9th Annual National Prosecutors' Conference

Saturday, 24 May 2008
Dublin Castle Conference Centre

Paul Anthony McDermott, BL
Law Library

~

Undercover Investigations & Human Rights

Undercover Investigations and Human Rights

Introduction

The purpose of this paper is to consider some case law from Ireland and around the world on the possibilities for successfully using evidence obtained as a result of undercover investigations in criminal trials. Given the difficulties that there can sometimes be in obtaining conventional evidence (such as investigations into terrorism or gangland activities) it is submitted that the courts should be much more open to the utilisation of some evidence.

Generally in criminal cases the only remedy that the defence seeks is the exclusion of the evidence. Thus some of the more inventive solutions that civil courts have come up with for dealing with improperly obtained evidence may have limited applicability. For example in *Jones v University of Warwick* [2003] 1 WLR 954 the Court used a costs order to signal its disapproval as to how certain evidence had been obtained. However recent suggestions from the Supreme Court that damages for a breach of the ECHR may be available in respect of inordinate delays in the criminal process may suggest that such a solution might also be available in the area of undercover investigations.

ECHR Case-law

Malone v United Kingdom (ECtHR, 2 August 1984)

- Malone, an antique dealer, was charged with offences relating to dishonest handling of stolen goods. He was acquitted on some, jury was hung on others and at a re-trial the jury again failed to agree. He was again formally arraigned but this time prosecution offered no evidence and he was acquitted

- Malone instituted civil proceedings in UK seeking declarations that interception, monitoring and recording of conversations on his telephone lines without his consent was unlawful, even if done pursuant to a warrant of the Secretary of State
- UK Govt admitted one conversation (about which evidence emerged at trial) had been intercepted by the police pursuant to a warrant issued by the Secretary of State

- UK Govt declined to disclose whether Malone's own number was tapped or whether other telephone conversations involving the applicant had been tapped – it was claimed that such disclosure might frustrate the purpose of intercepting telecommunications and might risk the identification of police informants or sources

- The then current practices followed regarding interceptions were those set out in the Govt's White Paper of 1980. A warrant under the hand of the Home Secretary or another Secretary of State was required, and would issue subject to the following 3 preconditions:

    - the offence is "really serious"
    - normal methods of investigation have been tried and failed or are unlikely to succeed in the circumstances
    - there is good reason to think that an interception would be likely to lead to arrest and conviction

- The European Court of Human Rights held unanimously that there had been a violation of Article 8 of the Convention in *Malone*'s case.

- On the principal issue, namely whether the interferences were "in accordance with the law" and "necessary in a democratic society", the Court was unequivocal. The phrase "in accordance with law" is not satisfied by the impugned action having some tenuous grounding in domestic law: the *quality* of the law itself is also amenable to scrutiny. There must be a:

    > "*measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by [Article 8.1]. Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident [citing Klass]…. [T]he law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence*".

- In *Malone*'s case it was common ground that the "settled practice" of intercepting communications on a warrant of the executive was literally in accordance with the law of England & Wales. That law, however, was found to be deficient. The Court considered it to be

"somewhat obscure and open to differing interpretations". It could "not be said with any reasonable certainty what elements of the powers to intercept are incorporated in legal rules and what elements remain within the discretion of the executive". Citizens could not know to what minimum degree of legal protection they were entitled.

- The European Court of Human Rights accepted that "the existence of some law granting powers of interception of communications to aid the police in their function of investigating and detecting crime may be 'necessary in a democratic society … for the prevention of disorder or crime'". The Court considered that the growth in crime rates (even back in 1984) – particularly organised crime – and the "increasing sophistication of criminals" made telephone interceptions even "an indispensable tool in the investigation and prevention of serious crime". However, the dangers posed to that same democratic society by potential abuse of secret surveillance also fell to be weighed in the balance. Ultimately, the regime in the UK could not be considered to be "in accordance with law" as required by Article 8.

