Jones v Bath and North East Somerset Council

CO/7826/2010

High Court of Justice Queen's Bench Division the Administrative Court

4 May 2012

[2012] EWHC 1359 (Admin)

2012 WL 1555227

Before: Mr Justice Mitting

Friday, 4 May 2012

Representation

Miss Yeuthman (instructed by Darbys) appeared on behalf of the Claimant.
Mr A Fuller (instructed by Banes Council) appeared on behalf of the Defendant.

Judgment

Mr Justice Mitting:

1 On 8 December 2009, on a day on which it was either raining or drizzling, the appellant was seen, according to the evidence of two different council employees standing outside Currys in Union Street in Bath. The first employee, a Mr O'Hagan, said that he saw the appellant arrive at 11.45 am and place a large red, white and blue laundry-type bag containing a number of umbrellas on the floor. He placed two of the umbrellas on the bag and held one up. He stayed there for 55 minutes, in other words, until 12.40 pm, shouting "Umbrellas, £5 get your umbrellas". He sold a number of them to passers-by, in the estimation of Mr O'Hagan of at least seven, eight or nine umbrellas, although in cross-examination, he admitted that the number could have been as high as 20. Mr O'Hagan said that the appellant did not move during the whole of that 55 minutes. Mr O'Hagan saw him again at 12.55 pm, that is about 15 minutes after he had last seen him, still in the same place.

2 A second employee, the principal licensing officer employed by the District Council, Mr Bartlett, saw the appellant standing in the same place with the bag on the floor holding an umbrella for 17 minutes between 13.05 pm and 13.22 pm. During that time, at specific times, he sold two umbrellas to passers-by and chanted, once, "Get your brolleys here, £5". It was undisputed that the appellant had parked his car in a nearby street, Westgate Street, about 200 metres or 300 metres away from which he was able to replenish his stock of umbrellas during the day. Those were, in summary, the facts found by the Bath Justices.

3 The appellant gave evidence that he had walked down Union Street to its continuation in Stall Street to meet a fellow trader, evidence which the Justices did not accept. They were satisfied that he did not move during either of the two periods of 55 and 17 minutes, about which the two council employees spoke. They considered that the evidence of Mr O'Hagan was less satisfactory than that of Mr Bartlett because Mr O'Hagan did not make notes and was unable to say precisely how many or when umbrellas had been sold. Nevertheless, they accepted his evidence as true and, relied upon it when making their findings of fact.

4 The appellant appeals by way of case stated against his conviction. The offence of which he was convicted was "street trading" in Union Street without a local authority licence. Union Street was, it is common ground, what is known as a "consent street" as defined in paragraph 1 of schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982 " ... a street in which street trading is prohibited without the consent of the district council ... ".

5 "Street trading" is defined in the same paragraph:

"Street trading" means, subject to sub-paragraph (2) below, the selling or exposing or offering for sale of any article (including a living thing) in a street;"

6 There are, however, a series of statutory exceptions to that prohibition set out in sub-paragraph (2), the first of which is trading under the authority of a pedlars license:

"(2) The following are not street trading for the purposes of this Schedule -

(a) trading by a person acting as a pedlar under the authority of a pedlar's certificate granted under the Pedlars Act 1871 ;"

7 The appellant's case was that he was acting as a pedlar under the authority of a pedlar's certificate which he held. The Pedlar's Act 1871 , according to its short title, was enacted "for granting certificates to pedlars". By section 4 , no one was to act as a pedlar without a certificate. A certificate was to be issued by a chief of police; it was to last for one year. The current statutory fee is £12.25. It could be revoked by the chief officer of police and there was a right of appeal to a magistrates' court against revocation.

8 By section 23 , certificates were not required for commercial travellers, sellers of vegetables and fish, fruit or vitles or persons selling or exposing for sale goods and the like in any market. Section 3 defines pedling:

"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."

