5th BILETA Conference
British and Irish Legal Technology Association

Computer Printout as Admissible Evidence A Critical Legal Study of Section 24 of The Criminal Justice Act 1988

Solomon E. Salako

Keywords: The hearsay rule - Application to Computer Printout - A Critical Analysis of various provisions especially section 24 of the Criminal Justice Act 1988 - Suggestion for Reform.

Abstract: Various attempts to harmonise the principles of law relating to the admissibility of computer Printout and other documentary evidence in criminal proceedings have not been entirely satisfactory The object of this paper is to unmask the countervailing considerations articulated by judges, legislators and law reformers in adapting the law of evidence in criminal proceedings to the realities of contemporary business practice and assess critically the statutory provisions in section 24 of the Criminal Justice Act 1988.

Introduction

> "The effect of the use of computers cannot be left undebated and the need for constructive criticism of the interface between computer industry and the judicial system is apparent for our system of justice to work The gaps... in the law caused by out-of-date statutes should be noted and filled at the earliest opportunity by Parliament"
> (Kelman and Sizer 1982; Foreword)

It is an irrefutable fact that the revolution in microelectronic technology resulting in advanced methods of capturing, storing, retrieving, receiving and analysing information by computers - highlighted by Kelman and Sizer - has not been fully assimilated into the English law of evidence. The admissibility of computer Printouts in criminal proceedings is still inextricably intertwined with the marcescent hearsay rule formulated in the fifteenth and the sixteenth centuries (Wigmore 1940 (Vol. 5): 9-11). The modern - and generally acceptable statement of the rule - is as follows:

> "Express an implied assertions of persons other than the witness who is testifying, and assertions in documents produced to the court when the witness is testifying, are inadmissible as evidence of the truth of that which was asserted."
> (Cross 1967: 387)

This rule formulated in an agricultural society to deal with "the practice of the jury's obtaining of information by consulting persons not called into court" (Wigmore) has been tinkered with, qualified and riddled with exceptions (but not jettisoned) in an attempt to adapt it to the needs of a technological society.

Historical Excursus

As far back as the middle of the 1500s in Fenwick's Trial the first attempt to reconcile the reception of valuable information and the fundamental right of the pensioner to fair hearing was made. In that case, it was held that the personal production of those who had already made statements upon oath was required in treason trials. So obnoxious was the practice of the jury in obtaining hearsay information that by the middle of the 1600s the impropriety of using hearsay statement by a person not called was detested and the statement excluded for the simple reason which Lord Chief Justice Goddard succinctly stated:

> "... the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury."

However, the public interest in the administration of justice led to the creation of several exceptions under which hearsay evidence were admissible. An important exception to the hearsay rule was the admission of public documents. Entries in registers of births, deaths and marriages have been rendered admissible if "the person who makes the entry does it contemporaneously or if his own knowledge, but depends on the public duty of the person who keeps the register to make such entries after satisfying himself of their truth. This requirement of duty and the tasks of gathering and recording of the information be performed by the same person osmotically permeated juristic thinking and was adopted in formulating the rules governing the reception of computer Printouts.

To tackle the injustice of mechanically adopting the rule against hearsay - the archaic fendal rule that the document must be compiled by the person with knowledge of the information was pressed into service. In Myers v. D.P.P the accused took part in a conspiracy involving buying wrecked cars with their log books disguising stolen cars so as to make them conform with the log books of the wrecked cars and selling them as renovated wrecks. The prosecution tendered microfilms of the manufacturers, cards (since destroyed) filled in by workmen showing the numbers cast into the cylinder with those on the cylinder blocks of the cars stolen. The majority of the House of Lords held that the admission of the records was a breach of the rule against hearsay. Lord Reid said:

> "...the entries on the cards were assertions by unidentifiable men who made them that they had entered numbers which they had seen on the cars."[5]

To plug the gap through which the accused was exonerated, the Criminal Evidence Act 1965 was enacted. The Act provides:

