

1988

[1988]

[QUEEN'S BENCH DIVISION]

*WATSON v. MALLOY

SAME v. OLDREY

lost
had no cert.1988 April 26;
May 5

Woolf L.J. and Hutchison J.

Hawkers and Pedlars—Pedlar—Meaning—Holders of pedlar's certificates trading from portable stalls—Whether trading as pedlars—Pedlars Act 1871 (34 & 35 Vict. c. 96), s. 3¹

The defendants, M. and O., both moved from place to place selling gift wrapping paper from portable stands. M., whose pedlar's certificate granted under the Pedlars Act 1871 had expired, erected his stand in a street where street trading was prohibited without the consent of the district council. O., who held a current pedlar's certificate under the Act of 1871, erected her stand in a street where street trading was prohibited. They were both charged with street trading without being authorised to do so under Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982, contrary to paragraph 10(1) of that Schedule. The defendants contended that they were trading as pedlars. The justices found that peddling had to be of a peripatetic nature but that that did not require constant movement to different positions in one town. They accordingly acquitted O. and since they found that it was only through mischance that M. found himself without a valid pedlar's certificate, he had a defence under paragraph 10(2) of Schedule 4 of taking all reasonable precautions and exercising all due diligence to avoid the commission of an offence.

On appeals by the prosecutor:—

Held, allowing the appeals, that the definition of "pedlar" in section 3 of the Act of 1871, which included "pedlar" and one who "travels and trades on foot" showed that the statutory definition of pedlar conformed with the ordinary conception of a pedlar as a person who sold items on the move and not from a stall; that a pedlar traded as he travelled and was not a trader who travelled to trade; and that, accordingly, the justices erred in finding that the defendants' activities were those of a pedlar (post, pp. 1032C-F, 1033A-B).

The following case is referred to in the judgment:

Sample v. Hulme [1956] 1 W.L.R. 1319; [1956] 3 All E.R. 447n. D.C.

The following additional cases were cited in argument:

Baker v. Bradley (1910) 103 L.T. 253

Howard v. Lupton (1875) 10 L.R.Q.B.D. 598

Keep v. Vestry of St. Mary's Newington [1894] 2 Q.B. 524

Summers v. Holborn District Board of Works [1893] 1 Q.B. 612

WATSON v. MALLOY

CASE STATED by Plymouth justices.

On 17 December 1986 an information was laid by the prosecutor, Andrew Forbes Watson, for and on behalf of Plymouth City Council alleging that the defendant, Walter Malloy, on 8 November 1986 at Plymouth, did engage in street trading, namely, the selling of gift

¹ Pedlars Act 1871, s. 3: see post, pp. 1029H—1030A.

Charge Pritchard

1 W.L.R.

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A wrapping paper from a portable stand in a consent street, namely, the pedestrian area of Old Town Street being the area between Eastlake Street and New George Street, Plymouth, without being authorised to do so under Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982, contrary to paragraph 10(1) of Schedule 4 to the Act.

B The justices heard the information on 28 January 1987 and found the following facts. On 8 November 1986 the defendant sold wrapping paper from a portable stand in a stationary position in Old Town Street, Plymouth, a consent street. The defendant travelled all over the country by motor vehicle to Leeds, Manchester and London selling merchandise from a portable stand, but spent the greater part of the year in the West Country. In the West Country he travelled around to Tavistock, Plymouth, Tintagel, Bude and Torquay selling merchandise from a portable stand, sunglasses in the summer and Christmas wrapping paper in the winter. The defendant held a pedlar's certificate from 25 October 1985 until 24 October 1986. He had applied for his pedlar's certificate to be renewed prior to the date of the alleged offence and produced a receipt in confirmation of that dated 28 October 1986. The defendant did not hold a pedlar's certificate on 8 November 1986. The defendant was not authorised by Plymouth City Council to engage in street trading.

D It was contended by the prosecutor that as the defendant was trading from a stationary position during some part of the day, it was inconsistent with the meaning of pedlar in section 3 of the Pedlars Act 1871, there being no mobility, even if the defendant had a current pedlar's certificate on 8 November 1986, which he did not.

E It was accepted by the defendant that there was no pedlar's certificate in force on the date in question, but it was contended that the defendant was a bona fide pedlar. It was accepted by the defendant that, had he got a pedlar's certificate, the peddling had to be of a peripatetic nature but that that did not require constant movement to different positions in one town. That to do so was importing a mobility requirement into the definition of a pedlar which was not there. It was contended that trade might be conducted from a stationary position provided that the defendant travelled around from town to town and that that was sufficient to come within the definition of a pedlar. The defendant contended he had a defence under paragraph 10(2) of Schedule 4 to the Act of 1982.

