

PARTIES: REGINA

v

GEOFFREY ROBERT EAST

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NO: 20208679

DELIVERED: 24 April 2003

HEARING DATES: 11 April 2003

JUDGMENT OF: MILDREN J

**CATCHWORDS:**

EVIDENCE

Telecommunications - admissibility of tape-recorded telephone conversation – “pretext phone call” - interception of conversations – protection for users – whether breach of Commonwealth or Territory Law – Surveillance Devices Act 2000 (NT) s 6 - whether conversation “private” – whether conversation should be rejected in the court’s discretion – relevant factors

*Listening Devices Act (1969)* (Vic) s 41  
*Surveillance Devices Act (2000)* s 3, s 5 and s 6  
*Telecommunications (Interception) Act 1979* (Cth) s 7

*Green v The Queen* (1996) 124 FLR 423, referred to  
*R v Edelsten* (1990) 21 NSWLR 542, referred to  
*R v M* [2002] QCA 486, referred to  
*T v The Medical Board of South Australia* (1992) 58 SASR 382, referred to

*R v Broyles* [1991] 3 SCR 595, followed  
*R v Storey* (Supreme Court of Victoria, unreported, 9 December 1994, BC 9406093, followed  
*R v Burt* (2000) 1 Qd. R 28, applied  
*R v Dat Tuan Nguyen* [1999] VSC (BC9907427), applied  
*Regina v Suckling* [1999] NSWCCA 36 (BC9900966), applied  
*The Queen v Swaffield; Pavic v The Queen* (1997) 192 CLR 159, applied

**REPRESENTATION:**

*Counsel:*

Crown:	Mr J Adams
Defendant:	Mr D Dalrymple

*Solicitors:*

Crown:	Office of Director of Public Prosecutions
Defendant:	David Dalrymple & Associates

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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*R v East* [2003] NTSC 42  
No. 20208679

BETWEEN:

**REGINA**  
Crown

AND:

**GEOFFREY ROBERT EAST**  
Defendant

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 24 April 2003)

- [1] The accused is charged with one count of having had sexual intercourse with Ms R without her consent and with three counts of indecent dealing with Ms R, a child under the age of 16 years.
- [2] So far as count 1 is concerned, it is alleged that this occurred on 17 May 2002 when the accused inserted his fingers into her vagina without her consent. The other three counts of unlawful and indecent dealing took place between 1 March and 18 May 2002. On each occasion, the accused is alleged to have either fondled Ms R's breasts or to have massaged the outside of her vagina.

- [3] The first police knew of this matter was on 3 June 2002 when a complaint was made by Ms R's mother to the police. Arrangements were made to interview Ms R and Ms R's mother at a "soft interview room" at the Casuarina Plaza building opposite the Casuarina shopping centre. The officer in charge of the investigation was a Detective Funnell and she was assisted by Detective Senior Constable Wayne Brayshaw.
- [4] A statement was taken from Ms R by Detective Funnell and a statement was taken from Ms R's mother by Detective Brayshaw. At the conclusion of those statements, Detective Funnell suggested to Ms R that she make a "pre-text phonecall" with the accused which would be tape recorded. A tape recording was made of the conversation between Senior Detective Funnell and Ms R relating to the pre-text phonecall. Without repeating the whole of the conversation, Senior Constable Funnell advised Ms R that she could not tell her what to say when she rang the accused, but that she was to concentrate on the matters referred to in her statement; Ms R was in charge of making the call and could hang up at any time; the police could not be involved in the conversation, but Ms R was warned not to make any threats of extortion during the conversation; that the police would not be present in the room when the conversation took place; and instructions were given to Ms R on how to operate the equipment. Ms R was advised that it was very important that the microphone used did not touch the telephone.
- [5] I will not detail exactly the equipment used and supplied by the police to Ms R to record the pre-text phonecall. Suffice to say that it is special

equipment, although the tape recorder used is a standard tape recorder. The equipment enables a recording to be made of the telephone call without any part of the equipment coming into contact with the telephone line, or the telephone including the handset.

