

PE1705/D

Petitioner submission of 31 March 2019

Summary

In addition to previous proposals I urge the Scottish government to recommend by some means that a hearing before a bench of five judges to remove the state of uncertainty in the law in relation to video evidence should be held and include consideration of the solutions to the challenges in presenting evidence made in this submission, as proposed by Lady Dorrian in [2017] HCJAC 25 but amended to consider inclusion of the suggestions in this submission.

History of this proposal and submission

When listening to and reading the report on the March 2019 ¹evidence session of the Environment, Climate Change and Land Reform Committee (ECCLRC) discussing the 2017 wildlife crime report the SSPCA and police representatives both remarked on the obstacles facing those wishing to present video evidence before a court. This directly relates to one arm of this petition, and I decided that I therefore needed to address more issues than I have so far. I conducted research into these obstacles, in so far as I was able, as I now have limited access to my nearest University digital resources and Journals. This submission considers how this may be approached with a view to helping to ensure that the wish expressed in July 2013 by Environment Minister Paul Wheelhouse could be fulfilled. He said that he would be urging the Crown Office to consider the use of video footage in cases against those committing wildlife crime. I found that Lady Dorrian in an opinion given in early May 2017 ²[2017] HCJAC 25 stated: "The most recent of the cases was reported in 2000. Even since that time there has been a significant increase in the use of video evidence in court. We consider that it is undesirable that the law in this area should be in a state of uncertainty. We consider that this would be an opportune time for the matter to be reviewed by a larger court, and on this ground of appeal alone, we will put the case out for a hearing before a bench of five judges." I have been unable to find such a hearing about video evidence, nor do I know if it ever happened, but if this could happen now it may well form a basis for a solution.

My proposal to suggest how to tackle considering the basis for a solution.

The Lady Dorrian opinion will likely result in considering all cases of video evidence. My concern is, in addition to that, in the specific issue of wildlife crime, which need have no different solution, there are additional considerations needed. I shall look at the issue in relation to 2 imaginary cases or scenarios of wildlife crime. The first is loosely based upon a real case, where a member of the public in say a pub causes injury to a bat, but no application was made to allow recorded evidence by another member of the public who may have filmed the event on a smart phone to have the video recording evidence presented in court. The second scenario is based upon an actual walk I undertook in February 2019 where I left my car adjacent to a public road, left that public road, carrying a large lens and camera which would allow me to view from several hundred metres details of any potential crime I witnessed. I also carried 3 cameras which could be used, should the need arise, for instance on encountering a set and baited pole trap, by being set in place with a view to recording evidence over a longer term which the police could retrieve, perhaps with myself in attendance, after I reported my actions to them. I will cover both of these imaginary events, describing them as a crime in progress, although, of course, I saw no sign of a crime. I crossed via a tall heather and Juniper covered valley to another public

¹ [19 March meeting of ECCLRC official report](#) (draft)

² Opinion of the Court delivered by LADY DORRIAN, the Lord Justice Clerk [2017] HCJAC 25

road which may have been suitable territory for Hen Harriers to nest, and returned via the other side of a hill to the first public road, past many inactive pheasant feeders.

The Challenges to presenting evidence.

1. Incomplete chain of evidence. The first matter is the incomplete chain of evidence which needs to be addressed, because unless the police themselves make the recording, there will be a gap between the recording being made and it coming into the possession of the police. I suggest that an agreed standard protocol could resolve this issue.

This may be addressed purely by the use of a standard form being available for entering into evidence audio and video recordings which might be handled by means of a code issue or amendment, but even that may not be necessary. The form would need to state the approximate time of the recording, and the date it came into the hands of the police. The investigating officer would need to state if he has any evidence that the recording may have been tampered with in any way, and to confirm that any such evidence will be made available, even if discovered later. Much other information may need to be included but I will not detail it here. If this form and the recordings are given to the defence, they may challenge this in the same manner as any other evidence. In relation to the scenario of the injury to the bat, the investigating officer would only need to confirm, or not, that he was aware of any evidence that the recording on the phone had been tampered with etc.. The prosecution, unless there is clear evidence that the chain of evidence has had a material effect on the evidence, should permit it to be given to the defence and await a challenge on or before the first diet, and for them or the court to consider that, rather than simply refusing to allow the evidence on the basis that they lack any information to what might or might not have happened to contaminate the evidence, which may well be considered reliable unless there is evidence to the contrary. Other judiciaries operate in this matter without problem, even where corroborating evidence is not a requirement. These jurisdictions may find the present situation in Scotland strange, at a minimum.

