

**Coventry University Repository for the Virtual Environment
(CURVE)**

Author name: Steventon, B.V.

Title: Entrapment and undercover operations - crossing the line between acceptable and unacceptable police behaviour.

Article & version: Published version

Original citation & hyperlink:

Steventon, B.V. (2001). Entrapment and undercover operations - crossing the line between acceptable and unacceptable police behaviour. *Coventry Law Journal*, volume 6 (2): 63-70.

<http://wwwm.coventry.ac.uk/bes/law/about%20the%20school/Pages/LawJournal.aspx>

Copyright © and Moral Rights are retained by the author(s) and/ or other copyright owners. A copy can be downloaded for personal non-commercial research or study, without prior permission or charge. This item cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder(s). The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

Available in the CURVE Research Collection: March 2012

<http://curve.coventry.ac.uk/open>

Coventry Law Journal

2001

Case Comment

Entrapment and undercover operations - crossing the line between acceptable and unacceptable police behaviour

Beverley Steventon

Subject: Criminal evidence. **Other related subjects:** Human rights

Keywords: Admissibility; Criminal evidence; Entrapment; Incitement; Police officers; Right to fair trial

Legislation: [Police and Criminal Evidence Act 1984 s.78](#)

European Convention on Human Rights 1950 art.6

Cases: [Teixeira de Castro v Portugal \(1999\) 28 E.H.R.R. 101 \(ECHR\)](#)

[Attorney General's Reference \(No.3 of 2000\), Re \[2001\] UKHL 53; \[2001\] 1 W.L.R. 2060 \(HL\)](#)

***Cov. L.J. 63 Introduction**

In *R v Sang*¹ the House of Lords held that entrapment is not a substantive defence in English criminal law. In addition they concluded that to allow the trial judge to use his common law discretion to exclude evidence simply because it had been obtained by the use of an *agent provocateur* would be to allow the defence of entrapment through the 'evidentiary backdoor'. Although *Sang* has not been overruled, entrapment *per se* not being a defence, the law in this area has developed significantly as a consequence of both statute and developments at common law. Section 78 of the Police and Criminal Evidence Act 1984 (PACE)² provides the trial judge with a very wide discretion to exclude evidence, whilst at common law there has been increased recognition of the scope of the abuse of process doctrine, enabling the court to stay proceedings as a consequence of police activity. The question is, what factors are likely to result in the exclusion of evidence under s.78 PACE or the staying of proceedings as an abuse of process? In addition, is the approach taken by the English criminal courts compatible with the jurisprudence of the European Court of Human Rights?

The House of Lords addressed both these key questions in the appeal of Loosely against his conviction on three counts of supplying, or being concerned in supplying to another, a Class A drug, and a reference brought by the Attorney-General, the two cases being heard together.

The Facts

The appeal of Loosely

The case against Loosely and his co-accused, Harris, was that they had supplied heroin to an undercover police officer known as 'Rob'. In 1999, the police in Guildford mounted an undercover operation due to concern about the trade of Class A drugs in the area. One focus of the operation was a public house called the Wooden Bridge. It was at this public house that a man gave the appellant's telephone number to **Cov. L.J. 64* the undercover police officer, Rob, as a potential source of supply. Rob telephoned Loosely and asked him whether he could "sort us out a couple of bags". Loosely said that he could and supplied directions to his flat. Rob went to Loosely's flat, where they agreed a price of £30 for half a gram of heroin. Rob then drove Loosely to a flat belonging to Harris. Loosely took the £30 from Rob, returning a few moments later with the heroin in a package in his mouth. They returned to Loosely's flat to conclude the deal, Loosely taking a small quantity from the package before giving the rest to Rob. Subsequent analysis indicated that the substance

was indeed heroin. Four days later, Rob telephoned Loosely. Again a deal was done and Rob was supplied with half a gram of heroin. Three days later Rob went to Loosely's flat and asked if he could supply him with a gram of heroin. Following a telephone call, Loosely took Rob to another address where he took £60 from Rob, returning with a package. Rob was told that this was half what he requested and that the rest would be ready in an hour. Although Rob returned several times to Loosely's flat, no further drugs were supplied.

