IN THE COURT OF APPEAL
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 8 of 2019
(CR 75 of 2018)

BETWEEN:

MALIA KOLOKILOLOMA FANUA Appellant

AND

REX Respondent

Coram: Whitten P
Blanchard J
Hansen J

Counsel: Mr S. Tu'utafaiva for the Appellant
Mr J. Lutui for the Respondent

Hearing: 23 March 2020

Judgment: 24 March 2020

JUDGMENT OF THE COURT

Introduction

1. On 26 June 2019, after a trial by judge alone, the appellant was found guilty of four counts of forgery and two counts of knowingly dealing with forged documents. She was sentenced to 3 years on the forgery counts and six months for using a forged document to be served concurrently. All sentences were suspended for two years on conditions including that she perform 60 hours community service, which, as at the date of the hearing of this appeal, has been completed.

2. The Appellant appealed against her conviction on, what was in essence, a single ground concerning the alleged wrongful admission of computer records by reference to sections 54C to F of the *Evidence Act* ("the Act").

3. At the end of his oral submissions, counsel for the Appellant indicated a wish to withdraw the appeal. For the reasons which follow, we consider counsel was, with respect, correct to do so. The appeal is accordingly dismissed.

Facts

4. The appellant was a member of the Tonga police force. Since 2005, she had been undertaking a Bachelor of Arts degree at the Tonga campus of the University of the South Pacific ("USP") majoring in Pacific policies as well as other policing courses. She was receiving funding from the Australia and New Zealand aid program for those courses up to and including the first semester of 2017.

5. In July 2017, she applied for further funding for the second semester. The application for funding was in the form of a promissory note by which she agreed to provide her tertiary education results and also acknowledged certain repayment obligations to the program if she failed any course.

6. To the promissory note, the Appellant attached, relevantly, a copy of her previous semester's exam results in the form of printouts from USP records (exhibit A-3). That printout showed that for the subject Legal Ethics, she achieved a B+, and for the subject Tourism in Less Developed Countries, she achieved a B.

7. Earlier, in January 2017, the Appellant provided a similar notification of exam results for the second semester of 2016 which included grades for the subject Legislation of B + and for Court and Dispute Resolution, a grade of A.

8. Hina Tufulele worked at the Ministry of Police. She received the documents submitted by the Appellant in July 2017. She gave evidence that when she was checking through the documents, she noticed the grades appeared to be emboldened and that they looked "like there was something that was done to that mark, there was a change." As a result, she contacted 'Ana Ve'ehala who was as an administrator of the USP campus in Tonga for confirmation of the results shown.

9. 'Ana accessed the computer records from USP in Fiji. She described the computer database of student exam results as the "banner system". She explained that the exam results were entered by an IT officer in Fiji by the name of Paula Koli. 'Ana gave evidence that she could only view those records from her computer terminal, but that each student had an individual identification number and username by which he or she could access their online account to print out their notifications of their exam results. She compared the grades shown on the computer system for all the subjects the Appellant had completed

with those the Appellant had submitted to Hina and saw that they were inconsistent. She had that record of all results printed out. That document was tendered as exhibit E. It showed that for Legal Ethics, the Appellant achieved a 'C', not a 'B+'; and for Tourism in Less Developed Countries, she obtained a 'C', not a 'B'.

10. 'Ana advised Hina of the discrepancies. Hina was then directed by her superior officer to check previous exam results which the Appellant had submitted against the grades shown in exhibit E. That revealed that in the second semester of 2016, the Appellant achieved only a 'C' for each of Legislation and Courts and Dispute Resolution (not 'B+' and 'A' respectively as submitted). The printout of USP's Notification of Exam Results for Semester 2 of 2016 was tendered as exhibit D.

11. Hina informed 'Ana of this further discrepancy. 'Ana then contacted USP Fiji personnel office where the exam results were kept and asked the officer there to check their records. She referred to email exchanges with the Student Academic office and Paula Koli and also Timothy Tuivana who was manager of assessment at the University. She reported the matter to the University's discipline committee.

