



HUMAN RIGHTS *advocacy*



LAWweek



Admissibility of covert surveillance evidence

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In recent years technology has developed at an unprecedented rate. Public authorities, concerned with law enforcement and national security, are using sophisticated modern equipment for surveillance and interception activities to cope with the time. Innovative technologies have enhanced their ability not only to track people through their computerised record trail, but also to see through walls, overhear conversations and follow movement of wrong doers. Satellite photographs, massive millimeter wave detectors or millivision, tubular and parabolic microphones, Van Eck Monitoring device, wiretapping, thermal imaging, mobile phone tracking are the more esoteric examples of modern surveillance technology. But do they produce admissible evidence for the court or are the intrusions upon the privacy of an individual justified? Despite repeated statutory attempts to regulate police and security service interception activity, controversy still persists. In this article we will try to understand three basic legal points regarding the admissibility of covert surveillance evidence:

- Are directed and intrusive surveillance activities justified?
- Are the data or evidence collected and conserved by surveillance and interception gadgets admissible in the court room?
- Are there any limits that can be placed on the power



of technology so it will not shrink the realm of guaranteed privacy?

Are directed and intrusive surveillance activities justified?

Blackstone long ago wrote that "Eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance" punishable at common law. But many jurists promote the view that it is imperative to use surveillance or interception devices "in cases vitally affecting the domestic security." They advocate that law enforcement authorities should be given the power to approve the installation of surveillance devices when required in the interest of internal security or national safety. As privacy is citizens' fundamental right any intrusion upon it cannot be justified easily. As a consequence there is a public policy dilemma as they seek a balance between the public interest in the prevention of crime and the need for constraints on state power to intrude into individual life. In an attempt to find a balance between the interests of the individual and the interest of a state, "proportionality" becomes a vital factor. Therefore, public authorities should act with prudence and be cautious about the fact that any unscrupulous conduct of them could cause severe intrusion upon one's privacy.

If a measure, which restricts the right of an individual, and does so in such a way as to impair the very essence of the right, it will almost certainly be disproportionate. [Rees v United Kingdom (1987) 9 E.H.R.R. 56]. Furthermore, "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 national law [the European Court stated in *Klass v Germany*, (1979) 2 E.H.R.R. 214 at para.50.]" The European Court adopted the most acceptable approach and provided proper guideline to determine whether an interception is ultra vires or not [JUSTICE: Under Surveillance: Covert Policing and Human Rights Standards (1998)]. The summaries of EC guidelines are as follow:

- Legitimacy: Public authorities should not step beyond their jurisdiction and act legitimately. Proper disclosure should be maintained so that citizens are aware of the circumstances under which surveillance may be undertaken or communications intercepted.
- Essentiality: The interference should be essential.
- Proportionality: The intrusive measures should be proportional to the seriousness of the offence, bearing in mind the rights not only of the individual but also those of others likely to be affected.
- Accountability: There must be proper controls and adequate and effective remedies against abuse.

But when the public authorities become the intruders, the consequences are apt to prove more than a mere nuisance. In this case, the court remains the main source of justice. In this circumstance the courts must assess the validity of public authority's action against a set of coherent standards. These include consideration of whether the action in question satisfies a legitimate ground for interference with the right, and, equally, whether such action is necessary and proportionate.

Are the data or evidence collected and conserved by modern-day surveillance and interception gadgets admissible in the court room?

Whatever potentiality the surveillance evidence possesses for the enforcement agencies, it is evident that court will not recognise its full prospect due to the lack of reliability. Defence lawyers always challenge the admissibility of innovative surveillance and interception technologies on the basis that new techniques are untrustworthy as there remain chances of manipulation. Sometimes evidence can be excluded for its illegal nature where public authorities act beyond their jurisdiction. But once an enforcement authority succeeds to maintain 'Proportionality' and 'Essentiality' remaining in their jurisdiction and if the intercepted evidence is free from manipulation and inaccuracy, courts are bound to accept that evidence. But it should be remembered "... [In respect of national security as in respect of other purposes, there has to be at least a reasonable and genuine link between the aim invoked and the measures interfering with private life for the aim to be regarded as legitimate. To refer to the more or less indiscriminate storing of information relating to the private lives of individuals in terms of pursuing a legitimate national security concern is ... evidently problematic." Judge Wildhaber in *Rotaru v Romania* (8 B.H.R.C. 449)].