- It is clear that *Malone* is not authority for the proposition that undercover police work in the form of interceptions is illegal under the Convention: provided it is rooted in an appropriate domestic legal framework, such interceptions may be unobjectionable. The year following *Malone*, the Interception of Communications Act 1985 was introduced in the UK. The Police Act 1997 also regulated the use of covert listening devices in a statutory manner. Later on, the Regulation of Investigatory Powers Act 2000 put covert investigative techniques on a statutory footing in the UK to a further degree.

- The Irish Council for Civil Liberties notes that a new Garda manual on the use of Covert Human Intelligence Sources (CHIS) has been introduced but is yet to be "human rights proofed". This would appear to be not dissimilar approach to the regime which operated in the UK prior to *Malone*: non-statutory, executive action. The ICCL has called for the implementation of a firm legal basis for such police work:

> "*[I]n line with best practice elsewhere, for example, Northern Ireland, the ICCL believes that Garda covert policies and practices should be set out in law and subject to external scrutiny by, for example, a High Court judge. Finally, it considers that all members of the Gardaí who are engaged in activities involving the use of covert policing should undergo human rights based training on new policies in this area*".

- We do not know how highly the European Court valued the protection of the privacy of one's telecommunications. Malone's claim for damages never came to be decided by the Court: he reached a friendly settlement with the UK Govt and the case was struck out of the Court's list.

Khan v United Kingdom (ECtHR, 12 January 2000)

- In this case, the use of covert surveillance by UK police agents was again placed in sharp focus. Khan had come to the attention of the police after his cousin, with whom he arrived in Manchester on a flight from Pakistan, was found to be carrying heroin worth £100,000. No drugs were found on Khan. He made no admissions when interviewed and was released without charge.

- Meanwhile, a Mr B was being investigated for suspected heroin dealing and a listening device had surreptitiously been placed on the premises of his home pursuant to a warrant authorising same.

- By fluke, Khan was friends with Mr B and visited him at his home. A conversation transpired between the two incriminating Khan in heroin dealing. Neither B nor Khan were aware B's home had been bugged.

- At trial, evidence of the bugged conversation was led by counsel for the prosecution, who admitted that there was no case against Khan without it. The tape was ruled admissible by the trial judge, and the case eventually made its way to Strasbourg.

- The Police Act 1997 was not yet in force at the time Khan was subject to bugging by the police. As the European Court of Human Rights put it:

> "*At the time of the events in the present case, there existed no statutory system to regulate the use of covert listening devices, although the Police Act 1997 now provides such a statutory framework. The Home Office Guidelines at the relevant time were neither legally binding nor were they directly publicly accessible. The Court also notes that Lord Nolan in the House of Lords commented that under English law there is, in general, nothing unlawful about a breach of privacy. There was, therefore, no domestic law regulating the use of covert listening devices at the relevant time*."

- Indeed, Lord Nolan in the House of Lords had expressed his astonishment at the failure of the UK legislature to ground this type of covert police work in a statutory framework:

> "*The sole cause of this case coming to your Lordship's House is the lack of a statutory system regulating the use of surveillance devices by the police. The absence of such a system seems astonishing, the more so in view of the statutory framework which has governed the use of such devices by the Security Service since 1989, and the interception of communications by the police as well as by other agencies since 1985. I would refrain from other comment because counsel for the respondent was able to inform us, on instructions, that the government proposes to introduce legislation covering the matter in the next session of Parliament.*"

- The Strasbourg court was unanimous in finding a violation of Article 8 in these circumstances. Interestingly, however, there was no violation of Article 6 (right to a fair trial) disclosed by the factual matrix in *Khan*: this was because under s.78 Police and Criminal Evidence Act 1984, the trial judge had a discretion to exclude the relevant evidence. The European Court is typically reluctant to engage in enquiries concerning admissibility of evidence, preferring instead to examine the overall fairness of the trial. The court noted that "it is clear that, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it under section 78 of PACE". This safeguard was sufficient to ensure the UK did not fall foul of Article 6.

Klass v Germany (ECtHR, 6 September 1978)

- Although *Khan* is a very recent litmus of Strasbourg's tolerance of covert police surveillance, it is *Klass v Germany* which is the *locus classicus* of ECtHR jurisprudence in this area.

- We find in *Klass* a statement of principle from the European Court that the Contracting States do not enjoy:

> "*an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate…. The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law*".

