

CO/8593/2010

Neutral Citation Number: [2012] EWHC 278 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 27 January 2012

B e f o r e:

LORD JUSTICE RICHARDS

MR JUSTICE CRANSTON

Between:

EAST RIDING OF YORKSHIRE COUNCIL

Claimant

v

DEARLOVE

Defendant

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Mr J Thackray (instructed by ERYC) appeared on behalf of the **Claimant**
Mr C Hassall (instructed by Amber Solicitors) appeared on behalf of the **Defendant**

J U D G M E N T

1. LORD JUSTICE RICHARDS: This is an appeal by way of case stated against a decision on 5 May 2010 by justices sitting in the justice area of Beverley and the Wolds, in the Humber Division of the Humber and South Yorkshire Area. By their decision, the justices stayed on the grounds of abuse of process a prosecution brought by the present appellant, the East Riding Yorkshire Council, against the respondent, Mr Philip Dearlove. The Council had preferred informations against Mr Dearlove to the effect that (a) on 12 August 2009 he drove a private hire vehicle without having a licence under section 51 of the Local Government (Miscellaneous Provisions) Act 1976, (b) between 19 March and 12 August 2009 he operated a private hire vehicle without a licence under section 55 of that Act, (c) on 12 August 2009, being the owner and driver of a vehicle, he carried on a licensable activity namely the sale by retail of alcohol from that vehicle without an authorisation required by the Licensing Act 2003, and (d) on 12 August 2009, being the proprietor of a vehicle in respect of which a vehicle excise licence was in force, he knowingly used the vehicle as a private hire vehicle without a current licence under section 48 of the 1976 Act.
2. The facts relevant to those charges, as found by the justices and set out in paragraph 2 of the case stated, are these:
 - "a. Mr Dearlove placed an advert for 'Executive Business Travel' in the 'Brough Guide' (a monthly free paper) in March 2009. This was reported and a copy of the advert faxed to the East Riding of Yorkshire Council on 19 March 2009. The advert stated 'Chauffeur driven BMW X6, VIP, Executive, Corporate, Business travel, Airport Connections, Male/Female Chauffeurs'. At the bottom of the advert an e-mail address was given as phildearlove@hotmail.com.
 - b. The East Riding of Yorkshire Council's records showed that Mr Dearlove was not licensed to offer the services in the advert.
 - c. Mr Paul Story, Licensing Officer liaised with Mr Dearlove via e-mail on 24th March 2009. Initially Mr Dearlove indicated that he would be pursuing licence applications. However, subsequently in a telephone call to Mr Story, on 27 March 2009 Mr Dearlove said that he would be using his vehicle for 'weddings and funerals' only, an activity which he had been advised did not require a licence. Furthermore, Mr Dearlove stated that he had had no work whatsoever.
 - d. On 17th June 2009 Louise Wilson, Senior Licensing Officer emailed Mr Dearlove reminding him of his licensing obligations if he was still minded to use his vehicle other than for weddings and funerals. In her e-mail she warned regarding the possibility of a test purchase and the fact that further action would be taken if Mr Dearlove did not respond. Mr Dearlove did respond the following day advising that he was not trading

as a taxi and in fact had had no business at all.

- e. On 4th August 2009 at the request of Louise Wilson, Debbie Smith made a telephone call to the number provided in the aforementioned advert. A taxi journey between Ferriby and Beverley was arranged for a fare of £100. Miss Smith had been instructed to ask if the fare included alcohol. This booking was not placed with Mr Dearlove.
 - f. On 12th August 2009 the 'test purchase' took place. Mr Dearlove was the driver of the vehicle and escorted Miss Debra Smith and Mr Daniel Hill as requested. Alcohol was offered at the start of the journey.
 - g. At the end of the journey Mr Dearlove accepted the £100 payment from Miss Debra Smith and gave a pre written receipt for the amount of £100 and a business card which reflected the advert as detailed in paragraph 2(a).
 - h. The Appellant interviewed Mr Dearlove under caution on 8th September 2009. During the interview Mr Dearlove stated that he was the owner, driver, operator of the vehicle on the day of the test purchase and the sole owner of Executive Business Travel. He accepted that he knew he needed to be licensed but accepted the job because it was a carrot being dangled.
 - i. The 'test purchase' took place in the absence of any suggestion, information or complaint that Mr Dearlove had breached the licensing laws. Throughout the whole of the period 19 March 2009 to 12 August 2009 there is no evidence before the court that would give rise to any suspicion whatsoever that Mr Dearlove had acted illegally by contravening the licensing legislation. The only evidence we have is that Mr Dearlove placed a single advert in March 2009 and no more and following that had no work whatsoever."
3. The issue for the justices was whether the Council had overstepped the limits of acceptable conduct, thereby giving rise to an abuse of process, in acting as described in those findings of fact and then prosecuting Mr Dearlove in respect of the matters covered by the test purchase.
4. The principal authority on this topic is the decision of the House of Lords in Attorney General's Reference No.3 of 2000, R v Loosely [2002] 1 Cr App R 29. At paragraphs 1 and 2 of his judgment in that case, Lord Nicholls of Birkenhead observes:

