The Stevenage Borough Council v Monty Wright CO 1764/95

High Court of Justice Queen's Bench Division (Divisional Court)

2 April 1996

1996 WL 1092207

Before: Lord Justice Leggatt and Sir Iain Glidewell

Tuesday, 2nd April 1996

Representation

Mr S Bird (instructed by the Chief Executive's Department, Stevenage, Borough Council, Danestrete, Stevenage, Herts SG1 1HN) appeared on behalf of the Appellant.

The Respondent did not appear and was unrepresented.

Judgment

Lord Justice Leggatt

The Stevenage Borough Council appeal by way of Case Stated against the acquittal by the Stevenage Magistrates of the Respondent, Monty Wright, on 23rd February 1995. He had faced two similarly worded charges of having, on 9th and 10th December 1994 respectively engaged in street trading in Queensway Street, Stevenage, in a prohibited street in that he had there sold wrapping paper. Those offences were charged as having been contrary to paragraph 10(1) of Schedule 4 of the Local Government (Miscellaneous Provisions) Act 1982 .

Unless I say otherwise, references in this judgment to sections will be to sections of that Act or to paragraphs of Schedule 4 .

By paragraph 1(1) of Schedule 4 : "'Prohibited street' means a street in which street trading is prohibited …"

By paragraph 2(1):

> "A district council may by resolution designate any street in their
>
> district as— (a) a prohibited street …"

Reverting to the definition paragraph:

'Street' includes—

> (a) any road, footway … or other area to which the public have access without payment … and also includes any part of a street …"

"Street trading" is defined as meaning:

> "… subject to sub-paragraph (2) below, the selling or exposing or offering for sale of any article … in a street …"

By sub-paragraph (2) various matters are listed as not constituting "street trading", of which the first is:

> "trading by a person acting as a pedlar under the authority of a pedlar's certificate granted under the Pedlars Act 1871 ."

The offence alleged against the Respondent is to be found in paragraph 10(1) which, so far as material, provides:

> "A person who—
>
> (a) engages in street trading in a
>
> prohibited street;
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> …
>
> without first having been granted permission to do so under paragraph 7(8)

above,

…

shall be guilty of an offence."

By sub-paragraph (2) of that paragraph:

> "It shall be a defence for a person charged with an offence under sub-paragraph (1) above to prove that he took all reasonable precautions and exercised all due diligence to avoid commission of the offence."

The Pedlars Act , referred to in the exemption from the scope of street trading in the Schedule , defines the term "pedlar" in paragraph (3), which says:

> "The term 'pedlar' 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."

Though the trades referred to are still familiar, pedlars are a dying breed.

The Magistrates found as a fact that on the dates in question the Respondent had a valid pedlar's licence. They found also that on 10th December 1994 the Respondent was in Queensway, a prohibited street, between 11.30 am and 2 pm, a period of two-and-a-half hours in all, since I understand them, by that finding, to have meant that he was in that street throughout that time. They explained that finding by saying:

> "During this period the Respondent was stationary, for at least an hour at the entrance to Westgate Arcade. Whilst in this position the Respondent was selling wrapping paper from a large shopping bag which was at his feet. The bag had a sign on its side. The Respondent called out to passers-by to attract their attention."

They thus succinctly indicated both the length of time for which the Respondent was in one particular position and the fact that he had set up a pitch during that period from which to sell his wares. The Magistrates stated:

> "The evidence produced by the prosecution was insufficient to make any findings of fact in relation to the 9 December, 1994."

That was the subject of the first charge, which is therefore not made the subject of the present appeal.

The Magistrates also found that:

> "The Respondent had been stopped by police and local authority officials in other towns whilst "trading in similar circumstances. They had accepted his Pedlar's Licence. The Respondent believed therefore that his Pedlar's Licence entitled him to trade in this manner."

Having in that admirable fashion found the facts, the Magistrates went on, unnecessarily in my view, to summarise the evidence for the prosecution, which was given by an official of the local authority, and for the defence, which was given by the Respondent himself. The Magistrates record that they had been referred to Watson v Malloy [1988] 3 All ER 469 as indeed we have been. Having taken the advice of the Clerk, the Magistrates found that on the occasion in question, on 10th December 1994, the Respondent was not acting as a pedlar. They said that the trading practice adopted by him was that of a pedlar and he was therefore entitled to the benefit of the proviso to paragraph (1) and (2) of Schedule 4 . They made plain that they reached that decision, having found it material that the Respondent was not trading from a stall, and that he

was entitled to stop to trade.

