

Cellphone technology, human rights and the criminal justice system

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Introduction

Millions use cellphones every day. It is unthinkable for anyone to not have one in his/her possession. We can be reached almost everywhere and at almost every destination. It is small, compact and extremely user friendly. Even school children from an early age pester their parents for this device. For some it is an irritation, for other an integral part of their daily existence – without which they cannot do.

The late Chief Justice Mahomed was apparently visibly irritated when a cellphone's ring interrupted the proceedings of the Judicial Services Commission of which he was the chairman: he remarked: "I will not tolerate this evil. I wish it had never been invented:"¹

People not only use it as a telecommunication device, but also as a typewriter SMS', calculators, and cameras –

In the Pietermaritzburg District Court², the charges were withdrawn against a 16 year old schoolboy who took photographs up his teacher's skirt with a camera-equipped cellphone, as he has completed a National Institute for Crime Prevention and the Reintegration of Offenders (Nicro) diversion programme.

He was charged with *crimen injuria* after he took photos up his teacher's skirt with a cellphone camera during a maths lesson. The teacher has sued the boy for R50 000 for the impairment of her dignity. If she succeeds in her civil action, the boy will only have to start paying the money once he starts to work. He allegedly showed the digital photographs to approximately 40 boys during a class break. In addition, he also sent the images to other students via text messages on his cellular telephone in return for money.

In the Regional Court in the South Coast, Durban³, two accused, Julyan and Strauss, while under the influence of ecstasy and alcohol robbed and murdered one Kenneth Gary van Aardt. The two accused who were given a lift by the deceased strangled him with a shoelace to death and buried him in a shallow grave near Julyan's house before taking-off with his car.

Strauss then communicated the incident via SMS to his ex-girlfriend whom at the time was based in the UK, who in turn contacted and informed the police. The SMS sent by

Strauss was used as evidence in court to corroborate the decomposing body of the deceased, which was found 68 days later with a shoelace around the neck.

A teenage girl in Worcester sent a terrifying SMS to her parents alleging that she had been abducted, gang raped, and that she had been kept against her will.⁴ Police engaged in a manhunt but the clue to her whereabouts were provided by the SMS.

Police obtained information from a cellphone company, which led to a house in Worcester, where it emerged that she had been by her own will. The SMS and the information obtained from the cellphone company were used in court against her on a charge of defeating the course of justice.

A woman sent a hoax SMS to her boyfriend alleging that she has been highjacked on route from Germiston to Pretoria, locked in the boot of her car before she was taken to and left in a shack in Alexandra.⁵ A hundred police searched for her with the community of Alexandra assisting. It later appeared that she was sitting in her father's car and the message was meant as a hoax to her boyfriend. NDPP's office stated that it was possible that a charge for the defeating the course of justice can be laid against her and the SMSs used as evidence against her.

In an Indian court a man was convicted for cannabis trafficking. The police during a house raid obtained the accused's cellphone and found on it 400 stored SMSs which many of them related to his cannabis dealings. The SMSs were used to secure his conviction.⁶

Cellphone technology and the information it generates

Although cellphones are used everyday, it is never realized what details are left in the wake of one call.⁷ Personal information such as the number that is dialed, the time the call is made, the location of both the caller and the recipient are obtainable by looking at cellphone records. The different cellphone companies record this information about cellphone calls on computer and they keep a record thereof.

Cellphone records can indicate precisely where a user was on a specific day, by using the records of the cellphone companies. The precise geographical area from where the call was made and the location where the recipient was can be ascertained. This can be determined by looking at which tower was used in making the call, the time of the call, the duration and which tower received the call. All this information is obtainable from the printouts of cellphone records from cellphone companies.

An expert if required will be able to plot all the detail on a map to indicate with precision where a user was when a call was made. A user who used a cellphone on a specific day and makes a number of calls whilst moving around can have the movements plotted on a map and it can then be traced by making use of cellphone records.

