Hart Publishing

Criminal Law, Simester and Sullivan (updated 14.10.02)

Entrapment, Pages 600-602

Looseley and Attorney General's Reference (No. 3 of 2000) [2001] 1 WLR 2060; [2001] 4 All ER 897; [2002] HRLR 8; [2002] 1 Cr App R 29; [2002] UKHRR 333; [2002] Crim LR 301.

In *Sang* [1980] AC 402, the House of Lords had declined to find that English law contained a substantive defence of entrapment. Following the decision of the European Court in *Teixeira de Castro* v. *Portugal* (1999) 28 EHRR 101, speculation arose whether the stance taken in *Sang* could be sustained after the commencement date of the Human Rights Act 1998. In *Teixeira*, the European Court ruled that Art. 6 provisions relating to the fairness of trial proceedings were engaged from the start of any criminal investigation. In that case, undercover police officers persistently asked D to provide them with drugs. In so doing, they rendered unfair the entirety of the proceedings consequent upon the supply of drugs by D to the officers, and the proceedings therefore contravened Art. 6. Although there were some particular features of the case which might be used to limit its impact - D was not a drug dealer; the solicitation was persistent - nonetheless *Teixeira*, on the face of it, had great potential to inhibit police entrapment procedures. Under the Human Rights Act 1998, the courts, as public bodies, must interpret the common law in accordance with the European Convention (s. 6 HRA 1998) and must consider any relevant jurisprudence of the European Court (s. 2 HRA 1998).

In the conjoined appeals of *Looseley and Attorney General's Reference (No. 3 of 2000)*, the House of Lords confirmed the decision in *Sang* by declining to provide a substantive defence of entrapment. Yet the decision in *Teixeira* was not without an impact. The House of Lords accepted that the requirement of fair trial went beyond the trial process itself and required examination of the entirety of the prosecution process. Certain forms of entrapment could elicit evidence which it would be unfair to use against D at his trial. For such cases, to comply with Art. 6, the judge should use her discretion under s. 78 of the Police and Criminal Evidence Act 1984 to exclude evidence which would have an adverse effect on the fairness of the proceedings.

Appropriately, however, *Looseley* does not treat fairness to D as the predominant consideration. The major objection to many forms of police misconduct is the damage done to the integrity of the criminal justice system:

> "It is simply not acceptable that the state through its agents should lure its citizens into acts forbidden by law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, *and an abuse of the process of the courts*." (Emphasis added: *per* Lord Nicholls at [2001] 1 WLR 2063-4; [2001] 4 All ER 898-9.)

The House of Lords considered that the primary check on excessive entrapment procedures should be a stay of prosecution on the basis that to allow the prosecution would be to abuse the process of the courts. This is surely the right emphasis. Unless entrapment procedures generate a free-standing defence (such as duress, if the

circumstances amount to that), our concern is not with the normative position of D. If a person is pressured or persuaded into supplying drugs for another, his normative position remains the same whether the person pressuring or persuading him against his better judgment to supply the drugs is an undercover policeman or an addict. The focus is on the degree of restraint that is required for acceptable forms of policing. Some forms of entrapping conduct are inescapable. If they were not, many forms of criminal activity involving willing buyers and sellers would, in practical terms, be unpoliced. At the same time, it is impossible *ex ante* to formulate with exactitude what, in terms of public policy, is the boundary-line of acceptable entrapment. In the broadest of terms, the House of Lords drew a distinction between acceptable conduct which merely presents D with an opportunity to offend - an opportunity freely taken - and unconscionable conduct by law enforcers which entices or pressurises D into committing an offence he would not otherwise have committed.

The House of Lords was, with respect, correct to rule that the *Teixeira* decision did not require the creation of a substantive defence of entrapment. Acquitting D is not the appropriate response where his conduct satisfies the definitial elements of the offence with which he is charged and where, all things considered, D had the capacity and fair opportunity to avoid breaking the law. But there will be occasions where seeking to convict D reflects badly on the State, notwithstanding D's culpability. In those cases, the right legal response is to deny the State a conviction by staying the prosecution.