

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT TIMARU**

**CRI-2017-076-000262
[2017] NZDC 25561**

NEW ZEALAND POLICE
Prosecutor

v

[NATHAN FARRELL]
Defendant

Hearing: 8 November 2017

Appearances: A Williams for the Prosecutor
T Jackson for the Defendant

Judgment: 14 November 2017

**RESERVE JUDGMENT OF JUDGE J E MAZE
[ON ADMISSIBILITY OF EVIDENCE UNDER S 78]**

[1] [Nathan Farrell] faces one charge of intentional damage of a sign belonging to the Waimate District Council on 24 February 2017. It will proceed to fixture on 27 November 2017. I am asked to rule on the admissibility in that hearing of evidence obtained from a surveillance camera. The police case relies upon the contents of film recorded by the surveillance camera mounted on a tree. The camera records in real time and is motion-activated. For the purposes of this decision I have not been given the film taken by the camera on the day in question.

[2] [Name deleted] is a senior survey technician and was engaged by the police to locate and document the site of the tree upon which the camera was mounted. He

concluded that the tree trunk was growing on public land, despite the fact that it was within a fenced area, and people could only gain access to it by opening a closed farm gate. The foliage of the tree would have extended onto privately owned land but the trunk was, as is shown on exhibit 1, on public land.

[3] [name deleted] is the caretaker at Holme Station. He installed the camera in question by tying it securely to the trunk of the same tree. He supplied the camera and hoped it might record events if the sign erected by the Waimate District Council at the roadside were to be knocked over. Signs had been knocked over previously and a new sign was installed on the day before he fixed the camera to the tree in February 2017. He discussed his intentions with [the Sergeant] of the Timaru Police. [The Sergeant] was with him, but neither in uniform, nor on duty, when [the caretaker] tied the camera to the tree late in the evening in question. He said they walked together into the paddock, and he believed at that time he was entering private property. He had not sought prior permission from the woman whom he believed to be the owner. A later attempt to obtain permission to enter her land was declined. [The caretaker and the Sergeant] walked around the trunk, but their exact path was not provided. They walked round the tree to determine where to fix the camera. He confirmed that neither the sergeant nor the New Zealand Police had supplied the camera. He also said [the Sergeant] did not fix the camera to the tree or turn it on. [The caretaker] intended to provide any resultant relevant footage to the police, but [the Sergeant] stated that what [the caretaker] did with the footage (if anything) was for him to decide. He did not consider he (or New Zealand Police) had any control over the camera or its use; he said he was there to “support” [the caretaker] “to ensure there were no issues”. He did not explain what rights he thought he would be exercising to enable him to do that, nor did he cite any authority for him to thus act. [The caretaker] later returned, removed footage from the camera, and gave it to the police. [The caretaker] is not the complainant in relation to the charge. He has no rights to, or legal interest in, the sign allegedly damaged by the defendant. The police, however, wish to rely upon the camera footage in prosecuting the defendant for intentional damage.

[4] The evidence therefore is that:

- (a) [The caretaker] (either alone or with [the Sergeant]) tied the camera to a tree which is on public, not privately-owned, land, before it recorded the footage; it remained in that position while recording the footage.
- (b) To fix the camera in that position, [the caretaker and the Sergeant] may possibly have entered privately owned land without permission while walking around the tree, but I was not told where exactly they walked, and they may equally possibly have been at all times on publicly owned land.
- (c) They acted together in entering the gate and walking around the tree, intending to assist each other; they entered the gate first at about 2200 hours on the evening in question.
- (d) Both believed at the time, erroneously in law and fact, that they were on privately owned land when the camera was fixed to the tree. Neither sought permission from the assumed land owner.
- (e) [The Sergeant] was not on duty or in uniform; he may have become an officious bystander had he sought to ensure there were “no issues” (whatever that was meant to mean), but he could not remotely claim to be exercising the authority of a police officer exercising his duty while he was engaged in “support’ for [the caretaker] by accompanying [the caretaker] in the exercise. He seems to consider that, based on his experience as a police officer, he was giving “security advice” to someone he knew.