- The applicants were lawyers and judges who claimed that Germany was obliged to notify those persons subjected to covert surveillance after the event, and to provide a judicial remedy against the ordering and execution of surveillance measures. (The law in question precluded the notification of surveillance subjects even where same would not compromise the purpose of the restriction.)

- The Court found that the surveillance contemplated was "in accordance with the law" as it resulted from parliamentary acts laying down strict conditions and procedures, including one act even modified by the German Federal Constitutional Court.

- The surveillance was also found to be "necessary in a democratic society in the interests of national security" and/or "for the prevention of crime". The relevant German statute precisely defined – and "thereby limit[ed]" – the purposes for which the

surveillance could be imposed. The statute authorised the responsible authorities to act in order to protect against "imminent dangers" threatening "the free democratic constitutional order", "the existence or security of the Federation or of a Land", "the security of the [allied] armed forces" stationed in the Republic or the security of "the troops of one of the Three Powers stationed in the Land of Berlin".

- The Court noted that the German statute authorising surveillance laid down stringent preconditions, and contained "various provisions designed to reduce the effect of surveillance measures to an unavoidable minimum and to ensure that the surveillance is carried out in strict accordance with the law". The Court was happy that "[w]hile the possibility of improper action by a dishonest, negligent or over-zealous official can never be completely ruled out whatever the system, the considerations that matter for the purposes of the Court's present review are the likelihood of such action and the safeguards provided to protect against it".

- Crucially, the Court held that "[i]n the absence of any evidence or indication that the actual practice followed is otherwise, the Court must assume that in the democratic society of the Federal Republic of Germany, the relevant authorities are properly applying the legislation in issue".

- The Court held, unanimously, that there had been no violation of Article 8 of the Convention.

- The constant emphasis the Strasbourg court placed on the detailed provisions and criteria laid out in the German law makes it all the clearer that it is necessary for Ireland to set out its police powers in relation to covert surveillance and undercover detection in an accessible, statutory framework, subject to checks and balances and tailored to the need to protect the interests of democratic society. Any blank cheque written by the Irish legislature for the Garda Síochána in this area will not be honoured in Strasbourg.

Teixeira de Castro v Portugal (1999) 28 EHRR 101

- In *Teixeira*, 2 Portuguese undercover police-officers persuaded a cannabis user to introduce them to his supplier. Failing to locate his usual supplier, the user identified the accused as a potential source of heroin. A meeting was arranged by the user during which the undercover officers indicated their desire to buy 20g of heroin from the accused. The accused procured the heroin to complete the sale, and was arrested and later convicted of a drugs offence. He appealed to the European Court of Human Rights, alleging a violation by Portugal of his right to a fair trial under Article 6 ECHR.

- The Strasbourg Court held that the guarantee of fairness under international human rights law is not confined to the trial process, but rather encompasses the proceedings as a whole, including "the way in which evidence was taken". The sort of entrapment that transpired in the instant case clearly threatened the fair administration of justice:

> *"The use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking. While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place … that it cannot be sacrificed for the sake of expedience. The general requirements of fairness embodied in Art. 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement"*.

- Active instigation of an offence by police, in the absence of any apparent predisposition on the part of the accused to offend, would appear to violate Art. 6. The accused in *Teixeira de Castro* had to source the drugs from a third party, and was found with no more drugs than were requested by the undercover police-officers. The court also noted that the officers had acted on their own initiative, without judicial supervision or good reason to suspect the accused of trafficking.

- *Teixeira de Castro* may be contrasted with the earlier case of *Lüdi v Switzerland* (1992) 15 EHRR 173 where the fact that the investigating magistrate had authorised the use of an undercover agent was considered to be an important safeguard for the right to

privacy under Article 8. As no such judicial authorisation had taken place in *Teixeira*, it could successfully be distinguished from *Lüdi*.

- The Strasbourg Court recently re-iterated its readiness to interfere in domestic trial processes where a violation of Article 6 may have resulted from entrapment activities. In *Edwards v UK* [2003] Crim L.R. 891 the Court accepted the importance of the public interest in fighting crime but held that the requirements of a fair trial are paramount.