At trial, it was submitted as a preliminary issue that either the indictment should be stayed as an abuse of process or, alternatively, the evidence of Rob should be excluded at the judge's discretion under s.78 PACE. Following a *voir dire*, the judge, referring to both English authorities and the judgment of the European Court of Human Rights in *Teixeira de Castro v Portugal*³, declined either to stay proceedings as an abuse of process or to exercise his discretion under s.78. After considering the relevant authorities, he concluded that the guiding principle was that "... the commission of offences should come about without the prompting of undercover officers in the sense that they provoke or incite the commission of offences which would otherwise not have occurred without their intervention...". In this case, he felt that the undercover police officer had done no more than present himself as an ideal customer and that, considering all the circumstances, his actions did not amount to incitement. Following the judges' ruling, Loosely changed his plea to guilty on three counts of supplying heroin and appealed against conviction.

The Court of Appeal,⁴ in dismissing the appeal, considered that the law in this area was clear and consistent with both the European Convention and the case law of the European Court of Human Rights. Evidence of a law enforcement officer should be excluded by a trial judge under s.78 if that officer had incited or trapped the defendant into committing the offence. However, where such an officer had merely given the defendant the opportunity to break the law and he had freely taken advantage of that opportunity in circumstances where it appears he would have behaved in the same way if the opportunity had been offered by anyone else, then there was no reason why the evidence should be excluded.

The Court of Appeal certified the following as a point of law of general importance:

"Should the judge have refused to admit the evidence of the undercover police officer 'Rob' because the role played by 'Rob' went beyond mere observation and involved asking the appellant to supply him with heroin, a request to which, on the judge's findings, the appellant readily agreed?"

***Cov. L.J. 65 The Attorney-General's Reference**

The case against the defendant was that on two occasions he had supplied a Class A drug (heroin) to undercover officers. The defendant had a proven history of dealing in Class B drugs. Undercover officers approached the defendant and asked him whether he wanted to buy contraband cigarettes. He did and a deal took place. The officers then asked him if he could supply them with heroin. The defendant said he did not know and that they should telephone later. This the officers did and the defendant said he could not supply at short notice and that they should telephone in a week. A week later the officers telephoned to say that they would be bringing more cigarettes. The defendant agreed to take them to the heroin supplier and said that in future they could deal directly with this supplier. At interview the defendant said that he had "nothing at all" to do with heroin but had become involved because the two men had approached him. The officers "were getting me cheap fags, so as far as I was concerned a favour for a favour".

At trial, the defence applied for the evidence of the undercover officers to be excluded under s.78 PACE or for the prosecution to be stayed as an abuse of process. The trial judge accepted the defence submission that the defendant had been incited to commit the offences, stating "...it is absolutely clear to me that in this case these officers went further than was permissible and in fact incited and procured the defendant to commit an offence he would otherwise not have committed". The trial judge concluded that, on the basis of *Teixeira de Castro v Portugal*,⁵ the defendant had been deprived of a fair trial and the proceedings were stayed as an abuse of process. The prosecution then offered no evidence and the defendant was acquitted.

Following the acquittal the Attorney-General referred the following point of law to the Court of Appeal:

"In a case involving the commission of offences by an accused at the instigation of undercover officers, to what extent, if any, have: i) the judicial discretion conferred by section 78 Police and Criminal Evidence Act 1984; and ii) the power to stay the proceedings as an abuse of the court; been modified by article 6 of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights?"

The Court of Appeal⁶ held that, in considering an application to stay proceedings or to exclude evidence under s.78 PACE, the court would be concerned both with the freedom of action of the accused and with the propriety or otherwise of the actions of the undercover officers. In most cases the principal question will be whether the officers did no more (whether by active or passive means) than to afford the accused the opportunity to offend, of which he freely took advantage in circumstances where it appears that he would have behaved the same way if offered the opportunity by someone else or whether by means of unworthy or shameful conduct they persuaded him to commit an offence of a kind which otherwise he would not have committed. The Court of Appeal considered this approach to be consistent with article 6. The Court also accepted that it would not always be easy to determine whether an individual had freely accepted an opportunity and would have acted similarly had it **Cov. L.J. 66* been presented by someone else and that it was not wise to lay down in advance any rule for deciding when the court should intervene. *Teixeira de Castro* must be considered on its own facts in the context of the Portuguese criminal justice system and the trial judge was wrong to conclude that he had no choice but to rule as he did. The Court felt that if, on the basis that the prosecution version of events had been found to be correct, the trial judge had asked himself whether the undercover officers had done more than give the accused an opportunity to break the law of which he had freely taken advantage, he would have answered that question in the negative. The Court of Appeal referred the point of law to the House of Lords.