They then considered the statutory defence and held:

> "The fact that the Respondent had previously been stopped for similar matters by the police and local authority officials and satisfied them on his trading practices by production of his further Pedlar's [certificate] was sufficient to satisfy the defence under para 10(2) [of] Sch 4 …"

Here in this court, for the Appellant, the Respondent having been unrepresented, Mr Bird cited Watson v Malloy for the purpose of distinguishing it. In that case two different persons, one of whom held a current pedlar's certificate and the other of whom did not, traded in different places and on different occasions from what were called "portable stalls" By description it seems that they may have been little more than flimsy racks from which the goods in question, (wrapping paper, as in this case) were suspended or upon which they were displayed. This court, in placing emphasis upon the fact that the definition of "pedlar" includes one who "travels and trades on foot", concluded that the statutory definition of "pedlar" conformed with the ordinary conception of a pedlar as a person who sold items on the move.

The court held, further, that a pedlar traded as he travelled and was not a trader who travelled to trade. The court therefore concluded in that case that the Justices had erred in finding that the defendant's activities were those of a pedlar, and that neither defendant was entitled to the benefit of the exemption from street trading and, accordingly, in that case, both should have been convicted.

The headnote, criticised by Mr Bird, I think rightly, puts emphasis upon the fact that a pedlar is a person who does not sell items from a stall. That is not necessarily implicit in the decision because, although the traders in that case both made use of a stall, the court did not indicate that that fact was in any way determinative.

In a passage which is often cited Hutchison J, giving the principal judgment, said at

> page 1032E: "The popular conception of a pedlar is someone who goes around
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> 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."

The judge made plain that he did not mean that the person concerned must not stop since it would be obvious that if he were, for example, a chair mender he would have to stop for the purposes of mending chairs. However, the judge contrasted the person who comes to the owners of the distressed chairs with setting up his pitch and allowing them to come to him. He had earlier pointed, in particular, to the overall purpose of the definition of "pedlar" in the Act of 1871 and what he termed "the vital conjunctive 'and' between travels and trades"

In that case also the statutory defence was relied upon. It was summarily disposed of by the court as, indeed, it can be in the present case. I have read the findings of fact by reference to which the Magistrates sought to support their conclusion that the defence was available to the Respondent. However, it seems to me, in accordance with Mr Bird's submission, that the Magistrates' finding amounts to an assertion that a person who, for no better reason than that

proceedings have not previously been taken against him, erroneously believes that lawfully he is entitled to do what he has in fact done, has taken all reasonable precautions and exercised all due diligence to avoid breaking the law. In this case, as Hutchison J held it to be in Watson's case, that conclusion was plainly unsustainable. When one looks to the language of the defence it is plain that a much higher burden is placed upon anyone who is to take advantage of it than the mere possession of an erroneous belief. It was said to have been founded on the Respondent's previous experience without, however, there being any indication of the circumstances that in fact prevailed when he had previously been challenged for trading elsewhere in a manner which he said was similar to that which he adopted in Stevenage.

Mr Bird, with an eye to Watson's case, submits that a trader is not entitled to set up a pitch and expect persons to come to him. What is, in effect, forbidden is travelling to trade from one position. If one is to act as a pedlar the trading itself must be conducted not whilst the seller is himself in motion, but without his occupying a particular position, such as might be regarded as a pitch, for any significant length of time. Whereas the use of a stall is not, as I earlier remarked, determinative, the fact that a seller does equip himself with a stall, or stand, or bag by which his goods are borne may indicate an intention to set up a pitch from which his business may be conducted.

The questions which Mr Bird says are to be answered in a case such at this are:

> '(i) What is the nature of the trading practice of the seller, and (ii) what is the nature of his 'conduct whilst he is stationary for the purpose of the selling?'

To answer those questions one must consider the length of time for which the person concerned is in one place and what he does whilst he is in that place.