F The justices found that defence made out being satisfied that the defendant had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence, and dismissed the information.

G The prosecutor appealed. The questions for the opinion of the High Court were (1) whether there was any evidence to support the finding that the defendant took all reasonable precautions and exercised all due diligence to avoid the commission of the offence; (2) whether, if there was no evidence such as was mentioned under (1) above, the determination was correct in law.

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WATSON v. OLDREY

CASE STATED by Plymouth justices.

On 8 December 1986 an information was laid by the prosecutor, Andrew Forbes Watson, for and on behalf of Plymouth City Council

alleging that the defendant, Tina Oldrey, on 8 November 1986 at Plymouth, did engage in street trading, namely, the selling of gift wrapping paper from a portable stall in New George Street, Plymouth being a street designated for the purposes of section 3 of and Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982 as a street in which street trading was prohibited, contrary to paragraph 10(1) of Schedule 4 to the Act.

The justices heard the information on 28 January 1987 and found the following facts. On 8 November 1986 the defendant sold wrapping paper from a portable stand in a stationary position in New George Street, Plymouth, a prohibited street. At other times during the year the defendant travelled around by motor vehicle to the towns of Saltash, Tavistock, Torquay, Brixham, Taunton and Tintagel and sold merchandise from a portable stand. She had no other occupation. The defendant had a current pedlar's certificate issued on 2 October 1986.

It was contended by the prosecutor that as the defendant was trading from a stationary position during some part of the day, it was inconsistent with the meaning of pedlar in section 3 of the Pedlars Act 1871 there being no mobility, and therefore paragraph 1(2)(a) of Schedule 4 was not an escape for the defendant.

It was accepted by the defendant that the peddling had to be of a peripatetic nature but that that did not require constant movement to different positions in one town. That to do so was importing a mobility requirement into the definition of a pedlar which was not there. It was contended that trade might be conducted from a stationary position provided the defendant travelled around from town to town and that that was sufficient to come within the definition of a pedlar.

The justices accepted the proposition by the defendant and dismissed the information.

The prosecutor appealed. The questions for the opinion of the High Court were (1) whether there was any evidence to support the finding that the defendant was acting as a pedlar under the authority of a pedlar's certificate granted under the Pedlars Act 1871; (2) whether, if there was no such evidence as was mentioned under (1) above, the determination was correct in law.

Stephen Hockman for the prosecutor.

Jeremy Griggs for the defendants.

Cur. adv. vult.

5 May. HUTCHISON J. read the following judgment. There are before the court two appeals by the prosecutor by way of case stated by Plymouth City justices in respect of their dismissal on 28 January 1987 of informations laid on behalf of the Plymouth City Council alleging unlawful street trading by the defendants. Before the justices and before us the cases were heard together, and while there are some factual differences between them, they are not in my view material.

It is convenient to mention first the case concerning Mr. Walter Malloy. The information alleged that on 8 November 1986 at Plymouth Mr. Malloy engaged in street trading, namely the selling of gift wrapping paper, from a portable stand in Old Town Street, which was a "consent street," without being authorised to do so under Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982.

A I shall in a moment refer to the relevant statutory provisions, but
before I do so, and in order that those references may be better
understood, I mention that the defences relied upon by Mr. Malloy were
that he was a pedlar trading as such, that accordingly he did not need
authority from Plymouth City Council pursuant to the relevant street
trading legislation, and that if, and in so far as, the absence of a current
B certificate prima facie prevented reliance upon that line of defence, he
could take advantage of a saving provision in the relevant statute by
reason of having taken all reasonable precautions and exercised all due
diligence to avoid the commission of an offence by having applied for
such a certificate.

C Before this court Mr. Griggs (for whose carefully researched and
erudite arguments on the law relating to pedlars and hawkers we should
like to express our admiration), suggested that the argument before the
justices on the point of reasonable precautions and due diligence had
been directed not merely to the circumstances in which Mr. Malloy
found himself without a pedlar's certificate, but involved also the
contention that, having for years sought and been granted one and
D traded, he believed lawfully, as the holder of such a certificate, Mr.
Malloy had taken all reasonable precautions and exercised all due
diligence not to break the law as to street trading.

