RECENT DEVELOPMENTS

ADMISSIBILITY IN FEDERAL COURT OF EVIDENCE OVERHEARD ON EXTENSION PHONE

Rathbun v. United States
355 U. S. 107 (1957)

Petitioner, in New York, spoke by telephone with Sparks in Pueblo, Colorado and threatened his life. In anticipation of another call, Sparks requested members of the local police force to overhear the conversation, using an extension phone in Sparks' home, and they overheard petitioner's subsequent call threatening Spark's life. At the trial the police officers testified to the conversation over timely objection that section 605 of the Federal Communications Act had been violated.[1] Petitioner was convicted of transmitting an interstate communication which threatened life[2] and the Court of Appeals affirmed.[3] The Supreme Court granted certiorari limited to the question of whether the use as evidence of the conversation overheard on an extension telephone was prohibited.[4] The Court found that the conversation was not "intercepted" as required by the Act, and thus the statute had not been violated.

The technical verbal approach taken by the Court in this decision seems to undercut the policy considerations of the Act, that surreptitious "eavesdropping" upon telephone conversation breeds legal enforcement inconsistent with standards of privacy and security. Prior to the Communications Act of 1934 telephone wiretapping was not governed by Federal restriction[5] except for a period during the first World War.[6] With the strong implication that the main purpose of the Federal Communications Act was to place the subject matter of the Radio Act

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[1] 48 STAT. 1103 (1934), 47 U.S.C. §605 (1952), ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ."

[2] 62 STAT. 741 (1948), 18 U.S.C. §875(b)(c) (1952).

[3] 236 F.2d 514 (10th Cir. 1956).

[4] Benanti v. United States, 355 U.S. 96 (1957), decided the same day as *Rathbun* determined that information obtained and divulged by state agents in violation of Section 605 is inadmissible in federal court, and that testimony in court is divulgence within the meaning of the statute.

[5] Constitutionality of wiretapping evidence was upheld in a 5-4 decision in Olmstead v. United States, 277 U.S. 438, 66 A.L.R. 376 (1928). Evidence was received without question in the years following; Rosenzweig, *The Law of Wiretapping*, 32 CORNELL L. Q. 514, n. 130 at 533 (1947).

[6] 40 STAT. 1017 (1918), "[whoever] . . . shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line. . . ."

of 1927[7] under control of the newly created Federal Communications Commission, the Supreme Court in *Nardone v. United States*[8] held section 605 to be a rule of evidence in the federal courts prohibiting federal agents from testifying to conversations overheard through wire-tapping interstate communications, in criminal trials.[9]

The federal courts were confronted with problems of definition brought about by the use of communications terminology within the statute drawn from the earlier Radio Act.[10] In defining the statute the basic assumption was that authorization by the sender precluded any interception insofar as that term meant a violation of the Act. Similarly the finding of non-interception made irrelevant the problem of identifying the sender and defining the term "authorized."

A technical reading of "interception" would require a physical break *between* sender and receiver. Based on a dictionary definition an early district court decision held evidence recorded with a device attached to the telephone wire *inside* a house admissible.[11] This approach was subsequently approved by the Supreme Court in *Goldman v. United States*[12] where the protection afforded by the Act was said to be confined to transmission of the message only. Following this pronouncement communications overheard while standing near a telephone receiver and conversation heard directly by government agents were held admissible.[13] In contradistinction the broader interpretation of "intercept" might have

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[7] Section 27 of the Radio Act of 1927, 44 Stat. 1172 drafted for radio and telegraphic communications was reenacted almost verbatim into §605 of the Federal Communications Act. The managers of the bill repeatedly declared that "The Bill as a whole does not change existing law," 78 CONG. REC. 10313 (1934). See Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal,* 52 COLUM. L. REV. 165 (1952). And see S. Rep. No. 781, 73d Cong. 2d Sess. 11 (1934).

[8] 302 U.S. 379 (1937).

[9] 308 U.S. 338 (1939). On the second hearing of the case Justice Frankfurter delivering the opinion of the Court, at p. 340 declared; ". . . the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree." Weiss v. United States, 308 U.S. 321 (1939), held *intrastate* communications within the Act.

[10] See *supra* note 7.

[11] United States v. Yee Ping Jong, 26 F. Supp. 69, 70 (W.D.Pa. 1939): "Webster's New International Dictionary defines the verb 'intercept' in part as follows: 'to take or seize by the way, or before arrival at the destined place.'"

[12] 316 U.S. 129 (1942). Here federal agents obtained evidence listening through the wall of an adjoining room by the use of a "detectaphone," the Court finding no interception in this type of "eavesdropping."

