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April 22, 2021

Potentially fake app messages result in appeal from firebombing conviction

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We have previously addressed the [concerns](#) of a civil court judge about the perils of having to deal with “fake news” in the form of spoofed emails and electronic documents. The Ontario Court of Appeal has addressed similar concerns as to the unreliability of electronic text messages and app messaging services which may be manipulated to appear to have been sent from someone when they were not. The failure of a trial judge to consider such issues led to the successful appeal for a man convicted of firebombing the home of a former friend who was having a relationship with his ex-wife: *R. v. Aslami*, [2021 ONCA 249](#).

Prior to the firebombing, the appellant had discovered that his recently-separated wife had commenced a sexual relationship with his friend (S.F.) as a way of hurting him. The appellant's wife ensured that he learned of the relationship when, the day after the sexual encounter, and shortly before the firebombing occurred, she sent the appellant a picture of her and S.F. in bed together. Shortly after the picture was sent, the home of the former partner of

S.F. was firebombed when a homemade incendiary device was thrown through the living room window. Fortunately, the occupants of the home (including S.F.'s children) escaped unharmed.

Before and after the firebombing, the appellant's ex-wife and S.F. received several messages, both by text and on social media platforms. Some of the messages suggested that the sender was involved in the firebombing. The appellant's ex-wife showed the messages she received to the police, which led to the appellant's arrest. At trial, both the appellant's ex-wife and S.F. testified to their belief that it was the appellant who had sent these messages.

At trial, the prosecution relied on evidence of the appellant's revenge motive and the fact that he had the opportunity to commit the attack. There was also a purported identification of the appellant as the firebomber, from a surveillance video. The messages received by the appellant's ex-wife and S.F. formed a crucial part of the prosecution's case.

The defence theory was that some, or all, of these messages were, in fact, created by the appellant's ex-wife and S.F. in order to frame him for the firebombing and cause his removal from Canada. The defence argued that the messages could have been sent by the appellant's ex-wife, on her own or in conjunction with S.F., and could have been made to look like they came from the appellant, in order to frame him for the firebombing. The appellant argued that this conduct would be consistent with the desire of his ex-wife to hurt him, or otherwise get revenge on him, arising from the breakdown of their relationship.

After reviewing the evidence, the trial judge found that it was the appellant who had sent the various messages at issue, and that there was "an overwhelming body of evidence" that established the guilt of the appellant beyond a reasonable doubt.

The Court of Appeal found that the trial judge had committed an error in accepting that the electronic messages had originated from the appellant.

There were three sources of the messages in the case: (i) SMS text messages, (ii) messages from an app called TextNow, and (iii) messages on a Facebook page. As noted by the Court of Appeal, these sources each have their own "particular frailties."

With regard to the SMS text messages, there was no dispute that the appellant's ex-wife and S.F. received various SMS messages from someone. The police extracted the SMS messages both from the phones that belonged to the appellant's ex-wife and S.F.

However, the cellphone number from which the

messages were sent was registered to someone other than the appellant. The only connection between the appellant and that cellphone number was the fact that the appellant's ex-wife had saved the number as a contact in her phone under the name "Sumal Jan," with a photo of the appellant. The appellant's ex-wife testified that "Sumal Jan" was the appellant's "real name from back home" and what his family called him. The appellant's ex-wife testified that she also recognized the number as one used by the appellant and she believed that she was communicating with him. A police detective gave evidence that there were several entries on the appellant's ex-wife's cellphone for the name "Sumal Jan" that had different phone numbers associated with them.

S.F. also received a few SMS text messages on the day of the firebombing, within the space of two or three minutes. While these messages were extracted from S.F.'s cellphone by the police, the sender's phone number could not be identified. There was no evidence that the phone number, from which these messages emanated, was connected to the appellant, other than S.F.'s evidence that he thought the messages came from the appellant.

With regard to the Textnow app messages, between the day of the firebombing and the next day, the appellant's ex-wife exchanged a great many messages with a contact who was, once again, saved by her as "Sumal Jan". The appellant's ex-wife again testified that she believed she was texting with the appellant. Because these messages were received through the TextNow app, they could not be extracted from the ex-wife's phone.

Rather than dealing directly with the problems surrounding the reliability of the TextNow



messages, the trial judge engaged in an exercise of comparing the TextNow messages with the SMS messages, which led to the conclusion that they all originated from the same person, namely, the appellant. The trial judge concluded: “I find that there are striking similarities in the substantive content, specific terms, tone, grammar and spelling when comparing the messages at tabs 1 and 3.”