The decision of the House of Lords

In respect of *Loosely*, the House answered the certified question in the negative, dismissing Loosely's appeal. The undercover operation had been authorized and overseen by a senior police officer. The trial judge found that the undercover officer had presented himself to the appellant as an ideal customer. The judge also found that he did not go beyond that portrayal and that he presented himself exactly as someone in the drugs world would expect to see a heroin addict. The judge concluded that the officer's conduct did not constitute incitement and on the facts before him he was entitled to come to that conclusion.

In respect of the *Attorney-General's Reference*, the House disagreed with the view of the Court of Appeal and considered that the trial judge had been correct to stay the proceedings as an abuse of process. The House considered that it was clear that the defendant had supplied heroin to the undercover officers because they had offered to supply, and did supply, him with cheap cigarettes. The officers did more than give him the opportunity to commit the offence, they instigated the offence through inducements that would not normally be associated with such an offence. The House answered the point of law referred by the Attorney-General in the negative. There was no significant difference between the requirements of article 6 and English law as it had developed through s.78 PACE and the power to stay proceedings as an abuse of process.

Commentary

In dismissing Loosely's appeal and answering the point of law referred by the Attorney General, the House of Lords has reviewed the law in relation to entrapment; the relationship between s.78 PACE and the power to stay proceedings; and the compatibility of domestic law in this area with article 6 and the jurisprudence of the European Court of Human Rights.

The House of Lords confirmed that *Sang* is still good law, in that it is still true to state that entrapment is not a substantive defence in English criminal law and that neither s.78 nor

article 6 have 'created' a defence of entrapment. However, as Lord Nicholls states, "It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then to seek to prosecute them for doing so." But the difficulty lies in identifying conduct which is defined by imprecise words such as 'lure', and in defining the boundary between acceptable and unacceptable police conduct. To some extent to date, the guidance given by the courts both in respect of s.78 and staying the proceedings as an abuse of process has **Cov. L.J. 67* involved indicating relevant factors that should be taken into account by the trial judge when considering whether to exclude the evidence or stay the proceedings. Although this approach provides flexibility, a degree of greater certainty would be injected into the law in this area if greater guidance were given and an indication of the weight to be attributed to particular factors. Although the House of Lords in this case thoroughly reviewed the current law in this area, the guidance remains limited.

The current law

Section 78 provides the trial judge with a very wide discretion to exclude evidence and the wording of s.78 specifically requires the judge to have regard to all the circumstances, including those in which the evidence was obtained. Although initially the Court of Appeal in *R v Harwood*⁷ expressed the view *obiter* that s.78 could not be interpreted so as to abrogate the rule that entrapment is not a defence, subsequent case law indicated that s.78 should be interpreted widely. In *R v Smurthwaite and Gill*⁸ the Court of Appeal held that entrapment or use of an *agent provocateur* did not provide a defence but this did not mean that s.78 was irrelevant. What mattered was the effect of the manner in which the evidence was obtained on the fairness of the proceedings. The Court of Appeal provided an inexhaustive list of factors to be taken into account when considering undercover operations. These factors tended to focus on a causation test, the first factor being whether the defendant was enticed into committing an offence he would otherwise not have committed. In addition the judge was to consider factors such as how active/passive was the role played by the officer and was there an unassailable record of what occurred. Although a step forward, this list of factors was not accompanied by detailed explanation or guidance on the weight to be attributed to particular factors.

Alongside the development of the law in relation to s.78, the common law was developing with an increasing acceptance of the role of the abuse of process doctrine in respect of entrapment. In *R v Horseferry Road Magistrates' Court, ex p Bennett*⁹, the House of Lords established that proceedings may be stayed not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial take place. The House of Lords confirmed in *R v Latif and Shahzad*¹⁰ that this principle applies to entrapment cases but felt that, due to the infinite variety of cases that could arise, general guidance as to how the discretion should be exercised in particular circumstances would not be useful. The trial judge would need to balance the public interest in ensuring that those charged with serious offences should be tried and the competing public interest in not conveying the impression that the end justifies the means. A development in the law in relation to entrapment, but again factors to be weighed in the balance without clear guidance.

