In the Commonwealth of the Bahamas
In the Supreme Court
Common Law and Equity Division
Claim No. 2020/CLE/gen/000627

BETWEEN:

KEITH MOSS JR

First Plaintiff

LAKEITRA MOSS

Second Plaintiff

AND
COMMISSIONER OF POLICE
ROYAL BAHAMAS POLICE FORCE
COMMONWEALTH OF THE BAHAMAS

First Defendant

AND
THE ATTORNEY-GENERAL
OF THE COMMONWEALTH OF THE BAHAMAS

Second Defendant

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Ciji Smith-Curry for the Claimants
	Randolph Dames for the Defendants
Hearing Dates:	17 March 2023

RULING

KLEIN, J.

Evidence—Admissibility—Challenge to admissibility of anonymous video recording of event—Video circulated on WhatsApp and downloaded—Compliance with s. 61 of Evidence Act as to proper operation of computer device—Claim for constitutional and other relief—Allegations of assault and battery by Police during 2020 New Year's Junkanoo Parade

INTRODUCTION AND BACKGROUND

1. This Ruling concerns the admissibility of two short video clips—one 24 seconds long and the other 30 seconds long—in a trial alleging assault and battery and breach of constitutional rights, which is set to commence in just over a week's time. The original recordings, which were apparently made by an anonymous cell phone user, shows unidentified police officers wielding batons and using force against spectators during the 2020 New Year's Day Junkanoo Parade. It was widely circulated on social media via WhatsApp and this is how it apparently came into the possession of the plaintiffs.

2. The plaintiffs claim that they were among those spectators at the Parade when they were "without cause" assaulted by unknown police officers under the command of the First Defendant. They filed a specially indorsed writ on 9 July 2020 seeking various declarations

and damages, including exemplary damages, for breach of constitutional and common law rights. The parties sued are the Commissioner of Police (in his representative capacity for the actions of the officers serving under him) and the Attorney General, on behalf of the State. The defendants' case is that the police were responding to a crowd disturbance and used reasonable force to break up the melee.

3. Among the items disclosed in the plaintiffs' list of documents is a video recording of the event. Curiously, and subject to what is said further below, the video was not sought to be adduced via any of the plaintiffs' witness statements, and neither was there submitted a certificate purporting to comply with s. 61 of the Evidence Act ("the Act") in relation to the admissibility of computer records and proving the accuracy of the same. A CD-Rom ("disc") containing the recordings was simply stapled to the plaintiffs' skeleton submissions on the admissibility issue.

4. The defendants object to the admissibility of the video, mainly on the ground that it does not comply with the conditions for admissibility of computer documents and for proving the accuracy of the same set out in s. 61 of the Evidence Act, and it was agreed that the matter should be heard as a preliminary issue. The court therefore gave directions pursuant to Ord. 31A for the admissibility issue to be heard in advance of the trial, which is set for 12-13 April 2023.

The statutory context

5. The main provision of the Act that falls for consideration is s. 61, but there are a few other sections which are relevant. Section 61 provides in material part as follows:

> "61. (1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) are satisfied in relation to the statement and computer in question
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> (2) The said conditions are —
>
> (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;
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> (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;
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> (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
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> (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.
>
> (3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether —

(a) by a combination of computers operating over that period;

(b) by different computers operating in succession over that period;

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this Act as constituting a single computer; and references in this Act to a computer shall be construed accordingly.

(4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) relate, and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Act — (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(6) Subject to subsection (3), "computer" means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison, or any other process.

6. Section 62, which sets out supplementary provisions to ss. 58 to 61, provides at sub-section (2) as follows:

> "(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 58, 60 or 61, the court may draw any reasonable inference from the circumstance in which the statement was made or otherwise came into being or from any other circumstances, including in the case of a statement contained in a document, the form and contents of that document."

7. Section 2 of the Act provides in part that:

" 'document' includes, in addition to any document in writing—

(a) any map, plan, graph or drawing;
(b) any photograph;
(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
(d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom:"

8. Section 61 is one of several sections of the Act which provide for certain categories of what would otherwise be hearsay to be admitted subject to compliance with certain statutory conditions. For example, s. 58 deals with admissibility of out-of-court statements; s. 60 with admissibility of official records; and s. 61 with admissibility of statements produced by computers (although, as explained below, certain kinds of computer evidence may constitute real and not hearsay evidence). These provisions roughly correspond to what were ss. 2, 4, 5 of the Civil Evidence Act, 1968, of England, and which were imported into the Rules of the Supreme Court 1978 ("R.S.C 1978") as procedural conditions to be met for adducing such evidence via Order 38, rr. 21, 21 and 23, which corresponded to ss. 2,4, 5 of the 1968 Act.)

