

Covert policing

By Simon McKay

Oxford University Press (2011)

ISBN 978-0-19-9289910-3

Book review by Sally Ramage, Editor, The Criminal Lawyer, Bloomsbury, UK

The author, Simon McKay, is ‘a former adviser to the government on covert policing and terrorist matters’. The title of this book is well chosen as it deals with police surveillance under RIPA. Chapter 10 however is dedicated to private and non-regulated surveillance, and it is a topic which readers are very grateful to have addressed. Apart from the Blackstone Practical Policing book on covert police covert surveillance, there are few books on this matter and none other which challenges the status quo as this book does.

Covert surveillance techniques

In the United Kingdom, police and other state authorities employ a variety of techniques to gain information in the prevention or detection of crime, many of which intrude into the individual’s private life. In particular, there is employment of covert surveillance techniques such as telephone tapping, bugging, and the use of closed circuit television surveillance, carried out without the individual’s knowledge.

Contents

The chapters in this book cover topics of privacy; police interception of communications; acquisition and disclosure of communications data; interference with property; intelligence sources; encrypted data; and issues that relate to practitioner criminal lawyers.

Privacy

A very important case is *McGowan v Scottish Water* [2005] IRLR 167 in which the facts are that Mr McGowan worked at a remote water treatment plant and lived nearby. Scottish Water suspected that he was falsifying his timesheets and claiming for work he hadn't done. They engaged a firm of private investigators to watch his house from the opposite side of the public road, and made a video of his comings and goings to compare with his timesheets. He was subsequently dismissed, following which he brought proceedings for unfair dismissal on the ground that his human rights under article 8 (1) of the Convention had been breached by his employer's surveillance. That is, the right to respect for his private and family life, home and correspondence. Again, evidence obtained by covert surveillance was held to be admissible, although David Ormerod has argued for a structured admissibility to Article 8, as discussed in chapter 10.

Heglas v Czech Republic (Application no 5935/02) 1 March 2007 was mentioned in chapter 10 as a reference to violation of Article 8 ECHR. It was not necessary for the court to

examine whether the interference was legitimate or not. The applicant alleged that he had been subjected to torture prohibited by Article 3 of the Convention when being questioned by the police about the whereabouts of the child J. on 1 October 2002. He further submitted that his right to a fair trial as guaranteed by Article 6 of the Convention, comprising a right not to incriminate himself and a right to defend himself effectively, had been violated in that items of evidence which the authorities had been able to secure only as a result of a confession extracted from him had been used as evidence at his criminal trial. By a decision of 10 April 2007 the Court declared the application partly admissible. The applicant had lodged the broadest possible application, aimed at discontinuing the proceedings because of the confession, which had made it possible to secure further items of evidence. His application had comprised a narrower request at least not to use evidence obtained in an illegal manner at his trial. He stressed that the Federal Court of Justice itself had not given any grounds for dismissing his appeal on points of law as ill-founded, so that the true reasons for its decision were a matter of pure speculation.

Terrorism

Significant caselaw discussed in this book include *Mark Christopher Breslin and others v Seamus McKenna and others* [2009] NIQB 50. This case is commonly known as the '*Omagh bombing case*'. The 12 plaintiffs in this action claimed damages including aggravated and exemplary damages for personal injuries sustained by them as a result of the explosion of a bomb in Omagh town centre on 15 August 1998. In addition there were three further claims for damages under the Fatal Accidents (Northern Ireland) Order 1977 and the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 as a result of the death of members of their families in the explosion and also wanted an injunction to restrain the defendants in respect of their future conduct. Before the bombing there was much police surveillance. Det Sgt Finbar Healy was a Garda officer who has been involved in surveillance duties for approximately 25 years. At 6:30 p.m. on 18 February 2000 he was tasked to take up observation duties in respect of 83 Oakland Park Dundalk. At 8:55 p.m. that evening the detective sergeant says that he saw three people come out of the house. These were Michael McKeivitt, David Rupert and another male. He saw that David Rupert and Michael McKeivitt were engaged in a conversation near the front door in the garden of the house. The third male appeared to be standing to one side. A blue Ford Fiesta arrived in the cul-de-sac at 9pm and David Rupert left in it with the unknown male. Gareth Mulley was the driver of that vehicle. Detective Sergeant Healy decided to follow the fiesta in his car which was parked outside the cul-de-sac. He ran up the laneway in order to reach his car. The fiesta drove to Wolfe Tone Terrace less than a mile away. It drove up broadside to the car of Stephen McKeivitt. Det Sgt Healy decided to return to Oakland Park. He parked his vehicle outside the cul-de-sac and ran down the lane so as to have a view of the cul-de-sac. He says that a short number of minutes later Mr McKeivitt's son, Stephen, came back to Oakland Park, collected his father and left with him. He said that he had no notes of the observation.

