

Admissibility of Improperly Obtained Surveillance Footage – The High Court in *Kadir v The Queen*

Authors: Justine Munsie and Brodie Campbell

The High Court in *Kadir v The Queen; Grech v The Queen*¹ (“*Kadir*”) recently determined that footage obtained by way of secret surveillance was inadmissible under the *Evidence Act 1995* (NSW) (the “**Evidence Act**”) in the prosecution case relating to conduct allegedly depicted in the footage.

This decision raises issues for media publishers who have come into possession of information from questionable or unidentified sources. In particular, publishers must be wary of information which they know or suspect has been obtained improperly or in contravention of an Australian law given that their ability to rely on such information in legal proceedings may be hindered.

The *Evidence Act* Provisions²

Section 138(1) of the *Evidence Act* provides that evidence which is obtained improperly or in contravention of an Australian law is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence that has been obtained in the way in which it was. To aid the court in this weighing exercise, the *Evidence Act* prescribes non-exhaustive factors the court must take into account.³ Of particular relevance to this case was the factor in section 138(3)(h): the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Background

The appellants in *Kadir* were charged with acts of serious animal cruelty as a result of the alleged use of rabbits as live bait during greyhound racing training on Mr Kadir’s property. At the appellants’ trial, the prosecution sought to tender evidence of seven recordings of video-surveillance footage secretly filmed by a documentary photographer, Ms Lynch, on behalf of Animals Australia, an animal welfare organisation (the “**surveillance evidence**”). Copies of the video recordings were provided to the Royal Society for the Prevention of Cruelty to Animals (“**RSPCA**”) by Animals Australia, based on which the RSPCA obtained a warrant to search Mr Kadir’s property (the “**search warrant evidence**”). Ms Lynch also attended Mr Kadir’s property on two further occasions where it was alleged that Mr Kadir made certain admissions in relation to the charges of animal cruelty (the “**admission evidence**”). The appellants objected to the admissibility of each of the surveillance evidence, search warrant evidence and admission evidence in aid of the prosecution.

Before the Trial Judge at first instance, the appellants successfully argued that the surveillance evidence, the search warrant evidence and the admission evidence were inadmissible on the basis that each was obtained improperly or in contravention of an Australian law and that the desirability of admitting the evidence did not outweigh the undesirability of admitting it. The impropriety or contravention of law stemmed from the fact that

¹ [2020] HCA 1.

² Note that similar provisions to the *Evidence Act 1995* (NSW) s 138 exist in Commonwealth and other State and Territory evidence legislation: see *Evidence Act 1995* (Cth) s 138; *Evidence Act 2008* (Vic) s 138; *Evidence (National Uniform Legislation) Act* (NT) s 138; *Evidence Act 2001* (Tas) s 138; *Evidence Act 2011* (ACT) s 138.

³ See *Evidence Act 1995* (NSW) s 138(3).

the surveillance evidence was obtained by way of a video recording made in breach of the *Surveillance Devices Act 2007* (NSW). In NSW, it is an offence for a person to knowingly install, use or maintain an optical surveillance device on premises if the installation, use or maintenance of the device involves entry onto the premises without the consent of the owner or occupier of the premises.⁴

The prosecution appealed to the Court of Criminal Appeal of the Supreme Court of New South Wales⁵ contending that the Trial Judge did not properly assess the factors in section 138 of the *Evidence Act*. The Court of Criminal Appeal found in favour of the prosecution in regard to some of the surveillance evidence, the search warrant evidence and the admission evidence and held that the desirability of admitting each item of evidence outweighed the undesirability of admitting it. In particular, the Court of Criminal Appeal found that the difficulty of obtaining the surveillance evidence lawfully tipped the balance in favour of admitting the first surveillance recording, but the following six recordings made by Ms Lynch that the prosecution sought to rely on were excluded.

The appellants were granted special leave to appeal to the High Court regarding the admissibility of the evidence. A central issue was how section 138(3)(h) of the *Evidence Act* should be construed.