12. The Crown case consisted of a comparison between the grades for the aforementioned subjects shown on the printouts submitted by the Appellant to those appearing on the USP computer printouts being exhibits D and E.

13. Exhibits D and E were the subject of objection by Mr Tu'utafaiva. During Hina's evidence, the issue of the admissibility of the USP Fiji records was raised. Mr Tu'utafaiva referred the judge to '*procedures in the Evidence Act that must be complied with before those records can be admissible*'. The Prosecutor told the judge that an affidavit from 'Ana, in respect of the computer records (presumably per s.54G of the Act), would be produced during her evidence. At the start of 'Ana's evidence, the Prosecution sought to tender an affidavit by her '*to establish the foundation of the authenticity and integrity of the electronic records*' so that the printouts of those records could be used as the 'best evidence'. The judge refused and instead required 'Ana to give the evidence directly. When Mr Tu'utafaiva objected to the tendering of exhibit E, the judge noted his objection but appeared to have agreed that submissions would be made at the end of the trial with a ruling on the objection to be delivered as part of the verdict.

14. The Appellant did not give or call evidence.

15. In his written closing submissions, Counsel for the Appellant expanded upon his objection taken during the trial to the admissibility of the printouts. He submitted that exhibit D should be disregarded because there was no evidence to prove how it came into existence, and that in relation to exhibit E, there was no evidence to prove the matters required by sections 54C to F of the *Evidence Act*. As to the latter, counsel submitted that the presumption of integrity of the computer system provided by s.54E did not apply to the case. In support of the objections, Mr Tu'utafaiva described 'Ana's evidence as being that the "student exam results are fed into the database known as banner by ID [sic, presumably meant to be 'IT'] people in Fiji; that she had limited access to what was stored on the computer and no access to the Notification of Exam Results in exhibit D. He added that there was no evidence as to the date the records in exhibits D and E were put into the computer system.

16. The Crown submitted below that 'Ana's evidence was sufficient for admissibility having regard to sections 54A, C, D and E of the Act.

Decision below

17. In his reasons for verdict, on the objection to exhibits D and E, the trial judge summarised 'Ana's evidence and then concluded that he was therefore satisfied that exhibit D was the original results which Fiji had printed out on 17 July 2017 and which 'Ana had identified. In relation to the requirements of sections 54C to F, his Honour again referred to 'Ana's evidence that:

    (a) *'The electronic record kept and used by the USP was such that nobody, except an authorised person, could access the exam results of the students, and that only the student whose results are concerned could access those results with a secret code only he/she alone has.*

    (b) *Every student has a separate identification number by which all his or her results are classified and kept and which cannot be accessed by anyone except by him or her by using his or her secret code.*

    (c) *The staff in Tonga (such as 'Ana Ve'ehala) may only access the transcript of academic record (unofficial) as in Exhibit E, but that the staff in Fiji alone could access the Notification of Exam Results as in Exhibit D.'*

18. In overruling the objection, the trial judge recited the provisions of sections 54C to F and, in respect of each, held that he was satisfied by the stated evidence:

    (a) that the prosecution had proved the authenticity of the records (s.54C);

    (b) of the integrity of the electronic records system by the which the USP exam results were kept (s.54D);

    (c) that the form of the printouts had been manifestly and consistently acted on, relied upon and used as the record of the information recorded and stored on the printouts of the USP exam results (s.54D(2));

    (d) there was no evidence to the contrary to rebut the integrity of the electronic records system (s.54E); and

    (e) s.54F simply allowed evidence to be given of usage and practice which the USP adopted with regard to the electronic record of exam results.