- [6] Ms R was then left alone and made a telephone call to the accused which was recorded. At the end of the call, the tape was handed over by Ms R to the police as they indeed expected her to do.
- [7] The prosecution contends that the tape recording contains a number of damaging admissions by the accused; that it is admissible in evidence at the accused's trial; that the recording made of the telephone call was not unlawful; and that there are no grounds upon which it would be appropriate for me to exclude the telephone call in the exercise of my discretion.
- [8] Mr Dalrymple, for the accused, conceded that the recording was not made in breach of s 7 of the Telecommunications (Interception) Act 1979 (Cth) for two reasons: first that the recording took place after the communications had already passed over the telecommunication system; secondly, there is no interception if one party to the telephone conversation makes a recording of the conversation; it is only when a third party makes a recording of the telephone conversation without the consent or knowledge of the participants to the conversation that there is a breach of the Act. Reference was made by counsel to the following authorities in support of these contentions: *R v Edelsten* (1990) 21 NSWLR 542; *T v The Medical Board of South Australia*

(1992) 58 SASR 382; *Green v The Queen* (1996) 124 FLR 423. The Crown does not challenge the correctness of any of these decisions. Both parties have approached this matter on the basis that the relevant legislation is therefore the Surveillance Devices Act 2000 (NT).

### **Surveillance Devices Act 2000 (NT)**

[9] Section 5 of the Surveillance Devices Act 2000 (the Act) provides as follows:

#### **5. No use, etc. of surveillance device without authorisation.**

A person must not attach, install, use, maintain or retrieve a surveillance device unless –

- (a) the person who is authorised to do so under s6;
- (b) the person is a law enforcement officer or a person assisting a law enforcement officer who is authorised to do so under this Part and who does so in accordance with the authorisation; or
- (c) the person is authorised to do so under a law of the Commonwealth and does so in accordance with the authorisation:

Penalty: For a first offence –

- (a) if the offender is a natural person – 100 penalty units or imprisonment for 2 years; or
- (b) if the offender is a body corporate – 1000 penalty units.

For a second or subsequent offence –

- (a) if the offender is a natural person – 100 penalty units or imprisonment for 2 years; or
- (b) if the offender is a body corporate – 2000 penalty units.

[10] Section 6 of the Act provides:

**6. Authorisation to use etc. surveillance device in certain circumstances**

A person may attach, install, use, maintain or retrieve a surveillance device in the following circumstances:

- (a) not relevant
- (b) in the case of a listening device or an optical surveillance device –
  - (i) if each party to the private activity or private conversation recorded, monitored, listened to or observed expressly or impliedly consents to the attachment, installation, use, maintenance or retrieval of the device;
  - (ii) if the person who uses the device is a party to the private activity or private conversation recorded, monitored, listened to or observed by the device;
  - (iii) if the person is a law enforcement officer who is attaching, installing, using, maintaining or retrieving the device in a public place; ...

[11] Section 3 of the Act defines "surveillance device" to mean "a data surveillance device, a listening device or an optical surveillance device or a tracking device".

[12] A "listening device" is defined by s 3 of the Act to mean:

... an apparatus, device, instrument, machine or piece of equipment capable of being used to record, monitor or listen to a private conversation or words spoken to or by a person in a private conversation, but does not include a hearing aid or similar device used by a person with impaired hearing to overcome his or her impairment and enable him or her to hear only sounds ordinarily audible to the human ear.

[13] There is no dispute that the apparatus used in this case fell within the definition of "listening device".

[14] "Optical surveillance device" is defined in the Act to mean:

... an apparatus, device, instrument, machine or piece of equipment capable of being used to visually record, monitor or observe a private activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome his or her impairment and enable him or her to see only sights ordinarily visible to the human eye.

[15] "Private conversation" is defined by s 3 to mean:

... a conversation carried on in circumstances that may reasonably be taken to indicate that the parties to the conversation desire it to be listened to only by themselves, but does not include a conversation carried on in circumstances in which the parties to the conversation ought reasonably to expect that the conversation that the conversation may be overheard.

[16] It was submitted by Mr Adams that the definition of "private conversation" is ambiguous. It is not clear whether the definition means that each of the parties to the conversation desire it to be listened to only by themselves or whether only one or more of the parties so desire it.

- [17] Mr Adams submitted that the Crown relied on an authorisation under s6 of the Act. There was no suggestion that s 5(b) or 5(c) applied.
- [18] Mr Adams submitted that the authorisation rose under s 6(b)(ii). His submission is that each of the provisions of s 6(b)(i), (ii) and (iii) are alternatives, notwithstanding that the word "or" does not appear at the end of sub placitum (ii).
- [19] Counsel for the accused, Mr Dalrymple, submitted that the conversation was not a private conversation as defined, as it was carried on in circumstances which could reasonably be taken to indicate that the complainant desired the conversation to be listened to (whether contemporaneously or at a later time), not just by the accused but also by police officers.
- [20] I consider that each of the provisions of s 6(b)(i), (ii) and (iii) are alternatives; in other words that the word "or" is missing from the end of sub-placitum (ii). The alternative is that each of those sub-placita have to be complied with in order for the use of the device to be lawful.
- [21] An examination of the circumstances covered by each of the sub-platica persuades me that it was not the intention of the Legislature that each of sub-platica 6(b)(i), (ii) and (iii) had to be satisfied in order for the authorisation to be lawful. Clearly s 6(b)(i) refers to a case where the listening device or optical surveillance device has been attached, installed, used, etc. by a third party. Sub-placitum (ii) deals with a separate situation where the device is attached, installed, used, etc. by one of the parties to the