He had a Dictaphone from which he made a duty report. He made his statement from the duty report. The Dictaphone tape had been reused. In relation to the meeting in the van in 1996 nothing much turns on this. Rupert says that he did not pursue Jennings for finance and Jennings says that Rupert did not ask for money. Very little seems to have been achieved at the meeting. Jennings at that stage did not place any value on Rupert. When he was approached in 1999 by the British Security Service and told that Rupert was operating ROI Jennings says that he was disappointed that he had not been told about this earlier. This case was briefly mentioned in chapter 3 to illustrate that disclosure is not capable of being made to individuals or their representatives but can be disclosed to a special advocate appointed on

their behalf. There are lawful exceptions to this and the word exception in this case was taken to mean ‘exceptional circumstances’ which the court deemed was in need of a ‘stringent test.’ The cases heard together, *R v Mayers; R v Glasgow; R v Costelloe and Bahmanzadeh; R v P; V and R* (2009) 2 All ER 145 became the leading authority on the application of the provisions of the Criminal Evidence (Witness Anonymity) Act 2008, argued by Sarah Whitehouse, barrister of 6 Kings Bench Walk (London EC4Y 7DR) and as discussed by Simon McKay at 9.152 (and set out in the Consolidated Criminal Practice Direction). The Lord Chief Justice of England and Wales in summing up said:

‘The Act simultaneously seeks to address the provisions of the European Convention of Human Rights and the relevant jurisprudence of the European Court, by seeking to preserve the delicate balance between the rights of the defendant, including his entitlement to a fair trial and public hearing, and to examine or have the witnesses who inculcate him properly examined, (Article 6) and the witness's right to life (Article 2) and physical security (Article 3) and indeed the right to respect for his or her private life (Article 8). The need for this balance has been addressed in a number of decisions of the European Court, including Kostovski v Netherlands 12 EHRR 434, Doerson v Netherlands 22 EHRR 330 and Van Mechelen v Netherlands 25 EHRR 647.’

A listening device

The case *Murray v Big Pictures (UK Ltd)* [2008] EWCA Civ 446 is clearly of much importance to the author who discussed it in chapters 2, 5 and 10. A listening device was installed into the accused’ motor vehicle, an intrusive act enough to bring another of many Article 8 privacy cases. The author creates huge uneasiness and contradicts the settled view by disabusing us when he states that the interpretation of privacy taken in the police Code of Practice in need of more sophistication and gives the reason for the many breach of privacy cases being brought as the ‘absence of a statutory or common law right to privacy in the united kingdom and ‘the misconception that the ECHR was or has been incorporated into the law of the jurisdictions within the united kingdom’ (see 2.68- contrary to *R v Mayers*, at paragraph 6.

Regulation of Investigatory Powers Act

The Act does not address the data, but only the hardware telephone equipment. RIP oversees all covert surveillance, much of which occurs in prisons, facilitated by police officers in disguise in prisons as prisoners in order to get close to certain criminals and investigate them surreptitiously (Jane’s Police Review, “Banged up”, May 2010). In the United Kingdom, police and other state authorities employ a variety of techniques to gain information in the prevention or detection of crime, many of which intrude into the individual’s private life. In particular, there is employment of covert surveillance techniques such as telephone tapping, bugging, and the use of closed circuit television surveillance, carried out without the individual’s knowledge.

Data protection

The rules on data protection apply to any company, firm, business, etc. which holds or uses ‘personal data’ stored electronically or in a structured paper filing system (i.e. where it is readily accessible). Personal data includes any piece of data or information that has an identifiable person as its subject matter (e.g. a job application letter, a contract of employment, payroll records, sickness records, CCTV footage, etc.). However, data protection does not apply to an individual acting in a personal capacity (e.g. a home CCTV security

system). Where it applies, data protection sets out eight principles that information should be fairly and lawfully processed; processed for limited purposes; adequate, relevant and not excessive; accurate and up-to-date; not kept for longer than is necessary; secure; not transferred to other countries (especially outside of the European Union) without adequate protection. Employees can make a subject access request, requiring their employer to provide all information held on them, such requests should be met within 40 days of a formal request being made. Employers can charge up to »10 to cover their administration costs. In particular, employers should be open about any sensitive information that they hold, such as health records and medical reports, and give employees the opportunity to correct or comment on this type of information.

Further Reading

Monessen, A., Starrs, J. and Henderson, I., (1995) *Scientific Evidence in Civil and Criminal Cases*, Westbury, NY Foundation Press.