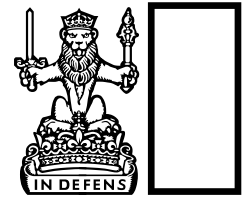


Crown Office and Procurator Fiscal Service

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30 May 2017

Dear Graeme

Thank you for your letter of 21 May 2017, addressed to my colleague Gary Aitken, enquiring about the admissibility of evidence in respect of wildlife crime.

I have been asked to reply in my role as the Head of the Wildlife and Environmental Crime Unit (WECU) in COPFS.

The Law on Admissibility of Evidence

The admissibility of evidence in criminal proceedings in Scotland is largely governed by the common law, although there are also statutory provisions which bear on the admissibility of certain categories of evidence. There is a substantial body of case law, developed over many years, which sets out the principles and considerations which fall to be applied.

The key common law authority, for present purposes, is *Lawrie v Muir* 1950 JC 19. In that case, critical evidence had been obtained by officials who, though acting in good faith, had illegally obtained entry to the premises in question. A Full Bench of the High Court reviewed previous authority, and concluded that an irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible. The Lord Justice-General, Lord Cooper, observed: "Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed". In the particular circumstances, the evidence was held to be inadmissible.

Quite apart from the common law rules, an accused person might object to the admissibility of particular evidence, on the basis that it would breach an accused's right to a fair trial under Article 6 of the ECHR¹. There is case law determining that certain types of evidence are incompatible with an accused's Article 6 right, rendering that type of evidence

¹ European Convention on Human Rights and Fundamental Freedoms 1950

inadmissible in a criminal trial in Scotland. However, even if the admission of evidence would not be incompatible with the accused's Convention rights, the common law rules of admissibility must also be satisfied.

The principles governing the admissibility of evidence are not specific to video evidence or CCTV evidence. Video and CCTV evidence is often used in criminal trials in Scotland. Any question about the admissibility of such evidence in any particular case will depend on the particular facts and circumstances of that case. Questions about the admissibility of evidence often relate, although not exclusively, to the manner, or the circumstances, in which the evidence was obtained.

The Role of Prosecutors

In making decisions in individual cases, prosecutors must apply the law (including the law on the admissibility of evidence) to the particular circumstances of the case. There is no particular policy or guidance to be applied in assessing questions of admissibility of evidence: it is a matter of law, not policy, and a matter to be resolved by applying the law to the particular factual circumstances of individual cases. Again, this is not specific to video evidence or CCTV evidence. Prosecutors are, moreover, under a duty to keep cases under review.

In a recent case, the Lord Justice-Clerk, Lady Dorrian, giving the Opinion of the Criminal Appeal Court approved the Lord Advocate's submission that: "it is important in the public interest that prosecutors exercise their judgment independently, robustly, forensically and objectively on the whole evidence available": *Stewart v. Payne* 2017 SLT 159, para. 97. From time to time, that may mean that prosecutors make decisions which are controversial – but it is important, in the public interest, that prosecutors exercise their independent judgment without regard to any potential controversy and that the independence of prosecutors to apply the law to the facts of particular cases is respected.

Recent Cases Involving Video Evidence

Following a defence challenge to the admissibility of covert video evidence obtained by RSPB investigators in the case against *Stanley Gordon*, Crown Counsel carried out a review of the relevant material bearing on that case and the case against *Craig Graham*. Crown Counsel concluded that the placing of covert cameras was, in those cases, for the purpose of detecting crime and, as that activity was not authorised, the subsequent video evidence was obtained irregularly. The irregularity was not capable of being excused, for the purposes of the common law of admissibility, and it followed, on the application of the common law principles to which I have referred, that the evidence was inadmissible. In light of that conclusion it was appropriate that the proceedings were brought to an end.

By way of context, it may be useful to mention the following:

- (i) The statutory access rights granted by section 1 of the Land Reform (Scotland) Act 2003 are granted for specific purposes. The purpose of investigating and detecting crime is not one of those purposes. It follows that someone who is on land for such a purpose is not there pursuant to the rights granted under the Act.
- (ii) In any event, the Scottish Outdoor Access Code states that where people exercising access rights wish to undertake surveys of natural or cultural heritage which require the installation of any equipment or instruments they should "seek the permission of the relevant land managers": para. 3.64.

(iii) The police have specific powers which they may utilise in appropriate cases in the investigation of wildlife crime. In particular, section 19(2) of the Wildlife and Countryside Act 1981 gives a specific power to constables to enter premises other than a dwelling if the constable suspects with reasonable cause that any person is committing or has committed an offence under Part I of the 1982 Act. Further, as you will appreciate, the police have statutory powers (under the Regulation of Investigatory Powers (Scotland) Act 2000 and the Police Act 1997) under which they may, when that is permitted under the statutory regime, be authorised to undertake covert surveillance.

COPFS remains committed to tackling wildlife crime, including raptor persecution. There is a strong presumption in favour of prosecution in cases reported to the Service where there is sufficient admissible evidence and prosecution is in the public interest.

Yours sincerely

Sara Shaw