private activity or private conversation and sub-paragraph (iii) deals with the attaching installing, etc. of a device in a public place by a law enforcement officer.

[22] It is obvious that Parliament intended to authorise a wide range of activities using listening devices and optical surveillance devices pursuant to s 6(b). Of particular concern must have been optical surveillance devices used by banks, service stations, shops and even by the owners of residential premises, to monitor the activity of persons within the premises or about to enter the premises, or leave the premises.

[23] As to the definition of "private conversation", I think that the preferable meaning is that each of the parties to the conversation desire it to be listened to only by themselves. Therefore, a conversation carried on in circumstances that may reasonably be taken to indicate that one of the parties to conversation does not desire it to be listened to only by themselves, the conversation is not a private conversation. The question then is whether the circumstances in this case are such as to indicate that Ms R did not desire the conversation to be only listened to by her and the accused.

[24] In *R v Storey* (Supreme Court of Victoria, Cummins J, unreported 9 December 1994, BC 9406093) a registered informant used a tape recorder to record conversations in the kitchen of her home between the informant and inter alia the accused Storey who was facing charges of two counts of

conspiracy to murder. It was the intention of the informant that the tapes would be listened to by police who provided the tapes as well as the tape recorder, and to whom the registered informant on a regular basis provided recorded conversations.

[25] Section 41(a) of the Listening Devices Act (1969) (Vic), provided that a person shall not use any listening device to overhear, record, monitor or listen to any private conversation to which he is not a party.

[26] The definition of "private conversation" in the Victorian act, was in para materia with the definition of "private conversation" in the Surveillance Devices Act (2000). It was submitted on behalf of counsel for Mr Storey that the conversations were not private conversations and therefore the argument was that the publication of the private conversation was illegal by virtue of s 41(b).

[27] Cummins J said:

I consider that the conversations between Mrs Drew (the informant), Mr Storey and Mr Howard were private conversations within the meaning of the s 3, despite her subjective intent that they not be private. That is because of the tests stated in s 3, namely:

... any conversation carried on in such circumstances as may reasonably indicate that the parties to such conversation desire it to be confined to such parties.

That is an extraneous and objective criterion, not a subjective one. I consider that the question is not to be answered by reference to individual subjective intent. The definition of private conversations is not directed to that phenomenon. The test is whether the conversation was carried on in such circumstances as stated in s 3. I

consider that the circumstances to which regard must be had are the circumstances known to the participants of the conversation. It is those circumstances to which regard must be had, not some antecedent private act such as putting a tape recorder in a kitchen cupboard. The test was not what was intended secretly and individually nor what has historically occurred secretly and individually, but what were the circumstances of the conversation, that is the circumstances existing between the persons then and there conversing.

[28] I consider the approach by Cummins J is correct and that it should be followed. It seems to me to be extraordinary that there is a breach of s 5 if a conversation which was never intended to be a private conversation is recorded. Does that mean, for example, that every time a journalist interviews a politician and uses a tape recorder to record what is said and the recording is made in circumstances where the conversation was held in a public place in the presence of hundreds of people who are also listening to the conversation, that there is a breach of s 5? Fortunately that question does not have to be resolved in this case.

[29] I am satisfied that on the facts of this case the conversation was a private conversation within the definition of that term as contained in s 3 of the Act and that s 6(b)(ii) applies and that therefore there is no breach of s 5 of the Surveillance Devices Act (2000).