9. I do not think there is any dispute between the parties that the video recordings come within the definition of a "document" for the purposes of s. 61 of the Evidence Act (see *Clarence Smith v Regina* SSCrimApp. No. 167 of 2015, *infra*). But as pointed out by Mr. Dames, while the disc is undoubtedly a "document" produced by a computer, there were other devices involved in the process by which the videos were captured and transferred to CD-Rom, including the use of a cell phone camera to capture the incident and the messaging app/social medial platform WhatsApp used to circulate it, and from which it was presumably downloaded.

Defendants' submissions

10. Accepting that the discs containing the video recordings are computer evidence within the meaning of the Act, the central argument of the Defendants is that the admissibility of that evidence depends on compliance with the provisions of s. 61. In particular, that it requires compliance with the *conditions* set out in 6(2) and the production of a *certificate* attesting to the matters in 61(4). Mr. Dames for the defendants also laid great stress on the fact that the source of the video was unknown, and therefore it was not identified or authenticated.

11. For the proposition that the evidence needs to comply with s. 61 of the Act, reliance is placed primarily on the Court of Appeal case of *Clarence Smith* (*supra*), in which the Court of Appeal, upheld the admissibility of video evidence from a surveillance camera tendered during the trial of the appellants for robbery and murder (of which they were convicted), but held that such evidence had to comply with s. 67(1) of the Act. That section (which was repealed in 2018), was based on s. 69 of the English Police and Criminal Evidence Act ("PACE"), and governed the admissibility of documentary evidence in criminal proceedings. It was in substance the equivalent of s. 61 in the context of civil proceedings.

12. While the COA in *Smith* was analyzing the principles in the context of criminal proceedings, they are equally applicable to the admissibility of computer evidence in civil proceedings. At paragraph 46, the COA said:

> "46. Documentary evidence produced by a computer is only hearsay if what is produced is from the input of information by a person; and in any such case, such a document is only admissible if it falls within one of the exceptions in section 66, and the conditions in section 67 are met. Inexorably, the surveillance tape in question comes from a camera connected to a DVR system which was programmed to automatically record images of any events within its view without human intervention or in-put, and is real evidence, and not hearsay. However, in as much as it is a document within the meaning of section 2 of the Evidence Act, and is unquestionably produced by a computer, its admissibility depends on compliance with the provisions of section 67(1)…".

13. However, the Court went on to find (at paragraph 48):

> "48. However, while I agree with Counsel that a tape recording is a document produced by a computer, and its admissibility is subject to compliance with section 67(1) of the Evidence Act. I am nevertheless satisfied that the evidence of Dale Strachan and Mark McKenzie which I fully set out above, wholly satisfies the criteria of section 67(1), and that the tape was properly admitted into evidence by the learned judge."

14. I did not understand Mr. Dames for the defendants to be taking any objection to the evidence on any exclusionary rule, such as relevance or unfairness, and no other grounds are indicated in his written submissions. However, during oral submissions, Mr. Dames took the point that the relevance of the material was also being challenged, and that the maker of the video recording would need to speak to its "relevance".

15. I did not accept that submission. As is often said, the question of relevance is determined by "logic and human experience", while the issue of admissibility of relevant evidence depends on rules of law and practice. I have no doubt that the video footage is relevant to the fact(s) in issue (*Hollington v. F. Hewthorn & Company Ltd.* [1943] 2 All ER 35). Fact in issue is defined at s. 2 as "*any fact as to which in the course of any proceeding it becomes material for the court to enquire, in order to ascertain the respective rights and liabilities of the parties or for any purposes incidental thereto*." The video recordings would certainly fall within one or more of the seven circumstances ("a" to "g") which constitute evidence which may be relevant to a fact in issue—for example, facts explaining the circumstances under which any fact in issue is said to have occurred ("c"); any fact tending to identify any person or thing whose identity is in issue ("f"); or any fact which may assist the court in assessing the damages in a case ("g").