> "(1) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to ESTABLISH that fact shall, on production of the document, be admissible in evidence of that fact if- (a) the document is, or forms part of, <u>a record</u> relating to any trade or business and <u>compiled</u>, in the course of that trade or business, from information supplied (whether directly or indirectly) <u>by persons who have, or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply</u>; and (b) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, as cannot with reasonable diligence be identified or found, or <u>cannot reasonablv be expected (having regard to the time which elapsed since he supplied the information and to all the circumstances) to have any recollection of the matter dealt with</u> in the information he supplied".
> (Emphasis supplied).

Cutting away the frills, a document is admissible if the following desiderata co-exist:

i) it is a record compiled by persons who have or are reasonably supposed to have personal knowledge of the matters; and
ii) that such persons are dead, beyond the seas or unfit to attend; or
iii) cannot be reasonably expected to have any recollection of the matters dealt with.

Let us consider these desiderata in a lexical order,

i) Record compiled by persons who have or are reasonably supposed to have personal knowledge of the matters

In R.v. Wiles[6] the defendant, a cashier at a self-service petrol station was charged with stealing money given to him in payment either for goods supplied by the petrol station shop or for petrol supplied by the automatic petrol pumps. The prosecution contended that the record made by the defendant at the beginning and end of his work shift was admissible as evidence as to the quantity of petrol supplied by the automatic petrol pumps by virtue of section 1 (1) of the Criminal Evidence Act 1965. Judge Allen at the Kingston Crown Court held that the record was not a record compiled from information supplied by a person and that the information causing the meter reading to come into existence was supplied, directly by the petrol pump. Again, in R. v.Wood[7] certain types of processed metals were stolen in transit. In order to prove that the metals which the defendant had handled had formed part of the stolen consignment, records in the processors, possession of the chemical composition of the consignment consisted of copies of figures from computer printouts supplied by chemists. The figures were composed to establish that the handled metals and those retained from the stolen consignment had the same composition. It was held that the printouts were inadmissible under section 1 (1) of the 1965 Act because they had been prepared for the purpose of the prosecution of the defendant and not in the course of trade or business a required by subsection 1 (a), above.

ii) That the person is dead. beyond the seas or unfit to attend

In R. v. Patel[8] the defendant was charged with assisting the illegal entry of A. into the United Kingdom. The Crown called an immigration officer who gave evidence that he had examined the record which showed that at the material time A. was an illegal immigrant. The Court of Appeal held that the officer responsible for the compilation of the record should have been called to give evidence. According to Bristow. J, "the Home Office records relied on by the Crown in this. case are hearsay, just as were the commercial records in question in Myers v. Director of Publication Prosecution. "[9]

iii) That the person who recorded the information cannot be reasonably expected to have any recollection of any matter dealt with

In R. v. Ewing[10] the defendant was charged with theft, forgery and valuable securities and uttering to forged documents. The trial judge held, inter alia, that a computer Printout relating to the defendant's bank account was admissible under section 1 of The Criminal Evidence Act 1965. On appeal, the Court of Appeal held that the trial judge was entitled to hold, as he did, that the computer operator, the person who had the information, could not reasonably be expected to have any recollection of it.

From the foregoing analysis it is crystal clear that the Criminal Evidence Act 1965 does not cover situations where the record is automatically produced as in Wiles or where a computer is used to solve problems as in Wood. This leads us to a pertinent question.

> Is it necessary to rely on the Criminal Evidence Act 1965 when we can equally press the Banker's Books Evidence Act 1879 into service, at least in some cases?

Professor J.C. Smith consistently argues that it is not necessary to rely on the 1965 Act and that the piece of evidence in Ewing is admissible by virtue of the Banker's Books Evidence Act 1879 (Smith 1981: 387-390; 1983: 473). This opinion is based on a literal interpretation of section 3 and 9 of the 1879 Act provides:

> "Subject to the provisions of this Act, a copy of an entry in the banker's book shall in all legal proceedings be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded."

