Neutral Citation Number: [2024] EWCA Crim 1320

Case No: 202400846 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2024

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE MARTIN SPENCER
and
MRS JUSTICE CUTTS

- -

Between:

THE KING	**Applicant**
- and –	
"AEB"	
"BNX"	
"BTD"	
"BXY"	
	Respondent

- -
- -

Louis Mably KC (instructed by **CPS Appeals and Review Unit**) for the **applicant**
Christopher Convey (assigned by **the Registrar of Crimnal Appeals**) for **"AEB"**
Nicholas Fooks assigned by **the Registrar of Criminal Appeals** for **"BXY"**

Hearing dates: 9 October 2024

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Approved Judgment

This judgment was handed down remotely at 10:30 a.m. on 1 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Holroyde:

1. The Registrar has referred to the full court this application by the prosecution for leave to appeal against a ruling by a judge in the Crown Court that certain evidence was inadmissible hearsay.

2. For convenience, we shall refer to the applicant as "the prosecution" and to the four respondents (the defendants in the proceedings in the Crown Court) as "the defendants".

3. The defendants are jointly charged with a money laundering offence, to which they have all pleaded not guilty. They have appeared before the Crown Court but their trial has not yet begun.

4. At the conclusion of the hearing we stated our decision that the prosecution be granted leave to appeal, that the appeal be allowed, and that proceedings may continue in the Crown Court against all four defendants. We indicated that we would give our reasons in writing at a later date. This we now do.

Reporting restrictions:

5. We have reflected on the submissions helpfully made to us at the hearing as to whether reporting restrictions should apply to this judgment. The issues raised in this hearing are likely to be of relevance in other cases. The hearing was, however, subject to the reporting restrictions imposed by s71 of the Criminal Justice Act 2003 ("CJA 2003"). That section prohibits any reporting of a prosecution application for leave to appeal under s58 of CJA 2003, save for certain specified matters. We have also considered whether a report of this judgment would give rise to a substantial risk of prejudice to the fairness of the trial which will in due course take place in the Crown Court.

6. We have concluded that the appropriate course, and one which avoids any substantial risk of prejudice to the fair trial of the defendants, is to exercise this court's power under s71(3) of CJA 2003 in such a way as to ensure that the defendants, whilst their trial is pending, shall not be identified in any report of these proceedings. We therefore order that no report of this appeal may name or otherwise identify the defendants, the location of the Crown Court where they will be tried or the judge whose decision is challenged in this appeal. Subject to that order, we disapply the provisions of s71(1). That order will continue until the conclusion of the proceedings in the Crown Court or further order. We direct that the prosecution must notify the Criminal Appeal Office when those proceedings have been completed, so that the court can consider varying the order.

7. The practical effect of our order is that this judgment may be reported in its present, anonymised, form.

The relevant facts:

8. It is unnecessary to give more than a bare outline of the facts. The prosecution case against the defendants is that they converted criminal property, namely the proceeds of frauds perpetrated against a number of banks, by purchasing Apple gift cards. It is alleged that the gift cards were used to acquire Apple products, which were then sold or returned to a shop and exchanged for another gift card.

9. In the course of the investigation, the prosecution obtained from Apple, pursuant to a production order, data which identified the bank cards and/or gift cards which had been used to make relevant purchases. The data were presented in the form of a spreadsheet. It is the information contained in the spreadsheet which was the subject of the judge's ruling.

10. In May 2023 the officer in the case, to whom we shall refer as "the officer", made a witness statement in which he explained how to interpret the data shown in the spreadsheet. He did so on the basis of a telephone conversation with Apple staff after he had received the spreadsheet in 2018.

11. In January 2024 the officer made a further witness statement. He stated that in September 2023 he had made further enquiries of Apple, including asking the following three specific questions:

> "Would it be possible to get a statement, similar to the previous statement dated 23/01/2018, but covering the second larger Apple disclosure? Can this include a description of how to correctly read the data?
>
> If a statement can't be provided, can a named person from the appropriate department email me explaining the process of how the data spreadsheet was originally produced, what business records needed to be reviewed to input the information together? This is not being requested in a statement.
>
> If a statement can't be provided, would it be possible to be provided with uncollated copies of the raw data which underlies the spreadsheets data previously provided in order to demonstrate the source?"

12. The officer went on to state that he received a reply in December 2023 which explained the process by which the spreadsheet was produced. In summary, the police had asked Apple for research on certain gift card numbers. An Apple retail fraud specialist had input those numbers into Apple's database and retrieved information relating to the purchase of that card.

