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Crown Court for the Division of Antrim

R v Bellingham
Ruling upon application that the prosecution should be stayed as an abuse of the process of the court: drugs supply: inducement by test purchase officer.

Smyth J:

Facts:

After a formal briefing a trained police test purchase officer of the drugs squad at 15.10 on Tuesday 14th May rang the defendant's mobile number from a call box opposite the Eglinton Hotel in Portrush.

The following conversation was recorded: "Can you sort us out with a few pills?" The defendant replied, "I don't know what you are talking about. You have got the wrong number." He then hung up. The police officer immediately rang back and the following conversation was recorded: "It's me again. I have checked the number and it's the right one. Can you sort us out?"

The defendant replied that he would not have any pills until after 5 pm and was asked by the police officer if he (the police officer) could ring back. The accused said yes and, when asked by the officer, said his first name was Craig.

At 17.15 the officer again rang the defendant's mobile and she asked: "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.

Outside the hotel the police officer and the accused met. Mr Bellingham handed over 5 ecstasy tablets and was given two marked twenty pound notes and gave a five pound note in change. It is not absolutely clear from the statements but there does not seem to have been any discussion about price which would suggest that either there was a mutual understanding that the cost would be seven pounds per tablet or that the accused was setting this price. The meeting finished with the officer asking if it was all right to phone the following day. The defendant replied: "Yes, ring me anytime."

The following day the same officer phoned Mr Bellingham and she asked: "Can you sort us with a few pills?" The accused replied yes and they arranged to meet at the Station Bar but in fact they seem to have met on the way there.

The transaction took place in the doorway of a shop into which Mr Bellingam had beckoned the officer. According to the officer, the defendant asked how many tablets and was told three and asked how much. He set a price of twenty pounds and was handed another marked note. The officer asked him if a friend called Deano could ring him the following day and Mr Bellingham replied that it was no problem.

At 12.55 on the following day, 26th May, another police officer, called Deano, rang the defendant's mobile and asked for Craig. The defendant asked if that was Dean and also asked how many tablets were wanted. He was told four. Mr Bellingham asked if the caller could hold on for a while and when he agreed the defendant asked for ten minutes. There followed a discussion as to how they should meet up and identify each other, the defendant offering again to come and meet the officer. The meeting took place about 10 minutes later and involved Mr Bellingham approaching the officer who was sitting on a wall in central Portrush and beckoning the officer into a building site. The following conversation took place;

The defendant: "How many did you say?"
The officer: "Four"
The defendant: "Four?"
The officer: "How much?"
The defendant: "twenty"
The officer: "Twenty? Nice one."

There followed a very short conversation as to how long the officer was staying and another marked twenty pound note was handed over to the accused. The price on this occasion had gone down substantially from seven pounds per tablet to five pounds which perhaps explains the officer's comment.

On 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 on a cabinet.

In interview the above facts were, largely, admitted by Mr Bellingham. He raised an issue as to whether there were three or four tablets requested by the officer in the second test purchase. The transcript of the audiotape has four recorded as being asked for. The officer received three tablets or forwarded three tablets to Forensic for testing.

Bellingham told the police that he bought ten tablets after the first call and, whilst it is not entirely clear, the price he paid per tablet he told the police was five pounds. I n relation to the number of tablets he said he got extra for himself but he also said in explanation of the others that he gave the test purchase officers (either seven or eight tablets) that he had "four, three or four from the weekend before." He denied supplying anyone else.

In relation to the money he explained that he received £127 a fortnight from the dole. The money found in his wallet was probably dole money. The search took place on a Friday. In relation to the £240 he said £100 came from the poker machine at the Station Bar and the rest was "just money that had been sitting about". He denied any of the money came from selling drugs but conceded that the four twenty notes he had received had been put in his wallet and could either have been spent or found in his wallet or in the box money.

In relation to the cannabis and the pills he admitted smoking cannabis and buying the diazepam and temazapam illegally.

There are two further matters that the accused said which I find relevant for my consideration here. 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.

He however made, reasonably strongly, the case, firstly, that 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.

It is against this background that Mr Boyd, who appears for Mr Bellingham, asks me to stay the prosecution on the ground that it is an abuse of the criminal process to let this prosecution go ahead on the supply charges since to do so would be to endorse State sponsored crime and that Mr Bellingham could not be shown to have committed this type of crime without the encouragement he received from the police. This is resisted by Mr Connor for the Crown, who says 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.

The Law:

The Court has been referred to two principal authorities, Texeiro de Castra v Portugal (1998) 4BHRC 533 and R v Loosely and Attorney General's Reference (No 3 of 2000) (2001) 4 AER 897, a House of Lords case which both comprehensively reviews the authorities and also discusses what effect

the incorporation by the Human Rights Act of the ECHR has had upon the existing law. The court has also been referred to “The Law of Evidence”, Dennis, Sweet and Maxwell at sections on Entrapment and Abuse of Process, 277-287.

The following principles I discern from considering these:

1. The incorporation of Article 6(1) the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Human Rights Act has not modified the existing law here (both at Common Law and Article 76 of the Police and Criminal evidence Order (NI) 1987). However, 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 the court should have regard to Article 6 and the corpus of Strasbourg case Law on entrapment.
2. Texeira 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. In considering whether to exercise these powers the Court is not seeking to discipline the police. Nor is entrapment to be considered as a matter going merely towards mitigation of sentence. 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. Predisposition on the part of the accused is not the criterion by which the acceptability of police conduct is to be decided. For this very reason a defendant’s past record is of limited value. (I would, however, imagine that in a case like this past offences of possession with intent to supply relevant drugs could be put into the equation but the court has to concentrate on the nature of the police conduct rather than the susceptibility of the accused).
6. The test in Texeira 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.

7. 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.

Application to this Case:

This was a planned police operation. It involved trained and briefed test purchase operators and was targeted at the supply of ecstasy tablets in the Portrush area. The court is aware from its own knowledge of some of the nature and extent of this problem.

The inducements involved were the initial approach by the officer, the repeated call by her and the provision of what would be commercial, "street retail" amounts for a small quantity of drugs.

In assessing whether this was "State created" crime I have not only had regard to the nature of the inducements I have mentioned but also the nature of the responses by the accused who both knew how to obtain the drug and who appeared to otherwise respond readily. His initial response, which was to indicate he did not know what the officer was talking about and to suggest that the wrong number had been got and to terminate the call, was, in my view, disingenuous. This response fell more 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".

I exclude from my consideration the fact that other drugs of lesser, prescribed categories were found in the flat of the defendant. These may do no more

than show that he was familiar with the drugs scene in a general sense. The fact that the finds include a total of £300 which include some of the marked notes is however relevant when one considers both the inadequacy of his replies as to what the money resulted from and his straitened financial circumstances at the time. I am of the view that this amount of money in all these circumstances tends to contradict his averral that he did not deal in drugs. That, however, does not have great significance to my finding.

As Lord Steyn said in R v Shahzad (1996) 1AER 353 at 360:

> "The weaknesses of both extreme positions leave only one principled solution. The court has a discretion: it has to perform a balancing exercise…the judge must weigh in balance the public interest in ensuring those that are charged with serious crimes should be tried and the competing public interest in not conveying the impression that the court will adopt approach that any end justifies any means."

I have performed this exercise and in my view this is 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.

There was one matter that I raised in the course of argument and that was whether three test purchases were necessary or whether they amounted to an "overkill" and whether evidence or charges should be restricted to one. Mr Boyd 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.

I feel that, having given this anxious consideration, 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 Looseley there were a number of police "stings".

I refuse the application.