16. Mr. Dames is right to point out, however, that ordinarily, the maker of the video would be required to authenticate the video recording and be available for cross-examination. Additionally, either that person, or some other appropriate witness or expert, would be required to speak to the operability of the computer system or device used and the steps taken in preserving the evidence and rendering it into the form presented for trial. But these are issues going to admissibility, not relevance.

Plaintiffs' Submissions

17. The written submissions of Ms. Ciji Smith-Curry underscored the point that the recordings were central to facts in issue before the Court, as it was contended that they would aid the court in determining whether or not the plaintiffs had been assaulted. It was further argued that the disc was a copy made from the original recording, which made it secondary evidence admissible by virtue of s. 43 of the Act. As indicated, I was not of the opinion that the relevance of the recordings was properly challenged or put in issue in these proceedings. But the issue of reliance on secondary evidence is caught up to some extent on the provenance of the recordings and the process or processes by which they were transferred to a disc.

18. In their submissions, the plaintiffs concede that they are unable to ascertain and locate the creator of the original video. But they argue that this should not preclude admissibility as the video is "…*legitimate and accurately represents the unedited events that transpired during a 24-second period on the date in question as there is no 'jump' in [the] video nor audio*." Further, they point out that the video clip, which they say went viral, was shared by numerous parties via WhatsApp Messenger, a social media platform which uses end-to-end encryption that ensures that communication shared between its users cannot be intercepted by and tampered with by third parties.

19. In oral submissions, Ms. Smith-Curry contended that because the videos fall into the category of documents which are produced without human intervention (apart from activating the programme) and may be considered "real evidence" it does not require compliance with the requirements of 61(2) and (4).

20. It is far too late in the day to take this point, and any confusion as to whether some documents produced by computers were exempt from compliance with technical rules relating to the operation of the device were put to rest by the House of Lords decision in *R v Shephard* [1993] A.C. 380 H.L. This emerges from paragraph 40 of the Smith case, where the COA quoted from *Criminal Evidence* (3rd Ed.) by Richard May, Ch. 11:28 and 11:29 in part (which are equally relevant to civil proceedings), where it states:

> "11-18. On the other hand, a computer may be used purely as a mechanical device or tool, e.g. a calculator. The resulting print-out is not hearsay but is admissible as real evidence since it involves merely the result of a calculation and not an assertion of the truth of the facts states…
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> 11.29 A party wishing to rely on a document produced by a computer must comply with s. 69 of the Police and Criminal Evidence Act 1984….It applies to all computer documents however produced. Thus, as has been seen, sections 23 and 24 of the 1988 Act [UK Criminal Justice Act 1988] provide for the admissibility of hearsay statements in documents. Both sections provide that admissibility is subject to section 69. Accordingly hearsay documentary evidence from a computer must meet the requirements of either section 23 or 24, and the requirements of section 69 before it is admissible. The same applies to documents produced without human intervention. Following the decisions in *Minors* [1989] 1 W.L.R. 441 and *Spiby* [1991] 91 Cr. App. R 186 it had been thought that the application of section 69 was limited to hearsay records. However, the House of Lords in Shephard [1993] 2 W.L.R. 1021 overruled these cases and held that section 69 applied to all documents produced by a computer whether they contained hearsay or not."

21. There is another dimension to the question of admissibility which I need to mention for completeness. Several days before the hearing of the admissibility challenge (14 March), the plaintiffs filed the affidavit of Melinda Carolyn Moss (apparently the step-mother of the

plaintiffs). It is not difficult to conclude that several paragraphs of the witness statement were an attempt to rehabilitate the position of the video evidence. For example, this is what is said at paragraphs 4-5:

> "4. That around 7:00 p.m. my husband, Keith Bradley Moss Sr. received a telephone call on his cell from a friend stating that First and Second Plaintiffs were involved in an incident with the Royal Bahamas Police Force and both Plaintiffs were beaten and bruised. My husband then informed me what had happened. Right after the telephone call my husband received the video of the incident which showed part of the altercation between the Plaintiff and members of the Royal Bahamas Police Force via WhatsApp. He forwarded the video to my cell phone. Upon receiving the video to my Apple 11 ProMax phone via WhatsApp Messenger (*sic)*.
>
> 5. After downloading the video, I notice that it was 24 seconds in length. I selected play and I saw one police officer running on east Shirley Street….".

She then purports to describe what she saw on the videos (paras. 5-8).

