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SOUTH TYNESIDE METROPOLITAN BOROUGH COUNCIL v. JACKSON [1997] EWHC Admin 149 (14th February, 1997)

IN THE HIGH COURT OF JUSTICE CO/510/96
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Friday, 14th February 1997

B e f o r e:

LORD JUSTICE KENNEDY

and

LORD JUSTICE MANCE

SOUTH TYNESIDE METROPOLITAN BOROUGH COUNCIL

-v-

JACKSON

(Handed Down judgment of the Stenograph Notes of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

MR H MENON (did not appear for judgment)(Instructed by Christopher GD Bradley, Town Hall and
CW16 Offices, South Shields) appeared on behalf of the Applicant.

MR T FINCH (did not appear for judgment)(Instructed by Terence Carney, Hebburn) appeared on
behalf of the Respondent.

J U D G M E N T

(as approved)

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Friday, 14th February 1997

LORD JUSTICE KENNEDY:

1. This is a prosecutor's appeal by way of case stated from a decision of justices for the Petty
Sessional Division of South Tyneside, sitting at Hebburn, who on 17th November 1995 considered 2
informations. The informations were identical save as to the date of the alleged offence, and they
alleged that on two separate days, namely 5th June 1995 and 19th June 1995, the respondent engaged
in street trading in a prohibited street, namely King Street, South Shields, contrary to paragraph
10(1)(a) of Schedule 4 of the Local Government (Miscellaneous Provisions) Act 1982.

2. Statutory Framework

Paragraph 10(1)(a) of the 1982 Act provides that a person who engages in street trading in a
prohibited street commits an offence. It was common ground before the justices that King Street was a
prohibited street, and the next question to be considered is what, for the purposes of Schedule 4, is
meant by "Street-trading". That is defined by paragraph 1(1) of the Schedule, which states that street
trading means, subject to sub-paragraph (2), the selling or exposing for sale any article in a street. It is
not disputed that on the relevant dates the respondent was exposing articles, namely audio tape
recordings, for sale in King Street, but paragraph 1(2)(a) of the Schedule provides that trading by a
person acting as a pedlar under the authority of a pedlar's certificate granted under the Pedlar's Act
1871 is not street-trading for the purposes of Schedule 4 to the 1982 Act. At the material times the
respondent had a pedlars certificate granted under the 1871 Act, so the issue before the magistrates

was whether on each occasion he was acting as a pedlar. As that constitutes an exception to the general provision which creates the offence of street trading the burden of proving that he was entitled to take advantage of the exception was on the respondent (see section 101 of the Magistrates' Courts Act 1980). The term pedlar is defined in section 3 of the 1871 Act. It means "any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot and goes from town to town or to other men's houses, carrying to sell or exposing for sale any goods, wares, or merchandise, or procuring orders for goods, wares or merchandise immediately to be delivered, or selling or offering for sale his skill in handicraft." The magistrates found that on each occasion the respondent was peddling lawfully, and they therefore dismissed the informations. They did not therefore find it necessary to consider in any detail paragraph 10(2) of Schedule to the 1982 Act which states that it shall be a defence for a person charged with an offence under sub paragraph (1) to prove that he took "all reasonable precautions and exercised all due diligence to avoid commission of the offence."

3. The Questions

Two questions are posed for our consideration, namely :-

"(1) whether we were justified in finding that the respondent was a person acting as a pedlar within meaning of paragraph 1(2)(a) of Schedule 4 (of the 1982 Act).

"(2) whether the evidence could have justified a finding that the defendant had discharged the burden of proving that he had a statutory defence under paragraph 10(2) (of the same Schedule) of taking all reasonable precautions and exercising all due diligence. "

4. Facts

I turn now to summarise the facts found in the case stated. The respondent had been a club entertainer for 25 years, and was well known in South Shields, where he had undertaken charity work. By June 1995 he had a wheeled unit (of which we have seen photographs) and which is described in the case stated as -

"made up of a seat, an electric keyboard, a storage box for tapes, a display area for tapes and leaflets and a pocket or hat for people to put money into."

