R v BELLINGHAM (NICC 2) [2003]

The application was that the prosecution should be stayed as an abuse of the process of the court and an inducement by test purchase officer.

This matter concerns a test purchase carried out by a trained police test purchase officer who rang the defendant's mobile number from a call box opposite the Eglinton Hotel in Portrush, Northern Ireland.

The officer was initially rejected by the caller but when she rang back later the following recorded conversation took place;

"Hi Craig, it's me again. Can you sort us out with five pills?"
The defendant replied, "Yes. Where are you?"
There followed directions to the Hotel area.

They met outside the hotel and Bellingham handed over 5 ecstasy tablets and was given two marked twenty pound notes and gave a five pound note in change.. The meeting finished with the officer asking if it was all right to phone the following day. The defendant replied: "Yes, ring me anytime."

Another transaction took place the following day and during this the officer asked if a friend 'Deano' could also contact him, he agreed. The following day another deal took place and was recorded as follows;

B: "How many did you say?"
D: "Four"
B: "Four?"
D: "How much?"
B: "twenty"
D: "Twenty? Nice one."
Another marked twenty pound note was handed over to the accused.

The next day the accused was arrested and questioned about these matters and his flat at Eglinton House was also searched. Various illicit drugs were found in various amounts and in various places. Over thirty temazepam and diazepam tablets, and three small pieces of cannabis resin, enough to make over 50 cigarettes, were found. Also found was £60 in a wallet and £240 in a box.

In interview the above facts were, largely, admitted by Mr Bellingham. He told the police that he bought ten tablets after the first call and buying further later. He denied supplying anyone else. He admitted smoking cannabis and buying the tablets illegally.

Counsel thought there were two matters that the accused said which he found relevant for his consideration, he said "...*He told police: "Well at the end of the day if they hadn't phoned me, and not, like at the end of the day, the first day she phoned I did hang up and tell her to know…" and, "I've already said I'm not an out and out drug dealer. Do you know the first time she did phone I did tell no listen hung up the phone, she rung back and I just says fuck well it's a couple of extra pound to be made so I done it".*

The police asked, in relation to his purchase of ten, how much profit he had made and he told them that he made two pound a tablet and that it was an easy twenty quid. This would have been so if 10 tablets had been sold for 7 pounds each but, according to the police, 13 tablets were sold for a total of £75. If the accused is correct about supplying 4 tablets on the second occasion, the price would have just been over £5 a tablet.

Counsel believed he had made a 'reasonably strongly' case, in that firstly, he would not have supplied these drugs but did so because of two things; the initial temptation presented by the police officer and her persistence in coming back to him and, secondly, a desire on his part to make easy money.

Counsel sought a 'stay of prosecution' on the ground that it was, '*an abuse of the criminal process to let the prosecution go ahead on the supply charges since to do so would be to endorse* ***State sponsored crime*** and that the defendant would not have committed the offence but for the officers encouragement.

The Prosecution countered by saying that the test purchase officers did no more than target the accused in a planned operation designed to combat illicit drug selling in Portrush. The offer to buy drugs came from the officers but the accused responded to it enthusiastically and without any, or any much, persuasion.

Counsel for the prosecution considered two principal authorities,

- Texeiro de Castro v Portugal (1998) 4BHRC 533 and
- R v Loosely and Attorney General's Reference (No 3 of 2000) (2001) 4 AER 897,

He stated; *"The following principles I discern from considering these:*

1. *..... in applying the existing law here on stays for abuse of process and in excluding evidence under Article 76 of the Police and Criminal Evidence Order (NI) the court should have regard to Article 6 and the Law on entrapment.*

2. *Texeiro de Castro v Portugal makes it clear that entrapment, and the use of evidence obtained by entrapment ("as a result of police incitement"), may deprive a defendant of the right to a fair trial embodied in Article 6 ECHR and, since it is unlawful for the court, as a public authority, to act in a way that is incompatible with a convention right, statutory and common law developments of abuse of process and fairness of trial have been reinforced. (R v Loosely at paragraph 15.).Entrapment is not a substantive defence but the developing rules on fairness may mean that either a prosecution may be stayed or evidence excluded under article 76 of PACE.*

3. *..... Entrapment goes to the propriety of there being a conviction at all because of the State's involvement in the way the crime came to be committed. At the heart of this is the concept that police conduct that induces crime is "unacceptable and improper". To allow such a prosecution would be an affront to conscience and, no matter what the culpability of the defendant, would be unfair both at Common Law, under Article 6(1) ECHR and, separately, under Article 76, PACE (NI) Order 1989.*

4. *Common sense suggests that not all police activity designed to encourage criminal activity (for instance police decoys in areas where rape or muggings have been frequent) will be regarded as unfair.*

5. *The test in Texeiro v Portugal was whether officers had "exercised an influence such as to incite the commission of the offence". The test in R v Loosely is whether, having regard to all the circumstances of the case, the conduct of the police is so seriously improper as to bring the administration of justice into disrepute.*

6. *The court should look at the nature of the offence, the reason for the police operation, the presence or absence of malice, and the nature and extent of the police participation in the crime. The greater the inducement held out by the police is, and the more forceful or persistent the police overtures are, the more readily may a court conclude that the police overstepped the mark. It will not, however, normally be regarded as objectionable for the police to behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant. If having considered all these matters, the court adjudges that this amounts to "State created" crime then the prosecution will be stayed or, less frequently, the evidence excluded under Article 76. On the other hand, where it is not such an affront the matter goes to mitigation of sentence if that is a relevant consideration."*

Counsel considered this being **State created** crime. He regarded the nature of the inducements but also the responses by the accused who knew how to obtain the drug and who appeared to otherwise respond readily. The initial termination of the call, was, in his view, *'disingenuous'*. He considered the response fell into the category contemplated by Lord Hutton in R V Loosely (at page 925):

> *"In considering the distinction (broadly stated) between a person being lured by a police officer into committing an offence so that it will be right to stay a prosecution, and a person freely taking advantage of an opportunity to commit an offence presented to him by an officer, it is necessary to have in mind that a drugs dealer will not voluntarily offer drugs to a stranger, unless that stranger first makes an*

approach to him, and the stranger may need to persist in his request for drugs before they are supplied……In my opinion a prosecution should not be stayed where a police officer has used an inducement which (in the words of McHugh J. in Ridgeway's case (1995) 184 CLR 19 at 92) is "consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity".

The Judge stated that this was *'a proper prosecution given all the circumstances including the nature of the police operation, the absence of any apparent malice, the nature and extent of the inducements and role of the police and the nature of the defendant's response. This was not a case of the accused being unfairly badgered or induced and, balanced against the scale and type of the problem it was aimed to counter, I do not find that the police actions are such that I consider staying this case as an abuse of the process of the court., I . I refuse the application for a stay and I also admit the evidence of the test purchases"*

Interestingly the Judge also considered whether three test purchases were necessary or whether they amounted to an 'overkill' and whether evidence or charges should be restricted to one. The defence suggested that the Court should have regard to the nature of the police operation and should limit the admissible evidence to the first test purchase. Mr Connor contended that the two subsequent test purchases were relevant in that they allowed the court to look at the response of the defendant to the officers as a whole.

He went on to say ***'the evidence is either admissible or not. It is relevant given the circumstances and the timescale. If there were not three separate charges of supply there might well be legal difficulties, perhaps not insurmountable, in admitting this as relevant evidence. In my view this is something that is best dealt with in mitigation if it comes to that. I also note that in R v Loosely there were a number of police 'stings'.***

The application was refused.