22. I asked Mr. Dames whether this witness statement allayed his concerns in respect of the admissibility challenge. He indicated that he had only recently received the witness statement and would reserve any challenges. However, he submitted that from his reading of the material parts (excerpted above), the witness statement did not satisfy the requirements of s. 61, and it did not authenticate the video or at all address the manner in which the CD-Rom was produced.

DISCUSSION AND ANALYSIS

23. It is indisputable that audio and video recordings are admissible in evidence once their authenticity and accuracy can be proved. In *Halsbury's Laws of England*, Civil Procedure (Vol. 28, para. 575), the learned authors state:

> "A video recording of an event which is in issue is admissible. There is no difference in terms of admissibility between a direct view of an incident and a view of it on a visual display of a camera or on a recording of what the camera has filmed. A witness who sees an incident on a display or a recording may give evidence of what he saw in the same way as a witness who had a direct view."

24. However, because of the nature of such evidence, various statutory provisions were put in place and common law rules developed to ensure that such evidence could be relied on. As explained by Lord Griffiths in *R v Shephard*:

> "The object of section 69 of the Act is clear enough. It requires anyone who wishes to introduce computer evidence to produce evidence that will establish that it is safe to rely on the documents produced by the computer. Such a duty cannot be discharged without evidence by the application of the presumption that the computer is working correctly expressed in the maxim *omnia praesumuntur rite esse acta* as appears to be suggested in some cases. Nor does it make any difference whether the computer document has been produced with or without the input of information provided by the human mind and thus may or may not be hearsay. If the document produced by the computer is hearsay, it will be necessary to comply with the provisions of section 23 or 24 of the Criminal Justice Act 1988, the successor to section 68 of the Police and Criminal Evidence Act 1984, before the

> document can be admitted as evidence and it will also be necessary to comply with the provisions of s. 69 of the Act of 1984."

25. As has been mentioned, s. 69 was the equivalent of what used to be s. 67 of the Evidence Act (see *Smith*), and its provisions are substantially similar to s. 61, which provides for documentary evidence in civil proceedings. Parliament has set out at s. 61(2) certain conditions which have to be satisfied in relation to adducing computer evidence—the most important of which is that the computer was operating properly during the period when the document was generated—as well as the required information in the certificate authenticating the document and the manner in which it was produced. As indicated, evidence as to the contents of a video recording constitute direct evidence of what transpired in a particular place at a particular time. But its admissibility depends on compliance with technical conditions which have developed to ensure it is safe to rely on such evidence.

26. Prior to the defendants' challenge, there was nothing by way of witness evidence explaining the provenance, authenticity and manner in which the evidence was produced. The video evidence was disclosed in the list of documents and the disc attached to the submissions. So, at the point of the challenge, there was absolutely nothing before the Court which even attempted to authenticate the video evidence and satisfy s. 61. The subsequent witness statement of Melinda Moss describes very generally how the video was forwarded to her via WhatsApp and downloaded and opened.

27. The Court has a wide discretion in deciding what evidence is admissible, and failure to comply with procedural rules does not necessarily render relevant evidence inadmissible. However, s. 61 is a statutory provision, and must be complied with for such evidence to be admissible, as the Court of Appeal found with the now-repealed s. 67. I therefore have very little reluctance in coming to the conclusion that the provisions of s. 61 of the Evidence Act are not satisfied with respect to the videos, and the Moss witness statement does not cure these deficiencies. On this basis, I would hold the videos to be inadmissible.

28. I have come to this conclusion mainly on the ground that the video recordings have not been properly authenticated and neither has there been any compliance with the other technical prerequisites for admissibility of computer or electronic evidence at s. 61.

Additional points

29. It is important to point out, however, that I am not here deciding that a video recording is *ipso facto* inadmissible simply because its source is unknown. We live in a digital era where almost any event of any significance occurring in public is captured on a cell phone, or some other personal device capable of recording digital and audio images. And there is a growing reliance on the use of pictures and videos posted on the internet or circulated on social media as evidence in legal proceedings. Oftentimes, it is possible to identify the maker of the video or photos or someone with knowledge of their creation who is able to authenticate the evidence and testify to compliance with any technical rules for admissibility interposed either by statute or common law. But sometimes in the case of "crowd source" videos or photos which are circulated widely on social media, it might not be possible to trace the source of the photo or video.