[13] United States v. Bookie, 229 F.2d 130 (7th Cir. 1956); Rayson v. United States, 238 F.2d 160 (9th Cir. 1956), involved overhearing while near the receiver; see United States v. Guller, 101 F. Supp. 176 (E.D. Pa. 1951); while Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950), and United States v. Lewis, 87 F. Supp. 970 (D.D.C. 1950), *reversed on other grounds,* 184 F.2d 394 (1950) involved hearing evidence directly.

included a physical or non-physical "break" or "overhearing" not *between* sender and receiver, but proximate in space to either.[14]

Construction of the term "sender" permits several possibilities, invoking a theory announced in *United States v. Polakoff*[15] that telephone conversation is "antiphonal"; each party being alternately sender and receiver. This view recognizes the disadvantages of separating conversation into segments of sender and receiver which is more readily accomplished in telegraphic and radio communications.[16] While the Second Circuit Court of Appeals applied the "antiphonal" concept in the *Polakoff* case, they there held that a recording made using an extension telephone was inadmissible where one party had consented, on the theory that since both parties were alternately senders, authorization of *both* was required by the statute.[17]

Notwithstanding the possible merits of the "two-party" theory, the majority of the federal courts have rejected it. Rather, they construe telephone conversation as being alternately sender and receiver, but require authorization of *one* party only for a finding of "non-interception" and admissibility of the overheard conversation as evidence.[18]

It is evident that the conflict of theory in the federal courts was the result of the *Nardone* cases[19] which, when viewed against the background of the Act, represent a policy formulation. The rationale there announced was that as a matter of public policy the enforcement of federal law by overzealous authorities should be discouraged where it would intrude unethically upon matters of personal privacy. This recognizes that wiretapping under certain circumstances may be, as phrased by Justice Holmes, "dirty business,"[20] leading to possible encroachment upon societal welfare. Thus emerged a concept of "fair play" which urged restriction.

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[14] United States v. Hill, 149 F. Supp. 83 (S.D.N.Y. 1957); United States v. Coplon, 185 F.2d 629 (2d Cir. 1950).

[15] 112 F.2d 888 (2d Cir. 1940), *cert. denied,* 311 U.S. 653. The "two party" theory was followed in Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); United States v. Gruber, 123 F.2d 691 (2d Cir. 1941); *cf.* James v. United States, 191 F.2d 472 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 948. There is argument that the "two party" theory was undercut by the Goldman holding in Chase's concurrence in Reitmeister v. Reitmeister, *supra.*

[16] The various communication theories are treated in Bernstein, *The Fruit of the Poisonous Tree,* 37 ILL. L. REV. 99 (1942).

[17] *Supra* note 15.

[18] United States v. White, 228 F.2d 832 (7th Cir. 1956); Flanders v. United States, 222 F.2d 163 (6th Cir. 1955). This theory would seem to predict that when party A telephones party B, B could authorize wiretapping and be viewed as a "sender" even though he has made no conversation. To thus view B as "sender" seems anomalous.

[19] *Supra* note 8. Nardone v. United States, *supra* note 9.

[20] Holmes, dissenting in Olmstead v. United States, *supra* note 5, at 470: "If the existing code (making it a misdemeanor to interrupt a message over telephone lines) does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."

The Supreme Court subsequently reiterated that exclusion of logically relevant evidence rested on a policy measure[21] designed to constrict federal enforcement when it overstepped the bounds of eithical conduct, but clarified the *Nardone* formula determining the limitations of the term "intercept."[22]

The instant case has conditioned the policy implications of Section 605 upon definitional variables rather than on a meaningful appraisal of rationale. The majority rests its finding of non-interception *not* on the basis that one party's authorization was necessary, *i.e.*, Sparks, but that since the clause immediately following the principal portion of the section says:

> . . . no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . .

the inference is that one entitled to receive a communication may do as he pleases with it. The court equates a "receiver" broadcasting a message and a party holding out his handset so another can hear from it[24] and finds these situations indistinguishable from a person permitting an outsider to listen in on an extension phone; interception has not occurred.[25] Finding persuasiveness in the fact that the telephone extension is a widely used instrument and that Congress couldn't have meant to restrict its use, the Court states that:

> Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, *interception*, has not occurred.[26]

The dissent adheres to the *Polokoff* case and views the conduct of the officers in this case as being an "interception" because there has

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[21] Goldstein v. United States, 316 U.S. 114 (1942).

[22] Goldman v. United States, *supra* note 13.

[23] At foot note 7 of the instant case, 355 U.S. at 110, the court cites a dictum from the *Polakoff* case, *supra* note 15 at 889: "We need not say that a man may never make a record of what he hears on the telephone by having someone else listen to an extension, or as in the case at bar, even by allowing him to interpose a recording machine. The receiver may certainly himself broadcast the message as he pleases. . . ."

[24] This situation arose in the *Bookie* case, *supra* note 13.