The right to privacy

Section 14 of the Constitution⁸ reads as follows:

Everyone has the right to privacy, which shall include the right not to have

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

This section dealing with the right to privacy consists of two parts.⁹ The first part guarantees a general right to privacy and the second part protects against specific infringements of privacy, mainly searches of home and property and seizures and infringements of communications. A right to privacy in information in possession of a third party revealing detail about an individual's movement and location would probably fall under the first part, which guarantees a general right to privacy. As a fundamental right it can be limited in accordance with the limitation clause that is by a law of general application, which includes other fundamental rights.¹⁰

In *Simons v P4 Radio*¹¹, a matter before the Broadcasting Tribunal, a presenter of the respondent conveyed a listener's cellphone number to other listeners, inviting them to call the said person and debate an issue with him. The presenter did not obtain the listener's permission to convey the number to the public. It was held that the conveying of a person's cellphone number to listeners without that person's consent amounted to an invasion of the listener's right to privacy, which was protected by the broadcasting code and also section 14 of the Constitution.

It was held that the listener did not say anything on air, which necessitated the serious invasion of his privacy. The Tribunal held that it is hard to imagine a set of facts (short of an emergency), which would allow the divulging of the cellphone number without the permission of the person involved.¹² It is clear from this case that although being heard by the Broadcasting Tribunal, that information such as the cellphone number of a user should be regarded as information that is protected. The furnishing of a cellphone number without the consent of the user was regarded as a very serious invasion of privacy.

In a number of decisions the admissibility of intercepted telephone/cellphone conversations came under scrutiny. In *Protea Technology v Wainer*¹³ it was held that where an employee make and receive calls that have nothing to do with his or her employer's business, a legitimate expectation of privacy exist in respect of the content such calls.¹⁴ Conversations by the employee, involving the employer's affairs are not private and not protected by the constitutional right to privacy. The employer is entitled to demand and obtain a full account of the content of such calls.

False and misleading information furnished by the police to obtain a direction to tap cellphones in *S v Naidoo*¹⁵, resulted that the direction was declared invalid. Because the direction issued by the judge was not lawful, the monitoring of the cellphone conversations was an unjustifiable violation of the right to privacy. In *S v Nkabinde*¹⁶ the monitored conversations between an accused and his legal representative was also held to be an invasion of the right to privacy of an accused. It however only relate to the content of telecommunications. It does not address the issue if the protection of privacy will stretch to all sorts of information such as movement and location obtained from cellphone

records.

Conclusion

If the access of information in possession of third parties generally is not properly regulated by legislation, anonymity of users will be lost. Information obtained from a customer's personal bank records reflecting withdrawal dates, times and locations from ATM machines, as well as credit cards purchases will also provide details of an individual's whereabouts and movements. Technology increases at an alarming pace and in future third parties could be in possession and have access to information containing biometrics features such as (fingerprints, palmprints, voice and eyescan DNA features).¹⁷ If all this information is in possession of third parties and not properly regulated, it will effectively take away an individual's right to determine what information others should know about the individual.

It is submitted that the nature and extent of non-communicative information and details obtained from the cellphone records such as location and movement of users is worthy of being protected by the right to privacy.

Notes:

- ¹ <http://www.derebus.org.za/archives/1999Feb/editorial/notes.htm>
- ² http://www.witness.co.za/content/2005_01/30517.htm
- ³ Cole, B "Drug, drinking and murder" <http://www.dailynews.co.za/index.php> (accessed on 16 November 2004)
- ⁴ <http://www.textuality.org/textully/archives/005778.htm> (accessed on 17 November 2004)
- ⁵ Article published as "Woman to pay for hoax hijack SMS" at <http://www.iol.co.za/news.htm> (accessed on 17 November 2004)
- ⁶ Border Mail "Mobile phone held drug deal details" http://www.bordermail.com.au/newsflow/pageitem?page_id=733126 (accessed 18.11.2004)
- ⁷ <http://www.electronics.howstuffworks.com/cell-phone7.htm>.
8 Act 108 of 1996.
- ⁹ De Waal J, Currie I, Erasmus G *The Bill of Rights Handbook* Juta (2001) 267.
- ¹⁰ Neethling J, Potgieter JM, Visser PJ *Law of Delict* 4th ed, Butterworths (2001) 19.
- ¹¹ *Simons v P4 Radio* [2003] JOL 10745 BCCSA.
- ¹² *Simons* para 11.
- ¹³ *Protea Technology v Wainer* 1997 (9) BCLR 1225 (W).
- ¹⁴ *Protea Technology v Wainer* para 1240.
- ¹⁵ *S v Naidoo* 1998 (1) BCLR 46 (D).
- ¹⁶ *S v Nkabinde* 1998 (8) BCLR 996 (N).
- ¹⁷ Van Tonder K "Biometrics Identifiers and Privacy" *De Rebus* August 2003 at 19.