"...It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law

and then seek to prosecute them for doing so. That would be entrapment...

...The difficulty lies in identifying conduct which is caught by such imprecise words as lure or incite or entice or instigate..."

Having dismissed as unsatisfactory a putative boundary based on mere passive observation by the police, he continued as follows in paragraphs 3 and 4:

"3. Moreover, and importantly, in some instances a degree of active involvement by the police in the commission of a crime is generally regarded as acceptable. Test purchases fall easily into this category. In *Director of Public Prosecutions v Marshall* [1988] 3 All ER 683 a trader was approached in his shop in the same way as any ordinary customer might have done. In breach of his licence he sold individual cans of lager to plain-clothes police officers. In *Nottingham City Council v Amin* [2000] 1 WLR 1071 a taxi was being driven in an area not covered by its licence. The driver accepted plain-clothes police officers as fare paying passengers. Police conduct of this nature does not attract reprobation even though, in the latter case, the roof light on the taxi was not illuminated. The police behaved in the same way as any member of the public wanting a taxi in the normal course might have done. Indeed, conduct of this nature by officials is sometimes expressly authorised by Act of Parliament. The statute creating an offence may authorise officials to make test purchases, as in section 27 of the Trade Descriptions Act 1968.

4. Thus, there are occasions when it is necessary for the police to resort to investigatory techniques in which the police themselves are the reporters and the witnesses of the commission of a crime. Sometimes the particular technique adopted is acceptable. Sometimes it is not. For even when the use of these investigatory techniques is justified, there are limits to what is acceptable. Take a case where an undercover policeman repeatedly badgers a vulnerable drug addict for a supply of drugs in return for excessive and ever increasing amounts of money. Eventually the addict yields to the importunity and pressure, and supplies drugs. He is then prosecuted for doing so. Plainly, this result would be objectionable. The crime committed by the addict could readily be characterised as artificial or state-created crime. In the absence of the police operation, the addict might well never have supplied drugs to anyone."

5. Lord Nicholls returned later, at paragraphs 19 and following, to the problem of defining or identifying the limits of acceptable proactive conduct by the police. I take two passages from that part of his judgment:

"23. ...On this a useful guide is to consider whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime. I emphasise the word unexceptional. The yardstick for the purpose of this test is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances. Police conduct of this nature is not to be regarded as inciting or instigating crime, or luring a person into committing a crime. The police did no more than others could be expected to do. The police did not create crime artificially..."

28. ...The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police overstepped the boundary: their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind. In assessing the weight to be attached to the police inducement, regard is to be had to the defendant's circumstances, including his vulnerability. This is not because the standards of acceptable behaviour are variable. Rather, this is a recognition that what may be a significant inducement to one person may not be so to another. For the police to behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant will not normally be regarded as objectionable."

6. One of the cases referred to by Lord Nicholls was the decision of the Divisional Court in Nottingham City Council v Amin [2001] 1 WLR 1071. Lord Hoffman in Loosely at paragraph 51 described Amin as a good example of a straightforward application of the distinction between causing the commission of the offence and providing an opportunity for it to be committed. Mr Amin owned a taxi which was not licensed to ply for hire in Nottingham. Two plain clothes policemen who saw him driving down a street in Nottingham in the middle of the night flagged him down. He stopped and upon request agreed to take them to the destination which they named. When they arrived, the policemen paid the fare and then charged him with the offence of plying for hire without a licence. The stipendiary magistrate excluded the evidence of the policemen under section 78 of the Police and Criminal Evidence Act 1984, referring to the officers as agents provocateurs, and in consequence dismissed the information. The Divisional Court held that it was wrong to do so and remitted the case with a direction to convict. At pages 1076H to 1077A, in a passage quoted by Lord Hoffman at paragraph 53 of Loosely, Lord Bingham of Cornhill CJ drew the following distinction from the authorities:

"On the one hand it has been recognised as deeply offensive to ordinary notions of fairness if a defendant were to be convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded, pressurised or wheedled into committing it by a law enforcement officer. On the

other hand it has been recognised that law enforcement agencies have a general duty to the public to enforce the law and it has been regarded as unobjectionable if a law enforcement officer gives a defendant an opportunity to break the law, of which the defendant freely takes advantage, in circumstances where it appears that the defendant would have behaved in the same way if the opportunity had been offered by anyone else."