The High Court's Decision

The High Court found that the way the lower Courts had construed section 138(3)(h) was misconceived. In particular, it was incorrect to take into account the demonstrated difficulty of obtaining the evidence lawfully as weighing in favour of admitting the evidence when it had been deliberately obtained unlawfully. As such, the High Court held that the Trial Judge's decision to exclude the entirety of the surveillance evidence was correct. In unanimously allowing, in part, the appeal, the High Court also found that the Court of Criminal Appeal was correct in finding that the search warrant evidence and admission evidence were admissible.

The High Court held that the factors in section 138(3) confer a discretion on courts to admit evidence should the court be convinced on balance that the public interest requires that the evidence be admitted. The significance of factor (h) will vary according to the circumstances. For instance, where evidence is at risk of imminent loss or destruction, cutting legal corners may be permissible following a court's assessment of section 138(1). However, where impropriety or illegality is engaged in willingly, proof that the evidence could have been obtained lawfully will ordinarily weigh against admission. The High Court found that the lower Courts, in assuming that proof that it would have been difficult to lawfully obtain the surveillance evidence was a factor that favoured admission, had misunderstood the operation of section 138. This was especially the case given that the surveillance evidence was obtained in what was described as '*deliberate defiance of the law*'. Furthermore, the fact that seven separate recordings were obtained in "serious contravention" of Australian law was a relevant factor. In the High Court's view, each time a recording was made, the seriousness of the contravention increased, especially given that the recordings were made because Animals Australia did not believe that the RSPCA would be able to obtain the evidence lawfully.

In comparison, the High Court found that the search warrant evidence was admissible: although Animals Australia seriously breached the *Surveillance Devices Act* which directly led to the RSPCA obtaining a search warrant, the RSPCA acted lawfully in the performance of its regulatory functions. The High Court

⁴ *Surveillance Devices Act 2007* (NSW) s 8(1).

⁵ The Director of Public Prosecutions can appeal evidentiary rulings under the *Criminal Appeal Act 1912* (NSW) s 5F(3A).

made reference to the position in the United States where the “fruit” of illegally obtained evidence would generally be excluded. If this position were applied in Australia, the search warrant evidence would likely be excluded. However, the High Court ultimately found that section 138 does not require or allow such an extension to be made and as a result the search warrant evidence and the surveillance evidence had to be considered independently. Here, the surveillance evidence was obtained unlawfully by a private body, whereas the search warrant evidence was obtained by a regulator acting lawfully who was seemingly unaware of the prior contravention. Further, there was no suggestion that the RSPCA would regularly act upon illegally obtained information and the capacity of the search warrant evidence to impact on the case was high, particularly given that the surveillance evidence was to be excluded.

The High Court likewise determined that Mr Kadir’s admission evidence should not be excluded on the basis that the causal link between the initial contravention and Mr Kadir’s admissions was tenuous. The Court again went through the factors in section 138(3) and found that the desirability of admitting the admission evidence outweighed the undesirability of admitting it. This was because, unlike the surveillance or search warrant evidence, allowing the admission evidence would not be seen as condoning vigilantism or encouraging contravention to the same degree. Additionally, Ms Lynch did not use any of the knowledge gained from the surveillance evidence in her conversation with the appellant: the contravention was merely a step in the investigation.

Consequences for Media Publishers

The practical consequences of the High Court’s decision can be clearly seen, especially given that section 138 is not limited to criminal proceedings.⁶ Publishers must be able to assess not only the quality of their sources, but also the likelihood that their information can ultimately be relied upon. This is because publishers who publish material on the basis of improperly or illegally obtained information open themselves up to potential liability and, if sued, may be unable to rely on such information as a basis for establishing a successful defence. The High Court’s decision in *Kadir* confirms this: just because evidence would have been difficult to obtain lawfully does not mean that deliberately unlawfully obtained evidence will be admissible.

⁶ However, the significance of certain factors will obviously vary depending on whether the court is deciding to exclude evidence in a civil or criminal proceeding; see *Kadir* at [15].



Level 12, 60 Carrington Street
Sydney NSW 2000 Australia

ABN 55 365 334 124
Telephone +61 2 8915 1000

mail@addisons.com
www.addisons.com

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