The unit was about 4 feet square and 2 feet 6 inches high. It was mounted on small wheels so that when seated at the keyboard the respondent, with his feet on the floor, could push the unit about. He could do that whilst continuing to play and sing. On each of the days which was the subject matter of an information the respondent took up a position in the pedestrianised area of King Street, South Shields. On 5th June 1995 he was observed from 12.30 pm to 3.25 pm. During the first hour he moved about seven times. Each time he moved by standing up, propelling the unit backwards for three or four steps and then sitting down again. He did not move continuously. He made a number sales of tapes during that period to people who approached him. During the remainder of the time on that day, and on the later occasion, his behaviour was broadly similar. The justices found that during the period of just under three hours on 5th June 1995 he moved 35 to 45 times, and on 19th June 1995, during a period of just under two hours he moved eleven times. He sold goods to customers who approached him, and solicited trade by handing out leaflets to promote his products. In fact the tapes which the respondent offered for sale were of himself singing. He did not sell any other tapes, and his tapes were not sold through any other outlet. When operating at South Shields the respondent travelled there in a van in which he also transported his mobile unit. He travelled also to other centres, trading in much the same way. During 1995 he had been as far afield as Inverness and Newquay. The magistrates accepted that on both dates to which both informations related the respondent had first visited other towns in the area before moving on the South Shields later in the morning. When he played the keyboard and sang his own songs potential customers would be attracted and approach him, they would then look at the tapes on display and on occasions make purchases. That, as the justices found,

was how he made his living. It was no secret that the reason why he moved a few feet now and again when he was operating in King Street, and no doubt when he was operating elsewhere, was that he was seeking to operate as a pedlar within the meaning of the 1871 Act. As the justices found, the respondent had studied the law relating to peddling, and had designed and used his unit to conform with his understanding of the legal definition. He had also sought the advice of the Police Authority as to what he had to do to fall within the definition of a Pedlar, and had taken counsel's opinion on the point. When he was eventually approached by law enforcement officers he made it clear that he was acting in a way which he believed to be legal and in accordance with his pedlar's certificate.

5. Authorities

There have been a number of decisions made by this Court, and some made by other courts, in relation to this branch of the law. I need not refer to all of them. In Watson v Malloy (1988) 1 WLR 1026 defendants who had pedlars certificates sold gift wrapping paper from portable stands. Those stands were erected in different locations, and the question to be considered was whether they were pedlars. At page 1032D Hutchison J said :-

"The definition in section 3 (of the Pedlars Act) so far from extending or varying, in my view entirely conforms with the ordinary conception of the meaning of the term pedlar; as one would expect with a definition which includes as part of the meaning the very word sought to be defined. The popular conception of a pedlar is someone who goes around selling things or services, who sells on the move, he is an itinerant seller. If the distinction is to be encapsulated in an aphorism, one might say that a pedlar is one who trades as he travels as distinct from one who merely travels to trade. I do not mean that he must not stop. As Woolf LJ suggested during the argument, the chair mender stops in order to mend chairs: but the feature which makes him a pedlar is that he goes from place to place, mending a chair here and a chair there; he comes to the owners of the distressed chairs, rather than setting up his pitch and allowing them to come to him."

In Normand v Alexander (1994) SLT 274 the High Court of Justiciary had to consider a somewhat similar problem in Scottish law. The Lord Justice General quoted what had been said in the case of Watson to which I have just referred, and said :-

"The correct approach is to examine the nature of the activity which is being carried on, at the time and in the place to which the charge relates. The question must then be, looking at that activity, whether it is an activity which can be described as falling within the term "pedlar", or whether it is an activity which falls outside that expression and thus requires a street traders licence. As we said earlier in this opinion, the essence of the activity which is the subject of the charge in this case was that of placing a stall to which customers were invited to come rather than moving from place to place to find customers in order to sell to them."

