ARTICLE:

Establishing possession, custody and control through electronic baggage tags

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This article examines two contrary decisions arrived in two separate cases involving drugs found in concealed compartments in suitcases of passengers at airports in Malaysia. Central to both cases was the admissibility and authentication of electronically generated baggage tags, instrumental in identifying and linking the possession, custody and control of the bags to the alleged owners. The issue extends beyond the identification of the computer and its program that produced the electronic baggage tags to tracking the access to the bags from the initial baggage drop-off point of to its retrieval by the alleged owners. The cases illustrate the serious issues in establishing or disputing possession, custody and control in the face of insufficient corroborating evidence.

Introduction

The rules of evidence are mainly concerned with how information, in the form of 'evidence', is given or presented in court; and whether that information can be admitted as proof of facts asserted. To be admitted, the evidence must be relevant to an issue before the court. However, relevancy is not synonymous with admissibility, as relevant evidence could be excluded on grounds that its prejudicial value outweighs it probative value.[1] Once relevance has been established, the next step is to establish the authenticity of the document in question. This can be challenging when dealing with electronic documents. It requires proving the authenticity, integrity and reliability of such computer or electronic data.[2] Authentication is about showing that the document is what it is claimed to be.[3] To tender electronic evidence, an adequate foundation for its admissibility is required showing that what is tendered is the object which was involved in the incident, and further that it has not been tampered with.[4] Integrity relates to how sound the data is, whether the data is complete, accurate, not damaged in any way. Reliability is linked to ensuring sufficient procedural and technical safeguards against tampering, verification measures on identity of users and audit trails,[5] enabling the evidence to be trusted. For instance, in *In re Vee Vinhnee, debtor, American Express Travel Related Services Company, Inc. v Vee Vinhnee,*[6] Klein J pointed out that the focus is not on the circumstances of the creation of the record, but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that was originally created. Unless some degree of evidence and assistance is afforded by counsel, the court is bound by the evidence and arguments before it. In the case of *United States of America v Bonallo*,[7] computer records had demonstrated that cash withdrawals were made when the defendant Bonallo was in the building. Evidence was adduced that the employee who replaced Bonallo, after his employment contract was terminated, discovered a 'fraud program' in Bonallo's computer program library. This program was used to provide access to ATM computer files, and to alter transaction records, although the program could also have been used for legitimate purposes. It was held that the mere fact that it was possible to alter data was insufficient to establish the computer's untrustworthiness.

Section 90A Evidence Act 1950 of Malaysia

Most jurisdictions started out with the notion that electronic evidence, due to its unique nature, requires

[1] Collin Tapper, *Cross and Tapper on Evidence* (Oxford University Press, 12th edn, 2010), 64.
[2] Stephen Mason and Allison Stanfield, 'Authenticating electronic evidence', in Stephen Mason and Daniel Seng (eds.), *Electronic Evidence* (4th edn, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2017), 195.
[3] A*ustralian Securities and Investment Commission v Rich* (2005) 216 ALR 320, [118], [2005] NSWSC 417.
[4] Broun, *McCormick on Evidence* 13–16 [213], quoted in Stephen Mason and Daniel Seng, 'The foundations of evidence in electronic form', *Electronic Evidence,* 48.
[5] Stephen Mason and Allison Stanfield, 'Authenticating electronic evidence', *Electronic Evidence,* 195.
[6] 336 B.R. 437 (9th Cir. BAP 2005).
[7] 858 F.2d 1427, 1436 (9th Cir. 1988).

special treatment under the law of evidence.[8] The Malaysian Evidence Act 1950 (EA1950) continues to subscribe to this view. Section 90A EA1950, with its seven subsections, facilitate the admissibility of computer generated documents into evidence. Under section 90A(1), computer generated or electronic evidence may be admitted either by oral testimony, from the maker of the document, or through a certificate stating that the document in question was produced by a computer in the course of its ordinary use that was functioning properly.[9] Although what amounts to 'course of its ordinary use' or functioning properly' has not been explained, it may be proved by the tendering of a certificate to that effect by someone responsible at any time for the management of that computer.[10] Section 90A(1) provides:

> 'In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement'.

