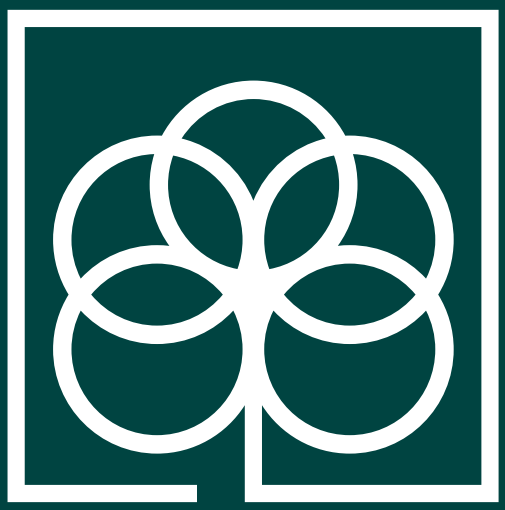

New Park Court

Criminal Briefing

Leeds

16 Park Place
Leeds
LS1 2SJ

DX: 26401 Leeds Park Square
T: +44 (0)113 243 3277
E: clerks@newparkcourt.co.uk

Newcastle

3- 7 Broadchare
Newcastle-Upon-Tyne
NE1 3DQ

T: +44 (0)191 232 1980
E: clerks@newparkcourt.co.uk

New Park Court

Called to the bar in 2012, Richard is an advocate who appears in cases of significant legal and factual complexity. At ease with professional and lay clients alike, he provides each case with bespoke and timely advice and attention.

Criminal Briefing

by Richard Holland

When the police are secretly listening:

The admissibility of covert recording evidence against co-accused

Imagine the scene. A conspiracy to deal drugs is afoot. The cocaine is bought and ready to transport. The couriers have organised themselves some vehicles on false plates. The money has been gathered in from those who owe it and the kingpin has given his approval for the deal to take place. The perfect plan.

The only problem is the police are listening in secretly, recording everything that is said…

Covert tactics such as this are a powerful (though carefully controlled and legally restricted) weapon in the police's arsenal. If a participant does not know they and their fellow conspirators are being monitored, they may be less guarded in what they say. They may inadvertently reveal not just what crime they are committing or hoping to commit, but who else is involved, what their roles will be, and may direct the police to the location(s) of key evidence.

Absent some remarkable explanation revealing that this is all a big misunderstanding, if the alleged conspirators are recorded saying something incriminating (or even simply present as part of the incriminating discussion) this is usually strong and compelling evidence against them in a future criminal trial.

What, however, is the situation for those who the police and Prosecution say are also conspirators, but who are not present when their alleged fellow conspirators are busy talking and being recorded?

Section 118(7)

Certain types of statements made by others outside of the witness box may not be admissible in criminal proceedings against a defendant. It would be rare for a conspirator, caught on tape talking about another conspirator, to come to court for that other conspirator's trial and confirm or repeat in the witness box what was said. Even if they are on trial together, the usual rule is that unless and until that defendant enters the witness box, what they have said outside of court (e.g. in a police interview) is not admissible against their co-accused.

The Prosecution will no doubt first attempt to argue that at least parts of what is contained in the covert recording is not hearsay at all. The change in the law in the Criminal Justice Act 2003, providing a new definition of hearsay, provides considerable opportunity for the Prosecution to argue that out-of-court statements are admissible when they would not have been under common law in the past. A further exploration of this topic is beyond the scope of this article however.

Assuming then that the Prosecution cannot persuade the Judge, there are however other ways of persuading the Court to disapply the normal rules. With covert recordings, the Prosecution will usually attempt to argue that this sort of evidence is admissible pursuant to the rule preserved by section 118(7) of the Criminal Justice Act 2003:

> *Common enterprise*
>
> *7 Any rule of law under which in criminal proceedings a statement made by a party to a common enterprise is admissible against another party to the enterprise as evidence of any matter stated.*

To put it another way, if the Prosecution can bring the recording within section 118(7), it will be admissible evidence not just as to the existence, nature and extent of a conspiracy but also the participation (or proposed future participation) in it of **persons absent** when those conversations took place.

The test

In *Platten* [2006] EWCA Crim 140, the test for admissibility under the common enterprise was said to be as follows:

> *It is a matter for the trial judge whether any act or declaration is admissible to prove the participation of another. In particular, the judge must be satisfied that the act or declaration:*
>
> *(i) was made by a conspirator,*
>
> *(ii) that it was reasonably open to the interpretation that it was made in the furtherance of the alleged agreement and*

(iii) that there is some further evidence beyond the document or utterance itself to prove that the other party was a party to the agreement.

Part 1 of the test is generally straightforward. Either the Prosecution will have guilty pleas from co-accused who have been recorded speaking or present, or the nature of the conversation will make it obvious they are a conspirator.

It is also not necessary to prove all parties to the conversation are co-conspirators – only that the statement is made by a conspirator in the singular. In *Platten* [2006] EWCA Crim 140 para 45, it was emphasised that conspirators will often need to make arrangements to carry it out, sometimes with third parties who aren't (or can't be proved) to be part of the conspiracy, and these conversations remain admissible against all conspirators.