The next case which I propose to refer is Shepway District Council v Vincent, decided in this Court on 29th March 1994 and as far as I am aware unreported. At page 3D of the transcript Mr Justice Laws, who gave the first judgment, said :-

"In essence the question for this court is whether on the primary facts found by them the Magistrates are bound to conclude that the respondent was at the time acting not as a pedlar but as a street trader."

That seems to me to encapsulate neatly the primary question which we have to decide. At page 5A Mr Justice Laws continued:-

"In my judgment, whilst it is plain that the pedlar must be a pedestrian but also that the goods that he sells must be in essence small goods, there is nothing in the definition given in section 3, nor in my view in the ordinary meaning of the term 'pedlar', to exclude a person who has some small means of assisting the transport of his goods, such as the trolley in the present case (the trolley in question was a small item on which the defendant normally carried his wares). Of course it is possible to conjure instances where someone travels from place to place using a much larger piece of equipment for the

carriage of his goods. Where any such instances arise it will be a matter of fact for the magistrates to decide whether the whole apparatus is of such a scale to take the respondent in question out of the definition of the term 'pedlar'. ”

The contrasting situation envisaged by Mr Justice Laws is one which may be thought to have some relevance to the facts of the present case. That was emphasised by Leggatt LJ in Tunbridge Wells Borough Council v Dunn, 19th March 1996 unreported, at page 8G of the transcript :-

"It seems to me that we must go by the definition of 'pedlar' as we find it in the Pedlars Act 1871. After identifying various descriptions of persons selling on a small scale as individuals, the section then describes what it is that they have in common. They are persons who, so far as material for present purposes, travel and trade on foot and go from town to town carrying goods to sell or exposing for sale any goods. ”

The defendant in that case was walking about offering balloons for sale.

In Stevenage Borough Council v Wright, 2nd April 1996 unreported, the defendant had been observed stationary for at least half an hour at an entrance to an arcade, selling wrapping paper from a large shopping bag at his feet. The bag had a sign on its side, and the defendant called out to passers-by to attract their attention. The magistrates found that despite his pedlar's certificate he contravened the 1982 Act, and this court upheld that finding. Leggatt LJ said at page 10C of the transcript :-

"Essentially a pedlar, acting as such, is travelling when he is not trading. So the length is important of those periods during which he is stationary and not selling but is prepared to do so. The use of a stall or stand may indicate an intention to remain in one place or in a succession of different places for longer than is necessary to effect a particular sale or sales”

At page 12G he concluded:

"in my judgment the respondent in the present case was not walking around to sell but for a considerable period of time was selling from a pitch to which he exhorted passers-by to come. On 10th december 1994 he was not, on the occasion charged acting as a pedlar and therefore is not entitled to the benefit of the exemption from street trading."

6. Analysis of Magistrates' Conclusions

In the present case the justices, having carefully considered Watson v Malloy, found it to be distinguishable "in that this respondent did not sell from a static position". It is only right to point out that the justices were not referred to the other authorities which I have cited in the course of this judgment. Had they been so referred it seems to me that they would not have concluded that on either occasion this respondent was acting as a pedlar as defined by section 3 of the 1871 Act. True it is that he did not sell from a static position in that at fairly frequent intervals he moved his unit (which many people might describe as a sort of street barrow or stall). But his purpose in moving was not to move on with his tapes so as to bring them to the attention of other potential customers. It was simply an attempt to take advantage of the statutory defence. From a trading point of view the reality was that on each occasion, for several hours, his stall was set up in King Street, and by singing and playing he sought to induce passers-by to come to him and buy his tapes. Clearly the respondent carried on his trade in many places other than King Street, South Shields, and the justices were entitled to have regard to that fact, but the same could be said of many a market trader who sells from a stall on market days, and who would certainly not be described as a pedlar.

