

SECRETLY RECORDED

Challenging evidence obtained from eavesdropping devices - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

In October 2000 the Regulation of Investigatory Powers Act 2000 (RIPA) came into force. RIPA, and the Codes of Practice that accompany it, now provide a statutory backcloth to all covert police operations. RIPA classifies covert surveillance into 3 types. First of all there is Directed Surveillance. This is typically the authorisation for a subject to be watched and followed – it requires no trespass onto property. Then there is Intrusive Surveillance; this will involve the placing of bugs in cars etc and any interference with property. Then there is the use of Covert Human Intelligence Sources – i.e. informants and undercover officers. This article concentrates on ‘intrusive surveillance’ – specifically the use of ‘probes’ or listening devices.

Article 8(1) of the European Convention of Human Rights established, even before the Human Rights Act 1998 came into force, the right to privacy. Surveillance is a breach of that right to privacy but of course it is a necessary and legitimate tool in the fight against crime. Article 8(2) provides that certain breaches (of Art 8(1)) will be lawful if the purpose is, for example, “the prevention of disorder or crime”, and that the interference with the right to privacy is “in accordance with the law.” That phrase simply means that there must be a proper statutory authority for the interference. Thus we have RIPA. Furthermore, though the word ‘proportionality’ is not mentioned in Article 8, any bugging operation which is not ‘proportionate’ will not pass the lawfulness test of Art 8(2) and will therefore be an unlawful interference of the suspect’s right to privacy. That though, as will be seen, does not necessarily help the suspect fight his criminal charges.

THE AUTHORISATIONS

Authority to place a bug in someone’s home or car is required from a Senior Officer and then by an independent Surveillance Commissioner, sections 32-40 RIPA. It was, and remains our practice, in appropriate cases, to demand disclosure of the application and authorisation forms. The reason these forms are usually sought is to consider a possible challenge to the lawfulness of the bugging operation. If the operation was not Art 8 compliant then there may well be an argument for excluding the evidence from the bugging device from the trial.

Following the case of *R v G.S. and Ors* [2005] EWCA 887, unrep. it is now more difficult for the defence to de-

mand the RIPA applications and authorisation forms as of right. In that case the Court found that the defence had asked for the application forms without any basis and were undertaking a ‘fishing expedition’ in the hope that the material could support an application to exclude the material. The Court considered that the procedure contained in the Act and Codes of Practice meant that the trial Judge did not have to decide if the police operation was lawful as that had already been done; the procedure in RIPA included an independent review by a Surveillance Commissioner who considered the question of lawfulness. However, the Court also went on to suggest that the application and authorisation material may be disclosable to the defence if, in effect, the defence identified some proper reason for disclosure – rather than just demanding the forms to see if a challenge could be mounted. The case of *R v Allsopp* [2005] EWCA Crim 703, was decided just weeks earlier than the *G.S.* case and, arguably, actually makes it easier for the defence to demand that officers come to Court to be cross-examined on oath (in the absence of the jury) about the lawfulness of the police operation (para. 28). It is certainly our view that Article 8 challenges can still be mounted in the Crown Court to police surveillance operations and that the disclosure and assessment of the background material should form a part of any proper challenge. For example, in establishing the proportionality of the operation, did the officers who deployed the bugging device have sight of the authorisation forms or have regard to the rights of others (non-suspects) whose privacy might be invaded by the placing of bug? See e.g. *R v Sutherland* 29/1/02 (unrep). These questions address the central question of the lawfulness of the intrusion.

WHY CHALLENGE THE AUTHORISATIONS?

Material which is tainted by a violation of Art 8 may be excluded from the trial process by way of application under s78 of the Police and Criminal Evidence Act 1984. Infact there are some cases where the Courts will actually prevent a trial from going ahead because of the unlawful activities of the police in securing evidence. For the Court to ‘stay the indictment’ on this basis there has to be an ‘abuse of process’ application – such applications are only granted in exceptional cases. In *R v Grant* [2005] 2 Cr. App. R 28 the Court of Appeal considered a case where the police eavesdropped on the communications of a suspect and his solicitor. The acts of the police were

clearly unlawful; the Court found that, in general terms, unlawful acts of such a kind, amounting to a deliberate violation of a suspect's right to legal privilege, were such an affront to the integrity of the justice system that the prosecution was rendered abusive and ought not to be countenanced by the Court.