The legal and factual challenge

[5] Mr Jackson submits for the defendant that the footage is inadmissible because:

- (a) The provisions of s 45 Search and Surveillance Act 2012 (SSA) prohibit “trespass surveillance” unless it is to obtain evidence relating to an offence punishable by imprisonment of seven years or more, or certain

specified offences under the Arms Act 1983 or the Psychoactive Substances Act 2013.

- (b) This is a charge of intentional damage carrying a maximum of three months' imprisonment.
- (c) "Trespass surveillance" means surveillance that involves trespass to land or trespass to goods (s 3 SSA).
- (d) The camera was a visual surveillance device, and in operating it so as to record activity within its range, it was used for surveillance.
- (e) Trespass (for the present purposes) is entry on land without the express or implied permission of the landowner.
- (f) The assertion [the Sergeant] had no part in the fixing and control of the camera lacks credibility and in fact both men were engaged in the activity in question, making this action trespass surveillance by an enforcement officer.
- (g) If the Court accepts the footage was obtained by trespass surveillance, s 30 Evidence Act 2006 applies as this was improperly obtained evidence. The only outcome proportionate to the wrongdoing (a deliberate breach of s 45 SSA) should be exclusion.
- (h) If the Court finds it was not a deliberate breach of s 45 SSA, it was nevertheless unfairly obtained, and should likewise be excluded.

[6] The police submit:

- (a) Section 45 SSA does not apply because this was not action by an enforcement officer; it was done by a private person acting in a private capacity (albeit with the knowledge of a police officer).

- (b) The Search and Surveillance Act does not prohibit what occurred as the camera was sited on public land and filming events on public land.
- (c) Even if there was a breach of s 45 (which is denied), the evidence should be admissible under s 30(3) Evidence Act; exclusion would be disproportionate to the extent of any wrongdoing.

Factual findings

[7] In the absence of any clear evidence on the point I am unable to conclude that [the caretaker and the Sergeant] entered upon privately owned land in fact when they walked around the tree or at any other time while engaged in this activity. Neither the photographs, nor the plan (exhibit 1), enable me to draw any conclusion on that issue. The evidence is that they may, and equally that they may not, have stepped on to what was, in fact and law, privately owned land. I can, therefore, draw no conclusion either way. If I was satisfied they had done so, then I am obliged to consider whether they could rely upon an implied licence to enter upon the private land (see below). The events in question began at about 10.00 pm, which means it was even later than that when they walked around the tree.

[8] I am unable to find as a fact that [the Sergeant] placed the camera in position and/or turned it on. I am satisfied he was involved in the decision to use a camera. He involved himself by accompanying [the caretaker] when [the caretaker] set up the camera and turned it on. He was there to provide “support” for [the caretaker]. Therefore, [the Sergeant] ran the risk that if [the caretaker] committed a criminal offence in that process, [the Sergeant] aided and abetted him in doing so. However, the evidence satisfied me that New Zealand Police did not own the camera, and did not own any footage it recorded. New Zealand Police had no right to control what was done with the camera or any footage it recorded. Had [the caretaker] played the footage and decided he did not wish to give it to New Zealand Police, the evidence shows he would have been perfectly within his rights. There is nothing to suggest that this was anything other than the work of a private individual making free with public property for his own private purpose (with the unauthorised and unwise involvement of an off-duty police officer purporting to provide advice and support).

Does s 45 apply to the events here?

[9] What occurred was not trespass surveillance because:

- (a) Filming with the camera was visual surveillance;
- (b) I am not satisfied that either [the Sergeant], or [the caretaker], or both, entered upon what was, in fact and law, private land in fixing the camera to the tree. I cannot conclude on the evidence that they committed a trespass.
- (c) Had they stepped on to private land, they would have committed a trespass, as they had no express permission and could not rely upon an implied licence. An implied licence can only be relied upon during reasonable hours; embarking upon this exercise in the dark after 10 pm would therefore exclude the possibility of an implied licence existing. In the absence of an intention to seek permission, any licence to enter must be expressed at the time or apparent from conduct on previous similar occasions (see *Hamed v R* [2012] 2NZLR 305). Any such licence must be to allow what in fact occurred (see *Hamed* para [156] to [158]). Therefore had either person entered upon private land, it would have been a trespass and unlawful.
- (d) The camera was sited and operating on public land. The fact that [the Sergeant and the caretaker] mistakenly believed they had entered privately owned land when they opened the gate and stepped within the fenced area does not make any difference; ignorance of the law cannot change the analysis.
- (e) Because the surveillance camera was on public land, capturing what could be seen with the naked eye, and operating only over public land, it does not constitute a search for the purposes of the New Zealand Bill

