 and held that since the print-

outs were produced without the intervention of a human mind they were real evidence outside the scope of sections 68 and 69 of *PACE* and as there was evidence that the computer had been functioning correctly at the material time, the evidence had been properly admitted.

37. "Real evidence", was said by Simon, P. in the *Statute of Liberty* case, to be:

"evidence afforded by the production of physical objects for inspection or other examination by the Court. If tape recordings are admissible, it seems that a photograph of radar receptions is equally admissible – or, indeed, any other type of photograph. It would be an absurd distinction that a photograph should be admissible if the camera were operated manually by a photographer, but not if it were operated by a trip or clock mechanism. Similarly, if evidence of weather conditions were relevant it would affront commonsense if it were to say that those could be proved by a person who looks at a Barometer from time to time but not by producing a Barograph record. So, too, with other types of dial recordings. Again cards from clocking-in-and-out machines are frequently admitted in accident cases. The law is bound now to take cognizance of the fact that mechanical means replace human effort".

38. There was nothing in the evidence in this case to suggest that any human mind could have intervened in the recording, which tracked telephone calls from the

land lines and the cell phones of which Mr. Darvill gave evidence. On the principle of Spiby, we are of the view that the evidence of Mr. Darvill was admissible as real evidence.

#### **COROBORATIVE EVIDENCE IN RELATION TO APPELLANT WILLIAMS.**

39. It was submitted on behalf of the appellant Williams that the evidence of McElroy that when calls to his cell phone from appellant Williams came to him, the number "1805" was displayed was inadmissible as hearsay. Mr. Stevens further submitted that the display of the word "Skin" and the number "916-1805" when the cell phone found in the bedroom of Williams was activated by the Police officer was also hearsay and inadmissible. In support of his submission, Mr. Stevens said that the evidence of the computer display was computer derived material and its admission in evidence was not permitted by the Evidence Act (1995) Revision. We have held above that the decision in *R. v. Spiby*, (supra) is controlling and that the admissibility of such evidence does not depend entirely upon the Evidence Act of 1995.

40. It had been decided in *Patel v. Comptroller of Customs*, [1966] AC 356 that the list of exceptions to the hearsay rule cannot be extended judicially to include such things as "labels and markings". That was a case dealing with a breach of the Customs Act of Fiji and the issue was whether from the words " Produce of Morocco" inscribed on bags passing through the customs, the court could infer

that the goods contained in the bags were produced in Morocco. The Privy Council declined to draw such an inference. It said nothing was known of when and by whom the markings on the bags were affixed and as no evidence was called to prove any fact, which tended to show that the goods in fact came from Morocco, there was no evidence to prove the falsity of the declaration contained in the Customs form then being considered. In the end the Board decided that as the only evidence connecting the appellant to the crime was the hearsay evidence, his conviction on that basis was unsafe and unsatisfactory.

41. The prosecution has sought to distinguish Patel's case from the instant case before us. Mr. Wilson submitted, that following the decision of the Court of Appeal in *R. v. Lydon*, [1987] Crim. L. Review, 407, the evidence as to the print-out of the computer stored information, was circumstantial evidence that could be used as corroborative evidence in a material particular in the case against Mr. Williams. We agree.

42. The Court of Appeal in England, when faced with a problem very similar to that which is presented in this case, decided that hearsay evidence is of no value when the assertion is put in evidence in order to assert the truth of the fact asserted. It is otherwise, if the statement could be regarded as no more than a statement of fact, involving no assertion as to the truth of the contents of the document. The facts of *Lydon* are interesting. There was a robbery of a post office by two men in which a gun was used. The robbers escaped in a motorcar, which had been taken from the area in London, Neasden, in which the appellant

Sean Lydon resided, and the car was later abandoned on the grass verge. A gun was found about a mile from the scene of the robbery on the on the grass verge along the route that the get-away-car had traveled. Near the gun was found two pieces of paper on which were written the words, "Sean rules" and "Sean rules 85". The gun did not fit exactly the colour description given by an eye-witness to the robbery, however, the Court held that the writing on the pieces of paper were admissible in evidence as pieces of circumstantial evidence for the jury's consideration. Clearly, the evidence was not being tendered to show that "Sean" ruled anything or anywhere. But it was evidence, the Court held, that could form the pool of circumstantial evidence against the appellant Sean Lydon.

43. In our view the evidence provided by the display of the word "Skin" as also the numbers "916-1805" on the telephone found in the room of the appellant Williams was admissible evidence. The evidence of McElroy that he observed the numbers "1805" displayed when he received telephone calls from the appellant Williams was also admissible as real evidence and capable of corroborating the evidence of McElroy. \*

44. The evidence of the greeting of the appellant Williams as "Skin" by his attorney and his response thereto was objected by Mr. Stevens as inadmissible as hearsay. It seems clear to us that the appellant Williams was not being accused of a crime when he was greeted by his attorney. In its context, it was an affable greeting. Appellant Williams did not demur when he was addressed as "Skin" and in fact acknowledged the greeting and responded thereto. *R. v. Christie*, [1910] 2

KB 496, 5 Cr. App. R. 65 was a case in which the defendant was alleged to have acknowledged an accusation of crime made against him or with circumstances in which he would normally have been expected to make some response to the accusation. The Christie principle is, in our view, inapplicable to the circumstances of this case. The greeting of Attorney Samson and the uncritical response of the appellant Williams to the greeting, was a fact that could be properly left to the jury on the issue of identification of the person known as "Skin". In this regard the decision in *R. v. Lydon*, (supra) is also relevant.

#### **DIRECTIONS ON CORROBORATION.**

45. The learned trial judge gave quite impeccable directions on the definition of corroboration. No challenge to his general directions was mounted by counsel for the appellants. At page 414 of the Record, the trial judge directed the jury that the prosecution "seeks to find its corroboration in the evidence of phone records and that is why they are of primary importance for you to evaluate and make what you will of the evidence you received". In our view the evidence of Mr. Darvill, gathered from the telephone records, was admissible evidence and capable of amounting to corroboration of the evidence of McElroy.
46. In giving his directions on the need for corroboration of the evidence of an accomplice, the judge properly directed them that if they did not find that there was corroborating evidence, they could convict on the evidence of McElroy alone and he gave a warning in these terms:

"Now it is the traditional role of the judge in every case in which an accomplice gives evidence to say to the jury that there is a special need for caution before operating on the evidence of an accomplice. Having warned yourself of that danger, and therefore analyzed his evidence with the greatest care, you are, of course, you are entitled to do so like any other witness. You may say, I warn myself that he has been untruthful; I warn myself that he was involved in this crime, he is by his own account a criminal. But nevertheless, having given myself that warning, I accept his evidence. That is what you are here to decide, whether you do so or whether you do not. That is exactly what your job is. But, ladies and gentlemen, it is customary to go on to add that it is considered unsafe for a jury to convict on the evidence of an accomplice alone, without corroboration. But, as I say, having warned yourself of that danger, you are entitled to do so".

47. We were invited by the prosecution to apply the proviso and to uphold the conviction if we were of the view that inadmissible evidence had been left to the jury as capable of amounting to corroboration. It is quite unnecessary for our decision, for the reasons stated herein, for us to make a decision on the proviso.

