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Case Comment

When will the conduct of non-state actors give rise to entrapment?

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Cases:

R. v TL [2018] EWCA Crim 1821; [2018] 1 W.L.R. 6037; [2018] 7 WLUK 801 (CA (Crim Div))

Attorney General's Reference (No.3 of 2000) [2001] UKHL 53; [2001] 1 W.L.R. 2060; [2001] 10 WLUK 696 (HL)

J. Crim. L. 434 In April 2017, it was alleged that the respondent (L) joined a chat room called "Say Hi' via WhatsApp and made arrangements to meet a girl he believed to have been 14. The girl in question was actually an adult male, Mr U, who ran a vigilante group called "*Predator Hunters* ' whose aim was to find and expose adults seeking to have sex with children.

L's profile in the group, which was a platform where sexual encounters could be easily arranged, had suggested "me and my female partner wanting a girl that's willing to try a new experience' indicating that the girl should be aged 18 to 29. Mr U joined the chat under the guise of a girl named "Bexie'. The registration stated the girl was born in 1999, suggesting that she was 18, however, when Bexie approached L in the chat she stated: "*Hiya am just your average 14-year-old girl looking to meet new friends* '. L responded by giving his age as 22 years and that his partner was a 19-year-old female before asking Bexie if she was looking for sex and if she wanted a threesome. Bexie responded by saying "*Hey am 14 so I'm very inexperienced* '. Discussion continued around arrangements and Bexie's experience where Bexie stated that she was a virgin. L then requested a picture of Bexie which was sent. It was argued later in the trial that this picture was of someone older than 14 and therefore misleading in regards to her age. When L asked Bexie to send him a nude photograph, Bexie said "*I don't send them sorry but if I come to you then I'll let you take some. Shall I come tomorrow after school?* '. Bexie then asked "*Does my age not bother you* ' to which L responded "*no* '. When asked if he had done it with a girl Bexie's age, the respondent stated "*no* '. Further discussion took place regarding the arrangements and contraception. When the specified time arrived for the sexual encounter, Mr U, members from "*Predator Hunters'* and the police turned up at L's door and he was arrested.

L was indicted in the Crown Court for a single offence of attempting to meet a child following sexual grooming contrary to s. 1(1) of the Criminal Attempts Act 1981 but applied for a stay of proceedings on the basis of an abuse of process due to entrapment. At the end of the prosecution's case, the stay was accepted the jury were discharged. The prosecution sought leave to appeal against this ruling pursuant to s. 58 of the Criminal Justice Act 2003.

Held, allowing the appeal, that Mr U did not induce L into committing an offence. It was observed that L made all of the running and at no time did Mr U take a lead. Mr U did no more than provide L with an opportunity to offend and as such, the requirements for entrapment were not satisfied. There was also an absence of state misconduct and as such the judge erred in staying the proceedings and a new trial was ordered.

Commentary

The role of entrapment is to prevent an abuse of process by the state and to ensure that the accused is afforded a fair trial. As such, this has been shaped by art. 6 of the ECHR as well as statutes such as s. 78 of the Police and Criminal Evidence Act 1984 which allows the court to refuse to admit evidence which has been obtained in circumstances which would have an adverse effect on the

fairness of proceedings. ***J. Crim. L. 435*** The law on entrapment has been developed through the common law with the leading case being *R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060 where it was determined that in such cases, a stay on proceedings could be granted on the grounds of entrapment (following the cases of *R v Horseferry Road Magistrates Court, Ex p Bennett* [1994] 1 AC 42 and *R v Latif* [1996] 1 WLR 104). Lord Hoffman stated that entrapment " … occurs when an agent of the state--usually a law enforcement officer or a controlled informer--causes someone to commit an offence in order that he should be prosecuted' (at [2071]).

This definition seems problematic when considering the facts of the present case as TL concerned the actions of a non-state agent in the form of "*Predator Hunters'.* This raises questions as to whether a non-state actor can be capable of bringing about entrapment and if so, what level of behaviour is required to achieve this.

At trial, the judge considered *Looseley* and concluded that:

There is nothing to stop such a group from gathering material and handing it to the police. It may form the basis of an intelligence led police operation, it may add to the body of evidence obtained by the police. However, in my judgment, if the purpose of the exercise is to behave like an internet police force, and to behave in a proactive way, in order to obtain evidence in which to mount a prosecution, it seems to me that the common law principle against entrapment should apply to this private citizens' operation as it would apply to a police operation.

