

Chichester County Council v Wood

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

CO/2738/96, (Transcript: Smith Bernal)

HEARING-DATES: 14 MARCH 1997

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COUNSEL:

C Lewis for the Applicant; S Field for the Respondent

PANEL: BROOKE LJ, BLOFELD J

JUDGMENTBY-1: BLOFELD J

JUDGMENT-1:

BLOFELD J: On 31 May 1996 the Chichester Magistrates' dismissed a charge that the respondent had engaged in street trading contrary to para 10(1)(a) of Sch 4 of the Local Government Act 1982. The matter now comes before this court by way of case stated. The facts found by the Justices are set out in this case stated

"The respondent entered North Street at approximately 9.50am on 14th July 1995. He sold flowers, when approached by members of the public, in North Street from various locations and moved on to the East Street.

The respondent was observed by Police Constable Hillman 10.35am in East Street, Chichester on the date in question. The respondent had with him a barrow with a canopy and on the barrow were buckets of flowers. The respondent used handles to push the cart, which was on wheels.

The respondent on being challenged by PC Hillman denied being in breach of regulations believing he was acting as a pedlar.

The respondent continued to trade and remained in East Street at a number of locations between Boots and a bit further than St. Martins Lane junction, for approximately three-quarters of one hour.

Towards the end of this period the respondent was approached by Police Constable Yau on two occasions. On the second occasion the respondent was asked to move but would not do so until a Council Official was seen.

The respondent believed he was being detained by the Police Officer whilst the Council Official was contacted."

It is not necessary to read the remaining paragraphs because they relate to council officials and what happened thereafter. Those facts can be identified to this extent. It is common ground that both North Street and East Street are prohibited streets. It is accepted that where at (d) it refers to a number of locations between Boots and a bit further than St Martins Lane. There was an appendix attached to our papers showing a plan of Chichester but it is accepted that is approximately 100 yards. Those are the necessary facts that is appropriate to recite.

At the Magistrates' Court, the respondents contended that the respondent was entitled to be acquitted because he was acting as a pedlar at the relevant period. The appellants submitted that he was not acting as a pedlar but was acting a street trader. The question put by the Magistrates to this court is:

"Whether on the evidence before us we reached a conclusion which a bench of Magistrates could have reached, having properly directed itself as to meaning of the phrase 'acting as a pedlar' in Paragraph 1(2)(a) of Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982 and having regard to the definition of 'pedlar' set out in section 3 of Pedlars Act 1871 and to the ordinary meaning of the word 'pedlar'."

We turn to consider the statutory framework. Paragraph 10(1)(a) of Sch 4 provides that:

"A person who --

(a) engages in street trading in a prohibited street;

. . .

shall be guilty of an offence."

It is relevant to read out paragraph 10(1)(d):

"A person who --

being authorised by a street trading consent to trade in a consent street, trades in that street --

(i) from a stationary van, cart, barrow or other vehicle or,

(ii) from a portable stall,

without having been first having been granted permission to do so under paragraph 7(8) above;

(e) contravenes a condition imposed under paragraph 7(9) above, shall be guilty of an offence."

The references to 'stationary van, cart, barrow or other vehicle' refers back to para 7. There is no need to read para 7 because it merely repeats these same words. The relevance of those words is that in schedule are clear references to vans, carts, barrow or other vehicle or portable stall.

We now turn to consider what is meant by 'street trading' for the purposes of Schedule 4 of the 1982 Act. It is to be found in paragraph 1(1) of the Schedule which states:

"'Street trading' means, subject to sub-paragraph 2 below, the selling or exposing for sale any article in a street."

It is common ground here that this respondent was exposing articles namely, flowers, for sale in both these two streets. Paragraph 1(2)(a) of the Schedule provides that:

"trading by a person acting as a pedlar under the authority of a pedlar's certificate granted under the Pedlars Act 1871; is not street trading for the purposes of Schedule 4 of the 1982 Act."

Again, it is common ground that the respondent had a Pedlar's Certificate granted under this Act. The sole issue before the Magistrates was whether he was acting as a pedlar. As that constitutes an exception to the general provision, which creates the offence of street trading, the burden of proving that he was entitled to take advantage of the exception was on the respondent.

The term 'pedlar' is defined under s.3 of the 1871 Act. It 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 merchandising immediately to be delivered, or selling or offering for sale his skill in handicraft."