Lastly, Facebook messages were exchanged between S.F. and someone using a Facebook account with the moniker, “Trustnoone Mob”. S.F. testified that he believed this account was associated with the appellant. He also testified that he believed he had been messaging with the appellant. The messages were obtained by the police through screenshots, taken by S.F. on his cellphone.

The Court of Appeal accepted that there were some SMS text messages, sent towards the end of the events leading to the arrest of the appellant, that could be used to support a finding that it was the appellant who sent those text messages to his ex-wife. However, when the appellant was arrested, no cellphone was found on his person and the police did not search the residence for one. In any event, those later text messages did not implicate the sender in the firebombing.

For the Court of Appeal, the “bigger problem” was that the case did not rest on the contents of the SMS text messages. Rather, the incriminating messages were obtained from the TextNow app, on which the appellant’s ex-wife testified that their whole argument had occurred. Unlike the SMS text messages, not only were the TextNow messages obtained in an unusual and not especially reliable way, there was nothing in the content of those messages that objectively established the appellant as the sender.

A witness from Rogers Communications provided technical evidence that only SMS text messages and voice calls appear in cellphone records, not communications sent through text apps like TextNow. A police detective explained how the TextNow messages were obtained from the phone of the appellant’s ex-wife, namely that the messages were contained in screenshots taken by the appellant’s ex-wife, while a detective watched, the day the appellant was arrested, and then again almost a year later.

However, the prosecution did not lead any evidence to establish precisely when the TextNow messages were sent. The police officer testified that the data connected to each TextNow image shows only the time when the screenshot was created and not exactly when each of the captured messages was sent or received.

The prosecution also did not lead any expert evidence regarding the functioning of the TextNow app, or its reliability, or any ability to manipulate the date, number, name of the sender, or any other details as to the operation of the app.

The appellant’s ex-wife testified to her belief that the times shown on the screenshots, in the small circles embedded at indefinite intervals between the messages, corresponded with when the TextNow messages were exchanged. But since the timestamps appear infrequently, often with many messages in between, they only provide, at best, a rough sense of the timing of each message on the day it was sent or received.

In the Court of Appeal’s view, the trial judge’s comparison of the content of the TextNow messages with the SMS texts was a “flawed and unreliable foundation” for the conclusion that they were sent by the same person. In the Court’s view, grammar and spelling are

not generally unique to a single person. Many unusual expressions are routinely used in text messages that do not reflect proper grammar or proper spelling. Further, text messages are often replete with spelling errors unintended changes made by the spell check function.

The Court of Appeal was also puzzled by what the trial judge meant by, or how he could extract, the “tone” of the text messages or how tone would be unique to the appellant. If the sender appeared angry or frustrated, he would not be the only sender of text messages who might be operating with those emotions. In addition, the reference to “substantive content” effectively assumed that the appellant was the sender. In other words, reliance on the content of the messages engaged in circular reasoning by assuming that because the sender of the messages knew about the firebombing, it must be the appellant who sent the messages.

Lastly, the Facebook messages had no evidentiary value. There was no evidence whatsoever tying the appellant to these messages, save for the evidence of S.F. that he believed that they came from the appellant. The problem with relying solely on S.F.’s evidence on this point, given the obvious animus between the two, is self-evident. S.F., more than any other person, had reason to falsely implicate the appellant. This approach failed to give any consideration to the defence position that, in fact, it was the appellant’s ex-wife and S.F. who were sending the messages as a way of framing the appellant.

In allowing the appeal from conviction, the Court of Appeal summarized the issue as follows:

This case demonstrates the risks associated with not paying adequate heed to the dangers that are associated with relying on text and other messages, absent expert evidence explaining how

various pieces of software, or “apps”, can be used to generate these messages, and how reliable the resulting messages are in different respects. Put simply, it is too easy to use various pieces of software to create, or manipulate, messages such that they can appear to be from someone when, in fact, they emanate from an entirely different person. Similarly, the timing of the messages can be altered to suit a particular purpose.

Trial judges need to be rigorous in their evaluation of such evidence, when it is presented, both in terms of its reliability and its probative value. While the trial judge did not engage in that rigorous analysis in this case, the prosecution ought to have called expert evidence to address the issues that the evidence posed, but they did not.

In the result, the appeal was allowed and a new trial was ordered on all charges.

In many cases, there may not be a serious question as to the authenticity of electronic communications, particularly if the adverse parties have independent copies of the same messages. In cases where the authenticity of electronic communications is potentially an issue, the directions provided by the Court of Appeal should be kept in mind and considered at an early stage of the proceedings in order to have appropriate expert evidence lined up to address any potential concerns about reliability.

Contact us

If you have a litigation matter and are in need of legal advice, please contact [James Cook](mailto:jcook@grllp.com), at 416.865.6628 or jcook@grllp.com.

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