Appellant's submissions

19. On this appeal, the Appellant repeated the objections made below and contended that the trial judge erred in law and fact by failing to exclude exhibits D and E on the grounds that the 'requirements' of ss.54C to F had not been met and that there was no evidence to prove how exhibit D came into existence. She elaborated on the grounds by submitting that:

    (a) there was no evidence of how the records were kept;

    (b) there was no evidence that the exhibits were genuine and not copies;

    (c) the trial judge failed to make a finding in respect of s.54D(1) concerning the best evidence rule;

    (d) there was no evidence to support his Honour's finding in respect of s.54D(2);

    (e) the judge did not make a finding, and there was insufficient evidence to support any finding that the electronic records system was operating properly;

    (f) there was no evidence to support the finding in respect of s.54E(2); and

(g) there was no evidence as to the standard, procedure, usage or practice on how the exhibits were recorded and preserved as 'required' by s.54F.

Respondent's submissions

20. The Respondent contended, in summary, that:

(a) the verdict was reasonable and supported by evidence at trial;

(b) the Appellant never challenged or proffered 'an alternative narrative' in cross-examination or oral evidence for the trial judge to consider;

(c) in consequence, the trial judge was left with only the Crown evidence, which he was entitled to accept, and upon which, he was entitled to convict the Appellant.

21. In defence of the trial judge's determination in this regard, the Respondent relied upon a statement by Cooke P. in *R v Connell* [1985] 2 NZLR 233 (CA) to effect that what a 'judge sitting alone delivers is intended to be a verdict' which 'need not be supported by elaborate reasons…Careful consideration is an elementary need, not long exposition'.

Analysis

22. By a different path of reasoning, which we will set out below, on what we consider to be the proper analysis of the statutory provisions in relation to evidence in the form of computer records, and the available evidence at trial, we consider the trial judge was correct to admit exhibits D and E.

23. With that ratification, the ensuing findings of fact that led to the convictions, namely, that the Appellant had altered the USP records to effectively elevate her grades, are unassailable and indeed were not challenged on this appeal.

Shortcomings in the judgment

24. We wish to address a number of criticisms of the trial judge's approach and determination of this issue, some of which were implicit in the grounds of appeal.

25. Turning firstly to a matter of procedure, the trial judge ought to have dealt with Mr Tu'utafaiva's objection when it was raised, not on verdict. In *R v Minors; R v Harper* [1989] 2 All ER 208 ("*Minors*"), the English Court of Appeal held that in deciding

whether to admit a disputed computer record, the appropriate course for the trial judge to adopt was to hold a trial within a trial to determine whether the prosecution had established that the statutory requirements were satisfied according to the ordinary standard of criminal proof.

26. One obvious reason for that edict is that forensic decisions by defence counsel, in terms of deciding whether to call evidence from the Accused or any other witnesses may be affected by the trial judge's determination on the objection. Here, it is not known whether the decision of the Appellant not to give or call evidence was based in part or in whole on the hoped for success of the objection. Any assumption that after hearing all the evidence against the foundational backdrop of exhibits D and E, the trial judge would exclude those printouts, was risky at best. In any event, no such point was raised on the appeal.

27. Another consideration is that the relevant provisions do not differentiate between civil and criminal proceedings. In a civil case, any issue as to the authenticity of any computer-generated evidence is likely to be revealed, or at least alluded to, on the pleadings. However, in a criminal case, upon the entering of a plea of not guilty, the Prosecution is required to prove every element of the charge to the requisite standard. In the absence of any pre-trial indication or agreement as contemplated by s.54H, it may not be until cross-examination of the relevant Crown witness that the Prosecution learns whether authenticity is actively disputed. To that end, ideally, the affidavit procedure provided by s.54G is something which should be employed in advance of the trial, with the Accused then being asked whether he/she agrees that the matters in sections 54D to F have been established, or if not, whether the deponent will be required for cross-examination. If not, at least one of the evident purposes of s.54G will be fulfilled by not having to call a witness at trial to give evidence of the matters deposed to in the affidavit.

28. We note here that the trial judge did not permit the Prosecution to rely upon an affidavit which had been prepared for 'Ana to prove those matters. As we mention below, that was probably appropriate, not simply because 'Ana was giving viva voce evidence at the trial, but because she was not the right witness to directly prove those matters.

29. A second issue is the sufficiency of the trial judge's reasons in overruling the objection. The giving of reasons is a normal but not a universal incident of the judicial process.