30. In many jurisdictions, courts have allowed reliance on anonymous photographic or video evidence in criminal and civil cases, as long as there was evidence to satisfy the authentication burden and technical conditions for admissibility. For example, in *Lamb v. State of Florida* (No. 4D17-545), 2 May 2018, the District Court of Appeal (Fourth District) upheld the decision of the trial judge on appeal over the objections of the defendant, that a video clip which he posted on his Facebook Account of him of sitting in a car which it was alleged he stole and which showed him wearing the victim's stolen watch just hours after a carjacking occurred ought not to have been allowed into evidence because of lack of authentication. The defendant (who was convicted of grand theft of an auto vehicle based largely on that evidence) had argued that the state would have to provide testimony from the either the defendant, co-defendant or other witnesses who appeared in the video, or from someone who recorded the video, to be able to properly authenticate it. The court held that the testimony from the Police digital forensic examiner's testimony regarding how the Facebook video was obtained from Facebook (downloaded and extracted) and its distinctive characteristics, and the victim's and police detective's testimony regarding its distinctive content, were sufficient to authenticate the evidence and the judge properly exercised his discretion in admitting it.

31. Similarly, in *R v. Andalib-Goortani* (2014 CanLIIDocs 33545), the Ontario Superior Court of Justice held that a photograph, which purported to show a police officer charged with assault winding up and about to hit a female with a baton, and which was anonymously posted to a website, could be authenticated by expert forensic evidence, although the court eventually held that the photo was not properly authenticated and therefore inadmissible.

32. Interestingly, it is noted that in the UK, the provisions of ss. 68 and 69 of PACE 1984, which governed the admissibility of computer records and made provisions for proving the accuracy of the same, were repealed by s. 60 of the YJCEA 1999. As noted in the explanatory note to s. 60:

> "Following the repeal, the ordinary law on evidence will apply to computer evidence. In the absence of any evidence to the contrary, the courts will presume that the computer system was working properly. If these is evidence that it may not have been, the party seeking to introduce the evidence will need to provide that it was working."

33. It is probably safe to say that the vast increase in the use of computer and electronic evidence in adjudication and concerns over the onerous conditions and high threshold for the admissibility of electronic evidence, has been responsible in part for the UK simplifying rules relating to admissibility of such evidence. However, there has been no similar relaxation of the rules relating to the admissibility of computer or electronic evidence in this jurisdiction.

34. During submissions, Mr. Dames went so far as to contend that it would be necessary for the plaintiffs to source someone from WhatsApp to establish the operability of their system as a precondition to admissibility. I highly doubt that this would have been necessary. But I accept that a witness needs to testify as to how the video was obtained (i.e., downloaded, extracted and presented in the form of a CD-ROM to the Court), describe any mechanical or computer processes involved in those steps, and confirm that accuracy of the secondary evidence (the recordings on the CD-ROM) with what was circulated on WhatsApp. As shown by the cases referred to from other jurisdictions, this can potentially be done by expert evidence, even where the maker or creator of the original footage cannot be located.

35. Further, it is noted that section 61(4)(d) states that a certificate signed by "*a person occupying a responsible position in relation to the operation of the relevant device*" is sufficient to satisfy then admissibility conditions. But as the cases have shown, the courts have not interpreted this strictly. In the leading case of *Shepherd* (supra), Lord Griffith observed as follows:

> "Documents produced by computers are an increasingly common feature of all business and more and more people are becoming very familiar with their uses and operation. Computers vary immensely in their complexity and in the operations they perform. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary for to call an expert and that in the vast majority of cases it will be possible to discharge the burned by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly. "

CONCLUSION AND DISPOSITION

36. I conclude by summarizing the ruling of the court as follows: as matters currently stand in terms of the evidential material before the Court, the objection of the defendants to the admissibility of the video footage on the grounds that it has not been authenticated and also fails to comply with s. 61 of the Evidence Act is sustained. In its current form, it is clearly inadmissible and I so hold.

37. I say "as matters currently stand" and "in its current form" because the trial in this matter has yet not occurred, and it might be possible for the plaintiffs to overcome some (if not all) of the admissibility hurdles prior to trial. Matters such as this also illustrate the importance of the parties knowing early on in the case management process specifically what evidence the other side proposes to rely on. That will allow objections to be taken early, so that the party with defective evidence can either take corrective action (if this can be done and there is time to do it) or abandon the particular item of evidence.

38. In the circumstances, I will order that the costs of this preliminary hearing be costs in the cause.

5 April 2023

Klein J.