Moving forward?

The House in *Loosely* was clearly of the view that staying proceedings is normally the appropriate response to a case of entrapment rather than the exclusion of evidence **Cov. L.J. 68* under s.78 (although the effect may be the same). Although not a new approach, this clarification by the House is welcome. A prosecution founded on entrapment would be an abuse of the court's process and hence proceedings should be stayed. The entrapped defendant is normally concerned not that certain evidence should be inadmissible but that due to the entrapment he should not be tried at all. This does not mean that s.78 does not have a role to play and indeed if the application to stay proceedings is unsuccessful then an application can be made to exclude evidence under s.78. Section 78 will be of particular relevance where, for example, the credibility or reliability of the evidence offered by the undercover officer is in doubt rather than the manner in which the evidence was obtained.

The House considered in some detail the conduct of undercover officers and when such conduct might cross the line into unacceptable behaviour. A key test identified by the House of Lords was whether the police simply presented the defendant with an unexceptional opportunity to commit a crime, such as might have been offered by others. However, even then, other factors such as how intrusive the methods were must be taken into account. The House of Lords was clear that the police must act in good faith and wholesale 'virtue testing' without good reason is not acceptable conduct. Reasonable suspicion of an individual or a particular place may indicate good faith. In *Williams v DPP*,¹¹ the police were aware of a problem with theft from vehicles in a particular area and accordingly set up a vehicle with the back door open and cartons of cigarettes visible. The Divisional Court held that the justices were right not to exclude the evidence on grounds of unfairness. The appellants had acted voluntarily. The House of Lords in *Loosely* were of the opinion that action by the police is permissible to target a specific problem. However, they recognised that had such activity been carried out by an individual policeman without evidence of a problem in the area then that would amount to an abuse of state power.

The House in *Loosely* also gave their approval to 'test purchases' and recognized that some undercover operations will inevitably involve active rather than purely passive behaviour by the police and that such activity may be necessary to effectively detect certain types of crime. In *DPP v Marshall*,¹² on a charge of selling alcohol without a licence, evidence was given of purchases made by undercover officers. The Divisional Court held that there was no deception practised by the undercover officers, merely a failure to reveal their identity. In *Nottingham City Council v Amin*¹³, a taxi driver, who was not licensed to ply for hire in a particular district, accepted two undercover police officers as fare paying customers. A stipendiary magistrate ruled that the evidence of the officers should be excluded under s.78 PACE. The Divisional Court, allowing the appeal, was of the view that the defendant had not been 'prevailed upon or overborne or persuaded or pressured or instigated or incited to commit the offence'. The House of Lords approved both these decisions, Lord Nicholls stating in both cases that the undercover officers had behaved as any member of the public might have done. This test is presented as a 'useful guide' to identifying the limits of acceptable behaviour and indeed formed the basis of the rejection of *Loosely*'s appeal.

The House in *Loosely* also considered that the nature and extent of the police participation in a crime would be a factor in indicating when the police had **Cov. L.J. 69* overstepped the mark. They felt that the greater the inducement held out, and the more forceful and persistent the police action, the more readily a court might conclude that the police had acted in an unacceptable manner. In addition, the court should have regard to the defendant's circumstances, including his vulnerability. In respect of the *Attorney-General's Reference*, and in disagreeing with the view of the Court of Appeal, the House indicated that in their view the defendant had been offered an inducement by the police (contraband cigarettes) such as would not normally be associated with the offence of supplying drugs. The trial judge had been correct to stay the proceedings. The House felt that the predisposition of the defendant was of very limited value in determining whether evidence should be excluded. It could be a relevant factor but such predisposition did not mean that the defendant could not be entrapped.

It must be concluded that the House in *Loosely* has comprehensively reviewed the current law. It has indicated that normally, where there is an allegation of entrapment, the correct procedure is for the defence to seek a stay of proceedings on the grounds of abuse of process and, to this limited extent, the roles of s.78 and the abuse of process doctrine, are clarified. However, the law in this area has not effectively moved forward. The lists of factors to be considered are reviewed and to some extent clarified but there is little additional guidance. It is still very much a case of the trial judge exercising his discretion on a case by case basis. The difficulty with this is highlighted by the *Attorney-General's Reference*; the House of Lords, with the exception of Lord Scott, disagreeing with the view of the Court of Appeal that the trial judge was wrong to stay the proceedings, thus indicating the need for further guidance in order to inject a greater degree of certainty.