2. The rights of individuals being recorded. I quote, not from the law or case law, but from a code, and consideration as to whether it applies can be made prior to requesting that a recording be used as evidence. This is one, but there are several references:

³“279 Surveillance of persons while they are actually engaged in crime in a public place is not obtaining information about them which is properly to be regarded as “private.””

This may require action to be taken where others recorded who are not engaged in crime to exclude them in some way from the evidence. In my scenario of an injured bat, there seems to me to be a clear case of likely allowing the evidence to be heard in court, although as always subject to a potential challenge.

3. The rights of the persons who own the land or property where the recording is being made. I shall cover this in my case where I might have encountered a crime in progress in the second of my scenarios. Clearly challenge 2 applies, and I suggest that as both the landowner and the alleged perpetrator may be guilty of crimes if so proven, that challenge 2 is applicable. In addition however, the prosecution would need to show that I had a right to be on the land. This is covered more fully in my submission of February 2019, but I will repeat that I would have a right to cross land under the Land Reform Act 2003⁴ (LRA) under sub-section 1(2) (b) and 1(4)(b) regardless of my obvious intent, should I encounter a crime in progress to take more action than simply contacting the police at the earliest opportunity. This would not necessarily apply in a general case of video recording which may occur, but is likely in a wildlife crime case because of the application of the LRA.

³ [Office of Surveillance Commissioners Procedures and Guidance 2016](#)

⁴ [Land Reform Act 2003](#)

4. The rights of a person who owns the land or property where the actual potential offence is being committed. This may be different from the rights of persons in challenge 3. Whilst this needs to be considered in more general cases, it is unlikely to need consideration in wildlife crime cases, but challenge 3 may well be similar, and the public place definition may help here as well.

5. The need to demonstrate that a recording being made does not require authorisation. I'll use my second scenario as illustration, being a crime in progress. Authorisation is unlikely at present, and may well be impossible, as the police representative may have hinted at in the evidence session referred to above for any suspected wildlife crime. I am forced therefore to show that it is not always required, and it is not in the second of my scenarios. There are laws as well as codes giving guidance, all in support of RIP(S)A 1(2)(c) which states "otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation under this Act to be sought for the carrying out of the surveillance." Page 4 of my February submission gives more details of when authorisation is not required, with quotes and links to codes. This would hold true in many cases of wildlife crime and perhaps also some general video recording situations.

Summary of the challenges.

It is my opinion that these challenges could be addressed in the manner I suggest without any required changes in Law. Perhaps members of the committee might consider commissioning an opinion from the government, whether it be a rebuttal or confirmation of the solution to the challenges in my submission here, as well as my request that they agree with my suggestion in the summary. I am, for obvious reasons, hesitant to spend more in legal costs than I already have in support of my petition. I should like to be made aware if my belief is correct but would agree that it is not necessary just to satisfy myself.

The relationship of this submission to the events referred to in the correspondence between the convener of the ECCLRC and the COPFS in May 2017.

Thus far in this submission, I have tried to be legally correct, but have not, as yet, sought to obtain independent legal advice, in contrast to my February 2019 submission. I have sought, despite my lack of legal training, to be as astute, clear and persuasive as an appeal court opinion.

This is in marked contrast, I suggest, to the letter from the head of the Wildlife and Environmental Crime Unit in COPFS who was asked to reply to the convener, and the support given to the decision of Crown Counsel by University of Aberdeen personnel. I have seen no remotely persuasive opinion in support of the decision, and I would like to see how such compares with my opinion given in my petition. I am truly prepared to be persuaded.

It is not in my nature, I admit, to shy away from such a controversial matter as wildlife crime, but do not see quite why it is controversial. Much wildlife crime is as often as not simply crime committed in support of what could be and is a legal activity, and I suggest it is only these crimes which are seen as controversial. These crimes, and their perpetrators, do not deserve the special treatment which some, including probably the perpetrators, believe that they receive.