As this is an 1871 Act, it is clearly an act passed before the advent of motor vehicles. That Act does not include reference to vans, barrows, other vehicles or portable stalls. The Magistrates found that this respondent was acting as a pedlar and dismissed the charge.

The appellants submit before this court that this respondent was not acting as a pedlar, but was acting as a street trader. They have referred this court a number of cases. It is appropriate to deal with some of them quite briefly. The first case I turn to is the case of the *Watson v Malloy* [1988] 3 All ER 459 [1988] 1 WLR 1026. That was a case involving the sale of wrapping paper in a consent street with the use of a wire stand. It would appear that the seller did not move around. At page 1032 of the latter report Hutchison J (as he then was) said:

"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 the 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 to sale.

The fallacy, as it seems to me, is this piecemeal approach is that it entirely disregards (i) the overall purport of the definition and (ii) the vital conjunctive 'and' between travel and trades. The definition in section 3, so far as 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 inherent seller.

If the distinction is to be encapsulated in an aphorism, one might say that pedlar is one who trades as he travels as distinct from one who merely travels to trade. I do not mean he must not stop. As Woolf LJ suggested during argument, the chair mender stops in order to mend chairs: but the feature which makes

* WRONG go to *Watson v Malloy*

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."

The appellants stress that last sentence 'he comes to the owners of the chairs rather than setting up his pitch and allowing them to come to him'. They then turn to the case of Stevenage Borough Council v Wright The Times 10 April 1996, (unreported) 2 April 1996. That was a case involving a person who was selling wrapping paper which he had at his feet. He was stationary for approximately two-and-a-half hours. Leggatt LJ in giving the judgment said at page 10:

"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."

It is appropriate to read further down the same page at G because it is relied on by the Respondent:

"The fact was that he was not trading from a stall did not of itself mean that he was acting as a pedlar."

If one turns further on in the judgment that Leggatt LJ makes it clear that the use of a stand is not necessarily a determining factor.

The next case that we were referred to was The Westminster City Council v Al Elmasoglu (unreported) 14 February 1996. The facts of this case related to the sale of hot dogs from a barrow which was moved from time to time. There the learned Stipendary Magistrate's opinion was cited by Forbes J in his judgment at page 6. The relevant part reads:

"I (stipendary magistrate) was of the opinion that

(a) although the appellant moved his barrow every few minutes this did not of itself bring this within the definition of a pedlar acting under the authority of a pedlar's certificate;

(b) the appellant did not stop his barrow to serve customers who asked for his wares; he stopped and then waited for customers to come to him whilst he was stationary in this place."

The learned judge then, having rehearsed the facts, came to the conclusion that the Magistrate's conclusions could not be faulted. She asked herself the right questions and she came to the conclusions on the facts which were entirely reasonable. Finally the appellant cited the case of Shepway District Council v James Vincent, 29 March 1994. This was a case involving the sale of balloons at Christmas items with the use of a trolley. Laws J, in his judgment at page 5 said:

"In my judgment, while it is plain not only that the pedlar must be a pedestrian but also that the goods which he sells must be in essence small goods, there is nothing in the definition given in section 3, nor in my view in the ordinary view of the term 'pedlar', to exclude a person who has some small

means of assisting the transport of his goods, such as the trolley in the present case. Of course it is possible to conjure instances where someone travels from place to place using a much larger piece of equipment for the carriage of his goods. Where any such instance arises it will be a matter of fact for the Magistrates to decide whether the whole apparatus is of such a scale as to take the respondent in question out of the definition of the term 'pedlar'."

It is convenient at this stage also to refer to a passage in the case of *Normand v Alexander* (1994) SLT 274. This was a case to which we were referred: the respondent. The relevant passage given by the Lord Justice General is at a page in that judgment which is not disclosed. I read it from the judgment in *South Tyneside Metropolitan Borough Council v Jackson*, unreported, 17 January 1997 where it is quoted by Kennedy LJ:

"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, looking at the activity, whether it is an activity which can be described as falling within the term 'pedlar', or falls outside that expression and thus requires a street traders 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 from moving place to place to find customers in order to sell to them."