Irish Case-law

- ***The People (DPP) v Dillon*** [2002] 4 IR 501 – evidence obtained by picking up a suspected drug dealer's mobile phone and holding a conversation with the person at the other end is excluded. The Court of Criminal Appeal said:

> *"It seems to us that the status of the interception must be determined as of the time of its commencement and cannot change on the basis of what develops during the conversation intercepted. An interception which is unlawful cannot become lawful on the basis of what is heard during it. Nor can an accused person be estopped from raising a question of admissibility of evidence based on unlawful interception on the basis of the illegal purport of the conversation intercepted. If that were permissible it would set at nought the detailed and specific statutory provisions relating to interception because it is only where a conversation evidences unlawful activity that it will be sought to introduce it in evidence. If a defendant could be so estopped, unlawful interception could take place with impunity so long as it yielded useful evidence and there would be no practical restriction on unlawful interception which did not yield such evidence because its occurrence would not become known."*[1]

Syon v Hewitt & McTiernan [2006] IEHC 376

[1] *The People (DPP) v Dillon* [2002] 4 IR 501

- *Syon* is one of the few Irish cases on entrapment and judgment was handed down in 2006 by Murphy J.

- The defendants were proprietors of a foodstore/newsagents and were charged with having sold or having offered to sell tobacco to a minor. The minor in question had been engaged by the Office of Tobacco Control (OTC) to conduct a so-called 'test purchase'. The District Judge stated a case to the High Court on 12 grounds, including whether there was a substantive defence of entrapment in Irish law. The OTC acted as *amicus curiae* before the High Court.

- Murphy J observed that the use of test-purchases of tobacco products was regulated by a 'protocol' approved and published by a Health Board project team, the Health Board being a potential prosecuting authority under the various Tobacco Acts. He noted that the protocol, "while it has not the force of statute, was devised as part of the functions of the OTC pursuant to ss.10 and 11 of the [Public Health (Tobacco) Act 2002]".

- The High Court pointed to the practical necessity for test-purchases, anchoring its argument in the unlikelihood that those involved in "consensual crime" would ever report the matter to the authorities: "[i]n this context not alone is it permissible to carry out random test purchases and to commission independent surveys so as to generate a list of target premises, it is the function of the [OTC] to do so".

- Murphy J held that there is no substantive defence of entrapment in the context of the case before him, and there was no discretion for the District Judge to exclude evidence arising out of alleged entrapment, other than on the general rules of evidence.

- *Syon* is a robust defence of the use of covert test-purchases by state authorities in Irish law. Whether it can be extended to immunise other types of undercover police work is less clear. The particular regime involved in *Syon* seemed to absorb much of the court's attention, and it may ultimately be confined to its facts.

DPP v John Gallagher [2006] IECCA 110

- Although *Gallagher* does not address the propriety of undercover investigations in general, an interesting point arose as to the effect of police surveillance on the concept of 'possession' in drugs cases.

- Gallagher was convicted under s.15A(1) Misuse of Drugs Act 1977 as a result of having been found to be in possession of a quantity of cannabis in excess of €12,697. He appealed to the CCA arguing, *inter alia*, that the evidence tendered and relied upon by the prosecution failed to establish that he had ever been, as a matter of law, in 'possession' of the drugs in question, and that the trial judge had misdirected the jury on the definition of possession.

- A forty-foot container located in a compound in Dublin Port came to be examined by a Customs & Excise officer who, after persistent investigation, discovered 3,259 slabs of cannabis within. Officers unloaded the container and removed it for further investigation.

- Customs & Excise decided to re-seal the container, place it back where they found it in Dublin Port and keep it under round-the-clock observation. At least 4 men – Gallagher included – were observed returning to the container, opening it and attempting to unload it (though this plan to unload the contents of the container was abandoned when use of forklifts proved problematic). They were all duly arrested.

- Gallagher argued that, since the container had been unloaded and moved around by Customs & Excise and An Garda Síochána before being re-sealed and re-placed in the port, Customs had taken 'possession' of the drugs and, as a matter of law, Gallagher could not be said to be in possession of the drugs himself. Furthermore, the container had remained the subject of covert surveillance by the Gardaí as it lay in the compound in Dublin Port and so was in the control of the Gardaí, rather than Gallagher.

