R v M [2011] EWCA Crim 648

The respondent, M, was to be tried at Burnley Crown Court in late November 2010 on an indictment containing one count of being concerned in supplying a Class A controlled drug, namely a quantity of diamorphine. M applied for the prosecution to be stayed as an abuse of the process of the court on the ground that he had been entrapped by an undercover police officer into committing the offence, as part of Operation Nimrod. Both counsel considered that the application should be determined after the police officer in question, referred to as JC, had given his evidence before the jury and been cross-examined. However, the Judge considered that he could and should determine the application on the basis of the written material before him, which set out the circumstances in which it was contended by the prosecution that M had been approached and supplied the drug to JC. Having heard submissions from counsel for the prosecution and without calling counsel for M, he stayed the prosecution.

The CPS appealed this decision and having considered the submissions of both counsel for the prosecution and M, the Court of Appeal allowed the appeal and ordered the proceedings to be resumed in the Crown Court. Operation Nimrod was a covert operation targeted at drug dealing in the North West of England. One of the people targeted as part of the operation was M. Between 4 September 2009 and 29 December 2009 there were various contacts between M and an undercover officer, JC.

On 29 October 2009 JC asked M “Where can I get some white from in the town centre?” M replied “You can get it off MC, but I haven’t got the number. You can ring X though, but we’ll have to meet him at the phone box near my house.”

M and JC then decided to call the dealer and JC gave M 40p to make the call from a phone box. During the call M ordered “twenty white and brown” and they were told to go to an alleyway near to a public house and wait for the dealer. JC gave M £25 and confirmed “one of each”. Shortly after a Mercedes pulled up and M leant inside the driver’s side window. After the car drove away, M approached JC and handed him a cellophane wrap containing a brown substance and said “That’s your brown. It’s a bit small but it’s good gear.” He also gave JC a blue coloured cellophane wrapper and said “That’s your white; it’s good white that.”

The drugs were diamorphine and although the parties met on other occasions, this was the only occasion on which drugs were supplied to JC by M. In his ruling, the Judge commented that the facts were not in dispute and that he had not thought it necessary to hear any evidence before making his ruling. The issue was whether M would have involved himself in the activity in question but for the request made by JC. It was apparent that M was a drug user, however in none of the periods of contact did he, of his own volition, make any

attempt to encourage the undercover officer in the use of drugs, nor did he offer to supply any or persuade him to take drugs until the occasion on 29 October 2009.

Having regard to the authority of R v Loosely [2001] UKHL 53, the Judge was satisfied that M would not have made any supply to JC had he not been incited by the undercover officer to do so and that at the time of the request the officer had ingratiated himself with M and they had become acquaintances, if not friends. M had agreed to JC's request, not for profit but because he thought he was helping a fellow addict. In these circumstances, the prosecution was an abuse of process.

Counsel for the prosecution submitted that:

- The officer had done no more than pose an open ended question. He had not asked M to commit a crime and had only given M the opportunity to commit a crime if he so chose;

- This was an example of the police doing no more that presenting the respondent with an opportunity to commit a crime. The police had not instigated or incited the crime.

Counsel for M submitted that:

- The police had breached the principle laid down by Lord Hoffmann in Loosely namely that "the only proper purpose of police participation is to obtain evidence of criminal acts which they suspect someone is about to commit or in which they are already engaged. It is not to tempt people to commit crimes in order to expose their bad characters and punish them." The Judge was entitled to take the view that even if this was an authorised operation the police had caused M to commit an offence which he would not otherwise have committed;

- M was induced to buy heroin for JC by the prospect of assistance in buying bottles of sherry. M, who is addicted to alcohol, is barred from entering the majority of shops in his area which sell cheap liquor. JC provided a vital service to M by taking money from him and buying bottles of sherry on his behalf;

- M was particularly vulnerable to unfair pressure of this kind.

He was an intermediary who was tempted to move outside his usual way of life and do a favour for a favour.

Having regard to the ruling in Loosely and the emphasis placed in that case on the fact that whether a prosecution is an abuse of process by reason of entrapment depends on the facts of each case, the Court of Appeal set out the principally relevant facts in the present case, namely:

- M was an addict who had never previously been convicted of supplying drugs. However, he was committing criminal offences by obtaining and possessing diamorphine for his own use;

- JC ingratiated himself into M's confidence in order to obtain evidence against those supplying hard drugs at, it was inferred, a higher level than that of a street dealer;

- Operation Nimrod was a legitimate police operation and it is accepted that JC's conduct was legitimate as an attempt to obtain evidence against M's supplier;

- M would not have supplied drugs had it not been for JC's request;

- In order to obtain that evidence, JC asked M where he could obtain hard drugs. He knew that M's supplier would not deal with JC directly, so that the supply would be indirect, through M;

- M was not asked himself to supply the drugs. He was asked where drugs could be obtained;

- No pressure or persuasion was used by JC, who offered no inducement to M to commit the offence.

The Court of Appeal stated that the final fact was particularly significant in the present case.

The court stated that the line between legitimate police conduct and improper entrapment may be difficult to draw, however in general, conduct that is open to a finding of entrapment such as to render a prosecution improper involves some pressure or persuasion on the defendant to commit the crime. Providing the opportunity for the commission of the crime will not of itself lead to a finding of ***entrapment.***

Having regard to the judgment in Loosely, the Court took note of the point that "in some instances a degree of active involvement by the police in the commission of a crime is generally regarded as acceptable", for example test purchases in which a plainclothes officer acts in the same way as an ordinary customer might have done.

In addition the court noted the statement in Loosely that "there are occasions when it is necessary for the police to resort to investigatory techniques in which the police themselves are the reporters and the witnesses of the commission of a crime. Sometimes the particular technique is acceptable. Sometimes it is not. For even when the use of these investigatory techniques is justified there are limits to what is acceptable." The Court of Appeal also noted that the overall consideration is always whether the conduct of the police was so seriously improper as to bring the administration of justice into disrepute.

Furthermore, the court had regard to the point made in Loosely that the greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily a court may conclude that the police overstepped the boundary. In addition, in assessing the weight to be given to the police inducement, regard is to be had to the defendant's circumstances including his vulnerability, in recognition that what may be a significant inducement to one person may not be so to another.

The Court of Appeal determined that there is no significant distinction between the assumed facts of the present case and Loosely. The court noted that it is an inherent aspect of any undercover police operation that the undercover officer ingratiates himself into the confidence of individuals involved in criminal conduct. Where an officer in this position offers an opportunity to a defendant to commit a crime without persuasion or pressure of the offer of significant inducement, this will not generally result in it being an abuse of process to prosecute the person who took that opportunity to commit an offence.

As such the court found that it was not open to the Judge to make a finding of entrapment on the assumed facts before him such as to render the prosecution of M an abuse of process.

The Court of Appeal noted that during the course of evidence, facts may be established that go significantly beyond those on which the Judge made his decision and in such a case it may be necessary for the court to review this decision. On this basis, the Court of Appeal considered that it would have been prudent for the Judge to have addressed the issue of entrapment after JC had given evidence before the jury, with M giving evidence in the absence of the jury at that stage if necessary.

The court noted that the matters relied on by M in support of his application for a stay of proceedings will be relevant to sentence, if he changes his plea or if he is convicted.