Section 9 of the Act provides:

> "... banker's books include ledgers, daybooks, cash books and all other books used in the ordinary business of the bank."

As suggested by Professor Smith in his commentary (Smith 1983: 473), a computer Printout may he included on an ejusdem generis interpretation. He cited Barker v. Wilson "where Bridge L.J. said that "books" included "any form of permanent record kept by the bank of transactions relating to the bank's business, made by any of the methods which modern technology makes available" and concluded:

> "This dictum is clearly wide enough to include the computer Printout. The matter is now part beyond all doubt by a new section 9 (2) of the 1879 Act, substituted by the Banking Act 1979, Sched. 6, and brought into force on February 19, 1982. Expressions in this Act relating to 'bankers' books' include ledgers, day books, cash books, accounts books and other records used in the ordinary business of the bank, whether these records are in written form as are kept an microfilm, magnetic tape or any, form of mechanical, or electronic data retrieval mechanism."

It is submitted, with due respect, that a contextual or purposive approach not only takes cognizance of other statutes in pari materia but also the mischief which the exclusion of certain evidence emanating from the computer sought to remedy[12]. Computer printouts are defective and excluded for the following reasons: (i) the person making the record does not necessarily have first-hand knowledge of the information recorded, (ii) even where he has first-hand knowledge of the information he may not understand it, (iii) the information might have passed through a number of hands and series of computers and (iv) even where the person has first-hand knowledge he may only retain a memory of the information as it is necessary to store it in a computer[13].

For these reasons it was necessary to rely on the 1965 Act. But this Act has been superseded by other statutory provisions which we shall consider.

Sections 68 and 69 of The Police and Criminal Evidence Act 1984

Under section 68 of and SCHEDULE 3 to the Police and Criminal Evidence Act 1984, a statement is admissible as evidence of any fact stated therein if the following conditions are satisfied:

> i) the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person who had or may reasonably be supposed to have had personal knowledge of matters dealt with; and
> ii) the supplier of the information is unavailable or not to be called to give evidence for reasons set out in section 68(2).

The wording of this section is wide enough to cover computer printouts of companies, building societies and banks. These printouts must comply with section 69 of the Act which provides that computer evidence is inadmissible unless it is shown that the computer was operating properly and was not likely to have produced an inaccurate statement because of improper use. In R. v. Minior. R. v. Harper[14] at separate trails of M and H the Crown sought to rely on the evidence of computer printouts. M was charged with attempting to obtain money from a building society by using a passbook in which entries purporting to show deposits totalling £510 were false. H. was charged with handling stolen goods by travelling on a bus with a stolen season-ticket. In both cases the trial judge held that the requirements of section 69 of the Police and Criminal Evidence Act 1984 regarding the accuracy and fumctioning of the computers which, produced the printouts had been satisfied. On appeal, Steyn J held that the computer printout of M's personal account showing the last four entires in the passbook were not recorded in the computer was rightly admissible as it was tendered by an auditor who had regularly worked with this particular computer for fourteen years. In H's case, the entries relied upon were transferred from a batch of cards to several computers and presented by a revenue protection officer who was not a computer technologist and it was held that the trial judge erred in admitting this evidence.

In the course of his judgement, the countervailing considerations were articulated by Steyn J in the following passage:

> "The law of evidence must be adapted to the realities of contemporary business practice. Mainframe computers, minicomputers and microcomputers play a pervasive role in our society. Often the only record of a transaction, which nobody can be expected to remember, will be in the memory of a computer. The versatility, power and frequency of use of computer will increase. If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) will in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. The phenomenon of a 'virus' attacking computer system is also well established. Realistically, therefore, computers must be regarded as imperfect devices[15].