13. That response was then embodied in a statement made in January 2024 by a fraud specialist employed by Apple Distribution International, which is based in Ireland. We shall refer to him as "the Apple employee". He explained the steps taken by an Apple retail fraud specialist "to produce the credit card numbers, details of exchanges and returns and linked purchases". He stated that the specialist who produced the spreadsheet (whom he did not name) had used "an internal tool" to input a gift card number, which enabled the specialist to view a receipt, from which a credit card number was obtained. The specialist was then able to retrieve from the computer system the history of all gift cards purchased with that credit card, and the history of purchases made with those gift cards, and any purchases which were subsequently returned to a store for a refund in the form of a fresh gift card.

The hearsay application:

14. The prosecution wished to rely on this evidence as an essential part of their case against the defendants. The defendants objected. Without going into unnecessary detail as to the procedural history, the issue came before the judge as a prosecution application to adduce hearsay evidence.

15. The prosecution, relying on *R v Spiby* (1990) 91 Cr App R 186, submitted that the information in the spreadsheet was real evidence, not hearsay evidence. In the alternative, if it was hearsay, it was admissible pursuant to s117 of CJA 2003.

16. It is convenient to refer at this point to the case relied on by the prosecution and the statutory provisions.

17. In *Spiby* it was held that information recorded on a computer, without having passed through a human mind, amounted to real evidence and was accordingly outside the scope of the hearsay provisions then contained in ss68 and 69 of the Police and Criminal Evidence Act 1984. The prosecution in that case had adduced evidence of a printout of information recorded by a computerised machine as to phone calls made from particular telephones in a hotel. The trial judge had rejected a defence submission that the evidence was inadmissible hearsay. This court, dismissing the appeal, upheld the presumption that mechanical instruments were in working order when they were used. The court agreed with principles stated in an academic article by Professor JC Smith, including an observation by Professor Smith that "hearsay information invariably relates to information which has passed through a human mind". At p192, the court went on to say this:

> "We respectfully adopt that helpful explanation of real evidence. We consider that the learned recorder was right in the present case to conclude that the computer print-outs from the Norex machine were real evidence. This was not a print-out which depended in its content for anything that had passed through the human mind. All that had happened was that when someone in one of the rooms in the hotel had lifted the receiver from the telephone and, with his finger, pressed certain buttons, the machine had made a record of what was done and printed that out. The situation would have been quite different if a telephone operator in the hotel had had herself to gather the information, then type it into a computer bank, and there came then a print-out from that computer. There the human mind would have been involved, that would have been hearsay evidence, and sections 68 and 69 would have been in point. However, in the present case, no such intervention of the human mind occurred. What was recorded was quite simply the acts which had taken place in regard to the telephone machinery and there was no intervening human mind."

18. Part 11, Chapter 2 of CJA 2003 contains provisions as to hearsay evidence. The general rule, stated in s114, is that in criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –

> "(a) any provision of this Chapter or any other statutory provision makes it admissible,

(b) any rule of law preserved by section 118 makes it admissible,

(c) all parties to the proceedings agree to it being admissible, or

(d) the court is satisfied that it is in the interests of justice for it to be admissible."

19. For the purposes of Chapter 2, s115 contains the following definitions –

"(2) A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.

(3) A matter stated is one to which this Chapter applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been –

(a) to cause another person to believe the matter, or

(b) to cause another person to act or a machine to operate on the basis that the matter is as stated."

20. One of the principal categories of admissibility identified in subsequent sections is contained in s117. So far as is material for present purposes, s117 provides:

"**117 Business and other documents**

(1) In any criminal proceedings a statement contained in a document is admissible as evidence of any matter stated if –

(a) oral evidence given in the proceedings would be admissible as evidence of that matter,

(b) the requirements of subsection (2) are satisfied, and

(c) the requirements of subsection (5) are satisfied, in a case where subsection (4) requires them to be.