E As to that, on our reading of the cases stated, the point was not
taken in this way before the justices. Furthermore, the argument is
plainly unsustainable, amounting as it does to no more than an assertion
that a person who erroneously believes that he is entitled to do that
which is in fact unlawful has taken all reasonable precautions and
exercised all due diligence to avoid breaking the law. It is not even as
though Mr. Malloy had taken legal advice on the subject. I shall say no
more about that particular aspect of the case.

F The offence charged arises under paragraph 10 of Schedule 4 to the
Local Government (Miscellaneous Provisions) Act 1982. Section 3
provides that a district council may resolve that Schedule 4 shall apply to
their district and that where they do so it shall come into force on the
day specified in the resolution. That was apparently done in this case.
The result is that by virtue of paragraph 10 of the Schedule a person
who in Plymouth engages in street trading in a prohibited street or in a
consent street without being authorised to do so under the Schedule
commits an offence.

G Paragraph 1(1) of Schedule 4 defines a "prohibited street" as one in
which street trading is prohibited and a "consent street" as one in which
street trading is prohibited without the consent of the district council.
Paragraph 1(2) provides that for the purposes of the Schedule "trading
by a person acting as a pedlar under the authority of a pedlar's
certificate granted under the Pedlars Act 1871" is not to be regarded as
H street trading. Paragraph 10(2) provides a defence to a person charged
with an offence under paragraph 10(1) if he proves that he took all
reasonable precautions and exercised all due diligence to avoid the
commission of the offence.

Section 3 of the Pedlars Act 1871 defines a pedlar as follows:

"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."

The justices found the following facts: (a) That on 8 December 1986 Mr. Malloy sold wrapping paper from a portable stand in a stationary position in Old Town Street, Plymouth, which was a consent street. They had before them a photograph, which we have been shown, which depicts a not unfamiliar scene: Mr. Malloy standing in some sort of recess on the side of the pavement remote from the street, with his sheets of Christmas wrapping paper displayed over plastic coated wire ladder rails which look not unlike the sort of thing that can be used for spreading out washing to dry indoors. 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 justices' findings continue: (b) Mr. Malloy travelled all over the country by motor vehicle to Leeds, Manchester and London, selling merchandise from a portable stand, but spent the greater part of the year in the West Country. There he travelled around to Tavistock, Plymouth, Tintagel, Bude and Torquay selling merchandise from a portable stand—sunglasses in the summer and Christmas wrapping paper in the winter.

The justices go on to describe how Mr. Malloy, despite having applied for renewal of his pedlar's certificate, came through some mischance or oversight to find himself without a valid certificate on 8 November. The justices, on the basis of the matters to which those findings relate, found the defence of all reasonable precautions etc. made out. Implicit in that finding is their acceptance of the proposition on which the argument on this appeal has concentrated—that Mr. Malloy was acting as a pedlar at the material time.

In the course of argument I suggested to Mr. Hockman, for the prosecutor, that if that conclusion were correct he might be disposed to concede the point on due diligence. He was not prepared to do so. However he never returned to the matter in argument, and since, on the view I take, this appeal succeeds on the principal ground argued by Mr. Hockman, I propose to say no more about the facts relating to the absence of a pedlar's certificate than that, as at present advised, I should have required a lot of persuasion to interfere with the justices' conclusion.

The point in this appeal which gives rise to general interest, and on which we are told it is regarded as a test case, is whether on the facts found by the justices it was open to them to hold that Mr. Malloy was acting as a pedlar.

On this issue the defendant, taking the view that the case stated by the justices did not contain sufficient information to enable this court properly to adjudicate upon it, successfully invoked his right to invite the court to remit the case to the justices for amendment. This was done by virtue of an order of 12 October 1987, whereby the justices were

A directed to amend the case by setting out a summary or annexing a note of all the evidence. This they did on 10 February 1988, stating in effect that the evidence for the prosecution was formal and unchallenged and that the evidence for the defence consisted of that of Mr. Malloy himself, who gave evidence on oath along the lines of his statement, which they annexed.

B In the circumstances I should read that part of the statement material to what I have described as the real point in this appeal:

C "I am a pedlar by trade and have been for about 30 years, holding a pedlar's certificate since 1957, except for a break of six years from 1970. On 8 November 1986 I was selling Christmas wrapping paper as I have done for years from my stall outside Boots Chemist in Old Town Street. I travel all over the country by motor vehicle to Manchester, Leeds and London selling merchandise from a portable stand but I spend the greater part of the year in the West Country. In the West Country I travel around to Tavistock, Plymouth, Tintagel, Bude and Torquay selling merchandise from a portable stand. I sell sunglasses in the summer and Christmas wrapping paper in the winter. I produce a photograph, Exhibit 1, of my stall."—That is the photograph to which I have earlier referred.—"I have always traded in this manner under my pedlar's certificate which I thought covered me."