This relaxes the direct evidence rule or rule against hearsay expressly by permitting documents produced by a computer to be admitted, albeit with the proviso that it should be produced by the computer in the course of its ordinary use.

Section 90A(2) EA1950 states how 'ordinary use' may be proved. It provides that:

> 'For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used'.

A question arises when neither the maker of the document nor a certificate is produced in evidence.

Case 1

In *PP v Goh Hoe Cheong & Anor.*,[11] acting on a tip-off that three men carrying drugs were going to board a flight to Paris, a team of police stationed themselves at the Kuala Lumpur International Airport (KLIA). Three suspects checked in their luggage which had a blue ribbon tied to the baggage handles at counter E14. The luggage was issued with computer generated baggage tags. The suspects were not immediately apprehended or their baggage seized. They were allowed to proceed to the departure gate, immigration and board an aerotrain to the Satellite Building. It was only when the baggage arrived at the 'baggage assembly area', prior to loading on to the aeroplane, that the three suspects were detained. They were then taken to a place below the aerobridge where the rest of the police team were waiting with the three bags. A subsequent physical body search at the Narcotics Department produced baggage keys from the trouser pocket of the first accused. The bags were then opened, searched, the interior lining cut and drugs found. Two of the accused were then charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking, which is an offence carrying a possible sentence of capital punishment. At the trial, the prosecution unsuccessfully sought to adduce the electronically generated check-in baggage tags in evidence to prove that the bags belonged to the accused.

The High Court had to decide whether the check-in baggage tags were admissible evidence before the court, and whether the prosecution had adduced *prima facie* evidence that the first and second accused had custody and control of the bags. The court was not convinced that the accused had custody and control over the exhibit bags. KN Segara J found that:

> (i) There was a break in the chain of custody and control of the exhibit bags, as the police had not seized the bags in question from the airport personnel immediately at the check-in counter itself. The court was also concerned

[8] Gita Radhakrishna, 'Computer Evidence In Malaysia: Where Are We?' [2013] 3 *Malayan Law Journal*, xxxiii.

[9] *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1.

[10] It is not clear what terms such as 'in the course of its normal use', 'good working order', 'functioning properly' and 'operating properly' mean. For a discussion of this problem, see Stephen Mason, 'The Presumption that Computers are reliable', *Electronic Evidence*, 6.5 – 6.30.

[11] [2007] 7 CLJ 68.

about the number of persons who physically handled the bags and had access to the bags between the time of checking-in and arrival at the assembly area at the Satellite Building. In the circumstances, there was the possibility that the bags could have been tampered with, switched and the blue ribbons and baggage tags (P6A and P23A) removed and retied to the switched bags after being checked-in and before their arrival at the baggage assembly area.

(ii) No evidence was presented from the airport management personnel or the air carrier concerned that the exhibit bags were in fact the same bags checked in at counter by the accused. Although the carrier's electronically generated baggage tags were found attached to the bags, and the baggage claim tags were attached to the respective tickets of the first and second accused (found in their possession), the bags were not in the possession, custody or control of the accused. Generally, in the absence of any express provisions to the contrary, as soon as a passenger checks in his bag at the check-in counter for his flight, the bag is in the custody and control of the carrier or its agents until it is claimed by and delivered to the passenger.

(iii) There was also no evidence that the packages containing drugs found in the bags had been concealed by the accused, since there was no fingerprints of either of the accused on any of the packages, and no witness from the carrier or the authority managing KLIA called by the prosecution to prove the physical checking-in of the exhibit bags by the first and second accused. Therefore, the computer generated baggage tags P6A, P23A and the respective baggage claim tags P16A and P31A, could not be admitted in evidence since the prosecution failed to comply with section 90A EA 1950.