There are some cases, or kinds of cases, where they need not be given.[1] The duty to give reasons does not arise only where there is a right of appeal against the decision; the foundation of the duty is the principle that justice must not only be done but must be seen to be done.[2] For example,[3] many questions concerning the admissibility of evidence may require nothing more than a ruling.[4] It all depends on the importance of the point involved and its likely effect on the outcome of the case. But when the decision constitutes what is in fact or in substance a final order, the case must be exceptional for a judge not to have a duty to state reasons.[5] Such a statement is desirable for the information of the parties, and in order to afford assistance to the Court of Appeal in the event of there being an appeal.[6]

30. For our part, while the principle in *Connell*, that not every matter to which the judge has regard need be the subject of elaborate reasons, may be readily accepted in appropriate cases, the present was not such a case. Here, the determination of the objections went to the heart of the Prosecution's case. That therefore required exposure of the reasoning process by which the judge arrived at each of his conclusions on the provisions of the Act he was asked to consider. Therefore, the blanket reliance on the summary of 'Ana's evidence, alone, was in our view not sufficient to properly explain any analysis of those provisions. Again, however, as this issue was not raised on this appeal, we dwell on it no further.

Consideration of the relevant provisions of the Evidence Act

31. We turn then to the relevant provisions of the *Evidence Act* the subject of the Appellant's objection and appeal.

32. In *Minors*, Steyn J explained the rationale for the then English legislation as:

> *"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*

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[1] *Public Service Board of New South Wales v Osmond* (1996) 159 CLR 656 at 666-7.

[2] *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247.

[3] As McHugh J noted in *Soulemezis*, supra. See also *Sellers v Marchant and Anor* [2007] NSWSC 309.

[4] In New South Wales, common law judges have long held that they are not obliged to hear argument on the admissibility of every question of evidence let alone give reasons.

[5] *Ahmed v Russell Kennedy* [2003] VSC 25 referring to *Brittingham v Williams* [1932] VLR 237.

[6] *Donovan v Edwards* [1922] VLR 87.

memory of a computer. The versatility, power and frequency of use of computers 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. Software systems often have 'bugs'. Unauthorised alteration of information stored on a computer is possible. The phenomenon of a 'virus' attacking computer systems is also well established. Realistically, therefore, computers must be regarded as imperfect devices. The legislature no doubt had in mind such countervailing considerations when it enacted ss 68 and 69 of the Police and Criminal Evidence Act 1984. At first glance these two sections of the Act do not appear to be of undue complexity. But in two criminal appeals which we recently heard, it became obvious that in each case prosecuting counsel, defence counsel and the judge fundamentally misunderstood the meaning of these statutory provisions in their application to the admissibility of computer printouts. It is our impression that this misunderstanding may not be restricted to those who were involved in the two appeals before us. There is also very little authority on the interpretation of ss 68 and 69. It may therefore be helpful if we set out our understanding of the meaning of these sections, and the procedure to be adopted in applying them, not exhaustively but in broad outline, before we turn to the particular facts of the two appeals."

33. Section 68 of the UK legislation prescribed the requirements for admissibility of documentary records in criminal proceedings and s.69 governed admissibility of evidence from computer records in criminal proceedings. Section 69 (and related provisions) was repealed in 1999. Since then, there are no specific requirements in the UK relating to the presentation of computer-generated evidence in criminal proceedings.[7] That may well be a reflection of what has become the ubiquitous nature of modern electronic information creation, storage and communication. The overwhelming proportion of cases where no issue arises as to the (actual or presumed) accuracy or reliability of information presented by computers has, in practice, probably rendered inutile the automatic need for lengthy and expensive demonstrations of authenticity and reliability of electronic records in legal proceedings.

34. Similar positions have been adopted in Australia and New Zealand where any issues concerning admissibility of documents as evidence of electronic records have been subsumed into the general rules of evidence relating to documents and exceptions to hearsay.

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[7] Halsbury's Laws of England, Volume 57 (2018), chapter 735.