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F The argument for the prosecutor is simple, and was succinctly put by Mr. Hockman. The vital words of section 3 of the Pedlars Act are, he submits "travels and trades on foot." Those words are not to be found in the analogous provision in the (now repealed) Hawkers Act 1888: see section 2. Travelling and trading on foot is of the essence. The succeeding words of the section impose additional, not alternative, requirements. Mr. Hockman submits that the words of the section recognise the clear distinction between a pedlar in the classic sense, and someone who sets up his stall for a day and cannot realistically be described as travelling and trading on foot.

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H Mr. Hockman, while acknowledging that considerations of this sort cannot be decisive on an issue which is essentially one of construction, points to the fact that if the defendant is a pedlar then the restrictions imposed on street trading are virtually ineffective. If Mr. Malloy is a pedlar, then so are market traders who set up their stalls on different days of the week in different towns. To obtain a pedlar's certificate presents no difficulty: all that is required is that the police should be satisfied that the applicant is above 17 years of age, of good character and bona fide intends to carry on the trade of a pedlar (see section 5 of the Act), and it may be assumed that in the case of persons of good character the issue of a certificate in response to an application is virtually automatic. The answer, Mr. Hockman suggests, is that people trading in the way Mr. Malloy trades simply are not pedlars, either in the popular conception of that word or in the terms of the definition of the Act of 1871.

Mr. Griggs began by drawing our attention to the distinction in the statutes between the hawker—with his horse, entitled to trade countrywide, subject to more stringent requirements for the grant of a certificate—and the humbler pedlar. I have to say that, interesting

correct

Hockman must be Sharp's pedlar

though I found this review of distinct but related forms of activity, one entirely and one largely superseded by modern social and commercial developments, it does not seem to me to elucidate the problem. A

Then Mr. Griggs proceeded to suggest that the essential distinction was between people with portable stands on the one hand and people with permanent shops on the other. This, as it seems to me, identified a distinction which might have been, but was not, drawn in the relevant legislation. B

Turning to the definition in the Pedlars Act 1871, Mr. Griggs submitted that there were five elements in the section: that he should be without a horse or beast bearing or drawing burden; that he should travel; that he should trade on foot; that he should either go from town to town or to other men's houses; and that he should carry or expose for sale goods etc. Taking each of these individually, he was able to argue that Mr. Malloy filled the bill. He had no horse; he travelled; he traded on foot; he went from town to town; and he exposed goods for sale. C

The fallacy, as it seems to me, in this piecemeal approach is that it entirely disregards (i) the overall purport of the definition and (ii) the vital conjunctive "and" between travels and trades. The definition in section 3, 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. D

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 L.J. 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. E

I hope that I have said enough to show why I cannot accept that Mr. Malloy, trading in Christmas paper—or for that matter sunglasses in the summer—in the way described in the amended case stated, is acting as a pedlar. I have derived no real help from the cases to which we were referred—even from the decision of Lord Goddard C.J. in *Sample v. Hulme* [1956] 1 W.L.R. 1319, relied on by both sides. On the facts found by the justices, and applying the definition in section 3 of the Pedlars Act 1871, Mr. Malloy simply was not trading as a pedlar. F

I can deal very shortly with the case of Miss Oldrey, where the position is, if anything, plainer. In her case too there was an order from this court which led the justices to augment the case stated. As originally drawn it recorded the finding that she on 8 November 1986 sold wrapping paper from a stand in New George Street, Plymouth, a prohibited street: and that at other times during the year she travelled around in a motor vehicle to various West Country towns and there sold merchandise from a portable stand. She had a current pedlar's certificate. G

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Hutchison J.

A Her statement, added to the case as a result of the order, records that she normally works from nine to four, and when in Plymouth sells goods from a stall in the same position. She plainly is not a pedlar.

It follows that in my judgment both appeals must be allowed. Since these appeals were brought in order to obtain a ruling on a point of principle, and that end has now been achieved, I would, as a matter of discretion, make no order remitting the matter to the justices.

B WOOLF L.J. I agree.

Appeals allowed.
No order for costs.
Leave to appeal refused.

C *Solicitors: Sharpe Pritchard & Co. for City Solicitor, Plymouth City Council; Peter Fox & Co., Taunton.*

[Reported by MISS GERALDINE FAINER, Barrister-at-Law]

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