(iv) Alternatively, no certificate under section 90A was tendered to the court, signed by a person who either before or after the production of the documents by the computer was responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

Consequently, in the absence of either oral evidence or any certificate under section 90A(2) EA1950, the electronically produced baggage tags could not be admitted into evidence. The prosecution thus failed to negate the possibilities of tampering with the contents of the bag and prove the charges against the first and second accused. This led to their acquittal without their defence being called.

The concerns of the court were valid, because there are cases of tampering with checked-in luggage at airports,[12] as evidenced in the case of *U. S. v Gabriel*.[13] The accused was a baggage handler for Worldwide Flight Services at the Cyril E. King Airport on St. Thomas, USA. He was charged on two counts of involvement in a cocaine smuggling operation at the airport. A co-worker testified that he was paid by the accused to remove flight tags from checked luggage while the accused kept watch and a third person loaded the cocaine into the bags.

Given these international occurrences, the prosecution should have called the airport staff responsible for processing the accused's check-in baggage to identify the exhibit bags; identify the accused, and explain the procedure at check-in. The rejection of the electronically generated baggage tags in the absence of a certificate under section 90A(2) or oral testimony was in keeping with established precedents in *Gnanasegaran a/l Pararajasingam v Public Prosecutor;*[14] *Ahmad Najib bin Aris v PP*,[15] and *PP v Hanafi Mat Hassan.*[16] However, although other corroborative evidence such as the baggage claim tags attached to the tickets of the accused and the baggage keys found on the person of the accused linked the ownership of the bags to the accused, it was insufficient to establish an unbroken chain of

[12] Scott Zamost, Drew Griffin and Curt Devine, 'Hidden cameras reveal airport workers stealing from luggage' *CNN*, 15 September 2015, available at http://edition.cnn.com/2015/04/13/us/airport-luggage-theft/index.html ; Mosi Secret, 'In Bags at J.F.K., Handlers Found Niche for Crime' *The New York Times* 9 December 2011, available at http://www.nytimes.com/2011/12/10/nyregion/cocaine-smuggling-case-shows-airline-baggage-handlers-misconduct.html ; G. William Hood, 'Swapped Baggage: Huge Problem' *Viva Cuernavaca* 8 August 2015, available at http://universaldomainexchange.com/vivacue2/swapped-baggage-huge-problem/ .

[13] 379 Fed.Appx. 194 (2010), 2010 WL 1918696, an unofficial version is available at http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2346&context=thirdcircuit_2010 .

[14] [1997] 3 MLJ 1.

[15] [2009] 2MLJ 613, FC.

[16] [2006] 3 CLJ 269.

possession, custody and control of the exhibit bags. Other relevant airport staff should have been called to give evidence on the handling and tracking of the bags from the check-in up to the baggage assembly area. Had there been CCTV recordings, these ought to have been adduced in evidence by the prosecution as further corroborative evidence. The CCTV recordings, being electronic evidence, would also need to satisfy the requirements of section 90A EA1950. A certificate under section 90A(2) EA1950 as to the proper working and normal course of use would have sufficed. In the absence of both these elements and any other sufficiently probative circumstantial evidence, the court ordered the acquittal of both the accused.

Case 2

In contrast, in *Mojtaba Moktarighahi Ali v Public Prosecutor*,[17] the accused, an Iranian national, was charged under section 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA) for trafficking in 2751.7 grams of methamphetamine. The accused had boarded a flight at Imam Khomeini International Airport, Iran to Kish Island and then to Dubai. From Dubai he arrived at Singapore Airport where he boarded another flight to Penang Airport. The carousel attendant (PW9) at Penang Airport observed a bag, exhibit P12, to be the only one unclaimed on the carousel. A baggage tag with the name of the accused and the flight numbers was attached to P12. When the accused arrived at the baggage collection carousel he admitted to PW9 that P12 was his and collected it. The accused did not deny ownership of P12 until a check carried out in the meeting room at the Airport Customs Office revealed five blue carbon paper packages inside a secret compartment of P12. It was only then that the accused denied ownership of P12. He variously claimed that his bag had been misplaced or exchanged enroute when boarding the flight at Dubai International Airport, since his bag had passed through the scanning machine without any problems. Alternatively, he alleged that the bag could have been tampered with by an unknown person who had created the secret compartment to hide the drugs. It was submitted in his defence that no evidence was led on the movement of P12 during its flight from Dubai, through Singapore to Penang in Malaysia. Other prosecution witnesses testified that the bag was not locked, thereby raising the possibility that the bag could have been tampered with. Accordingly, it was claimed that the accused had no custody, control and knowledge of the contents inside P12.

