Does accessing mobile data of rape victims threaten their right to privacy?

LNB News 30/05/2019 7

Public Law analysis: In early May 2019, the Crown Prosecution Service (CPS) introduced a new digital processing form to all forces in England and Wales, in order to collect relevant information on the digital devices of complainants and witnesses for trials. While the CPS designed the forms to facilitate full disclosure, while respecting individual rights to privacy, the forms have become controversial, with some complaining it amounts to a 'digital strip search' which potentially punishes the victims of crime. Sandra Paul, partner at Kingsley Napley, draws on her own professional experience and explains why these forms are unlikely to pose a threat to the privacy of victims.

What is the purpose of these consent forms? Why have they been introduced?

The new consent forms (the form) are designed to ensure a nationally consistent approach to the collection of electronic evidence from complainants. The aim is to provide clarity around the process and to give complainants a clear understanding of how their data might be used and therefore have confidence in assisting with the investigation and potential prosecution. While the current furore is in respect of complainants of sexual assault, the form and practice, is relevant to all offences.

How does the requirement for victims of rape or assault to give police access to their phones, or risk their case being blocked, threaten their rights to privacy regarding mobile phones and other personal electronic items? Is there a risk that this requirement punishes the victim?

The Code of Practice to section 3.5 of the Criminal Procedure and Investigations Act 1996 (CPIA 1996) imposes an obligation on the police to 'pursue all reasonable lines of inquiry' whether they point towards or away from the suspect's guilt. This is absolutely necessary if we are to have fair trials. We are entitled to have confidence in convictions and this is only possible if a jury has access to all relevant evidence.

'Relevant' means anything that has some bearing on the offence under investigation, or on the surrounding circumstances of the case. These lines of inquiry will depend upon the individual circumstances of each case. Evidence held on phones is no different than any other evidence—be it letters, DNA or eye witness evidence.

The form indicates that it might not be possible to progress cases if all the evidence is not available. The CPS charging threshold for all cases clearly states that a charge can only be authorised if there is 'sufficient evidence to provide a realistic prospect of conviction'. The logical conclusion is that the absence of what might be crucial evidence can adversely affect the ability to charge.

However, the form—and my experience of the practical application of the rules—also indicates that the absence of this evidence is not necessarily a 'block' to a case proceeding. Cases may well proceed in the absence of this evidence. However, the CPS has legal obligations of disclosure under CPIA 1996.

The police, prosecutors and defence alike, are frustrated at the commonly-held perception that complainants providing the police with access to their phones means that their entire lives will automatically become part of any court case. The starting point is that the prosecution will only want to rely on material which is helpful to their case, ie which supports the account of the complainant. There surely cannot be any protest from complainants as to this stage of the process. However, once a defence statement has been submitted, the prosecutor is under an obligation to carry out further an objective review and to disclose any material which they assess could be unhelpful to the Crown's case, or helpful to the defence case as set out in the defence statement. It is this part of the disclosure process which may result in material from a complainant's phone being provided to the defence team, and it is this which inevitably sends people into a spin.

In 18 years, I have never had access to information from a complainant's phone which was not directly responsive to this test. The defence is we are not permitted to go 'fishing around' in the complainant's data in the hope of finding something useful. On the last occasion that telephone evidence was reviewed in one of my cases (which was in March 2019) I did this, and I had to attend the police station, the officer stayed in the room supervising me throughout and I had to then write to the CPS to ask for copies of the data we wished to rely on. The barrister acting for the Crown as well as the CPS lawyer reviewed the material before it was provided to me.

It appears inimical to a 'fair' trial process that relevant evidence is 'hidden' from the court and jury. We have numerous well publicised examples—think Birmingham Six (see *R v McIlkenny; R v Hill; R v Power; R v Walker; R v Hunter; R v Callaghan* [1992] 2 All ER 417), through to more recent examples—of miscarriages of justice or near misses where this has happened.

Only relevant and admissible evidence will be permitted by the court. In order to be relevant, the evidence has to be probative of some matter in issue ie go towards proving or disproving some element of the offence charged. The court has additional legislative safeguards in cases of sexual assault ie section 41 of the Youth Justice and Criminal Evidence Act 1999 which prohibits information regarding previous sexual history being adduced without leave of the court and only then when a series of gateways designed to protect the complainant have been navigated.

The reality is that only material that is relevant to this case is admissible.

If the complainant is able to identify that there is no relevant evidence on the phone, the phone does not need to be downloaded. If the complainant is able to identify the parameters of the potentially relevant material—eg the only communication with the suspect was by WhatsApp—then, barring technical limitations, only that information needs to be downloaded.

Emotive terms like 'digital strip search' or 'punishment' of the complainant are perhaps responsible for the fear that has been invoked rather than a careful analysis of what the new form seeks to achieve.

Where the prosecution fails to comply with their obligations to investigate all reasonable lines of inquiry or provide disclosure, there is a real risk that a trial will collapse if the effect of the failure is to make it impossible for the defendant to have a fair trial as to do otherwise wards would amount to an abuse of process.

Those who have complained about the 'electronic strip search' of complainants by the police looking at their phones are in effect saying that the complainant's right to privacy outweighs the defendant's right to a fair trial. That is not the case. The right to privacy is a qualified human right, whereas the right to a fair trial is not. For justice to be done in our courts it requires a careful balancing exercise and on occasion, one must give way to the other.

This vetting only applies to victims of sexual assault and rape. Do you think this will be extended to victims of other crimes and why?

The CPS has confirmed that the use of these forms is not limited to specifically for sexual assault complainants—they can be used in any investigation where digital devices may be examined.

As indicated above, ‘vetting’ does not accurately describe the process being discussed. It is the collection of relevant evidence to determine whether a crime has been committed and thereafter whether there is sufficient evidence to secure a conviction. For instance, a text to a friend immediately following the alleged incident provides contemporaneous evidence and potentially a first account which has particular weight in cases such as these. Similarly an assertion that there was no previous sexual contact can be undermined by photographic evidences of the complainant and suspect. This is not about ‘digging up dirt’—it is about ensuring investigators and prosecutors have as full as picture as possible.

In all sexual offence cases that I work on, the suspects phone and electronic equipment is seized, under compulsion if necessary and so irrespective of their consent. Indeed, the desire to seize such equipment can amount to a ground on which to arrest a suspect.

The difficulty with rape and serious sexual offence cases is that it is often one person’s word against the other and it is rare to have independent witnesses. A mobile device—particularly if it includes location data—might be able to establish a chain of events or timeline that would otherwise not be possible and might clearly be of benefit to both parties.

The CPS is gathering views and concerns from victim groups about the new consent form. How do courts treat victims of rape differently to victims of other crimes? What can be done to change this?

There are already special provisions in place to deal with adult complainants in sexual offences trials and all otherwise vulnerable witnesses for whom those special measures might increase the quality of their evidence. Complainants in sexual offence trials have these measures available to them as of right and I have never come across a case where those measures are applied for but not granted by the court in a case concerning sexual offences.

What can courts do to ensure they protect the human rights to privacy of victims of rape, while gathering the necessary information to prosecute a perpetrator?

The court has an obligation to protect the human rights of all concerned in the trial. Developing a consistent and transparent way to gather data and inform the complainant about how that data will be put to use is an important safeguard. What we need is a fair trial, no matter which side of the aisle one speaks from. The court

and all parties can continue to provide and adhere to clear guidelines via the Criminal Procedure Rules and related legislation.

Interviewed by Samantha Gilbert.

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