The need to strike the right balance between the flindamental right of the accused to fair hearing and the admissibility of evidence electronically produced which are sometimes defective is illustrated by the following cases decided under the Road Traffic Act 1972. In Owen v Chesters [16] it was held that if the prosecution was to rely on the measurement produced by an intoseimeter, its prosper calibration must be established. In Morgan v Lee[17] it was held that a police officer could refresh his memory from the result of breath analyses which he had seen in the display of an intoseimeter. More recently, in Sophocleous v Ringer[18] the defendant, a motorist, was arrested and at a police station provided a specimen of blood for analysis pursuant to section 8(6) of The 1972 Act as substituted. At the Metropolitan POLICE Laboratory the analyst made four separate analyses using a computer which printed the results in forms of a graph. The defendant argued that in view of section 69 of the Police and Criminal Evidence Act 1984 and in the absence of proof of the accuracy of the computer, the evidence was inadmissible. It was held that since the analyst gave evidence refreshing her memory from the figures produced section 69 was inapt in the circumstance.

Section 24 of the Criminal Justice Act 1988

Section 24 of the 1988 Act repealed section 68 of the Police and Criminal Evidence Act 1984 and laid to rest the foundation requirement that the Printout must be compiled by a person "acting under a duty". The Printout is admissible by virtue of section 24(1) if the following desiderata are satisfied:
.

> i) the document was created as received by a person on the course of a trade, business,

profession or other occupation, or as the holder of a paid or unpaid office; and
ii) the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with).

Sub-section 4 adds a proviso that the requirements of section 23 (2) of the Act must also be satisfied, viz-

a) that the person who made the statement is dead or by reason of his BODILY condition unfit to attend as a witness;
b) that
  i) the person who made statement is outside the United Kingdom; and
  ii) it is not reasonably practicable to secure his attendance; or
c) that all reasonable steps have been taken to find the person who made the statement but that he cannot be found.

From a critical legal perspective the position of the law after 1988 may be summarised as follows. First, the feudal anachronism, namely, the requirement that the document must be compiled by a person "acting under a duty" has been jettisoned. There is, however, a requirement that the document "was created or received by a person in the course of his profession, trade or business ... and [that] the information ... was supplied by a person ... who had personal knowledge of the matters dealt with." After 1988 the computer records must also satisfy the provisions of section 69 of the Police and Criminal Evidence Act 1984.

Second, computer printouts in criminal proceedings are admissible as documentary evidence under the statutory exception to the hearsay rule. In the cases we have considered the duality's of electronically recorded evidence has been highlighted: when produced to show that the matter is recorded it is original evidence but when such evidence is tendered as truth of content, then the recorded evidence is hearsay (Sharpe 1989, p.18). This duality's is the underlying principle in the decisions from Wood: to Minor and Harper. In so far as the printouts tendered in these cases were tendered as evidence of the truth of the information dealt with they have rightly been regarded as documentary evidence and their ADMISSIBILITY depended on whether they satisfied one of the statutory exceptions to the hearsay rule. In Ewing the printout was admissible because it satisfied the provisions of section 1 of the Criminal Evidence Act 1965 and in Minor and Harper admissibility depended on sections 68 and 69 of The Police and Criminal Evidence Act 1984. These statutory provisions are the framework delimiting the scope of the adjudicatory and discretionary powers of judges. Within this framework principle and counterprinciples jostle for recognition and are reconciled by judges.

On the one hand, the ends of justice must be served by ensuring that the prisoner "should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury" bearing in mind that computers occasionally malfunction and that the phenomenon of a 'virus' attacking a computer system is well-established. On the other hand, "if computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) will in practice be immune from prosecution".

Third, where computers are used to perform functions of calculation as in Sophocleous v. Ringer no question of hearsay is involved and section 69 of the Police and Criminal Evidence Act 1984 is inapt in the circumstances. This is only the case where the figures are used to refresh the memory of the witness otherwise, it is hearsay on the authority of Wood[21]

Fourth, there is no statutory definition of the circumstances in which a business document is prepared for the purposes of criminal proceedings or criminal investigation[22].

