1983

JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NO: 1/83

BEFORE: The Hon. Mr. Justice Zacca - President
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Ross, J.A.

R. v. MARGARET HERON

F.M.G. Phipps Q.C., instructed by J.H.N. Forrest for Appellant

W. Alder for Crown

January 26,27,28, & March 24, 1983

ROWE J.A.

The Jamaica Telephone Company Limited provides telephone services on contract to owners or occupiers of premises in Jamaica. These services include the provision of the telephone instrument, the wiring of the premises and the wiring outside the premises which wiring terminate in the telephone exchange. There is a piece of equipment at the telephone exchange which acts much like a computer and records automatically on magnetic tape in respect of long-distance and overseas calls the telephone number from which the call originates, the number called, the time and duration of the call and the date thereof. The magnetic tape is removed from the Recorder and sent to the computer centre in New Kingston where it is read by the computer under programme control and the information is stored on magnetic discs. The magnetic tape is erased and returned for further use in the Recorder. The process is completed when the customer's master record is compared with the information on the magnetic disc and the customer is billed. But there have been occasions when the telephone number or numbers from which the telephone calls originated, have been unassigned to any particular customer. In those circumstances the computer provides a print-out which discloses the type of call, the originating telephone number, the number called, the destination of the call and the charges that are applicable. One such print-out which was in the possession of Mr. Spence the company's

commercial manager on July 3, 1980 revealed the most startling information. It purported to show that from telephone number 926-7195 were made overseas and long distance calls totalling more than 2,800 over a period April 4, 1979 to July 3, 1980 for which the total charges were $58,938.92. And not one penny of these charges had been paid principally because the telephone number 926-7195 had not been assigned to anyone.

Mr. Spence along with Mr. Crawford the Customers' Repair Supervisor set out on July 3, 1980 to trace the physical location from which telephone calls on 926-7195 originated. First, Mr. Crawford placed a signal in the Central Office Exchange of the Telephone Company on a particular cable pair which at the Exchange bore the number 926-7195. Then he used special test equipment to follow that signal and he was led to 4 Altimont Crescent, St. Andrew where there is a set of apartment buildings and between two of these buildings he checked a telephone terminal which had hundreds of cable pairs. He identified the signal which he had under investigation and he traced the signal to an "electric room" at the southern section of No. 4 Altimont Crescent, and observed that interior wires connected to the identified cable pair led to apartment No. 8. The police were summoned.

Mr. Crawford, other telephone company employees, and the police were admitted into apartment No. 8 by the appellant, Margaret Heron. In the living room was a green telephone type K500 which bore the number 926-7754. Mr. Crawford lifted the receiver and identified the signal which he was looking for throughout the search. He then dialled the Central Office and asked someone to identify and verify that number 926-7195 was the telephone number he was then using. He further asked the person to speak to him on the number. After a few seconds while Mr. Crawford was still holding on the line the person on the other end of the line spoke and told him something. He instructed this person to call him back on 926-7195. About 10 seconds later the telephone rang and the same person was on the line.

Further investigations revealed that there was a white telephone in the bedroom type K500 bearing the number 926-5781. It too emitted the signal, the object of Mr. Crawford's search. The telephones in both rooms

rang at the same time and Mr. Crawford concluded from his investigations that although the two telephones bore different numbers actually inscribed on them, they were actually extensions of the same telephone number. The appellant who admitted that she was in charge of the telephone in the apartment was later arrested and charged under the Public Utilities Protection Act for that she did on divers dates between April 4, 1979 and July 3, 1980, trespass upon the Works of the Jamaica Telephone Co., Ltd. After a protracted trial, she was convicted on October 26, 1982 and sentenced to six months imprisonment with hard labour.

The prosecution's case rested on the evidence of Mr. Crawford, the contents of the appellant's diary, the appellant's admission that she was in charge of the telephone and upon the computer print-out. At trial and again before us the defence has contended that the portions of Mr. Crawford's evidence which related to the conversations which he had with some unidentified person at the telephone company which assisted him in verifying telephone number 926-7195 were inadmissible being hearsay as that person was not called to testify as to what he did in the Central Exchange. It is beyond argument that a tribunal of fact ought not to draw an inference which is in direct contradiction to the sworn evidence and on that principle the learned resident magistrate was bound to give weight to Mr. Crawford's answers in cross-examination when he said:

> "Unless the person at the company's office confirmed something on the lines with me (while I was testing) I could not be sure of the identity of the circuit under investigation."