35. Strictly speaking, documentary records of transactions or events are a species of hearsay, which are not admissible unless they come within the scope of a common law or statutory exception to the hearsay rule. However, as noted in *Minors*, to the extent a computer is merely used to perform functions of calculation, no question of hearsay is involved as such calculations probably do not constitute evidence in any strict sense of the word.[8] Further, their Honours considered whether computer print-outs may sometimes be admissible as real or original evidence. They concurred with the view expressed by Professor J C Smith[9] that where a computer operator, by hitting the appropriate keys, credits an account, the printout provides the thing done because it was the thing done or, at least, a copy of the thing done, in which case, no hearsay is involved. However, it will still be necessary in such a case, in the absence of agreement on the point, to prove the provenance of the computer printout.

36. The relevant provisions of the *Evidence Act* in this case were inserted in 2003. They are broadly consistent with the modern approaches in the jurisdictions referred to above albeit with the retention of what might be regarded as certain intermediate guidelines or safeguards.

37. In the case of a computer record, the best or direct evidence is from the person who originally entered the data or information into the computer. As computers have been invented to, among other things, store and reproduce vast amounts of information over long periods of time, the modern law on evidence recognises the reality that most people who entered particular data years ago are unlikely to have any firsthand recollection of doing so. Therefore, secondary evidence of the information, in the form of printouts, may be admissible subject to the statutory requirements pertaining to hearsay in documents generally and any specific provisions concerning electronic records.

38. The provisions under consideration here reside within Part II of the Act and presumptions as to documents. We observe at the outset that none of the said provisions expressly regulate the admissibility of electronic records in mandatory and/or proscriptive terms. In other words, they do not expressly provide that if they are not met, a computer printout will be inadmissible. They do not need to. As noted above, the starting point in a case

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[8] *R v Wood* (1983) 76 Cr App R 23; *Sophocleous v Ringer* [1988] RTR 52.

[9] In his note on *R v Ewing* [1983] Crim LR 472, and his earlier article 'The Admissibility of Statements by a Computer' [1981] Crim LR 387.

such as the present, is that the content of the printouts was hearsay under s.88. Their admissibility primarily depended on whether any of the exceptions in s.89 applied. In our view, for the reasons which follow, sections 54A to G of the Act operate as aids in that determination.

Section 54A and B

39. The Appellant's submissions below and on this appeal, and the trial judge's determination, identified s.54C of the *Evidence Act* as the starting point in determining whether the computer printouts ought be admitted into evidence.

40. In fact, the correct starting point, in our view, is s.54A, which provides:

> ***General admissibility***
>
> *Nothing in the rules of evidence shall apply to deny the admissibility of an electronic record in evidence on the ground that it is an electronic record.*

41. Section 2 defines "electronic record" to include a printout of data recorded or stored in or by a computer system or other similar device.

42. Section 54B permits a court to have regard to evidence adduced under section 54A in applying any law relating to the admissibility of records. Such laws include the relevant provisions of Part III concerning documentary evidence and the hearsay exceptions relating to statements in documents in Part IV.

43. Immediately then, one sees that the legislative intent is that, assuming relevance, once a document is proven, through admissible evidence, to be an 'electronic record' (here, a computer printout), that document will not be rendered inadmissible simply because (here) it is a computer printout. This is an important adjunct to the aforementioned Parts of the Act concerning documentary evidence, and in particular, the exceptions to the hearsay exclusion which are referred to further below.

Section 54C

44. Section 54C provides:

Authentication

The person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.

45. In determining then whether a party seeking to rely on a document has satisfied its evidentiary burden of establishing that the document *is* an electronic record for the purposes of s.54A, s.54C requires proof of authenticity. If that evidence is insufficient for a Court to be satisfied that a document is an authentic electronic record, it may be excluded as inadmissible.

46. In the context of electronic records, authenticity has two aspects.

47. The first aspect is the requirement that a printout is what it claims to be, namely, a document produced by a computer system containing information stored in that system. In the instant case, 'Ana's unchallenged evidence was capable of supporting a finding that exhibits D and E were printouts of the USP's electronic records of the Appellant's grades which the Prosecution claimed them to be.

