Entrapment

2 May 2012

Some readers of this article will know all about test-purchase operations where under-cover officers will ask suspected street dealers for drugs - the officers will of course be 'wired for sound'. Other readers may be painfully aware of so-called 'participating informants' where a member of a group is also acting as a police informer. But the extent of under-cover police operations would surprise many. Rahman Ravelli solicitors alone have been involved in cases where an officer has pretended to be involved in the car-ringing business and even where an officer masqueraded as an under-cover contract killer for hire. These operations often lead to allegations by a defendant of entrapment. Entrapment is not a defence in English criminal law. However, if entrapment can be demonstrated then the case is likely to be stopped as an abuse of process or, at the very least, the evidence obtained excluded from any trial.

In Texiera de Castro v Portugal (1998) 28 EHRR 101 the applicant, who had no previous convictions, complained that his right to a fair trial (Article 6 of the Convention) had been breached when 2 men came to his house and asked to buy heroin. He did not have any heroin but took them to another house to buy the drugs whereupon the 2 men arrested him. He was convicted but the European Court agreed with him that the officers had acted as agents provocateurs, he had in other words been incited into committing an offence he would not have otherwise have committed.

Introduction of Regulation

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For many years it was only the interception of mail and telephone calls that was subject to any statutory regulation. It was not until February 1999 when the Police Act 1997 came into force that a proper statutory basis for the authorisation of covert entry upon and interference with property, or with wireless telegraphy, was established. The 1997 Act went someway to addressing the astonishment expressed by Lord Nolan in R v Khan (Sultan) [1997] AC 558 at 582, House of Lords, at the lack of any statutory system of regulation in the use of surveillance devices.

The primacy placed on a statutory backcloth to surveillance operations came not from a Government desire for its citizens to know and understand the power of the authorities, but because it had to under human rights law. Article 8 of the Convention establishes, the right to a private life. Surveillance is a clear breach of the target's rights under Article 8. However, under Article 8(2) certain breaches of the right will be lawful if, for example, the breach is in order to effect "the prevention of disorder or crime", but only so long as the interference with the right (to privacy) is "in accordance with the law". That phrase simply means that there had to be some proper statutory authority for the interference, not just Home Office guidance documents. This led to Parliament enacting Regulation of Investigatory Powers Act 2000 (RIPA), which formalised all State surveillance operations against its citizens.

Regulation of Investigatory Powers Act 2000 (RIPA)

The effect of RIPA is that we, the public, can see for ourselves exactly what the State's powers are to conduct surveillance against us. We know what the process and procedures are, the different types of surveillance and the authorisations needed by the investigating officers. In fact the statute makes no requirement to obtain authorisation for any of the types of surveillance contemplated by the Act. However, the Codes of Practice make it clear that police officers etc are expected to properly authorise surveillance or informant operations and that if they do not they run the risk that the material gathered will be excluded from the court process; see e.g. para. 2.2. of the Code of Practice on Covert Human Intelligence Sources.

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Types of Surveillance Authorities

Part II of RIPA, divides covert surveillance into three different categories: Firstly, there is Directed Surveillance; this is covert but not intrusive. This is the most basic type of surveillance under the Act, in reality it is 'tailing' someone, following them, photographing and videoing them. It requires only internal authorisation by a designated person who believes that it is proportionate to the aim sought to be achieved. Secondly, there is Intrusive Surveillance; this is defined as covert surveillance carried out in relation to anything taking place on residential premises or in any private vehicle. Such surveillance must be authorised by the Home Secretary or, one of a designated number of others such as the Chief Constable of a police force. The grounds are narrower than for directed surveillance and all authorisations for intrusive surveillance are also subject to scrutiny by a Surveillance Commissioner.

Thirdly, there is Covert Human Intelligence Sources - informants; under s26(8) a person is a CHIS if:

- (a) he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c)
- (b) he covertly uses such a relationship to obtain information or to provide access to any information to another person; or
- (c) he covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.

Section 29 deals with authorisation for CHISs. Authorisation should not be granted unless the authorising officer believes that the authorisation is necessary and proportionate. The requirement of necessity must be justified on specified grounds which include the wide ground of 'preventing or detecting crime or of preventing disorder'; s29(3).

RIPA Codes of Practice

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Each type of surveillance, directed, intrusive etc has a Code of Practice. The Codes set out in detail the police application procedure. Application forms are used and there are time limits for each authorisation. CHIS authorisations last up to 12 months under para 4.17 of the CHIS Code of Practice but the Code also provides at para. 4.19 that:

Regular reviews of authorisations should be undertaken to assess the need for the use of a source to continue.. Particular attention is drawn to the need to review authorisations frequently where the use of a source provides access to confidential information or involves collateral intrusion.

This requirement for targeting, justification and review is one of the reasons that we don't see very many 'Donnie Brasco' type operations in the Courts; i.e. long term infiltration of a gang for the purpose of gathering evidence about numerous persons and for offences unknown. The CHIS Code of Practice sets out at para. 4.14 the information to be provided in applications for authorisations, which includes the reasons why the authorisation is necessary and proportionate and "the purpose for which the source will be tasked or deployed" and "the nature of what the source will be tasked to do."

Looseley

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The House of Lords followed the approach of Strasbourg's Texiera de Castro case in the leading domestic case of R v Looseley; A.G.'s ref (No. 2 of 2000) [2002] 1 Cr. App. R 29. The Lords noted that the proper approach to take where a state agent had lured a citizen into committing an offence was for the Court to stop the prosecution as an abuse of process and said that when a Court is considering the limits of acceptable police behaviour in a particular case a useful guide is to consider whether the police did no more than present the Defendant with an unexceptional opportunity to commit a crime. If the officers went further than others might have done in a similar position then the police are to be regarded as artificially creating the crime. So, in a test-purchase case the first consideration is to consider whether the undercover officer has, for example, persistently badgered the suspect until he relented - if so then, applying the Looseley test the Judge may stop the case as the Defendant has been entrapped; (see case of R v Moon, 70 C.L. 194; 10//1/04, CA). On the other hand if an officer has infiltrated a group of known criminals acting on solid intelligence and has called in the arrests just prior to a bank-robbery then the level of participation of the officer with the group may be more justified - but the question still remains of incitement - who proposed the robbery in the first place?

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Where the facts are disputed evidence can be heard before the start of a trial and the Judge will form his own view of the police's behaviour. It maybe that

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the balance of police behaviour does not support a submission that the offence was incited by the police - however, just because a defendant could have a fair trial does not mean it is fair to try him, i.e. if the police behaviour does not breach the Looseley test, and a Judge can't be persuaded that the defendant cannot have a fair trial, then he may still be persuaded to rule out the officer's evidence without actually stopping the case. For example where a known jewel handler offers stolen gems to an under-cover officer and the officer did not incite the offence, but it turns out that the arrest followed a culmination of months of over the top surveillance and unauthorised use of the under-cover officers, then the argument would be that though there is no formal entrapment, the defendant's Article 8 rights (right to privacy) have been violated by an unlawful operation and it would not be fair to admit the evidence.

Each case of course depends on its facts but the issues need to be identified early so that the all important Defence Statement can be prepared properly and any disclosure requests which might assist in the Defendant's argument properly considered. Without a properly crafted Defence Statement, genuine entrapment issues become more difficult to tackle - as always early and thorough preparation is the key.

Authors

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