In the course of his test Mr. Crawford relied partly upon his recognition of the implanted signal and partly upon what he was told by the technician from the Central Exchange. What he was told formed an important part of his investigations, indeed, it was the final factor on which his judgment was formed, but for the purposes of a trial the only person competent to give evidence as to what was said, was the maker of the statement and he was neither identified nor did he testify. It was an important aspect of the

case for the prosecution that there should be a positive identification of the telephone number which was activated when a call was dialled from the telephone instruments at the appellant's apartment. Stripped of the inadmissible hearsay evidence, the position was that the witness upon whom the prosecution relied could not be sure of the identification of the telephone number 926-7195 as the one so activated. That situation could have been corrected by more efficient investigation or more astute prosecution, but alas it was not.

Of much greater significance is the attack mounted by Mr. Phipps on the admissibility of the computer print-out, Exhibit 5, which was tendered to prove that a particular telephone line was used and as a result certain monthly charges were incurred. Earlier in this judgment brief reference was made to the system used by the telephone company to produce the computer print-out. It is necessary to give in a little more detail the steps taken at the computer centre to obtain the computer print-out. Diane Smith, the System Development Supervisor of the Data Processing Department of the Jamaica Telephone Company in giving evidence of the system employed by the Telephone Company said that the operator would use a key-board to give instructions to the computer, would load magnetic tapes, load computer punch cards, load paper in the printers and load the magnetic disc modules. She did not herself perform any of these functions in relation to Exhibit 5 nor could she tell who did the programming. Neither did she as a matter of routine, check all reports leaving her department on a daily basis. At its highest Diane Smith was relying on the infallibility of the system which was used by the telephone company to record the outgoing calls, to programme the computer, and to the accuracy of the performance of the computer itself.

The challenge to the reception into evidence of the computer print-out, was, that it was in breach of the hearsay rule. To test this challenge, reference must first be made to the decision of the House of Lords in Myers v. D.P.P. (1965) A.C. 1001. There the appellant was charged with receiving stolen cars and conspiracy to defraud the purchasers of the stolen cars. In order to establish that the cars admittedly sold by the appellant

were the stolen cars disguised, the prosecution called as witnesses, employees of the manufacturers of the cars, who produced records compiled by various workmen as the cars were made purporting to show the engine, chassis and-cylinder block numbers which had been recorded on a card by employees of the manufacturers as the cars were being originally made. These documents were held to be inadmissible as they did not fall within any known exception to the hearsay rule. The House of Lords decided that a trial judge had no discretion to admit a record in a particular case on the ground that he was satisfied that it was trustworthy and that justice required its admission; as that would be an innovation on the existing law which decided admissibility by categories and not by apparent trust-worthiness of particular documents.

The decision in Myers v. D.P.P. supra has been followed in Jamaica in at least two cases. In 1969, the Court of Appeal decided R. v. Homer Williams reported at 11 J.L.R. 185. There the trial judge admitted as evidence in proof of the identification of a bicycle, the testimony of a witness who identified the bicycle by comparing the serial number etched on the frame of the bicycle with the serial number on the exporter's invoice, which invoice had not been prepared by the witness himself. This evidence was held inadmissible on appeal as the witness had neither made a physical check of the serial number of the bicycle against the invoice nor witnessed such a physical check. After referring to the judgment in Myers v. D.P.P. supra Shelly J.A. said at page 187:

> "The law was then in England what it is in Jamaica today."

Then came R. v. Paulette Williams R.M.C.A. 125/79 (unreported) in which the judgment was delivered on December 19, 1979. Micro-films of three cheques were produced and received in evidence and it was held that they were received in breach of the hearsay rule. In the course of the judgment I said:

> "A micro-film of a cheque is neither a book nor an entry in a book. The cheque itself would not be regarded as one of the books of the bank. In our view, Part II of the Evidence Act does not provide statutory basis for the reception into evidence of micro-films. We do not expect science to be ahead of the legislator but an inconvenience so glaringly demonstrated in 1964 still awaits rectification in Jamaica."

The law of Jamaica in relation to the hearsay rule is the same today as it was in 1969, notwithstanding the decisions in R. v. Homer Williams 1969 and R. v. Paulette Williams ten years later.

In Myers v. D.P.P. there was every likelihood that the persons employed to compile the records in the ordinary course of their business faithfully and accurately made the records. After a lapse of years it might be impossible to identify the persons who made the physical records and if one were to rely on a common sense approach one would probably conclude that the contents of the records could be relied upon to prove their own truth. But that is not the law. As Professor Cross says in the Third Edition of his Book on Evidence p. 453:

> "Express or implied assertions of persons other than the witness who is testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted."

