

TELEPHONE EVIDENCE

Tackling Surveillance Evidence - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

Why is 'phone evidence' so prolific in prosecutions these days? It is a simple recognition that the explosion in the last 10 years of the use of mobile phones has given the police a very useful investigatory and evidential tool. The mobile phone is a personal tracking device and the phone number might reveal a record of communications with other suspects.

CONSPIRACIES

The use of telephone evidence is now an almost an essential part of any allegation of conspiracy. The essential element of the offence of conspiracy is evidence of an agreement with others to commit an offence. The 'agreement', of course, is never a signed document expressing a contract to commit a crime. The Crown will simply invite the jury to infer the agreement from the surrounding circumstances. This will often mean heavy reliance on the phone contacts between suspects and also the timing and frequency of those contacts.

For example, the Crown might invite a jury to infer that one series of calls by a Defendant to others is the 'arrangement stage', and the next series of calls, happening just after the arrest of those others, is the Defendant desperately trying to find out what has happened to his drugs, guns or whatever. Indeed the police have used the tactic of making arrests of suspects lower down an indictment just to see what the reaction is of those higher up – this includes an analysis of telephone call patterns.

The problem for those facing serious charges is that the calls may be quite innocent and the accused simply cannot remember why he made or received certain calls. He may be asked about a series of one minute calls made many months earlier. The other problem is the danger of guilty association; in other words the Defendant has been up to no good but of a completely different type, and much less serious than the detective at the interview seems to be suggesting. A police theory then appears to be backed up by the phone evidence.

So what are the issues in a phone evidence case that Defendants and their advisors should be considering?

PHONE ATTRIBUTION

Of course in order for the police to suggest that a suspect has been in phone contact with another suspect the police

need to know the phone numbers of the two concerned. Most mobile phone users use phone credits rather than accounts. This means the network provider, Vodaphone, T-Mobile etc will probably have no record of the name and address of the subscriber. This is not a problem for the police when the phone is seized directly from a suspect on arrest. It is a problem when a series of incriminating text messages, or calls patterning, are then found on the phone from another number that can't be traced through the network provider.

In that situation the police will hope that the call/text message is to or from someone logged into the mobile's memory/SIM card address book. For instance, there may be a series of calls just after the suspects arrests from someone 'John' – 'John' may also have sent an incriminating text message. The police may suspect that 'John' is their suspect; John Smith. The police now, ideally, need John Smith's phone to be on him when he is arrested, or in his car or home. There is no rule of law that provides that phone numbers being attributed to certain suspects have to reach a certain gold evidential standard. No phone may be discovered at all. The police may just ask for the phone billing for John's phone and discover that that phone is used to call John's Mum, John's workplace etc etc, creating a stronger attribution of the phone number to John. On the other hand if the attribution is very weak the defence could make an application to the Judge that this evidence is so weak, so inherently unreliable, that it ought in fairness not to be allowed to go before the jury as an attribution. The Judge may agree and that would be the end of the phone evidence. Alternatively he might rule that the issue is one for the jury and all he will do is direct that any phone charts make it plain that the tag 'John Smith' next to the offending phone number on the chart is replaced with the phrase 'phone attributed to John Smith'. In the case of *R v Mason*, Court of Appeal, 14th February 2006, the Court of Appeal held that an entry in the memory of a co-Defendant's phone, which linked the number attributed to the Defendant to him by name, was an admissible attribution.

TRACKING AND BUGGING

Mobile phones can of course be powerful evidence of where a particular individual was at a certain time. The evidence comes usually from an expert briefed by the police who will consider information from the network provider about which of their 'cell-sites' were used in

certain calls; i.e. which cell picked up or received the radio wave transmissions carrying the call. If the police want to show the movement of an individual from one place to another then the expert can show how the phone signal passed from one cell site to another as the handset moved, or simply show that some time after one call was made another was made that used a different cell. It has to be borne in mind that in rural areas the use of a cell may not mean the user is particularly close to that site, whereas in places like London the logging of a call on a particular site invariably means the handset is very close by.

TELEPHONE CHARTS

Police officers who have made a number of arrests and have seized a number of mobile phones will request their Force Analysts to turn the billing information into something meaningful that a jury can understand. In other words the production of colour coded telephone link charts showing diagrams linking phone numbers with suspects and with each other and showing the times of calls between the various handsets. These charts are increasingly becoming the centre-piece for prosecutions. However, it must be remembered that these charts are just that 'charts'; they are not evidence of the actual phone calls. They come from the phone billing and if the defence cannot check the phone billing against the charts for accuracy then the charts may have to be heavily edited by the Crown. Also the evidence is of calls the prosecution want the jury to know about – there maybe other information in the billing which assist the Defendant.

The authors were involved in a large drugs conspiracy case where material from the phone companies had been destroyed, as they routinely are after a certain period, and the police no longer had the billing information originally provided. All that was available was the charts. This created an opportunity to argue that the charts could not go before the jury as there was no evidential basis to support them and that the charts were not a reflection of the billing as they involved an element of human input and the charts were therefore hearsay. In the event the matter was not argued as the Defendant was discharged following a separate legal argument. Since then however the new Criminal Justice Act 2003 has been implemented and it is now easier for the Crown to have hearsay evidence admitted. However, in our view, s129 of that Act preserves the position. The section provides that representations of fact made 'otherwise than by a person' (i.e. by a computer) which depend upon their accuracy on information supplied by a person are not admissible "unless it is proved that the information was accurate". It can be seen therefore that there are still potential arguments available to challenge the accuracy of phone charts. If the Crown cannot produce the billing material then the charts may be lost to them, depending on the human input in creating the charts.

PRELIMINARY HEARING

Frequently a Defendant will find himself at a Crown Court preliminary hearing very soon after arrest and find himself slightly perplexed as to what the evidence is against the Defendant. The Crown are routinely given up to 6 weeks to serve their papers. It is those papers which must disclose a prima face case for the prosecution. If the allegation is conspiracy then phone charts may be served on the defence solicitors at or before the preliminary hearing. It should be remembered that this is simply not good enough – the charts are not evidence of calls being made or received; it is simply a handy shorthand, a prosecution tool. The evidence of the phone billing has to be produced.

This can cause the prosecution problems given the tight time-frames for service of evidence after the preliminary hearing. Often the telephone data will have been gathered as the police investigation was on-going and the charts then produced for Court but without any actual billing being obtained. The police will then often have to re-obtain the same material as formal billing. This is either because the original data was served in an unacceptable format, was hearsay or the analysts have since disposed of it. This takes time – which causes even more problems as the phone companies do not hold details of billing for very long. The moral of the story is that all Defendants facing indictable only charges which rely heavily on telephone evidence should make it clear at the preliminary hearing that a dismissal argument may follow service of the case papers. If the Crown cannot in that time back up their charts with proper billing evidence then the prospects of a successful dismissal argument are greatly increased. As usual proactive defending is the key.

AUTHORS

Jonathan Lennon is a Barrister specialising in criminal defence in complex/serious cases and Prison Law at 23 Essex Street Chambers in London. He was former co-editor of the Prison Law Reports.

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.

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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

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