9 By the Provision of Service Regulations 2009 , the part of the definition which included the mender of chairs and the selling or offering for sale of skill in handicraft have been deleted. The current definition of pedlar therefore only encompasses a person who goes from town to town or to other men's houses to sell goods. Two questions were not addressed by the Justices which are fundamental to culpability under paragraph 10(1)(b) and paragraph 4 of the 1982 Act. First, upon whom does the burden of establishing the exception for pedlars lie? Secondly, what if any purpose is currently served by the requirement that a pedlar should travel and trade on foot "without any horse or other beast bearing or drawing burden". As far as the first is concerned, Miss Yeuthman and Mr Fuller, who have some experience of these cases and have made short and helpful submissions to me, agree that the burden of establishing the statutory exception lies on the defendant. That concession is correctly made. The test for the circumstances in which the burden of proof lies on the defendant to a criminal charge was authoritatively determined in R v Hunt [1987] AC 352 . The head note is a accurate summary of the reasons of their Lordships, and states:

"That the burden of proving the guilt of an accused was on the prosecution save in the case of the defence of insanity and subject to any statutory exception; that such exception might be

> express or implied and the burden of proof might be placed on the accused whether the exception appeared in the same clause of the instrument in question as that creating the offence or in a subsequent proviso and whether the offence was triable summarily or on indictment, and would be discharged on the balance of probabilities; and that where a linguistic construction did not indicate clearly on whom the burden of proof should lie the court might look to other considerations to determine the intention of Parliament, such as the mischief at which the provision was aimed and practical considerations such as, in particular, the ease or difficulty for the respective parties of discharging the burden of proof".

The authorities to which I have been comprehensively referred do not speak with one voice insofar as they address the issue at all about where the burden of proof lies.

10 In Shepway District Council v Vincent [1994] QBD, CO 209/96, a decision of the Divisional Court of 29 March 1994 , Laws LJ, giving the principal judgment appears to suggest that the burden of disproving the defence lay on the prosecution. At page 3, D to E:

> "In essence the question for this Court is whether the on primary facts found by them the Magistrates were bound to conclude that the respondent was at the time acting not as a pedlar buts a street trader. If not, he was entitled to be acquitted".

11 More recently, in South Tyneside MBC v Jackson [1997] CO/510/96, a decision of the Divisional Court of 14 February 1977 in which Kennedy LJ gave the principal judgment, it was assumed and stated that the burden of proof lay on the defendant:

> "Unless the respondent could show that he was a pedlar acting under the authority of a pedlars certificate granted under the 1871 Act he contravened paragraph 10(1)(a) of the 1982 Act, because what he was doing was undoubtedly street trading, as defined by that Act."

And:

> "In view of their other findings the magistrates did not consider whether the respondent had established the statutory defence provided by paragraph 10(2) of the 1982 Act".

12 If, in his judgment, Laws LJ was seeking to suggest that the burden of disproof lay on the prosecution, I respectfully disagree: the assumption made by the Divisional Court in Jackson which accords with the modern approach to establishing statutory exceptions to what would otherwise be a criminal offence seems to me accurately to state the law. If one contemplates for a moment the factors that may be taken into consideration comma someone claiming to trade as a pedlar with a pedlar's certificate will be in a better position than the prosecutor to produce the certificate and to describe, if he does so truthfully, what was the nature of the trade that he was undertaking and the manner in which he was undertaking it. It will not be difficult for him to discharge the burden of proving that he was trading as a pedlar with a certificate. It is not unreasonable therefore to expect that it should be he who must discharge the burden rather than the prosecutor who must disprove it.

13 Neither Miss Yeuthman or Mr Fuller had contemplated the second question which I raised and addressed it on their feet. I have not therefore had the benefit of mature consideration or research into authorities. I do not intend to rest my decision on the conclusion that I am about to express and it may

be that further research would show that my conclusion is unsound. But absent any authority to the contrary, it seems to me that the definition of pedlar in section 3 of the 1871 Act requires that the pedlar is both peripatetic and ambulatory. In the 19th century, a trader who arrived in a town with a horse and cart carrying a significant quantity of goods for sale would not have been within the statutory definition because he would have travelled with a horse or other beast bearing or drawing burden. In modern times the horse is to be replaced by a motor vehicle, typically a small van or a car. Although in none of the authorities to which I have been referred has this issue been addressed and in some of them it has appeared that the trader has travelled to the town where his activities were scrutinised by motor vehicle, I have no doubt that as a matter of construction, horse or other beast bearing or drawing burden should now be read as motor van or car. In modern times someone who drives with his goods in his own van or car to a town or city to offer goods for sale, is not acting as a pedlar. He is not acting as a pedlar because he is not travelling there on foot. The requirement that he conducts his activities on foot applies both to travel and trade.