In the present case the justices also considered, as they put it "the mischief that the street trading legislation was intended to address". That can be a useful approach when a court has to construe an ambiguous word or phrase used in a statute, but it cannot be a valid approach here because of the format of the legislation. Unless the respondent could show that he was a pedlar acting under the authority of a pedlars certificate granted under the 1871 Act he contravened paragraph 10(1)(a) of the

1982 Act, because what he was doing was undoubtedly street trading, as defined by that Act. The definition of "pedlar" in the 1871 Act was formulated to indicate when a pedlar's certificate would be required, and, except perhaps incidentally, the object of that legislation does not seem to have been "to protect traders who pay the costs associated with running a permanent shop from unfair competition from street traders whose overheads would necessarily be substantially less". Furthermore, because of the way in which the statutes inter-act it would not be possible for a defendant to take advantage of the statutory defence only so long as he sold goods not offered by shops in the vicinity where he was operating. As I have tried to indicate, when deciding whether a defendant is or is not a pedlar a court has to look at what he is and how he behaves. The nature of his merchandise is largely irrelevant, and it is wholly irrelevant whether or not that merchandise is being sold by others with permanent premises nearby.

In view of their other findings the magistrates did not consider whether the respondent had established the statutory defence provided by paragraph 10(2) of the 1982 Act, that is to say shown that he took all reasonable precautions and exercised all due diligence to avoid commission of the offence. As I have already indicated, the justices found that this respondent went to considerable lengths to avoid transgressing the law. He studied the law himself, and consulted counsel and the police authority as to what he had to do to fall within the definition of a pedlar. He then acted in accordance with the advice which he had received. As Mr Menon said, he did not consult the local authority, so I suppose it could be argued that he had not taken "all" reasonable precautions, but he may well have thought that it would be the police rather than the local authority who would be seeking to enforce the law. Generally speaking ignorance of the law, even on the part of a defendant who has made enquiries, is no defence. In the current eighth edition of Smith and Hogan on Criminal Law the authors say at page 83 :- "It must usually be proved that D intended to cause, or was reckless whether he caused, the event or state of affairs which, as a matter of fact, is forbidden by law; but it is quite immaterial to his conviction (though it may affect his punishment) whether he knew that the event or state of affairs was forbidden by law. This is so even though it also appears that D's ignorance of the law was quite reasonable and even, apparently, if it was quite impossible for him to know of the prohibition in question. "

At page 84 the authors continue :-

"It probably makes no difference that D had received competent legal advice that his conduct would be lawful it is no defence that D acted in reliance on an assurance by a competent official that no prosecution would be brought; but that is a most material factor when it comes to sentence. Arguably it might be different where the official advice is that the proposed act is lawful, but the authorities at present are against this view. "

It is the possibility canvassed in that last sentence which we have been asked to examine in this case. I have had the advantage of reading in draft the judgment of Mr Justice Mance in relation to this issue and although I was originally inclined to the opposite opinion I find his arguments persuasive. However, as the magistrates did not find it necessary to consider whether the respondent had established the statutory defence, and as Mr Menon, for good reasons, is not asking us to remit the case to the magistrates whatever may be our answer to the questions in the case stated it may be said that our decision in relation to the second question is really academic.

8. Conclusion

I would therefore answer both questions in the negative. That means that the appeal is allowed but because of the stance adopted by Mr Menon no convictions will result, and as to costs the only order sought is by the respondent who seeks legal aid taxation. I would make that order.

LORD JUSTICE KENNEDY: For the reasons set out in the judgments which have been handed

down, and which are available to the parties, we answered both questions in the negative. That means that the appeal is allowed but because of the stance adopted by Mr Menon at the hearing no convictions will result. As to costs, the only Order sought is that which is by the Respondent who seeks legal aid taxation. We make that Order.

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