The European Convention on Human Rights

In *Teixeira de Castro v Portugal*,¹⁴ the defendant, who had no previous criminal record and was unknown to the police, was introduced to two undercover officers by a third party. The undercover officers said they wished to purchase 20g heroin. The defendant purchased drugs on their behalf and sold them to the undercover officers at a profit. The European Court of Human Rights held that there had been a violation of article 6 (1). The use of undercover officers had to be restricted and safeguards put in place even in cases concerning the fight against drugs. The right to a fair trial under article 6 could not be sacrificed for the sake of expediency and the public interest could not justify the use of evidence obtained as a result of police incitement. There was no evidence that Teixeira was predisposed to crime and this offence was incited and would not have been committed without the police intervention. The defendant was denied a fair trial from the start. The Court attached significant weight to the fact that Teixeira was not suspected to be involved in drug trafficking, was not known to the authorities and there was no evidence that he was predisposed towards crime. He was incited to commit the offence.

In answering the point of law referred by the Attorney General, the House of Lords concluded that there was no significant difference between the requirements of article 6 and English law as it has developed through s.78 and the power to stay proceedings. Although the Court of Appeal in *Smurthwaite*¹⁵ focused more on a test of **Cov. L.J. 70* causation rather than predisposition, one factor to be considered was whether the officer was acting as an *agent provocateur* in enticing the defendant to commit an offence he would otherwise not have committed. In following these guidelines, it would be hoped that a trial judge would have excluded evidence akin to that offered in *Teixeira*, indicating consistency with the approach taken by the European Court of Human Rights. However, can the same be said for circumstances similar to those arising in *Williams*¹⁶ and *Amin*¹⁷? The individuals in these two cases acted voluntarily and were under no pressure, but equally were not being specifically targeted by the police and were not individuals of known criminal disposition. To what extent therefore were they incited to commit offences that they otherwise would not have committed? In *Williams* the police were responding to thefts in the area but the trap set tempted individuals to commit opportunistic crime and, arguably, this oversteps the boundary. In *Amin*, on appeal, the defence submitted that the police had not acted in a purely passive manner and had instigated the offence as a consequence of which the defendant had been deprived of a fair trial. This argument was rejected, with Lord Bingham concluding that *Teixeira* needed to be considered on its facts and in *Amin* the defendant was not deprived of a fair trial, the police merely offering the defendant the opportunity to commit the offence. The House of Lords in the present case agreed with Lord Bingham, Lord Nicholls expressing the view that if a person freely takes the opportunity to break the law given to him by a police officer, the police officer is not to be regarded as inciting or instigating the crime.

There is undoubtedly a grey area where it will be difficult for the trial judge, having paid due regard to the guidance provided by the House, to determine whether or not the evidence should be excluded. One area of particular difficulty is where a defendant who was previously unsuspected by the police, has acted willingly. In *Teixeira* the defendant acted willingly and yet was deemed to have been deprived of a fair trial from the outset. *Amin* clearly comes close to the borderline and it can be argued that traps such as that set up in *Williams* cross the border into unacceptable police behaviour. Further guidance is surely required to ensure both consistency in domestic law compatibility with article 6.

Principal Lecturer in Law, Coventry University.

Cov. L.J. 2001, 6(2), 63-70

1.

[1980] AC 402

2.

Section 78(1) states 'In any proceedings the court may refuse to allow evidence on which

the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

[3.](#)

(1998) 28 EHRR 101

[4.](#)

Unreported, April 13th, 2000

[5.](#)

supra, note 3

[6.](#)

(2001) 2 CAR 472

[7.](#)

[1989] Crim LR 285

[8.](#)

[1994] 1 All ER 898

[9.](#)

[1994] 1 AC 42

[10.](#)

[1996] 1 WLR 104

[11.](#)

(1994) 98 Cr App R 209

[12.](#)

[1988] 3 All ER 683

[13.](#)

[2000] 1 WLR 1071

[14.](#)

supra note 3

[15.](#)

supra note 8

[16.](#)

supra note 11

[17.](#)

supra note 13