The issue before the High Court was whether the accused had rebutted the presumption of possession and raised a reasonable doubt on the prosecution's case. Mohd Amin Firdaus Abdullah J found that:

> '… on the evidence adduced by the prosecution, it could be inferred that P12 belonged to the accused and that there was no probability of it having been exchanged for a similar bag or misplaced as the baggage tag 'P12A' with the name of the accused, the flight number and the baggage number was attached to its handle. PW9, the customer service officer for Silk Air working for KL Airport Services Sdn Bhd had testified that he arrived at the carousel area before all the baggage were downloaded onto the carousel. Thus, if anyone had tried to tamper with P12, PW9 would have known as he said that he was always beside the carousel. He further testified that he had compared the details in the claim tag together with the electronic ticket found in between the pages of the accused's passport with the details on the baggage tag and found that the name of the passenger and the baggage tag number were the same. Following the Court of Appeal's decision in *Gnanasegaran*, the evidence showed that P12A was produced by a computer and section 90A(6) EA 1950 applied to deem P12 to be produced by a computer in the course of its ordinary use and hence P12A was admissible.'[18]

In applying the presumption as to judicial notice in section 114(e) EA1950, the High Court observed that it was common knowledge and a universal practice at airport check-in counters that a luggage tag bearing the name of the passenger, the flight and luggage number would be attached to the handle of the luggage. Moreover, once a passenger's luggage was checked in at the airport counter, nobody except authorised airport personnel would have access to it.

Counsel for the accused had initially objected to the admissibility of the baggage tags P12A, but later and for reasons unknown, withdrew the objection. The

[17] [2012] 6 AMR 249, [2012] 6 CLJ 728 [HC].

[18] *Mojtaba Moktarighahi Ali v Public Prosecutor* [HC] [2012] 6 CLJ 728, [138].

electronically generated baggage tag together with the baggage claim tag attached to the accused's ticket was instrumental in identifying the bag as belonging to the accused, a fact which the accused had initially admitted to PW9. It could also serve to establish ownership of the bag and its contents from the point of the baggage carousel where PW9 saw him, to the point of his apprehension, but not to an unbroken chain of possession, custody and control of the bag from Dubai Airport to the Penang Airport. Counsel for the accused should have asked for evidence of the weight of the bag (i) when it was checked in at Dubai Airport, then (ii) at Singapore, and (iii) upon apprehension. It would also have been important for the airport personnel who had access to the bag, to have been cross examined on the process of transferring the baggage from one flight to another, and to provide evidence of CCTV recordings from Dubai Airport and Singapore Airport. A difference in the weight of the bags at either Dubai Airport or Singapore could have corroborated the accused's defence of tampering. Without such other corroborative evidence, the baggage tags could not establish that the bag and or the baggage tags had not been tampered with.

Unlike in *PP v Goh Hoe Cheong & Anor.*,[19] the court did not consider the possibilities of tampering by airport baggage handlers or other airport staff with authorised access to passenger bags. Evidence of the numerous changes of aircraft by the accused in his flight from Iran to Penang, and the fact that the bag was found unlocked was insufficient to raise a reasonable doubt in the prosecution's case. On appeal, the Court of Appeal found that frequent changes in the appellant's defence had failed to cast a reasonable doubt on the prosecution's case. Moreover, his defences were merely a bare denial without more and evasive in nature. Consequently, the findings of the High Court were upheld.