- This argument was rejected by the Court. Opining that it must have been "clear as a pikestaff" that the 4 men in question enjoyed actual control and possession of the container, and were engaged in a joint enterprise to unload it and deliver it on to Dublin, Murray CJ said:

> *"The fact that the Gardaí were involved in a close surveillance operation with a view to arresting those involved in the transportation and unloading of the drugs does not take*

> *away from these objective facts and does not in law mean that those involved did not at the time of their arrest have possession of the drugs in question. Neither at any stage did the drugs in question lose their illicit status. Surveillance operations based on information and intelligence are part and parcel of policing techniques and it would be ludicrous to suggest that such surveillance operations, which closely monitor illegal activity with a view to arresting the culprits, could in some way exculpate such culprits from responsibility for their actions and in particular mean that they did not have possession of that which was de facto in their possession.*"

Kane v Governor of Mountjoy Prison [1988] 1 I.R. 757

- Kane was arrested pursuant to s.30 Offences Against the State Act 1939 on suspicion of membership of an unlawful organization. He was required to be released after his period of detention came to an end, but the Gardaí learned that a request was being made by the RUC for an extradition warrant. As the application to the District Court in respect of extradition could not be made until a District Judge became available that evening, the Gardaí subjected Kane to the most intense and close overt surveillance, following him openly on foot and by car. Kane was arrested later that day for breach of the peace, but complained by way of an application under Article 40 of the Constitution to the High Court and, on appeal, the Supreme Court, that he was effectively being unlawfully detained by the Gardaí, despite having been released.

- An interesting dictum of McCarthy J (diss.) in *Kane* is to the effect that *covert* police surveillance is a justifiable intrusion upon a subject's rights. Although McCarthy J was dissenting on the main issue for decision in the case (viz. whether, in the absence of specific justification, the *overt* surveillance of an individual could constitute an infringement of his constitutional right to privacy or his right to liberty, making same susceptible to an Article 40 application), he said the following:

> "*The issue narrows further, if as I do, one concludes that covert surveillance, which, by definition, does not impede the freedom of choice of movement, is a lawful invasion of privacy, to whether or not the overt nature of the surveillance can be equally so justified*".

International Case-law

England

Re DH (A Minor) (Child Abuse) [1994] 1 F.L.R. 679

- After a child, D, was admitted to hospital with respiratory difficulties, paediatricians suspected he might be the victim of Munchausen's Syndrome by proxy at the hands of his mother. It was thought that the mother was deliberately blocking the child's airways on occasion.

- After investigation, mother and child were transferred to a specialist unit where covert video surveillance was employed (without telling the mother or seeking permission of the father of the child). Two assaults by the mother were caught on tape, whereby the mother was seen placing something over the child's face. She was arrested and brought to a police station for interview. After initially denying any involvement, the mother was shown the results of the surveillance and admitted one incident, eventually pleading guilty to a count of cruelty to a child.

- This case concerned family law proceedings revolving around the issue of contact (access), but the court took the opportunity to address the question of covert video surveillance (CVS):

> "*The first point to be made is, of course, that there was in this case and there can generally be no objection to the admissibility of evidence produced by means of CVS. Counsel were agreed that even if the evidence were unlawfully or improperly obtained, it would still be admissible in civil proceedings and a fortiori in proceedings relating to a child where the welfare of the child plainly requires that the truth of the manner in which he was abused should be ascertained*.
>
> *[S]ubject always to the overriding discretion to exclude evidence under s 78 [of the Police and Criminal Evidence Act 1984], recent decisions of the Court of Appeal (Criminal Division) appear to sanction the admission of covertly*

obtained evidence: see R v Smurthwaite; R v Gill (1993) The Times, October 5 (soliciting to murder where in each case the person solicited by the defendant was an undercover police officer posing as a contract killer); R v Bailey and Another [1993] 3 All ER 513 (secretly tape-recorded conversation between the two defendants in a remand cell); R v Jones (1994) The Times, January 13 (video-recording of customers in a public house used as a means of assisting the victim of an assault to identify his attackers)."