For my part, I do not derive much direct assistance from aphorisms about travelling to trade. Mr Bird attempts one such when he says that "it was the trade in this case that was passing, not the trader". Neat though the aphorism may be, it does not directly assist the court in its appraisal of the seller's conduct. It is, however, a fact, which Mr Bird emphasised, that the Respondent in this case did remain stationary for a significant period of time. He submits that had the Justices asked themselves the simple question whether whilst conducting these activities the Respondent was acting as a pedlar, they would not have misled themselves.

Mr Bird has submitted that the scope of the exemption from street trading is governed by the conjunctive "and" between "travels" and "trade". That echoes the submission in Watson . "Travels trades" is, of course, part of the definition of a "pedlar". That is not a consideration that I find compelling. The only significance of the words is that to be a pedlar a person must travel as well as trade, but he does not have to do them both simultaneously. As was pointed out in Watson's case, the chair mender obviously has to pause to mend a chair or chairs. When Hutchison J described him as one who sells on the move, he obviously did not mean that he has to be in motion whilst he is effecting sales. He meant, as the judge said himself, that a pedlar is an itinerant selling, or, as Mr Bird has put it, "he is peripatetic"

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. I believe the existence of a stall in Watson's case to have been material but it does not follow that it was indispensable. Even the presence of goods at the seller's feet, whether in a container or not, may suggest that the person concerned is taking up or staking out a pitch, although it must not be forgotten that the statutory definition of a pedlar includes a person who goes from town to town "exposing for sale any goods"

The Magistrates justified their decision that the Respondent was a pedlar by saying that they "found it material that the Respondent was not trading from a stall and that he was entitled to stop to trade". The fact that he was not trading from a stall did not of itself mean that he was acting as a pedlar, and though he was entitled to stop to trade that was only so in the sense of pausing for the purpose of effecting individual sales.

The pith of the case against the Respondent was contained in paragraph 2.3 of the Case

Stated, where the Magistrates said that:

> "During the period the Respondent was stationary, for as least an hour, at the entrance to Westgate Arcade. Whilst in this position [he] was selling wrapping paper from a large shopping bag which was at his feet."

They mentioned that the bag had a sign on its side. No doubt that was for the purpose of advertising his wares. They mentioned also that he called out to passers-by to attract their attention, that is to say, to urge them to come to him rather than being content to go to them himself.

The summary of that evidence is that the Respondent had, in effect, established the pitch where he remained for at least an hour. As Hutchison J put it in Watson's case at page 1030C:

> "The picture is, as this finding of the justices established, of a man conducting his business from one position, rather than of someone carrying and selling goods as he moves around."

The same feature was identified by the Lord Justice General in Normand v Alexander [1994] SLT 274 when he said at page 276D:

> "This does appear then to be a case where he positioned himself in the public place waiting for customers to come to him, rather than moving around from place to place seeking his customers."

The Lord Justice General summarised the position in that case at page 276L by saying:

> "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, when 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 trader's 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."

An example of the latter type was to be found in the case which was decided by the present constitution of this court on 19th March 1996, Tunbridge Wells Borough Council v Dunn . It suffices to say that in that case the Magistrates found that the Respondent was not trading from a fixed position. He moved up and down the road in the course of selling and offering for sale his balloons. At no time did he have a stand whilst he was selling or exposing the balloons for sale, and he did not have any articles on the ground around him. That was an example of a Respondent who walked up and down whilst selling his wares. In those circumstances we concluded that the Respondent had been acting as a pedlar and, the Justices having acquitted him, we dismissed the local authority's appeal against that decision by way of Case Stated.

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 is therefore not entitled to the benefit of the exemption from street trading.

The questions asked by the Justices need, for the reasons I have earlier indicated, be answered only by reference to the charge in respect of 10th December 1994:

> "(i) Whether there was evidence to support the finding that the Respondent was acting as a pedlar under the authority of a Pedlar's Certificate granted under the Pedlar's Act 1871 ?"

The answer is "No"

> "(ii) Whether on the evidence the Magistrates reached a conclusion which a bench of magistrates properly directing itself as to the definition of 'pedlar' set out

in Section 3 of the Pedlar's Act, 1871 could have reached?"

To that the answer is "No"

> "(iii) Whether there was evidence to support the finding that the Respondent had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offences as charged?"

To that the answer is also "No"

I would therefore allow the appeal. Very properly, in the circumstances of this case, the Appellants do not ask us to remit the case to the Justices.

Sir Iain Glidewell:

I agree. There is nothing I can usefully add.