Part 3 of the test will be satisfied so long as there is some other evidence suggesting the relevant defendant was part of the conspiracy (for example, a significant pattern of movement or telephone contact, items found by the police, admissions in interview or discussions which that particular defendant was present for).

"Furtherance of the alleged conspiracy"

It is Part 2 of the test where it is likely the submissions on admissibility will be most keenly fought.

The first point to note is that the test for the Judge is simply whether it is "reasonably open to the interpretation" that what was said was in furtherance of the alleged agreement. It by no means needs to be certain before the evidence is admitted.

The second point to note is that the Court of Appeal has arguably liberalised what evidence might be considered "in furtherance of the alleged agreement" over time.

In *Blake* (1844) 6QB 126, for instance, it was said that matters recorded by one conspirator for his convenience, mere narratives, descriptions of past events or records made after the conclusion of the conspiracy are not in furtherance of the common design and "are thus not admissible against anyone other than the maker".

In *Tripodi* (1961) 104 CKR 1, it was suggested that admissibility of such evidence would ordinarily relate to directions, instructions or arrangements or to utterances accompanying acts.

In this context, it had been arguable that for the statement or utterance made by one conspirator to be admissible against another who was not present at the time, it had to be accompanied by an action moving the conspiracy forward at that moment (for instance, giving an order) or relate to future or prospective action by one of the conspirators (for instance, relating that Mr X would on a certain future day do something to move the conspiracy forward). Anything which talked about what had happened in the past – "mere narrative" would not be admissible against anyone not present.

The liberalisation of what is "mere narrative"

However, in *Platten* (para 35), it was emphasised that the exclusion of "mere narrative" applied only to "narrative" made **after the conclusion** of the conspiracy. Narrative statements made during the conspiracy and as part of the conspiracy will be admissible "*because they are part of the natural process of making the arrangements to carry out the conspiracy*".

Indeed, the Court quoted with approval (para 35) a section from *Jones; Barham* [1997] 2 Cr. App. R 199, where that Court rejected the proposition that one conspirator telling another about what a third alleged conspirator had told them and done the day before was "mere narrative" and not admissible against the third alleged conspirator because he was not present in the conversation. The Court in *Jones; Barnham* held (page 129):

> *In our view this is the enterprise in operation with the field organiser reassuring the driver and bringing him up to date. That is why the evidence is admissible*

Dealing with a similar instance in *Platten* itself, the Court held:

> *None of these conversations are pure "narrative". They are evidence of the conspiracy in operation. It will be typical of a conspiracy that a conspirator will be having second thoughts and then being persuaded to forget his doubts. It will be typical of conversations between conspirators that they should be discussing the roles of the other.*

Similarly, in *Sofroniou* [2009] EWCA Crim 1360, the Court considered one conspirator telling another that "Leon" (said to be the appellant) gave or owed £12,000. Pitchford LJ, affirming the approach of the Court in *Platten*, rejected the submission that this was a narrative of past events and fell outside the rule preserved in s.118(7):

> *In our view this statement could be regarded as part of the tallying up exercise as to the payment for drugs on the previous day. [X – another conspirator] needed to know what had happened with the Liverpool journey as part of the conspiracy's ongoing operations. It was not a description of a past event but a running record of the drug dealing operation as the conspiracy progressed. Thus it was in furtherance of the conspiracy and admissible against the Appellant.*

If the Prosecution can show that the speaker is a conspirator, and that even if they are talking about past events, this is to strengthen the resolve of others, be part of the "tallying up" exercise of how the conspiracy is going, or provide the necessary context for further action, instruction or discussion about what to do next, the evidence should be admissible pursuant to section 118(7) against all alleged conspirators, not just those speaking or present in the recording.

Drafting a conspiracy charge so that it has an appropriately wide date range – so long as this can be justified on the evidence – may also assist in arguing that what was said by way of narrative was during the conspiracy, and not after its completion.

Safeguards

Two safeguards for the defence remain when this evidence is admitted (see, for instance, *King* [2012] EWCA Crim 805, paras 33-34, and *Platten* at para 27).

First, the Jury must be directed about the limitations of such evidence – that the defendant was not present to contradict what was said, the maker of the statement has not been cross-examined, that the Jury should not guess what was said if anything was inaudible, and that they would need to be sure what the speaker was saying was reliable and truthful.

This is an important direction. It invites the Jury to treat the evidence with caution, and specifically consider whether the speaker might, for their own reasons, be exaggerating, lying or simply be mistaken about a particular person or detail.

Second, the Judge must direct the Jury about the risk of convicting simply on the basis of narrative hearsay only and the need for some other separate evidence to prove the particular defendant's involvement in the conspiracy.

The nature and precise wording of this direction will need to be tailored to the facts of the particular case. The significance of the direction will depend also on the evidence which has been adduced. Where there is abundant (and obvious) other circumstantial evidence which might prove a defendant's guilt (DNA, observation evidence, phone contacts/messaging), such that the covertly recorded evidence is merely the skeleton on which this other evidence may be laid, the utility of such a direction will be limited. In a case where the Prosecution really do not have much else to show other than what others have said on the covert recordings, the direction will take on more practical significance.