

R v Smurthwaite & Gill [1994] 1 All ER 898

Entrapment

Smurthwaite and Gill were convicted separately of soliciting murder. In each case the person solicited was in fact an undercover police officer posing as a contract killer. The prosecution case depended upon covertly recorded conversations between the undercover officers and the defendants. The defendants appealed on the basis that the trial judge should have exercised his section 78 discretion and excluded the evidence of the covertly recorded conversations. They argued that the undercover officers were *agents provocateur* because if they had not come on the scene the defendants would not have sought to have had their spouses killed. Further, by posing as contract killers, the undercover officers had obtained the recordings by entrapment or by means of a trick.

Dismissing the appeals, the Court held that the judge had no discretion to exclude otherwise admissible evidence merely on the grounds that it had been obtained improperly or unfairly. The evidential requirement in section 78 of PACE that prosecution evidence might be excluded having regard to the circumstances in which it had been obtained had not altered the substantive rule of law laid down in **R v Sang** [1980] AC 204 that entrapment or the use of an *agent provocateur* did not afford a defence per se to a criminal charge. Thus, the fact that evidence has been obtained by entrapment, or the use of an *agent provocateur*, or by trick, did not of itself require the judge to exclude it. If, however, he considered that, in all the circumstances, the admission of evidence obtained in this way would have such an adverse effect on the fairness of the proceedings that he ought not to admit it, then he will exclude it.

Lord Taylor CJ in **Smurthwaite** stated that the factors to be taken into account by the court in determining how to exercise its section 78 discretion in these circumstances **included**:

1. whether the undercover officer was acting as an *agent provocateur*;
2. the nature of any entrapment;
3. whether the evidence consists of admissions to a completed offence or relates to the actual commission of an offence;
4. how active or passive the officer's role was in obtaining the evidence;
5. whether there is an unassailable record of what occurred or whether it is strongly corroborated;
6. whether the undercover officer abused his [undercover] role to ask questions which ought properly to have been asked as a police officer in accordance with PACE Code C.

These factors are often referred to as the 'Smurthwaite criteria'. In Smurthwaite's case, although there was an element of entrapment and trick, the officers had not acted as *agents provocateur*. The first two factors focussed on the defendant's freedom of choice or, put another way, the extent to which, if at all, the undercover officers did more than provide an opportunity to offend. The tapes recorded the actual commission of the offence rather than admissions regarding some offence committed in the past. The tapes made it clear that it was the defendants who had made the running and that the officers had played a minimal role and had used no persuasion towards the defendants. Further, the tapes provided an accurate and unassailable record of what had been said.

The list of factors is not all inclusive and, notwithstanding the general guidance given in **Smurthwaite**, each case will turn on its own facts.

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Reference should always be made to the original case.*