From these authorities, a number of matters appear to be reasonably clear:

1. Each case depends on its own facts.
2. A pedlar goes to his customers rather than allowing them to come to him.
3. A pedlar (*travels & trades* as he travels) rather than travels to trade. *misquote of Pedlars Act*
4. A pedlar is a pedestrian. *Trade AND Trades Act 1988 Woke v Hally*
5. If a pedlar is a seller, rather than a mender, he sells reasonably small goods.
6. He is entitled to have some small means of assisting his transport of goods, such as a trolley.
7. It is necessary to consider his whole apparatus of trading and decide if it is of such a scale to take the person concerned out of the definition of 'pedlar'.
8. The use of a stall, or stand, or barrow, may indicate an intention to remain in one place or in a succession of different places for longer than is necessary to effect the particular sale or sales indicating that he is a street trader and not a pedlar.
9. If he sets up a stall or barrow and waits for people to approach him, rather than approaching them, that is an indication that he is a street trader and not a pedlar.

incorrect - hawkers

The respondent makes a number of submissions.

A large number of the submissions are effectively factual submissions and they have to be made on the basis of the findings of fact to which I have already referred. He submits that the facts of this case were a matter for the magistrates and that they were entitled, as a matter of law, to come to the conclusion that the respondent was a pedlar and that there is nothing wrong in law with their decision. He stresses that as there is in the cases, I particularly the Shepway case, reference to the use of a trolley; therefore he submits that the use of a barrow, is not fatal and is a proper adjunct for a pedlar to use. He stresses that it was the first day that the respondent was trading in this way as a pedlar. He points out that the magistrates made a finding that he was going from town to town. But this was not in dispute. What the magistrates were considering and what this court is now considering in addition is his behaviour at, is the law relating to his action while in Chichester. It is accepted that he was, in due course, going to other towns. Respondent submits that the fact that people came to him, rather than him going to them, is not significant. But, having rehearsed the various authorities, for my part, I would find that the authorities were against him on that important point. He submits that what the respondent was doing, by using a barrow and by selling flowers, was something well within the contentation of the Pedlars Act and that barrows no doubt existed in the 1870's and, undoubtedly, flowers did.

He submits that in this case the facts indicate that the respondent only remained standing for the period that he was making a sale. When one examines the facts, the following inferences seem clear. When he was in North Street he was approached by members of the public. That implies that he was waiting for them to come to him and not going to them. Further, when we get to (b), of the findings of fact as he had with him a barrow with a canopy and a barrow with buckets of flowers, that is clearly a very much more substantial item than the trolley envisaged in the Shepway case and is a pointer towards him being a street trader and not a pedlar. Thirdly, he was in East Street for at least three quarters of an hour before he was stopped, and during that period he only moved about 100 yards. From that the inference is, clearly, he was not approaching customers with his barrow with the buckets of flowers upon it but was waiting for them to come to him.

Finally, it is part of the facts that towards the end of this period the respondent was approached by the Police Constable Yau on two occasions. On the second occasion, the respondent was asked to move. The inference from that is that he would not have been asked to move if he had not been there stationary for a period. The magistrates were of the opinion that the respondent traded on foot in East Street for an approximate period of one hour. That opinion is criticised by the appellant because it is said that the Magistrates fell into error. He was on foot in that he was, not at the time, in a vehicle, but he was trading on foot, he was trading from a barrow. In my view, that criticism by the appellant is a justified criticism. The magistrates' were also of the opinion that he used a barrow and not a static pitch. That, again, as the appellant submits, is significant in that it points to the fact that he was trading from street barrow, which indicates a street trader type of trading rather than a pedlar type of trading. I agree with this submission.

Consequently, having considered with care the facts of this case and the indications that we obtain from the decided cases, I have no doubt in my mind that the magistrates, unfortunately in this case, fell into error. I am bound

to say that I have considerable sympathy with them because, although they were referred to some authorities, they did not have the advantage of having cited before them the cases which we have cited before us, nor did they have the benefit of the clear and admirable arguments that we have heard, to which I express my gratitude to both counsel in this case. NOT SO!!

Returning to the question that the magistrates posed:

"Whether on the evidence before us we reached a conclusion which a bench of Magistrates could have reached, having properly directed itself as to the meaning of the phrase 'acting as pedlar'."

I would answer that question 'no'. The appellant indicates that he is not asking this court to remit the case for a further hearing but he is content for a declaration. I would consequently say that declaration should be given but that question should be answered in the negative.