48. The second aspect of authenticity concerns the accuracy or reliability of the information contained on the printout as being a faithful (or authentic) reproduction of the information or data originally entered and stored in the computer. Prima facie, where that information is adduced by other than the author of it, it will be hearsay. Therefore, the enquiry turns to the hearsay exceptions in s.89. As stated, in our view, sections 54D to G do no more than provide the means by which that enquiry may be satisfied.

49. Strictly speaking, insofar as the Prosecution relied on the contents of the printouts adduced by 'Ana as evidence of the truth of the grades stated in them, they were hearsay under s.88. The point was neither taken nor considered below. In any event, had it been, it would have been answered by one or more of the following exceptions provided by s.89. Pursuant to subsection (e), the grades on the exhibits disproved any state of mind of the Appellant that the grades she had submitted were genuine. Alternatively, pursuant to subsection (n), the grades in the printouts recorded in the USP banner system were admissible as evidence of those facts as they had been compiled as part of USP's business records from information supplied (directly or indirectly) by persons who had, or could reasonably be supposed to have had, personal knowledge of the matters dealt with in the information supplied. In this case, as 'Ana testified, that was most likely Paula Koli or

whomever else from USP Fiji's IT department was responsible for entering the grades into the system. For the purpose of the proviso to this hearsay exception, such a person was 'beyond the seas' and/or could not reasonably be expected (having regard to the time which had elapsed since he supplied the information and to all the circumstances) to have any recollection of entering the Appellant's particular grades into the USP system. Further, the Court could draw a reasonable inference from the form or content of the exhibits that they were USP exam result records. Beyond that, the subsection provides for determinations as to the weight to be attached to such documents as being a product of having regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, whether or not the person who supplied the information recorded in the statement did so contemporaneously with the occurrence or existence of the facts stated, and whether or not that person or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts. All of those considerations were in favour of accepting 'Ana's evidence in this regard and admitting the exhibits into evidence.

Section 54D

50. Section 54D provides:

> ***Best evidence rule***
>
> *(1) In any legal proceeding, where the best evidence rule is applicable in respect of electronic record, the rule is satisfied on proof of the integrity of the electronic records system in or by which the data was recorded or stored.*
>
> *(2) In any legal proceeding, where an electronic record in the form of printout has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the printout, the printout is the record for the purposes of the best evidence rule.*

51. The Appellant's submissions below and on appeal did not descend to detail on whether the trial was a proceeding where the best evidence rule was applicable, or even, for the purposes of the section, what any such proceeding might be. The trial judge did not advert to the issue at all. Whatever may have been intended by the legislature, as Lord Denning MR held in *Garton v Hunter* [1991] 1 All ER 451 at 453:[10]

[10] Applied recently in *Rex v Fonua* [2017] TOSC 33.

> *"... Nowadays, we do not confine ourselves to the best evidence. We must admit all relevant evidence. The goodness or the badness of it goes only to weight."*

52. Be that as it may, subsection (1) directs attention to proof of integrity of the electronic records system. In this case, there was no direct evidence of integrity of the banner system at the relevant time. However, as will be seen shortly, s.54E presumes that integrity in the circumstances set out therein.

53. Subsection (2) does little more than define the circumstances in which a printout will be regarded as the best evidence. One can easily see the sense in it, for if the best evidence rule was to be strictly applied to evidence stored in a computer, the party seeking to rely on that evidence would arguably have to bring the computer into court and display the information on the computer screen. As a matter of obvious practicality, the legislature has attempted to make clear that printouts of such information may be regarded as the best evidence of that data or information. The words "has been manifestly or consistently acted on, relied upon, or used as the record of the information" could hardly be wider in conveying that intent. Here, the printouts had been used as a record of the Appellant's grades. They were the best evidence of that information. We note also that the notification of exam results submitted by the Appellant with her Promissory Note (adduced, without objection, by the Prosecution as exhibit A3) was in precisely the same form as exhibit D.