or Rights Act (NZBORA). I refer to *Hamed* (supra) paragraph [167]. In the present circumstances there can have been no reasonable expectation of privacy for those using the road within the scope of the camera.

- (f) The activity was not undertaken by an enforcement officer. [The Sergeant] was not relying upon any rights or duties cast upon him as a sworn police officer at the time; he acted in a private capacity and without the protection of any authority he might in other circumstances have had as a police officer.
- (g) The activity was not undertaken by the New Zealand Police; [the caretaker] had ownership and control of the camera and any footage.
- (h) Section 45 SSA provides that nothing in sub-part (1) of Part 3 of the SSA authorises an enforcement officer to engage in trespass surveillance and the use of interception devices except in certain limited cases. Trespass surveillance is forbidden, therefore, whether by an enforcement officer or anyone else, except in those few limited circumstances applying only to enforcement officers.
- (i) Even if this were trespass surveillance, it would have been unlawful and brief entry upon private land, but the fixing and operating of the camera would not have constituted a trespass in itself, and would not have led to a breach of NZBORA. It was not, however, trespass surveillance, primarily because I cannot find it established on the available evidence there was a trespass.
- (j) [The caretaker and the Sergeant] could in theory have trespassed in either (or both) of two ways: by trespassing on private land in order to set up the camera on public land, or by setting up the camera on private land. I adopt the view “trespass surveillance” is intended to mean the latter, that is, operating a visual surveillance device or an interception device without the express or implied authority of the private land

owner or occupier to operate that device there. I draw support for that view from *Hamed*, although there the surveillance was over private Tuhoë land. It seems unlikely that the section is designed to make surveillance, which is otherwise entirely on public land, unlawful, solely because it is accompanied by the chance and brief occurrence of a trespass. If I am correct in that interpretation, then even if the two men had committed a trespass in the course of setting up the device on public land, it would not have been “trespass surveillance”. However, as noted above, the evidence fails to satisfy me the men committed a trespass at all.

Is evidence gained from a camera placed on public land and filming activity on public land improperly obtained?

[10] It is clear there is no impropriety in security cameras operating in public places; there can be no reasonable expectations of privacy while in public places (*Hamed*). Such cameras may be undesirable in the eyes of many, but they are not unlawful. Therefore, the footage obtained from the privately owned camera installed (I suspect by good fortune rather than good management) on a tree on public land, filming activity on public land, was not improperly obtained. Neither can it be said to have been unfairly obtained as there can be no reasonable expectation of privacy for anyone moving about a public space. It therefore follows that the evidence does not satisfy me that a trespass occurred, nor does it establish that a breach of NZBORA occurred. There is no basis to consider the balancing exercise under s 30 Evidence Act.

[11] However, if I were wrong in the above conclusions, and the footage was obtained improperly and/or unfairly, and by virtue of a trespass, such trespass was minor (a few footsteps only at most) and did not impact upon the rights of the defendant, as it was not his land upon which any such trespass occurred. While that is not determinative, it is a relevant consideration. The defendant’s need for redress of the wrongs done in order to obtain the evidence is low or non-existent, given also that the filming was in a public space. The balancing exercise would inevitably fall in favour of admissibility (see Cross: EVA 30.8).

Summary

[12] The footage obtained from the camera mounted on a tree on public land and filming events occurring on public land was not obtained improperly or unfairly; and it is admissible evidence (as it is capable of being seen as relevant and probative) in the hearing of the charge of intentional damage.

J E Maze
District Court Judge