THE RIGHT TO A FAIR TRIAL

Assuming a Defendant has persuaded a Judge that a bugging operation was not properly authorised, or was disproportionate and his Art 8 rights have been violated – the next question the Judge will be asking himself is 'so what?' A breach of Art 8 does not mean that the material must be excluded. The dominant factor in the trial Judge's mind will be the Defendant's Art 6 rights, i.e. the right to a fair trial. The Strasbourg Court itself has recognised that a breach of Art 8 does not of itself establish a breach of Article 6; *Perry v UK*, 6737, July 17 2003. A forensic approach is necessary; i.e. consideration of whether parts of the covertly obtained material can be excluded, or whether there is a realistic argument that the impact on the case as a whole of admitting unlawfully obtained evidence would be to breach the fair trial requirement of Art 6 of the Convention. Solid reasoning has to be put before a Judge for such an argument to be successful.

IDENTIFICATION

Another issue in 'bugging cases' is identification. This can be a difficult area; a Defendant insists that he is not the speaker identified on the transcripts as uttering the damning words. Suppose, for example, a bug is placed in a house or car and the police then listen and transcribe weeks or months of conversations without actually keeping observations on the car or house for the whole of that period, not an unusual scenario. Sometimes the voice attribution may be obvious – for example where the speaker the police are interested in is clearly identifying himself. But what about where there are a number of speakers and no visual I.D., or obvious reference of who was actually present? In such a case the Crown may produce transcripts saying that 'Speaker 1 is X'. X may disagree. How do the Crown prove their case? The usual route is for a voice identification expert to listen to the disputed tape. However, this is not the end of the story. Identification by voice is not like identification by DNA or fingerprint – it is not an exact science. The Crown's expert is expressing his or her opinion and a defence expert may come to a different opinion. There are two types of voice analysis that the experts commonly use. One is more reliable than the other, so it is worthwhile understanding what technique has been used. There is the auditory technique which involves the expert listening to the sample and the disputed tracks and making identifications through features such as dialect or accent. Then there is the more scientific acoustic method which involves the use of on screen display of information about

the acoustic properties of the speech which depend upon the individual's vocal tract, mouth and throat.

In *R v O'Doherty* [2003] 1 Cr. App. R 5 the Northern Ireland Court of Appeal held that in the present state of scientific knowledge no prosecution should be brought where the identification evidence relied solely on the auditory method. An exception to this rule might be where the police know that X is present in a car, or a room full of people, and the expert is simply being asked to listen to the voices and attribute X to one of the speakers. The issue then becomes 'how do the police know that X was present?' The authors are involved in appeal on this very point where the 'knowledge' was said to come from the limited context of what was said, rather than a visual identification in an auditory analysis case.

Eavesdroppers and bugs are here to stay – but, for the time being, so is the Human Rights Act with the protection that it can offer.

AUTHORS

Jonathan Lennon is a Barrister specialising in serious and complex criminal defence case at 23 Essex Street Chambers in London. He is a contributing author to *Covert Human Intelligence Sources*, (2008 Waterside Press) and has extensive experience in all aspects of the Proceeds of Crime Act 2002.

Aziz Rahman is a Solicitor - Advocate and Partner at the leading Criminal Defence firm Rahman Ravelli Solicitors, specialising in Human Rights, Financial Crime and Large Scale Conspiracies/Serious crime. Rahman Ravelli are members of the Specialist Fraud Panel.

RAHMAN RAVELLI

Rahman Ravelli Solicitors Ltd (Company Registration No.6295702) are leading Criminal Defence Lawyers regulated by the Solicitors Regulation Authority. We are Solicitors specialising in the defence of Serious Fraud, Serious and Complex Crime and Asset Forfeiture (including SOCA (Serious and Organised Crime Agency) Civil Recovery), Nationwide.

We are Specialist Panel Members (Fraud and VHCC) able to undertake the most Complex of cases.

CONTACT US

Rahman Ravelli Solicitors
Saracen House, 10 Pellon Lane, Halifax, HX1 5SP
DX 16001 Hx1
Tel: 01422 346666 (24HR)
Fax: 01422 430526
enquiries@rahmanravelli.co.uk

Copyright © 2009 Rahman Ravelli