(2) The requirements of this subsection are satisfied if –

(a) the document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office,

(b) the person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matters dealt with, and

(c) each person (if any) through whom the information was supplied from the relevant person to the person mentioned in

> paragraph (a) received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office.
>
> …
>
> (4) The additional requirements of subsection (5) must be satisfied if the statement –
>
> (a) was prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation …
>
> (5) The requirements of this subsection are satisfied if –
>
> (a) any of the five conditions mentioned in section 116(2) is satisfied (absence of relevant person etc), or
>
> (b) the relevant person cannot reasonably be expected to have any recollection of the matters dealt with in the statement (having regard to the length of time since he supplied the information and all other circumstances. …"

21. Returning to the present case, the defendants submitted to the judge that the information in the spreadsheet was hearsay evidence and that the conditions of s117 of CJA 2003 were not satisfied. In the alternative, even if it was admissible evidence, it would need to be produced and interpreted by someone from Apple, and no such witness was put forward by the prosecution. In the further alternative, if admissible in principle, the evidence should be excluded pursuant to s117(6) of CJA 2003 or s78 of the Police and Criminal Evidence Act 1984.

The judge's ruling:

22. The judge identified three issues: was the information in the spreadsheets hearsay? If it was, did s117 of CJA 2003 apply? If the material was admissible, how was it to be produced?

23. As to the first issue, the judge concluded that the spreadsheet was based on raw data but was not itself the raw data. The statements of the officer and the Apple employee made it clear that an Apple fraud specialist had input gift card numbers in order to access transactional data through different searches. The judge ruled:

> "It cannot be said that the spreadsheet was automatically generated without the intervention of the human mind as its content depended on the gift card information selected by the prosecution. I therefore consider the spreadsheet to be hearsay. It follows that it can only be admitted into evidence if it comes within one of the exceptions to the hearsay rule."

24. As to the second issue, the judge ruled that the requirement in sub-paragraph (a) of s117(2) was satisfied. The judge could not say whether (b) was satisfied, because the evidence before the court was not clear. The judge further ruled that s117(5) was engaged, but the prosecution had adduced no satisfactory evidence that the

requirements of s117(5) had been met. The judge concluded that, in the absence of such evidence, the prosecution could not rely on s117 and that, accordingly, "the spreadsheet is, at present, inadmissible hearsay".

25. Having made that ruling, the judge did not address the third issue.

The appeal to this court:

26. The prosecution gave notice of appeal against the judge's ruling, pursuant to s58 of CJA 2003. All necessary statutory requirements have been complied with, and the "acquittal undertaking" required by s58(8) has been given.

The submissions:

27. Mr Mably KC, for the prosecution, submitted that the evidence of the officer and the Apple employee proved that the spreadsheet was in effect a printout of the raw data and was therefore the raw data itself. He argued that it did not cease to be raw data because a human mind had been involved in selecting and extracting the information which appeared in the spreadsheet. The judge was therefore wrong to rule that the information in the spreadsheet was hearsay, and wrong to rule that s117 applied to that information. Mr Mably pointed out that the judge had accepted that Apple's electronic records operate automatically when the transactions of purchasing, using or exchanging gift cards were carried out, and that those records were admissible as real evidence. The judge's error, he submitted, lay in treating the spreadsheet as something different from the raw data rather than merely a selection and extract from the raw data, produced in a readable form.

28. Mr Mably accepted that the position would be different if a person had typed the data into Apple's system, or had referred to the raw data but had then created his own record in the form of a spreadsheet. But, he submitted, the evidence showed that the selection process which had been carried out merely limited the amount of data, without altering its status as real evidence.

29. If (contrary to his primary submission) s117 was engaged, Mr Mably submitted in the alternative that all the requirements of that section were met. He argued that the relevant person, for the purposes of s117(2)(b), was the shop assistant and/or the customer engaged in the relevant transaction. On that basis, the requirements of s117(2)(c) and 117(5) were plainly satisfied as a matter of overwhelming inference.

30. For the defendants, Mr Convey took the lead in making submissions which were adopted by Mr Fooks. Two of the defendants played no active part in the hearing, but we have proceeded on the basis that, as in the court below, they also adopt Mr Convey's submissions.

31. The defendants submitted that the judge had been correct: the spreadsheet was not merely an extraction of raw data but, rather, a report which had been produced after searching, sifting, selecting and collating extracts of the raw data. That exercise, it was submitted, had initially been directed by the police, but was then carried out at the discretion of one or more unidentified persons working for Apple. Mr Convey accepted that the raw data held by Apple could be real evidence if it were produced. He pointed out that, although the prosecution had asked for the underlying raw data, Apple had not

provided it. Referring to the passage in *Spiby* which we have cited in paragraph 17 above, Mr Convey argued that the production of the spreadsheet necessarily involved the application of the human mind. He noted that the prosecution had accepted that the spreadsheet contained at least one error.