Judicial construction

In *R. v X* (Telephone Intercepts: Admissibility of Evidence) [2001- 145S.J.L.B. 28], defendants, who had been charged with offences related to possessing and misusing drugs, appealed by saying that evidence of intercepted telephone conversations that had been obtained in a foreign jurisdiction was inadmissible and should be excluded under the prevailing regulations of UK. Dismissing the appeal the House of Lords held that as the telephone interceptions had been undertaken lawfully outside UK with the aim of bringing about a criminal prosecution, and as such evidence had not been used for any other purpose nor held for longer than was necessary, there had been no illegality and the surveillance evidence was admissible. Same approach has been taken by American Court in *Kyllo III* in determining the question about admissibility of surveillance evidence. In this case enforcement authorities used thermal imaging device to identify indoor cultivation of marijuana plant belonged to *Kyllo* without securing a warrant. The survey revealed unusually high amounts of heat emanating from the walls of the residence. Then a warrant was issued and a raid uncovered the presence of an extensive indoor marijuana growing facility. *Kyllo* was convicted of drug manufacturing and sentenced to 63 months in prison. *Kyllo* then appealed by saying the



warrantless use of the thermal imager was unconstitutional.

As we know, the indoor marijuana cultivation process requires extensive use of artificial lighting. These lights generate enormous amounts of heat that is emanated outdoors either naturally or through a ventilation system installed by the cultivator. A thermal imager, placed outside the residence, can be used to measure and record the magnitude of these heat emissions. In *Kyllo I* [533 U.S. 27 (2001)], the Supreme Court held that "the use of a thermal imager to detect heat emissions from a home is not authorised under the Fourth Amendment and is therefore presumptively unreasonable without a warrant." But later in the *United States v. Kyllo* [190 F.3d 1041 (Kyllo III)], a panel of the Ninth Circuit held that the government's warrantless use of a thermal imager was not an unreasonable act and thus the evidence is admissible. The court reasoned that because the technology merely measured "wasted or depleted heat" and did not reveal any "intimate details" inside *Kyllo*'s home, it was constitutionally legitimate. Accordingly, the court concluded that one's home is not safeguarded from such outside, non-intrusive government observation.

It should be noted that not always courts feels reluctant to find useful evidence (unlawfully obtained surveillance evidence) as inadmissible. In *Khan v United Kingdom* (2001) 31 E.H.R.R. 45], unlawfully obtained surveillance evidence was held to be admissible. In this case, the Court conceded that the installation of the listening device had involved a civil trespass. But the Court accepted that without the tape recording there would be no case to answer. The trial judge, therefore, declined to exclude the taped conversations under the prevailing law of UK. *Khan* was sentenced to three years' imprisonment. An appeal was made to the House of Lords. The House took the view that the trial judge had been justified in not excluding the evidence. Despite finding unanimously that *Khan*'s right to privacy had been violated, the European Court held that *Khan* had received a fair trial.

Further, where a court believes that surveillance evidence is possibly manipulated, it may ask for supporting evidence. For example, if X, an enforcement agent, produces a satellite image to the court to prove that Y is using his company trucks to carry illegal equipment and chemicals, court may ask the question - whether the satellite had been working properly at the time it shoot the image, so further proof of correct functioning, reliability and accuracy from an expert witness might be necessary in this case (Satellite photograph 21st Century evidence by Ray Purdy & Richard Macrory, New Law Journal, March 7, 2003).

Are there any limits that can be placed on the power of technology so it will not shrink the realm of guaranteed privacy?

Electronic surveillance is an essential part of modern policing but we cannot rely on the courts to ensure that they do not infringe fundamental liberties. There is indeed a need for a proper legislative framework covering the whole range of such operations. But unfortunately, most states are reluctant to confront fundamental issues relating to policing and privacy. They have consistently failed to impose adequate controls on surveillance and interception activities of their public authorities. It's true most states, in recent days, have legal framework authorizing surveillance activities but they do not provide sturdy shield against any intrusion. Limited scope of prevailing legal regulations left much surveillance practice beyond authorization. Therefore, new regulations should be enacted to provide proper guideline for those who are exercising investigatory powers such as telephone and mobile tapping, first hand recording conversation etc.

As we know, the extent of guaranteed privacy of an individual is still uncharted area for the modern law; therefore it is for the judiciary to assess the validity of police action against a set of coherent standards (Test of essentiality and proportionality). It should also be explicit that court should not rely on any surveillance evidence when its procedural safeguards are infringed.

Recently, our President has signed a decree allowing the country's public authorities such as NSI, DB and DGF, police to intercept phone calls and e-mails of any citizen without seeking the permission of the judiciary. This decree further allows investigators to use intercepted telephone conversations as evidence in court. But the extent and scope of this declaration is still blurred. Though several western countries have this kind of prerogatives or regulations but they legitimated electronic intrusion only to protect themselves from lawlessness or to preserve domestic tranquillity or to smack organised crime. And their public authorities are not free from total accountability.

