

TELEPHONE EVIDENCE

Tactics and Strategy - 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, BT, 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 that 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. However, in a case that Rahman Ravelli Solicitors were involved in Sheffield Crown Court recently a successful submission was made to exclude certain telephone evidence on the basis that its attribution was so weak. There is no rule of law and all depends on the facts and circumstances of the individual case.

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 - perhaps within metres. Such evidence, coupled with evidence of calls made around certain key events, may provide the prosecution with compelling material that needs very thorough analysis by anyone defending in such a case.

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 often 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. The evidence comes 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 may be 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 Criminal Justice Act 2003 has been implemented and it is now easier for the Crown to have hearsay evidence admitted. Section 129 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 - the arguments will turn on hearsay issues, see eg *R v O' Connor* TLR 19/7/10.

In a case called *R v Leonard* 173 JP 366, CA the Court of Appeal found that text messages stored on a phone that was discovered on someone who had been arrested were hearsay. These messages were supposedly commenting on the quality of drugs that had been delivered to the holder of the 'phone. Of course just because something is hearsay does not mean it is not admissible, but it is a reminder that challenges can be made to what may seem, at first blush, to be solid evidence.

CONCLUSION

Telephone evidence can make or break a case. Telephones provide a picture of a defendant because they are such a part of modern life. That is often the argument that the jury must be presented with the 'complete picture' and not just snap shots or edited highlights. The challenges we have outlined here e.g. attribution, hearsay etc are not easy. There is often a dense amount of material to consider - more often in the unused material as opposed to the used evidence. As ever early preparation is the key if there is to be any hope of mounting any kind of challenge to this sort of evidence.

AUTHORS

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