- Wall J emphasised that the "paramount concern is the welfare of the child", a principle which requires no translation into Irish law and is equally applicable in this jurisdiction. He held that the protection afforded to a child by the incontrovertible discovery of the source of the assaults upon that child outweighs the temporary damage caused by an assault which is permitted to take place for the purpose of being filmed. Accordingly, where a doctor takes the view that CVS is essential for the treatment of his patient, he is not required to seek parental consent, provided he is satisfied there is no risk that his patient will come to any serious harm. Where there is "a risk of anything other than transient harm to the child", consent of the parent not suspected of Munchausen's Syndrome by proxy should be obtained.

- While Wall J felt a "sense of unease at the abrupt manner in which a procedure designed to establish a medical diagnosis turned into a criminal investigation", he ultimately concluded that use of CVS in the circumstances was lawful.

- *Re DH* shows the usefulness of covert video surveillance in cases of abuse, and is judicial recognition of same. It is unlikely that an Irish court would adopt a different approach to the English Family Division in such circumstances as were presented in *Re DH*.

Williams v DPP [1993] 3 All ER 365

- Still controversial is the *Williams* case where the police set up a "virtue testing operation". They left a van load of cigarette cartons unsecured and unattended in a public street. Two members of the public, who came across the van, began to unload the cartons and, to their surprise, were arrested. It was held that the police had done nothing to force, persuade, encourage or coerce them into doing

what they had done They had been perfectly free to decide whether or not to succumb and were the victims not of a trick, but of their own dishonesty. This was in spite of the fact that there was no evidence of any prior involvement in criminal offences.

- Later English cases have suggested that this would not apply if a police officer left a wallet on a park bench in order to see who picked it up and whether they stole it as this would be entrapment.

- The difference between the two scenarios is not entirely clear, unless some special jurisprudence applied to the wallets of senior officers.

Italy

- Italian law shows up the difficulties attendant upon international co-operation in the conduct of undercover police operations.

Cass., Sez. VI 1999

- An informant introduced an Italian undercover agent to Colombian drug dealers looking to export cocaine to Italy. The agent flew to Colombia, posing as a courier willing to fly shipments of cocaine to Italy. However, just as the Italian undercover agent went to fly home with his consignment of cocaine, the savvy Colombian drug-dealers announced their plan to hold the informant hostage until such time as the cocaine has been safely distributed to their customers in Italy.

- To protect the hostage informant, the Italian agent duly distributed the cocaine to the customers of the Colombians. After the informant was released, co-operating European law enforcement agencies managed to arrest the customers and a number of dealers, and seize the consignment of drugs. The case was heralded in the Italian media as a success, only for the *agent* himself to be arrested due to a curious provision of Italian criminal law prohibiting undercover agents from distributing drugs as part of an investigation. After being initially convicted, the agent was eventually acquitted on appeal.

The art case

- In another Italian fiasco, a U.S. undercover agent operating in Italy purchased stolen art as part of his operation. Italian law prohibits the police from buying stolen goods. The U.S. agent was indicted for illegally buying stolen art. The U.S. Department of Justice sought to have the charges dropped, but all they could do was ask that the Italians not seek extradition, and order the agent to stay away from Italy

Australia

***Ridgeway v The Queen* (1995) 184 CLR 19**

- In *Ridgeway v The Queen*, the leading Australian case on entrapment, the accused contacted a man he had met in an Australian prison, proposing a heroin smuggling operation. Unbeknownst to the accused, this contact had become a police informant, and notified the authorities of the plan. The informant, with the co-operation of Australian Federal Police & Customs and a Malaysian police-officer, purchased and imported heroin which he sold to the accused. The accused was charged and convicted, and appealed to the High Court.

- By a 6-1 majority, the High Court quashed the accused's conviction, holding that the public policy discretion articulated in *Bunning* could be extended "by analogy" to exclude evidence of a person's guilt or elements of an offence, where the very commission of that offence was procured by unlawful conduct on the part of police officials. Mason CJ, Deane & Dawson JJ held:

> "*The critical question was whether, in all the circumstances of the case, the considerations of public policy favouring exclusion of the evidence of the appellant's offence, namely, the public interest in maintaining the integrity of the courts and of ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement, outweighed the obvious public interest in the conviction and punishment of the appellant of and for the crime*".