If our government uses due diligence and makes sure that (a) public authorities will be accountable for their actions, (b) they will maintain Proportionality and Essentiality remaining in their jurisdiction, (c) they will maintain proper disclosure (the absence of any disclosure obligation means that the majority of interferences with privacy will be undetected), (d) judiciary will be robust enough to help shape the occupational and professional culture of the enforcement agencies, vigilant citizens will not have any objection in accepting this kind of Presidential Order.

The author had his graduate and post graduate legal degrees from Great Britain. Right now he is studying in University of Aberdeen.

Cabinet gives nod to procurement law

The cabinet passed the draft of much-talked about Public Procurement Act, 2006 without keeping any clear-cut provision for punishment in case of violating the law. In the draft, a drastic change has been brought about regarding the review panel. An option has been kept to make public purchase in the interest of the people while a scope for government intervention is also there in the name of resolving complications. However, some negative features have been removed. The lottery provision has been omitted, negotiation has largely been cancelled, and the option of purchase in phases has also been obliterated.

The revised draft says if an officer commits any irregularities he will be charged under the Government Servants (Discipline and Appeal) Rules, 1985 and departmental actions will be taken against him. Again if an officer is found involved in corruption in any stage of a public purchase such as process of the purchase deal and its implementation, criminal proceedings will be brought against him. Sources said in most countries the public procurement law specifically spells out jail terms or penalty in case of corruption or violation of the law by an official, but nothing of that sort is there in this bill. -*The Daily Star, February 21.*

Jhalakathi Judges Killing Rahman, Bangla Bhai get 40 years

A trial court here sentenced top Jama'atul Mujahideen Bangladesh (JMB) leaders Abdur Rahman, Bangla Bhai, Molla Omar and Amzad alias Khalid Saifullah to 40 years' rigorous imprisonment for abetting and plotting the killing of two judges in Jhalakathi. In the first judgement against the four absconding top leaders of the banned Islamist militant outfit, the court jailed them in a case filed under the Explosive Substances Act. Charge sheet in the murder case filed after the gruesome killings is yet to be submitted. The CID is investigating it. The Barisal Divisional Speedy Trial Tribunal acquitted another accused, Sultan who was in jail custody and was brought to the court, giving him benefit of doubt. Judge of the tribunal MA Matin ordered his immediate release if not wanted in any other case. The judgement said the painful incident might not have happened if Mannan would not allow the assassin Mamun, who was in the guise of a stranger, to meet the judges without any obstacles. -*Prothom Alo, February 21.*

Cabinet okays bill to amend CrPC

The cabinet approved a bill seeking amendment to the Criminal Procedure Code (CrPC), 1898 in a bid to separate the judiciary from the executive. The cabinet at a meeting chaired by Prime Minister Khaleda Zia approved the bill. "Passing the bill is going to be the biggest development towards separation of the judiciary from the executive," Law Minister Moudud Ahmed told reporters. The bill requires the president's recommendation since it involves creation of judicial magistrates. Once the law is passed in parliament, the president will have to promulgate two rules under the articles 115 and 133 of the constitution regarding appointment, transfer, job discipline of the magistrates before the law comes into effect. The proposed bill has divided the magistrates into two groups, judicial and executive. Judicial magistrates will have no administrative business and they will be under the authority of the Supreme Court. Executive magistrates will not take part in any judicial activities. They will however be authorised to issue executive orders such as declaration of section 144, and issuance of orders to use force in cases of deterioration of law and order along with carrying out other administrative jobs. -*The Daily Star, February 21.*

Defamation Case

Prothom Alo editor, publisher get bail

A Dhaka court granted bail to the editor of the Prothom Alo and its publisher in a defamation case filed by Public Works Minister Mirza Abbas. The daily's Editor Matiur Rahman and Publisher Mahfuz Anam along with their lawyers appeared before the Chief Metropolitan Magistrate's (CMM) Court and prayed for bail. After the hearing, Metropolitan Magistrate Mizanur Rahman granted them bail upon a bond of Tk 5,000 with two guarantors. Moving the bail petition, their counsels told the court that the case was filed as part of conspiracy to harass them. Moreover, the charges brought in the complaint against the two were baseless and concocted, the counsels added. Advocates Syed Ahmed Gazi, Mahbubul Haq, Anwarul Kabir Babul, Ashraf Ul Alam, Prosanta Kumer Karmaker, Shahidullah Miah and Chaitanya Chandra Halder appeared for the editor and the publisher. The minister filed the case against the two on February 2 for running a news item on January 5. -*The Daily Star, February 21.*