As Lord Hoffman observed at paragraph 54, what Lord Bingham meant by that last observation was that the policemen had behaved like ordinary members of the public in flagging the taxi down. They did not wave £50 notes or pretend to be in distress.

7. The justices in the present case had those two authorities cited to them. In the light of them and the submissions they heard, they found as follows at paragraph 7 of the case statement:

"We were of the opinion that the actions of the Local Authority were excessive in the absence of any criminal activity on Mr Dearlove's part and as such we found it would be unfair to allow the proceedings to continue and ordered a stay of the proceedings.

In coming to this decision we were guided by the relevant direction given in the case of R v Loosely and considered;

- the reason for the test purchase and any reasonable grounds for suspicion.
- the nature and extent of Local Authority's participation in the crime with regard to the defendant's circumstances including his vulnerability.

There was no evidence whatsoever that Mr Dearlove was engaged in any criminal activity. Indeed there was no evidence of any suspicion that he had done so.

He placed a single advert in March and then entered into correspondence with the Local Authority regarding his licensing obligations. This resulted in him advising the Council that he was not pursuing a taxi licence, would restrict any work to weddings and in fact had not had any business whatsoever.

It cannot then be said that the Local Authority established reasonable grounds to suspect that offences were being committed prior to the deployment of the test purchase.

As a result of the correspondence that had taken place between Mr Dearlove and the prosecution, the East Riding of Yorkshire Council had specific knowledge of Mr Dearlove and his business

circumstances.

In this regard the Council cannot be said to have done no more than an ordinary member of the public would do. It is not a case of a random test purchase, but is more akin to 'virtue testing' in circumstances where the Local Authority were aware that Mr Dearlove had had no work and may well be financially vulnerable to such testing.

For the same reason the case can be distinguished from that of Nottingham City Council v Amin [2000], 1 Criminal Appeal Reports 426. The random flagging of what appears to be a taxi on the street cannot be said to be the same some as a pre-planned test purchase some 5 months after a single advert is placed, particularly where there is no suspicion of any criminal activity at all and the specific knowledge came about through the correspondence that had taken place."

8. The questions posed for the opinion of the High Court with regard to those findings are these:

"i) In the light of Loosely ... in which the House of Lords summarised the relevant principles did the magistrates err in law in finding the investigating officers' conduct went beyond simply providing Mr Dearlove with an opportunity to commit a crime.

ii) Did the Magistrates err in law in determining that the information available to the appellant prior to the test purchase did not amount to reasonable grounds that criminal activity was taking place.

iii) Did the Magistrates err in law in distinguishing the facts of this case from the case of Nottingham City Council v Amin...in that a test purchase by telephone booking or waving down a vehicle was no different."

9. The submissions of both counsel have been commendably concise and focused. For the appellant, Mr Thackray submits that the justices erred in law in concluding that there had been an abuse of process in ordering a stay. In particular, he submits that they made findings that were Wednesbury unreasonable or they otherwise erred in law in distinguishing Amin and failing properly to apply the principles laid down in Loosely. It is said that the Council in this case did no more than behave in the same way as any member of the public wanting a private hire vehicle. The fact that a telephone call was made as opposed to flagging the taxi down was not a meaningful point of distinction with Amin because the service Mr Dearlove was offering was one that required a telephone booking rather than flagging the vehicle down in the street. It is

further said that the advertisement was continuing evidence of Mr Dearlove's potential to commit the crime, which was confirmed by his attendance for booking and his voluntary provision to the officers of a business card for further business.

