

Commercial High COURT ADMITS SMS as Evidence

In a landmark order delivered by the High Court Judge K T Chitrasiri, the Commercial High Court Judge of Colombo, photo copies containing screen-shots of Short Message Services (commonly known as “SMS”) were allowed to be marked and produced in evidence in a money recovery case - H.C. (Civil) **181/2007(MR)**.

In this case, *Marine Star(Pvt)Ltd.*, the Plaintiff sought to admit photo copies of SMS, copied from messages received on a mobile phone, to prove admission of liability by the Defendant, *Amanda Foods Lanka (Pvt) Ltd.* Learned Counsel for the defendant objected to all those documents being produced in evidence stating that no provision in law is available for this Court to admit the contents of such documents in evidence.

The Court observed that “As it concerned an important issue on rules of evidence, especially at a time when there is a rapid development in technology taking place, Court decided to consider the issue carefully”.

The Judge decided as follows:-

“The document sought to be produced being a photocopy (not the original) does not fall into the category of “Primary Evidence”. It belongs to the category of “Secondary Evidence”. Section 63 of the Evidence Ordinance stipulates that the “Secondary Evidence”, includes copies made from the original by mechanical process which in themselves ensure the accuracy of the copy, and copies compared with such copies. Also, the oral accounts of the contents of the documents given by a person who has himself seen it”.

“The photocopy sought to be produced is a copy of a short message received on a screen of a mobile phone. Therefore, unless the original message of that copy received on the screen of the mobile phone is admissible in evidence, the said photocopy could not be regarded as evidence. Thus, the primary issue here is to determine whether the message received on the screen of a mobile phone could be considered as a document according to the law”.

Citing the case of *Abubakhar Vs. Queen* (54 NLR 566), and the case of *In re S.A. Wickramasinghe* (55 NLR 511), the judge observed “that the Courts in this country had been making efforts to widen the scope of the meaning given to the word “document” relying upon the interpretation referred to in Section 3 of the Evidence Ordinance. Thus, it is evident that even from very olden days, Courts in this country were very much inclined to admit and rely upon the evidence which have been generated with the assistance of technology, despite the fact that such evidence did not appear on a surface similar to a sheet of paper”.

In the course of the judgment, the Judge Chitrasiri also made another important observation in respect of the Supreme Court decision in *Benwell vs. Republic of Sri Lanka-1979 (2) SLR 194*

The Judge held that “the issue in this action does not refer to a document generated through a computer as in the case of *Benwell Vs. Republic of Sri Lanka*. Therefore, the question to be decided in this instance could easily be distinguished from the judgment by Justice Collin Thome. Therefore, this Court is inclined to follow the decisions pronounced in the aforesaid cases namely *Abubaker vs. Queen* and *in re S.A. Wickramasinghe*.

“Thus, it is my opinion that the message, received on the screen of a mobile phone which had been typed by another person from a different point and was sent with the assistance of technology, could be admitted in evidence. In the circumstances, I decide that the original message received by a mobile phone should be considered as admissible evidence in terms of the provisions in the Evidence Ordinance enacted in the year 1895”.

The Judge proceeded to consider whether the short messages that are to be produced in evidence could be allowed to be led in evidence under the provisions of the Electronic Transactions Act No. 19 of 2006. Citing Section 21(2) of the Electronic Transactions Act and the definition of data message “electronic document” “electronic record” and “communication” the Judge held that the Interpretations referred to in the Act “*would definitely include a SMS message under Section 21 of the Act*”. Therefore, the judge held that “*It is my opinion that a short message commonly described as SMS falls within the scope of the Electronic Transaction Act and therefore the evidence sought to be produced by the plaintiff could easily be admitted in evidence under Section 21 of the said Act No. 19 of 2006*”.

“The learned Counsel for the defendant has argued that the provisions of the Electronic Transaction Act cannot be invoked in this instance since the alleged SMS messages were not compiled or received in the course of business, trade or profession or other regularly conducted activity. I am not inclined accept this argument since the sole basis of this action depended upon an agreement, which is purely in the nature of a commercial activity. Moreover, the SMS messages in question had been exchanged between the parties whilst acting under the terms and conditions contained in the said business agreement.

In the circumstances, it is my considered view that the SMS messages sought to be produced in this instance could be admitted in evidence even in terms of the provisions contained in the Electronic Transactions Act No. 19 of 2006”.

“Now that I have described the two methods available in law, namely under the Evidence Ordinance and under the Electronic Transaction Act, to admit the SMS messages in evidence, it is pertinent to refer to Section 21(1) of the Electronic Transaction Act as well since it contains an exclusionary clause. In that it is stated; *“Notwithstanding anything to the contrary in the Evidence Ordinance or any other written law, the following of this Section shall be applicable for the purposes of this Act.”*”

Therefore, it is necessary to ascertain whether the provisions of the Evidence Ordinance could be made use of in this instance. The basis on which I have relied upon the provisions of the Evidence Ordinance purely depends on the interpretation given to the word “document”. Whereas the decision to act in terms of Section 21 is based upon the object of the Act namely the recognition accorded to the new developments in technology. I do not see any contradiction between the two for me to disregard the provisions of the Evidence Ordinance as far as the instant issue is concerned. **Thus, it is my opinion that this Court is free to make use of either provision.**

However, as I have explained herein before, this Court could have admitted the contents of not only short messages but also a document appearing on a computer screen, relying upon the interpretation referred to in the Evidence Ordinance enacted as far back as 1895 even without recourse to the said Electronic Transaction Act. This view had been expressed on the same line in the cases of Abubhakar Vs. A.G. and In re S.A.Wickramasinghe relying upon the said interpretation to the word

“document” in the Evidence Ordinance. Accordingly, the images appearing on any substance should be allowed as evidence according to the circumstances of each case.

However, the application now before Court is to admit a photocopy of the said message received by a mobile telephone. Therefore it is the duty of the plaintiff to prove the relevant photocopy in terms of section 63 of the evidence ordinance. Subject to the aforesaid condition referred to in Section 63 of the Evidence Ordinance, the documents marked X17to X53 and X55 to X57 are allowed to be marked and produced in evidence.