JUDGMENTBY-2: BROOKE LJ

JUDGMENT-2:

BROOKE LJ: The Pedlars Act 1871 takes one back to a far away world, a world which existed before the motor car and the bus and the construction of the tarmacadam highway, before the supermarket and the out-of-town shopping centre. When tinkers and pedlars performed a valuable social service by carrying their wares for sale or offering their skills for reward from house to house, bringing the shops to the community, rather than the community to the shops. The Oxford Dictionary of English Etymology shows that the use of the word 'pedlar' to mean a travelling vendor of small wares goes back to the fourteenth century and that his ped was a wicker pannier. Leaping forward 500 years, the language of the definition of the word 'pedlar' in s.3 of the 1871 Act recaptures that lost world of the novels of George Eliot and Thomas Hardy, the hawker, the pedlar, the petty chapman, the tinker, the caster of metals, the mender of chairs, indeed any person who travels and trades on foot and goes from town to town or to other men's houses. Such an itinerant tradesman may not have a horse or other means of beast bearing or drawing burden. The section defines what he will be doing, carrying to sell or exposing for sale any goods, wares or merchandise, procuring goods, wares, or merchandise immediately to be delivered, or selling or offering for sale his skill in handicraft. The policy of the 1871 Act was to prevent anyone from trading in this particular way unless he could satisfy the chief officer of the local district that he was over 17 years of age, was a person of good character and in good faith intended to carry on a pedlar's trade, (s.5(1)).

In the end he may be granted, for a fee, a pedlar's certificate. It is noticeable that s.23 of the Act excludes from the necessity of obtaining such a certificate three quite different types of the tradesman:

"1. Commercial travellers or other persons selling or seeking orders for goods, wares or merchandise to or from persons who are dealers therein, and who buy to sell again, or selling or seeking orders for books as agents authorized in writing by the publishers of such books;

2. Sellers of vegetables, fish, fruit or victuals;

3. Persons selling or exposing to sale goods, wares, or merchandise in any public mart, market or fair legally established."

The Pedlars Act 1871 is still, to a substantial degree, in force today. The holder of a certificate granted under the Act is exempt from the ordinary requirements of the law relating to street trading. Cases decided in this court over the last three years evidence the growth of a small cottage industry among people seeking to evade the consequences of the prohibitions on street trading by pretending to be pedlars using various colourable devices to this end.

As a last resort it will be a question of fact for the Justices in each case whether the person in truth was acting as a pedlar. They can take into account such modern decisions as Sample v Hulme [1956] 3 All ER 447, [1956] 1 WLR 1319 which shows that the pedlar may convey his goods to a place by van provided he then goes from house to house to try to sell them to householders or Shepway District Council v Vincent (unreported) 29 March 1994 which shows that he may have recourse to some small means of assisting the transport of his goods, such as the trolley that was used in that case. But if they remember that the words an Act of Parliament are to be interpreted in the context of the Act in question at the time it was passed, they may be less willing to acquit those who are blatantly not pedlars within the meaning of the Act, but who are trying to use the words of the definition contained in s.3, taken on their own without reference to their statutory context, in support of their pretence that they have the Act's protection when they are trading in the street. For the reasons given by my Lord, I agree that the answer given to the question posed by the Justices in this case should be 'no'.

MR LEWIS: I am obliged, my Lord. There is no application for costs on my part.

MR FIELD: My Lord, I have two applications. The first is for legal aid taxation and the second is this. I submit that the court today has been required to look at a large number of decisions, particularly recent decisions from 1994 to 1996, in an area which, I submit, does leave the law in a case of some uncertainty. Matters were raised today that addressed the burden of proof generally in this matter, given that it is something of an exception, although the Act is phrased in such a way that the offence could be construed as still involving the burden of proof on the prosecution because it describes the following as not street trading. In other words, it could be argued that the prosecution, in proving street trading, have to prove all the other elements, rather than the defendant having to prove anything. In particular, it appears from the case of the Shepway v Vincent that where the question of size of the article comes into play:

"Where any such instances arise it will be a matter of fact for the Magistrates to decide whether a whole apparatus is of such a scale as to take the respondent in question out of the definition of 'pedlar'."

It seems to be suggesting there that the burden there is on the prosecution to prove that the size of the appendage is such that it cannot be that he is not a pedlar, rather than the pedlar having to prove that it was only small. If that is right, there is some area of doubt there as to burden of proof in relation per se and that specific aspect of the definition.

There is also, my Lord, the question that was put in the judgment, the fact that there is an inference of waiting for customers to come to the person is a crucial element. Although, again, I submit there is doubt because the Tunbridge Wells case did say when they come to refer to pedlar:

"He stopped and waited for the members of the public to approach him to buy his balloons."