Fifth, the foundation requirement in section 24(1) of the Criminal Justice Act 1988 purged of its feudal anachronism is still a major but slippery plank in the prosecution case.

Conclusion

In civil proceedings, the hearsay rule has been eroded to the point of extinction by the Civil Evidence Acts 1968 and 1972. In criminal proceedings, attempts have been made by the legislature in 1965, 1984 and 1988 to adapt a rule formulated in an agricultural society to a technological society. Whilst it is pertinent to mention that such an adaptation has been accomplished in the law of tort with little statutory intervention[23], the social engineering effectuated by legislators by requiring the persons creating or receiving the information in the printout to have satisfied certain conditions and the requirement that the computer system must be functioning properly recognises the limitations of the computer system.

It is in the interest of justice that the defendant should be given a fair trial. It is equally in the interest of justice that offences involving dishonesty are not immune from prosecution simply because computer printouts are inadmissible. It has been suggested that the common law rule against hearsay should be reformulated.[24] A simple alternative is to remove documentary evidence from the marcescent hearsay rule in criminal cases and render it admissibly subject to a discretion similar to that vested in judges by section 78 of the Police and Criminal Evidence Act 1984 to exclude such evidence if it is prejudicial to the case of the defendant.

Footnotes

1 13 How. St. Tr. 537

2 R.v.Clewes (1953)37 Cr. App. R. 37

3 Per Fry L.J. in Lyell v.Kennedy (1887)56 L.T. 64 see also Sturla v.Frescia 43 L.T. Refs. N.S. 209; 5 App. Case. 23, Doe d. France v. Andrews 5 Q.B. 759 and Doe d. Warren v. Bray (1828) 8B

4 [1965] A.C. 1009; 48 Cr. App. R. 348

5 Atp. l022; pp. 362-363

6 [1982] Crim.L.R. 669

7 (1983) 76 Cr. App. R.23. see also R.v.Pettigrew (1980) 71 Cr. App. R. 39 where the defendants were charged with burglary and found in possession of three new £5 notes. It was held that the number of the rejected notes could never be in the personal knowledge of the operator because they were recorded by the operation of the machine

8 [1981] 3 All E.R. 94

9 Supra,n.14

10 [1983] 2 All E.R. 645; [1983] Crim. L.R. 472

11 [1980] 2 All E.R. 81

12 This approach was discussed by Viscount Simonds in A-G v. Prince Ernest August Hanover [1957) A.C. 436 at 467

13 For a discussion of the defects of computer evidence, see Mawrey and Salmon 1988; Chp.9

14 [1989]2All E.R. 208

15 At p. 210

16 [1985] R.T.R. 191

17 [1985] R.T.R. 409

18 [1988] R.T.R. 52

19 See note 2, supra

20 per Steyn J. in R. v. Minor and Harper [1989] 2 All E.R. 208 at 210

21 Supra, n.7

22 No statutory definition in Section 24(4) as in section 23 (3)(a)(b) dealing with first-hand hearsay

23 See, for example, Donoghue v. Stevenson [1932] A.C. 562 and the avalanche of cases on negligence

24 "Phipson On Evidence", First Supplement to the 13th edn., para. 16-12

References

CROSS, R. (1967) *Evidence,* Butterworths, London

KELMAN, A. AND SIZER, R. (1982) *The Computer in Court* (Guildford and King's Lynn); foreword by Douglas A. Eyeions

MAWREY,R. AND SALMON, K. (1988) *Computer and the Law,* BSP Professional Books, Oxford

SHARPE, S. (1989) *Electroncially Recorded Evidence,* Fourmat Publishing, London.

SMITH, J.C. (1981) *Commentary on R. v. Ewing,* Criminal Law Review

SMITH, J.C. (1983) *The Admissibility of Statements by Computer,* Criminal Law Review

WIGMORE, J.H. (1940)A *Treatise On the AngloAmerican System of Evidence,* Vol.5