14 On the admitted facts in this case, the appellant arrived in Bath with a car full of umbrellas for sale. That fact alone, in my view, put him outside the definition of pedlar. Lest that conclusion be too stark I turn to the way in which the case was presented to me in skeleton arguments and dealt with by the justices. On the justices' finding of fact, which they were clearly entitled to make, the appellant sold umbrellas from a place at which he stood without moving for two successive periods of 55 minutes and 17 minutes. No assistance can be derived from earlier cases in which different periods have been scrutinised. The simple question on the facts of this case is, whether or not on those proven facts, the justices were entitled to find that the appellant was not trading as a pedlar. Ultimately, that question is one of fact and judgment. Thus asked there can be only one answer to the question, which is that the justices were entitled to find that the appellant had not established a statutory exception. Accordingly, even if my construction of the exception is erroneous, I am satisfied that the justices were entitled to find as they did that the answer to the question posed by the case: "Whether on all the evidence that was before us we correctly decided that the appellant was, on 8 December 2009, not acting as a pedlar in accordance with the authority of this claimant's certificate granted under the Pedlars Act 1871 " is, yes, the justices were entitled so to find. For those reasons this appeal is dismissed.

15 MR FULLER: My Lord, there is the consequent application for costs by the successful respondent. I have alerted my learned friend to the calculation of those costs taking place. I have received one update whilst we have been in court and it is right to say that the total sum of costs incurred by the local authority in responding to this appeal is some £2,263.

16 MR JUSTICE MITTING: Is there any issue about that?

17 MISS YEUTHMAN: My Lord, it is a means tested application. Mr Jones has four children, his income per month is £795, his outgoings are £1,051. The shortfall is made up by his partner who submits £510 in benefits, but he doesn't have any savings, he is not a man of deep pockets.

18 MR JUSTICE MITTING: He will have to assist me on this. Am I entitled take into account means when considering whether to order costs against an appellant?

19 MISS YEUTHMAN: I am afraid I don't have chapter and verse, but I see my learned friend does.

20 MR FULLER: If it assists, in relation to the basic power under the Senior Courts Act 1981, section 28 (a) , proceedings on case stated by a magistrates' court, this court in effect has the power to make such order in relation to the matter including costs as it thinks fit, so it is a wide discretion that your Lordship has.

21 MR JUSTICE MITTING: But in criminal cases prosecuted summarily, if my understanding is correct and I don't claim it necessarily is, justices are entitled to take into account the means of a defendant when making an order for costs. I think there's a decision with Lord Bingham when he was Chief Justice

to that effect, Northampton or Nottinghamshire Magistrates', from recollection.

22 MR FULLER: The position is that I don't argue against the proposition that consideration of means would be relevant to the exercise of the wide discretion the court has as below. If it assists your Lordship, I don't know if it appears elsewhere in the papers, the justices dealt with this matter by way of a financial penalty of £200. There was a contribution towards the costs, that were asked for which was certainly in a low four-figure sum, I can't recall the precise figure, but a contribution of £200 was ordered in the court below.

23 MR JUSTICE MITTING: From the figures I have been given, he has no money. Is the fine going to be dealt with by sitting at the back of the court for a day?

24 MR FULLER: The justices made a collection order in relation to that and the details in relation to the payments of those sums will be dealt with, as all fines imposed upon people of modest and low incomes are, and I imagine that some arrangement will be arrived at by Mr Jones by liaising with the justices' clerk or the justices' court.

25 MR JUSTICE MITTING: Is there any query about the figures I have been given?

26 MR FULLER: In relation to the defendant's means?

27 MR JUSTICE MITTING: Yes.

28 MR FULLER: I hear them for the first time today. I don't think at any stage I have been presented with evidence one way or the other. Of course in the lower court a means form is completed. I don't recall whether a form was completed, I suspected it was on the last occasion which involves a declaration by the defendant on that occasion.

29 MR JUSTICE MITTING: The last thing I want to do is cause any further expense, but I am reluctant to determine costs where there is a customary procedure which requires a declaration by the defendant to be short circuited if it is not right. In principle, you are entitled to have your costs and there's no challenge to the reasonableness of the sum, but there's no prospect of recovering that from the defendant unless he wins the pools or the lottery or whatever.

30 MR FULLER: Acting as I do on behalf of the council tax payers of Bath and North East Somerset Council, I am obliged to ask.

31 MR JUSTICE MITTING: I am not going to make any order for costs because I think it is pointless and it will merely put everybody to further expense.

32 Thank you both for an interesting foray into an area of law which, until yesterday afternoon, I was completely unfamiliar.