Crowley says minority rights must be protected

US Congressman Joseph Crowley said the Bangladesh government must protect the rights of the minorities to uphold democracy in the country. "In the homework of democracy, the duty of the majority is to protect the minorities' rights," he told journalists after a meeting with Ahmadiyya leaders at Bakshibazar in the city. Joseph F Crowley, co-chair of congressional Bangladesh Caucus who arrived in Dhaka, also held a meeting with the Bangladesh Hindu Buddhist Christian Oikya Parishad (BHCOP) leaders and Mahanagar Sarbojaneen Puja Committee at the Dhakeswari National Temple. Earlier, Crowley placed wreath at the Central Shaheed Minar on the occasion of International Mother Language Day. He appreciated the religious harmony and practice of democracy in Bangladesh, but said the government should take appropriate measures on the allegations of the minority communities in Bangladesh. -*The Daily Star, February 22.*

Judiciary Separation

Hearing on contempt rule

Hearing on the contempt rule against nine bureaucrats on charge of distorting the judgment of the judiciary separation case will be held in the full court of the Appellate Division of the Supreme Court today with Chief Justice Syed JR Mudassar Husain in the chair. The accused government officials will have to appear in person before the Appellate Division since the apex court did not exempt them from the contempt charge and personal appearance before the court. On February 1, the Appellate Division adjourned until February 22 the hearing on the contempt rule issued by the Supreme Court against nine bureaucrats on charge of distorting the judgment of the judiciary separation case. -*BD News, February 22.*

Hasina for clear govt stance on electoral reforms

Leader of the Opposition Sheikh Hasina asked the prime minister to come up with a clear stand if her government would accept the opposition's proposed reforms in the caretaker government system and the Election Commission (EC). "If the prime minister does not accept our reform proposals, the people know how to get those implemented," said Hasina, also president of the main opposition Awami League. She was speaking while welcoming some new entrants to her party at her Dhanmondi office in the capital. Former additional secretary Shamsul Islam, Barrister Maksudul Islam, former deputy secretary Aminur Rahman and industrialist Tanvir Chowdhury Sagor joined the AL. The former prime minister, who placed the reform proposals in parliament on February 12, reiterated that the BNP-led coalition government is manipulating the voter list to rig the next general election. The AL chief asked her party leaders and activists to resist 'vote thieves' in every village, union, upazila and district. -*The Daily Star, February 24.*

FOR YOUR *information*

Protect our children from sexual abuse: Time to speak

Awareness programme for the parents

To protect our children from sexual abuse discussion sessions are arranged for the parents in different parts of the capital by a non-government organisation—Breaking the Silence. To create a positive environment and protective behaviour in the society on child abuse with particular focus on non-commercial sexual exploitation of children this organisation runs various types of programmes for parents and students.

In this school programme they arrange discussion sessions for the students and their parents. It is evident that in our society discussing sexual issues is a taboo. For that reason it is very important to reach the parents and students in a gradual and interactive process.

In the sessions they talk about the social development and as well as the psychological development of a child and after one session when the parents are comfortable with the terms and become more participating then sharing of experience takes place.

Most of the time they have some kind of experience on sexual abuse and most of us have almost the same kind of harsh experience. By the way of sharing experience the organisers gain the faith and confidence of the parents and convey their messages on the issue.

- The awareness sessions mostly cover the following topics:
- What is sexual abuse
 - Types of abuse
 - Myths regarding the issues

The session also provides information on different types of psychological and physiological disorder, which are rooted in sexual abuse and trauma.

This organisation also provides counselling by their experts for the traumatised children.

-Law Desk.

LAW *event*

Selection process of judges should be above politics

"There should be no political consideration in the selection process of judges. We practice this in the UK. In this regard a comparative study on the existing system of the United Kingdom and Bangladesh judicial appointments may be helpful. By and large most people don't know whether anybody of any party has been appointed or not." These remarks were made by Mr. Michael Sayers, General Secretary, Commonwealth Association for Legal Reforms Agencies at a working dinner of the Bangladesh Institute of Law and International Affairs (BILIA) auditorium on February 08, 2006.

In his remarks he mainly focused on the existing procedure through which they can fairly and freely assess, select and recruit suitable candidates. On issues of legal and judicial reforms and share the experience of the United Kingdom and the Canadian jurisdiction in matters of appointment of judges and the independence and separation of judiciary, BILIA organised this session.

Barrister Amir-ul Islam expressed his unhappiness at lack of transparency in the appointment of judges in Bangladesh legal framework. Criticising the existing



justice system. Former chief justice and BILIA President Habibur Rahman also made fruitful contribution to the session. BILIA Director Wali-ur Rahman moderated the session and he underlined the importance on such interaction for the growth and development of law and jurisprudence in a country which will ultimately accounts for good governance, accountability, transparency and systematic strategic issues affecting Bangladesh and its well-being. Among others, Barrister, Barrister Rokanuddin Mahmud, Advocate ABM Nurul Islam, Dr. Shirin Sharmin Choudhury, Barrister Tanzibul Alam were also present at the programme.

Law Desk.

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