There Mr Dunn did stop and wait for people to come to him. He was held to be a pedlar. It appears that other cases, and now this case, are perhaps suggested otherwise, it is not permissible to stop and wait even for a short period.

The question has arisen as to the cruciality or otherwise of this notion of static pitch, a stand, what a stand means, does it mean a static pitch, or does it mean an appendage?

I would submit, taking all those matters together and taking into account that this is a growing cottage industry, as your Lordship put it, is an area which does require clarification. I submit this is a case that this court could properly certify that there was a point of public importance pursuant to Order 57 of the Rules of the Supreme Court. I would ask for your leave.

BROOKE LJ: Order 57, rule?

MR FIELD: Ord 57, r 1, my Lord.

BROOKE LJ: Order 57, r 1?

MR FIELD: My Lord, yes. The actual notes are at 57/1/7.

BROOKE LJ: This is a familiar procedure that we may be asked to certify as a point of law of general public importance involved in the decision. Have you drafted the point of law?

MR FIELD: My Lord, a draft question is here.

"Whether a person is acting as a pedlar within the meaning of section 3 of the Pedlars Act 1871 when he sells goods from a barrow to members of the public who approach him."

My Lord, if you were with me that this is a point of public importance I can say that this draft comes from my learned friend, who perhaps envisaged that this was a point of public importance. If your Lordships are with me, I would ask for a short period of time to put this into a perfected form that fully encapsulates those problems that I submit have arisen from the bringing together of all these cases in perhaps, I would submit, one of the most thorough analyses of all the cases on the point. I take that from references in the other transcripts. There is no reference to these cases that I submit are highly important the hot-dog seller and the man with the trolley. This does, for the first time, bring into play all the authorities on the point and is one that, it were to go to the House of Lords, would conveniently deal with just about every issue that arises with the problem of defining the distinction between 'pedlar' and 'street trader'.

I also remark my learned friend, because of his research, has also raised the point of the nature of a street trader's certificate and as to whether barrow trading can ever be lawful street trading, particularly if it is mobile. That something which has never been considered before. This is a case which brings together conveniently some very important questions that do appear to have been answered, not perhaps inconsistently, but I do submit there have been inconsistencies in respect of certain aspects, certainly there is some confusion, I would submit. This is a case of general public importance for the reasons your Lordship has identified. This is a growth matter. Your Lordship mention the fact of Internet and what did people do to try and avoid these provisions. I would not submit anyone was trying to avoid anything. I would submit that people are trying to comply with the law. Whatever the interpretation is, it is important that people who are seeking to comply with the law do know exactly how far they can go. For example, if Mr Wright in the Stevenage case had traded in that way before and believed in some ways that meant he was able to do it again. There is a man who has been criminalised for making a living in the way he thought he was allowed to do. Equally, Mr Wood not have the intention of being a criminal, hence he applied for a Street Traders Licence.

I submit this is a point of law which should be categorically and comprehensively dealt with and clear guidance should be given. I would submit that some clear test needs to be laid down, almost akin to a checklist, which what this court has attempted to do today I would submit, so that people do know what they can and cannot do.

BROOKE LJ: I think to some extent that is wishful thinking if one is interpreting an Act of 1871 rather than modern codified law. Even the intellectual geniuses of the House of Lords would be hard pushed unless they rewrite the Act.

MR FIELD: My Lord, I would say this. Whilst it is an 1871 Act, it is one that is arising now in a fairly regular basis. There are now four very recent cases this is now the fifth, that this court has decided. Clearly, there is still room for ambiguity, for example . . .

BROOKE LJ: I think you have put the point across, Mr Field.

BROOKE LJ: Mr Field, our feeling is that there is a point of law here of general public importance. We are not particularly happy with the present drafting. It may be that you and Mr Lewis might put your heads together usefully and draft a certificate which covers the issues in this case. The House of Lords can only be concerned with the issues in this particular case. If it can be so drafted as to implore their Lordships without going outside the four corners of the certificate and can deal with the outstanding points of course it would be help.

MR LEWIS: My Lord, I was responsible for drafting this last night on my word processor but I did not send it by Internet or even by pedlar down to my learned friend. It might be some assistance if your Lordship could give some indication as to the kind of points that you feel ought to be included. I can hand this over to your Lordship.

BROOKE LJ: Yes. If you could hand that up. We are not minded to give leave to appeal. This must be a matter for their Lordships to certify whether they