- The calibration of the relative weight of the competing public interests in convicting the guilty and maintaining faith in the administration of justice is said to depend on various factors, including:

> "*the nature, the seriousness and the effect of the illegal or improper conduct engaged in by the law enforcement officers; and whether such conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution of criminal proceedings*".

U.S.A. / Canada

- In both the U.S. and Canada, a distinct defence of entrapment exists.

- The U.S. approach focusses on the concept of predisposition on the part of the accused: if the accused was already predisposed to committing the offence, he may not be able to rely on the defence of entrapment. If, on the other hand, the undercover police agents have 'caused' an accused to commit a crime which he never would have considered were it not for the police's involvement, entrapment may be found. In one of the most recent decisions of the Supreme Court on the subject, this key concept was at play. A Nebraska man, convicted of receiving child pornography through the mail, appealed all the way to the Supreme Court: *Jacobson v United States*, 503 U.S. 540 (1992).

- Overturning his conviction, White J found that Jacobson was not predisposed to committing the crime (which had only recently been outlawed just prior to the offence at hand). Rather, undercover mail inspectors had planted the idea in his mind via mailings criticising politicians for infringing people's civil liberties through their passing laws such as the one the inspectors hoped Jacobson would break.

- In a vehement dissent, O'Connor J pointed out that Jacobson could easily have ignored or disposed of the leaflets mailed to him, and put the facts of the case in a stark light:

> "*Keith Jacobson was offered only two opportunities to buy child pornography through the mail. Both times, he ordered. Both times, he asked for opportunities to buy more. He needed no Government agent to coax, threaten, or persuade him; no one played on his sympathies, friendship, or suggested that his committing the crime would further a greater good. In fact, no Government agent even contacted him face to face*".

- She expressed concern that the majority's expansion of the predisposition concept would undermine the feasibility of undercover 'sting' operations into the future:

> "*(A)fter this case, every defendant will claim that something the Government agent did before soliciting the crime 'created' a predisposition that was not there before. For example, a bribetaker will claim that the description of the amount of money available was so enticing that it implanted a disposition to accept the bribe later offered. A drug buyer will claim that the description of the drug's purity and effects was so tempting that it created the urge to try it for the first time. In short, the Court's opinion could be read to prohibit the Government from advertising the seductions of criminal activity as part of its sting operation, for fear of creating a predisposition in its suspects*".

- As Irish law on entrapment is so underdeveloped, it remains to be seen what our approach to the question of predisposition would be. As seen above, *Syon* denied the existence of a distinct defence of entrapment *per se*. However, the precise contours of our law in this field remain to be defined.

- In Canadian law, the defence of entrapment is understood to function as an aspect of the inherent jurisdiction to stay proceedings as an abuse of process: *R v. Mack* (1988) 67 C.R. (3d) 1 (S.C.C.). Lamer J in *Mack* rejected the American subjective approach (which focussed on the predisposition of the accused) as "fundamentally flawed" and inconsistent with the proper rationale behind the defence of entrapment, identified as the "avoid[ance of] improper invocation by the state of the judicial process and preserv[ation of] the purity of the administration of justice".

- In Canada, a 3-part test is applied to determine whether an accused has been unlawfully entrapped. According to Professor Stuart's *Canadian Criminal Law: A Treatise*, 4th ed. (2001) at 585:

> "*Police can only offer the opportunity to commit an offence if they meet one of the threshold requirements of reasonable suspicion that a person was engaged in criminal activity or a bona fide inquiry into criminal activity. Even if one of these threshold requirements is satisfied, there will be entrapment if they move beyond providing an opportunity to inducement*".

Conclusion

The purpose of the above survey, which is necessarily brief, is to illustrate the many and varied scenarios that can arise in this area and to show that there is nothing to prevent greater use of evidence obtained as a result of undercover investigations in criminal trials.

Paul Anthony McDermott BL
23 May 2008