The English Parliament by the Criminal Evidence Act 1965 sought to neutralise the effect of the decision in Myers v. D.P.P. and to render admissible in certain circumstances, a document which is or forms part of, a record relating to any trade or business and compiled, in the course of that trade or business from information supplied by persons who have or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply. This Act of 1965 although sufficient to correct the situation in cases similar to that which arose in Myers v. D.P.P. has been found to be unhelpful to a prosecution which depended upon a computer print-out. Stewart Pettigrew was convicted of burglary, he having been found in possession of three £5 notes shortly after the burglary of a house from which £650 in £5 notes had been stolen. At his trial the prosecution tendered in evidence a print-out from a computer operated by an employee of the Bank of England. It was held on appeal that

an operator of a Bank of England computer print-out machine which checks bank notes automatically and which has the dual function of separating out the defective notes and recording their numbers and also of recording the serial numbers of the notes at the beginning and end of each bundle of £5 notes, cannot be said to have personal knowledge of what emerged from the machine, namely, the print-out, recording the serial numbers of every note in the bundle. As a consequence even on the Criminal Evidence Act of 1965 that evidence was inadmissible and Pettigrew was acquitted - R. v. Pettigrew (1980) 71 Cr. App. R. 39.

The operation of an automatic system was not in the contemplation of the English legislators when the Criminal Evidence Act of 1965 was passed. This appears clearly from the differences between that Act and the Civil Evidence Act of 1968 which in Section 5 specifically deals with the admissibility of statements produced by computers in civil proceedings. The Criminal Law Revision Committee in England in its Eleventh Report of June 1972 made a review of the law of evidence in Criminal cases and dealt specifically with the rules relating to the admissibility of hearsay evidence. Section 35 of the Draft Bill which accompanied the report contained provisions for the admissibility of statements produced by computers of which direct oral evidence would be admissible if certain stated conditions were satisfied. That Report has not yet been translated into law, but litigants in England who sue in the civil Courts now have the assistance of the Civil Evidence Act of 1968 which permit under controlled circumstances, the introduction into evidence of computer produced statements. It may very well be that major commercial inconvenience will be suffered by the Jamaican Community if timely legislation is not enacted to provide for the admissibility in evidence of documents produced by computers.

To return to the instant case, it must be highlighted that without the computer print-out there would have been nothing to connect the telephone numbers in the appellant's diary with any user by her of the telephone. Put another way, the matter rested thus. There was a page

in the appellant's diary on which was recorded no less than fifteen overseas telephone numbers. When the learned resident magistrate compared the diary numbers with those appearing on the computer print-out he found that the diary numbers appeared hundreds of times on the computer print-out and it was not unusual for the same overseas telephone number to appear on the computer print-out several times on any given day. If the computer print-out could be admitted in evidence it would be overwhelming proof that whoever was making those indiscriminate calls was a party to a "racket", a conspiracy to defraud. It was not surprising then that the learned resident magistrate made a finding of fact that the appellant's diary contained several local and overseas telephone numbers which were repeatedly recorded in the print-out, Exhibit 5, and further that the appellant made or was party to the making of inordinate, unauthorized and unpaid for use of telephone line 926-7195 over the relevant period. But it was solely on the basis that he found that the appellant had made massive unauthorized and fraudlent use of the unassigned line 926-7195 that he drew the inference that the appellant was a party to the unauthorized and illegal connection of the said line to telephone instruments in apartment No. 8 at 4 Altimont Crescent, and consequently guilty of a trespass upon the works of the telephone company.

Beyond a peradventure, therefore, if the computer print-out had not been admitted into evidence, there would have been insufficient evidential material on which the learned resident magistrate could have based his finding of fact on which to ground guilt, and in the absence of statutory authority and based on the decided cases, the computer print-out was not admissible in proof of its contents.

The appellant must therefore have the benefit of the technical rules of evidence. It was not sufficiently established by admissible evidence that the two telephones in the appellant's apartment were connected to telephone line bearing the number 926-7195. Neither was it sufficiently established by admissible evidence that from telephone bearing number 926-7195 any overseas or internal long distance calls were made. This seemingly unmeritorious conclusion is arrived at because the computer-print out was not admissible in evidence and the technician at the company's office who verified the number which Mr. Crawford dialled

was not a witness in the case and curiously enough Mr. Crawford could not detect any tampering with the telephone wires which connected the lines in the "electric room" on premises 4 Altimont Crescent with the telephone in the appellant's apartment.

Accordingly the appeal is allowed, the conviction quashed and the sentence set aside.