Section 54E

54. Section 54E provides:

> ***Presumption of integrity***
>
> *In the absence of evidence to the contrary, the integrity of the electronic records system in which an electronic record is recorded or stored is presumed in any legal proceeding —*
>
> *(a) where evidence is adduced that supports a finding that at all material times the computer system or other similar device was operating properly, or if not, that in any respect in which it was not operating properly or out of operation, the integrity of the record was not affected by such circumstances, and there are no other reasonable grounds to doubt the integrity of the record;*
>
> *(b) where it is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or*

> *(c) where it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.*

55. Here, there was no evidence to attract the operation of subsections (a) or (b). However, 'Ana's evidence, to which no objection was taken, as to the usual procedure by which exam results were recorded and stored in the banner system at USP Fiji did meet the requirements of subsection (c). As she described it, that procedure was part of the usual and ordinary course of business of USP. The IT person she specified was not a party to the proceeding and he did not record or store the grades under the control of the Crown.

56. As the Appellant did not adduce any evidence to the contrary, nor did cross-examination challenge let alone damage 'Ana's evidence in this regard, the trial judge was entitled to find that the proof of integrity of USP's electronic records system referred to in s.54D(1) was satisfied by establishing the presumption of integrity provided by s.54E.

Section 54F

57. Section 54F provides:

> ***Standards***
>
> *For the purpose of determination under any rule or law whether an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or preserved, having regard to the type of business that used, recorded or preserved the electronic record and the nature and purpose of the electronic record.*

58. Suffice to say, s.54F is facilitative only and does not add another layer of requirement for admissibility. Where the presumption of integrity is not available under s.54E, and a party wishes to prove integrity for the purposes of s.54C and/or 54D(1), s.54F does no more than provide examples of the ways in which that integrity might be established. Further consideration of it in this case did not arise given the finding available on s.54E above.

Section 165

59. For completeness, we conclude our analysis with section 165 which provides:

> ***Decisions not to be reversed on sole ground of improper admission or rejection of evidence***

> *The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the Court before which the objection is raised that independently of the evidence objected to and admitted there was sufficient evidence to justify the decision or that if the rejected evidence had been received it ought not to have altered the decision.*

60. As noted above, the Appellant's case here was based on the sole ground of the alleged improper admission of exhibits D and E. Even if our analysis of the provisions the subject of the appeal above might be considered incorrect, in our view, s.165 would nonetheless prevent the setting aside or reversal of the verdict.

61. Putting aside the documentary evidence in exhibits D and E, there was other independent evidence, to which no objection was taken, and which, collectively, was sufficient to support the trial judge's decision:

    (a) Hina's evidence of the relevant grades on the record submitted by the Appellant appearing emboldened as if they had been altered;

    (b) 'Ana's evidence of the inconsistencies in the grades on her computer screen compared to that submitted by the Appellant (although her evidence as to the information displayed on her computer of the records in USP Fiji may still have required a similar analysis to that undertaken above to assess reliability and therefore weight);

    (c) that the Appellant was the only person, other than USP Fiji, who could access her own personal academic records and print them out;

    (d) as the judge found, the Appellant was the only person with the interest or motive to elevate her grades to ensure continued funding for her studies and avoid the promise of having to repay course fees for any subjects she actually failed; and

    (e) conversely, USP had no interest or benefit in displaying through 'Ana's computer terminal, grades which were lower than those submitted by the Appellant, if they were not in fact the actual grades achieved by the Appellant.

62. We would reject the Respondent's submission that the Appellant's decision not to adduce evidence, thereby not providing an alternative explanation or 'narrative', was a valid basis for the trial judge to accept the evidence that was called by the Prosecution, for to

do so would be tantamount to reversing the onus and undermining the presumption of innocence. However, once a prima facie case had been established, even on only the independent evidence outlined above, the absence of any explanation by the Appellant for the discrepancies in the grades, consistent with her innocence, meant that the judge's verdict was, in our view, reasonable and supported by the evidence.

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Whitten P

COURT OF APPEAL TONGA

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Blanchard J

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Hansen J