Subsequent cases on similar facts, such as *PP v Yahya Hussein Mohsen Abulrab*,[20] *PP v Duangchit Khonthokhonburi [W/Thailand],*[21] and *PP v Rudolf Tschernezow*[22] where the accused persons arrived at various airports in Malaysia from other jurisdictions, have also construed the concept of possession, custody and control strictly from the point where the accused collected his baggage to the point of his apprehension. In *PP v Rudolf Tschernezow* the accused was charged under section 39B(1)(a) of the Dangerous Drugs Act 1952. He had arrived at the International Airport Senai in Johor Baru, from Hong Kong after transiting through KLIA. Having collected a purple bag from the baggage carousel, he was stopped at the customs point where the baggage scan indicated suspicious packages. It was later confirmed that the bag contained 896.3 grams of Methamphetamine. The baggage tag and the baggage claim tag attached to his ticket identified him as the owner of the bag, a fact which he did not deny. The defence was premised on an innocent carrier. Various communications through e-mails, Facebook and mobile telephone was tendered in support. Though acquitted at first instance, the accused was convicted at the Court of Appeal. To establish possession, custody and control, the court was referred to the Federal Court's decision in *PP v Abdul Rahman Akif*,[23] which held that to show possession, custody and control, the prosecution would also have to establish knowledge of the drugs in possession. The Federal Court went on to state that '... where knowledge cannot be proved by direct evidence, it can be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.'[24] Thus proving knowledge, possession, custody and control is subjective and can be established through a wide range of surrounding or circumstantial evidence.

Conclusion

The critical difference concerning the electronically generated baggage tags in the two cases is that first, unlike *Goh Hoe Cheong*, the evidence of the electronic baggage tags in *Mojtaba* was corroborated by the evidence of PW9, and which was not objected to by the accused's counsel. However, the evidence of PW9 only established 'possession, custody and control' from the point of the baggage collection carousel and not before. Nevertheless, the High Court proceeded to apply the presumption in section 114(e) EA1950 and the deeming provision in section 90A (6). This was not invoked in *Goh Hoe Cheong*, decided in 2007. Secondly, unlike in *Goh Hoe Cheong*, the High Court in *Mojtaba* in 2012, (upheld by the Court of Appeal) was prepared to take judicial notice of the universal

[19] [2007] 7 CLJ 68.
[20] [2014] 1 LNS 1862.
[21] [2015] 1 LNS 92.
[22] [2017] 1 LNS 70.
[23] [2007] 4 CLJ 337.
[24] [2007] 4 CLJ 337 at 349.

practice at airport check-in counters and baggage tagging without inquiring into the possibility of tampering by airport baggage handlers. Thirdly and most significantly, there was no objection on this point by the accused's counsel.

Consequently it is necessary, when dealing with electronic evidence, to lay meticulous foundational evidence establishing its authenticity.[25] Where the defence is one of tampering or innocent carrier, the oral evidence or certificate relating to the integrity of the system and the record keeping process as required under section 90A(2) EA1950 has to be challenged. Integrity of the evidence here relates not only to the identification and correct functioning of the computer that produced the baggage tags but to the entire journey of the bags from the tagging to its collection by the alleged owner. Lawyers need to understand that challenging the integrity and reliability of the electronic process is no different from challenging non-electronic procedures. They need to know the different sources from which evidence can be sourced, e.g. CCTV, social media, emails, mobile telephones, and question the record keeping and tracking procedures in tracking the chain of evidence in order to challenge its authenticity. The need to authenticate evidence has not changed – only the methods of authenticating the different types of electronic evidence. This is an area where lawyers need to acquire competency as a matter of professional competence.

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[25] Stephen Mason and Allison Stanfield, 'Authenticating electronic evidence', in *Electronic Evidence*, 195.