10. For Mr Dearlove, Mr Hassall submits that the justices were plainly aware of and had well in mind the relevant authorities and applied the test in those authorities. Loosely shows that each case will turn on its own facts, but regard is to be had amongst other matters to the nature of the offence, the reason for the operation and the nature and extent of the officers' participation in the offence. He submits that the justices considered all those matters and paid particular attention to the fact that this was a single advertisement and there was no evidence of Mr Dearlove having taken any bookings in the intervening period thereafter. They also looked carefully at his personal position and the issue of financial vulnerability and whether the Council's officers took advantage of it. In his submission, the justices' decision cannot be classified as one that no reasonable justices could have reached; they did not take into account any irrelevant or inappropriate material; and they were entitled to distinguish Amin as they did. Mr Hassall suggests that even if this court might not have come to the same decision as the justices, there is nonetheless no basis for interfering with the decision that the justices did reach.
11. I accept that the justices' reasons show that they had the relevant authorities very much in mind. The real question in this case is not one of legal misdirection but whether it was reasonably open to the justices to reach the conclusion they did in the application of the relevant legal principles to the particular facts. For my part, I respectfully differ from the conclusion they reached. I do not consider that the Council's officers stepped over the permitted line. They did nothing that an ordinary member of the public might not have been expected to do. Although the justices placed a great deal of weight on the absence of any evidence of unlawful conduct by Mr Dearlove beyond the one test purchase, it is important to look at the wider context of that test purchase.
12. Mr Dearlove placed an advertisement seeking business in March. He subsequently indicated to the Council that he would be pursuing licence applications, but he then switched to saying that he would be using the vehicle only for non-licensable activities, in serving weddings and funerals. In mid-June, he was reminded of his obligations and warned specifically of the possibility of a test purchase, to which he responded that he was not trading and had no business at all. It was only some seven weeks later, on 4 August, that the test purchase was initiated, using the phone number in the March advertisement. Although this does not appear in the findings set out in the case stated, we are told that there was unchallenged evidence before the justices that a female answered that phone call and said, "Hello, Executive Business Travel", and that when the booking was taken, for transport to Ladies' Day at Beverley Races on 12 August for £100, it was confirmed on request that sparkling wine was included in the price. There was also evidence that

Executive Business Travel made contact on 11 August to confirm the booking. The service was then provided on 12 August as booked and an invoice was provided, together with a business card advertising the service.

13. **It does not seem to me that there was, in the conduct of the council's officers, anything that could amount to impermissible entrapment. They booked the service just as an ordinary member of the public would do. The telephone booking was the equivalent, for this kind of service, of the flagging down of a taxi in Amin. At first sight it may look like a long journey and a high price, but for an executive service offering business and airport travel with alcohol included it cannot be said to be wholly out of the ordinary. In my view this was not a case of virtue testing or anything akin to it, notwithstanding the Council's knowledge that Mr Dearlove claimed to have no work and for that reason would no doubt be keen to take a booking. In my view the officers simply provided the opportunity for commission of an offence by the provision of the very kind of service that Mr Dearlove had advertised.**
14. **Nor is there anything in the wider context to cause me concern. The advertisement itself provided reasonable grounds for suspicion. The service on the day and the business card provided at the end of it shows that continuing suspicion was indeed justified. Mr Dearlove had an express warning that a test purchase might be made and there can be no unfairness in those circumstances in initiating a test purchase a few weeks later. There is, moreover, a strong public interest in ensuring that only licensed operators supply taxi services of this kind. The fact that this was the only evidence of unlawful conduct during the relevant period does not mean that the evidence was improperly obtained. If Mr Dearlove was proved to have offended only on this one occasion, the proper way to reflect that was in the sentence. The bringing of the prosecution, in all the circumstances, could not sensibly be regarded in my view as an affront to the public conscience.**
15. **Recognising that the justices, approaching the issue conscientiously, analysed matters in a very different way, I have asked myself carefully whether there could be room here for reasonable disagreement, in which case of course there would be no basis for interfering with the justices' decision. In my judgment, however, it simply was not reasonably open to the justices to find on these facts that the Council's officers had acted in such a way as to make it unfair or an abuse of process for the prosecution to be brought. Thus, the justices, in my judgment, erred in law in ordering the stay of proceedings.**
16. **For those reasons, I would answer question 1: "Yes". I do not think an answer is needed to question 2: the information available to the Council formed part of context to which I have referred, but it was open to the Council to make a test purchase irrespective of whether the information provided reasonable grounds for believing that criminal activity was taking place. As to question 3,**

I have indicated that in my view the situation here was comparable to that in Amin, but I do not think that a specific yes/no answer is required to the question formulated.

17. For the reasons I have given, I would allow the Council's appeal, would quash the decision to stay the prosecution and, subject to any further submissions, would remit the case to the justices for substantive consideration of the charges.
18. MR JUSTICE CRANSTON: I agree.
19. LORD JUSTICE RICHARDS: In the absence of any further submissions, that will be the order.
20. MR THACKRAY: Thank you.