[25] To strengthen this proposition, the Court poses a hypothetical situation; an employer directing his secretary to listen to business conversation over an extension phone, and concludes: "It is unreasonable to believe that Congress meant to extend criminal liability to conduct which is wholly innocent and ordinary." 355 U.S. at 111. The dissent finds this logically distinguishable from a police officer called in to detect crime, 355 U.S. at 113.

[26] *Id.* at 111.

been no authorization by the petitioner-sender.[27] It is suggested that since the *Nardone* Court read "no person" in a strict literal sense, the Court here should interpret "sender" similarly, rather than to mean just one of the parties to the conversation.

The result in the *Rathbun* case has seized upon the manipulative view of the term "intercept" rather than to extend the periphery of policy formulation to a consistent application to criminal justice. Without deciding who the "sender" is the Court has inserted a new interpretation into Section 605 by holding that there can be no interception if one is entitled to receive a communication. Following this theory it would seem that when one is "entitled to receive," any conduct which would be termed an "interception" were he not the receiver is by definition *precluded* from reaching that state. The principal portion of the statute, "no person not authorized by the sender" is now relegated to a posture of little meaning since a *receiver* can do no wrong. On this basis, *if* an extension phone was conclusively determined as being physically *between* two parties to a conversation one listening on the extension could logically be viewed as "entitled to receive." Having been on the same circuit as the intended party, the message reached him *first*.[28] By the majority's theory a person listening on the extension would be immune from the mandate of the Statute, even though *neither* party had consented! A logical construction of "authorized by the sender" would solve this, but the theory of the instant case would compel a finding of non-violation. The majority's reliance upon Congressional meaning lends little support to their theory since Congress did not speak regarding the application of the Act to evidence, or telephones.[29]

The majority has employed the unsatisfactory telephonic terms within the statute[30] to narrow considerably the underlying policy rationale that the enforcement of the criminal law has boundaries which should

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[27] Mr. Justice Frankfurter, with whom Mr. Justice Douglas joins in dissenting, defines an "interception" in the principal case as ". . . an intrusion by way of listening to the legally insulated transmission as though between a speaker and a hearer. . . ." 355 U.S. at 113. Though the dissent agrees with the *Polakoff* view, which would require both parties' consent, it views only authorization of the petitioner as necessary for non-violation.

[28] Dicta in the court of appeals decision of the principal case, *supra* note 3 at 517: "It may be possible as far as we know to attach an extension phone so that the message passing over it reaches the ear of the listener before it reaches the ear of the one carrying on the conversation and for whom it is intended. If such is possible, in such case it would constitute an interception."

[29] *Supra* note 7.

[30] The comparison of a statute drafted with telephone wiretapping in mind, *i.e.* the Act of 1918, *supra* note 6, and §605 yields a marked difference in terminology. But attempts to authorize wiretapping since the Nardone decision have failed. See S. 3756, 75th Cong., 3d Sess. (1938); S. Rep. No. 1790, 75th Cong., 3d Sess. 3 (1938); H.J. Res. 571, 76th Cong., 3d Sess. (1940); H.R. 2266, 77th Cong., 1st Sess. (1941); H.R. 3099, 77th Cong., 1st Sess. (1941); H.R. 4228, 77th Cong., 1st Sess. (1941).

not be transgressed, regardless of meritorious results. From the policy standpoint the facts of the instant case would seem to rhyme with the formulation that "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."[31] The fact of an extension phone, in itself, should not give rise to such circumvention, for the original interpretation "was not merely meticulous reading of technical language—but translation into practicality of broad considerations of morality and public well being."[32] A recent district court decision has logically avoided the hypertechnical pitfalls inherent in section 605, suggesting:

> Science has made rapid advances in the communications field since 1934. Today there are means available to listen in on telephone calls without the use of an actual tap or a physical contact with the lines of transmission. To hold that these modern methods are without the scope of the statute means that the law is a dead letter. The spirit of the Act requires the exclusion of this evidence.[33]

The ramifications of the present decision are clear. No longer will state or federal authorities be threatened with the application of section 605 so long as they can utilize regularly installed extension phones to "listen in" with the permission of the one receiving the message. That Congress envisioned such manipulation of the statute is open to serious doubt. The struggle between the policy considerations present in the wiretapping are of the law and the amorphous nature of the statutory language within section 605 evidences a clear need for Congressional reappraisal and action.

R. Otto Meletzke

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[31] Nardone v. United States, *supra* note 8, at 383.

[32] Nardone v. United States, *supra* note 9, at 340.

[33] In United States v. Hill, 149 F. Supp. 83 (S.D.N.Y. 1957) it was held that a microphone jacked into a tape recorder and held by an agent of the Federal Bureau of Narcotics above the telephone without the defendant's consent was an interception within §605 and therefore inadmissible.