[30] Notwithstanding that there is no breach of the Act, counsel for the accused submitted that I ought to reject the pre-text conversation in the exercise of my discretion. I was referred to a number of authorities which considered the admissibility of pre-text conversations, including *The Queen v Swaffield*;

*Pavic v The Queen* (1997) 192 CLR 159; *R v Burt* (2000) 1 Qd.R 28; *R v M* [2002] QCA 486; *Regina v Suckling* [1999] NSWCCA 36 (BC9900966) and *R v Dat Tuan Nguyen* [1999] VSC 420 (BC9907427). What those cases established is that there may be reasons depending on the facts of each case why the Court ought to exercise its discretion to reject pretext conversations. Included amongst the circumstances to be considered are whether or not the conversation is being used as a means of getting around a decision already made by the accused to exercise his right of silence; the extent to which the person recording the conversation is an agent of the police; whether the conversation as recorded is in the nature of an interrogation or whether it is merely recording a normal conversation between two or more people; whether the circumstances under which the conversation was being held were such as to render it unfair to admit the conversation for other reasons such as, for example, the accused was not in full control of his faculties at the time which affected the reliability of what was said by the accused. This is by no means an exhaustive list of the sort of factors which may be relevant in any particular case.

- [31] The first question is whether Ms R was an agent of the police. In a very similar case, *R v M*, supra, the Court of Appeal of Queensland held that the complainant, who telephoned the accused from a police station was indeed an agent of the police. A different view was taken by the Court of Appeal of Queensland in the case of *R v Burt*, supra, at least by Thomas JA at p 34. The only difference between the situation in *R v Burt* and *R v M*, is that in

*Burt's* case it was alleged that the accused had already made limited oral admissions to the complainant over the telephone, otherwise in both cases the complainant was enabled by the police to record a pre-text telephone conversation in the same manner, or in substantially the same manner, as has been done in this case. Commonly the purpose of the telephone call and the recording of it was to gather evidence against the accused. I think in those circumstances, Ms R should be regarded as an agent for the police.

[32] A similar conclusion was reached by the Supreme Court of Canada in *R v Broyles* [1991] 3 SCR 595 when a friend of the accused visited the accused whilst in prison at the request of the police and wore a recording device provided for by the police.

[33] *R v Broyles* was cited by the majority in *R v Swaffield* (1998) 192 CLR 159 at 201 with apparent approval.

[34] In *Broyles* case the ensuing conversation was rejected because the statements made by the accused had been elicited in circumstances where without the intervention of the authorities there would have been no conversation at all and parts of the conversation were in the nature of an interrogation and not merely parts of a conversation which flowed naturally.

[35] So far as the conversation between the accused and Ms R is concerned, although there are a few leading questions, it could hardly be described as an interrogation or elicitation. The complainant in this case is only 15 years of age. The accused is an older and more mature person and there were a

number of occasions when the accused could have terminated the conversation had he wished to do so. Indeed, on one occasion towards the end of the conversation Ms R attempted to terminate the conversation but the accused had more to say.

[36] Counsel for the Crown conceded that there were some difficulties with the reliability of the admissions made during the conversation. At the time of the conversation the accused was at work. He was employed pouring concrete. There were a number of fellow workers around and he was obviously taken by surprise by the call which he received on his mobile telephone. During the record of interview he said that he was in a hurry and would have said anything to Ms R because he had concrete "going off around me and I just could not stop".

[37] The Crown does not deny that the call was made at a time when the accused was in fact in the middle of a concrete pour and there were other workers around him. Nevertheless, I am not persuaded that it would be unfair to the accused to admit the conversation in those circumstances. There is nothing on the face of the conversation which suggests that it is unreliable. No doubt the conversation occurred at a time when the accused was likely to be embarrassed, but the accused had the opportunity to terminate the conversation. It seems that it was unlikely that any of his fellow workers could have overheard the conversation given that there was the noise of a helicopter in the background. The accused has had the opportunity to give his explanation to the police of the phone call in the formal record of

interview which the prosecution intends to tender. I am unable to see any unfairness to the accused in the circumstances of this case.

[38] Objection was made to a part of the telephone call when Ms R asked a question about "the other times". It might be thought that what then followed amounted to an admission that there were other times similar to the occasion which is the subject of count 1 on the indictment. There is only one charge of that nature. No clear admission is made in relation to there being any other times, or as to what they were. I accept the submission of counsel for the accused that that part of the conversation is prejudicial and that the prejudicial nature of it outweighs its probative value. Accordingly, the material starting from the top of page 5 of the transcript of the pretext phone call until the end should be excluded.

[39] So far as the record of interview is concerned, there are questions in the record of interview, which relate to the pre-text conversation. However the material which much be excised is not referred to in the record of interview.

[40] No other objection was taken to the record of interview at this stage, although counsel for the accused indicated that he was still considering his position in relation to that. Subject to any further application which may be made by Mr Dalrymple, I see no reason at the moment to exclude any part of the record of interview.

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