32. As to the prosecution's alternative submission, the defendants drew attention to a change in the approach taken by the prosecution. The defendants submitted that the prosecution had chosen in the court below to present their case in such a way that, once the judge had ruled that the information in the spreadsheet was hearsay, there was no evidence which could enable the judge to be satisfied as to the identity of the relevant person for the purposes of s117(2).

33. We are grateful to all counsel for their submissions. We have summarised them briefly, but have taken into account all the points which were made.

Analysis:

34. As we have noted, it is common ground between the parties – and we agree – that the raw data held by Apple were recorded automatically when the relevant transactions were carried out. Inevitably, the raw data would be stored in vast quantities in a form which could not sensibly be placed before a jury. Evidence may only be admitted in a criminal trial if it is relevant to the issues in the case: it was therefore incumbent upon the prosecution to identify the computerised records which were relevant. On the evidence before the judge, that is what happened here: the prosecution identified the reference numbers of gift cards which were thought to be relevant to the prosecution case, and Apple personnel used an internal tool (which we take to be some form of search facility) to select and extract the records of transactions involving those gift cards, transactions involving the subsequent use or exchange of those gift cards, and transactions involving other uses of the same credit cards.

35. The central question in this appeal is whether that process of using the computer to search, select and extract a sub-set of the overall data stored in the computer involved the intervention of a human mind, such as to transform the information in the spreadsheet from raw data admissible as real evidence to a hearsay statement admissible only in accordance with the statutory provisions. We have no doubt, on the evidence before the judge, that no such transformation occurred. Raw data which is merely selected and extracted from a larger body of raw data is still the raw data. The human decisions taken in setting the parameters of such a selection and extraction process, and/or in setting the search terms and filters used to select and extract the relevant data, and/or in choosing how best to present the selected and extracted data in a format intelligible to a jury, might in some circumstances be the subject of challenge on a different ground, for example relevance or fairness; but those decisions cannot in themselves alter the character of the selected and extracted material as raw data. It may be noted that in *Spiby*, the relevant information, selected and extracted from the overall data recorded by the telephone machinery, was that relating to calls made from particular phones within the hotel, during a particular period of time, relevant to the police investigation. The court did not suggest that the process of selection and extraction had altered the character of the raw data.

36. On the evidence here, there had been no human intervention which in any way altered, or added to, the raw data selected and extracted from the overall body of raw data. The

selected and extracted information therefore continued to be real evidence, in accordance with the principle stated in *Spiby*.

37. We would add that it is, as always, important to keep in mind the clear distinction between evidence which is inadmissible, and evidence which is in law admissible but may in a particular case be excluded by the court on grounds of relevance or fairness. Here, it was necessary for the prosecution to adduce evidence to prove that the process of selection and extraction did not involve human intervention in the creation or manipulation of the data. The evidence of the officer and the Apple employee was sufficient in that regard, and therefore sufficient to establish the admissibility of the information in the spreadsheet as real evidence. Issues such as those raised by the defendants in relation to their not having been provided with other raw data, or in relation to the non-identification of the Apple personnel who carried out the process, could then only be relevant to an application to exclude evidence which was in law admissible, or to cross-examination of the two witnesses to whom we have referred.

38. With all respect to the judge, the ruling that the spreadsheet was hearsay evidence was therefore a ruling which involved an error of law or principle.

39. That is sufficient to determine the outcome of this appeal. We shall therefore address the prosecution's alternative ground of appeal only very briefly. Given that we are satisfied that the information in the spreadsheet is real evidence, it is artificial to try to analyse what the position would have been if it were hearsay. We do, however, accept Mr Mably's submission that if it were necessary to identify "the relevant person" for the purposes of s117(2)(b), it would be the customers and/or shop assistants whose actions in carrying out the relevant transactions caused the raw data to be recorded automatically. We agree that, as a matter of overwhelming inference, each of those persons could reasonably be supposed to have had personal knowledge of the matters with which they were dealing at the time (s117(2)(b)); and none of them could reasonably be expected now to have any recollection of the matters dealt with (s117(5)). Thus, if it had been necessary to do so, we would have found that the judge erred in ruling that, if s117 applied, its requirements were not fully met.

40. It was for those reasons that we granted the prosecution leave to appeal and allowed their appeal. We reversed the judge's ruling that the information in the spreadsheet was hearsay, holding that it was admissible as real evidence, and exercised our power under s61(4)(a) of CJA 2003 to order that the proceedings may be resumed in the Crown Court.