In reaching this line of reasoning, the trial judge relied upon the authorities of *R v Shannon* [2001] 1 WLR 1, *CRHCP v The General Medical Council and Saluja* [2006] EWCA 2784 (admin) (herein referred to as *Saluja*) and the European Court of Human Rights (ECtHR) jurisprudence from *Shannon v United Kingdom (admissibility) (67537/01)* [2005] Crim LR 133. In *Saluja,* a journalist posing as a patient persuaded a doctor, on payment, to provide her with a fraudulent doctor's note so that she could take time off work and have a holiday. Mr Justice Goldring held that:

… the authorities leave open the possibility of a successful application for a stay on the basis of entrapment by non-state agents. The reason I take to be this: Given sufficiently gross misconduct by the non-state agent, it would be an abuse of the court's process (and a breach of article 6) for the state to seek to rely on the resulting evidence. In other words, so serious would be the conduct of the non-state agent have to be that reliance upon it would compromise the court's integrity. (at [81])

In making this finding, Goldring J suggested that this level of conduct would be rare and the actions of the journalist in this case fell far short of such circumstances. In *Shannon,* the *agent provocateur* was an undercover journalist posing as an Arab sheikh in relation to the supply of drugs. The Court of Appeal rejected the appellant's argument that there had been an abuse of process on the basis that there was a distinction between state actors and private citizens. Potter LJ suggesting "there was no suggestion of criticism of the part played by the police or Crown Prosecution Service, the organs of the state responsible for gathering the evidence and instituting proceedings' (at [21]). His Lordship concluding that in relation to staying proceedings in entrapment cases:

… it is not itself sufficient, unless the behaviour of the police (or someone acting on behalf of or in league with the police) and/or the prosecution authority has been such as to justify a stay on grounds of abuse or process. (at [39])

A subsequent appeal brought to the ECtHR in *Shannon v United Kingdom* was dismissed, but the ECtHR did acknowledge that it could not exclude the possibility that evidence obtained as a result of entrapment by a private individual may render proceedings unfair.

In considering this line of analysis, the Lord Chief Justice, in the present case, acknowledged that "there is a recognition that the conduct of a private citizen may in theory found a stay of proceedings as an abuse of process' (at [32]). His Lordship adding that "it is not inconceivable that given sufficiently ***J. Crim. L. 436*** gross misconduct by a private citizen it would be an abuse of the court's process (and a breach of article 6) for the state to seek to rely on the product of that misconduct' (at [32]). But the Lord Chief Justice highlighted that this level of conduct is rare and that there had been "no reported case in which such activity has founded a successful application for a stay …' (at [32]) and that the "circumstances of the present case are not amongst them' (at [33]). In criticising the trial judge, the Lord Chief Justice concluded that:

[His] approach allowed no distinction between the conduct of U, as a private citizen, and agents of the state, when considering whether to stay the prosecution as an abuse of process. In our judgment he

erred in that respect. For that reason, the judge's conclusion cannot be supported. (at [31])

Hofmeyr "*The problem of private entrapment* ' [2006] Crim LR 319 argues that the case law on private entrapment is both "contradictory and unsatisfactory' in its nature (at [319]) and it is difficult to disagree with this position. In his judgment, it seems that his Lordship could have done more to clarify the role of non-state actors in relation to entrapment. It seems fair to conclude that although the behaviour of a non-state actor would not directly bring about an abuse of process, the reliance by state authorities of evidence obtained by a non-state actor whose behaviour is considered "sufficiently gross misconduct' would be deemed enough for a stay of proceedings. It is therefore apparent that the crucial consideration in both "*private* ' and "*non-private* ' entrapment cases is the type of behaviour necessary to bring about an abuse of process.

In *Looseley,* Lord Nicholls stated that "it is simply not acceptable 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' (at [2063-4]). He added that "[t]he difficulty lies in identifying conduct which is caught by such imprecise words as "lure" or "incite" or "entice" or "instigate"' (at [2064]). The Lord Chief Justice in reflecting on this identified a distinction between on one hand causing and on the other hand providing an opportunity to commit an offence with importance being placed on whether "the law enforcement officer behaved like an ordinary member of the public'. (at [20])

The House of Lords, in *Looseley,* placed emphasis on the nature of suspicion when considering entrapment, with Lord Hoffman surmising that "[t]he only proper purpose of police participation is to obtain evidence of criminal acts which they suspect someone is about to commit or in which he is already engaged. It is not to tempt people to commit crimes in order to expose their bad characters and punish them' (at [2077]). His Lordship looked at the need for reasonable suspicion and proper supervision but clarified that "reasonable suspicion does not necessarily mean that there must have been suspicion of the particular person who happens to have committed the offence'. Lord Hoffman acknowledged that "a bona fide investigation into suspected criminality [may] provide and opportunity for the commission of an offence which is taken by someone to whom no suspicion previously attached' (at [2078]). His Lordship relied upon the example in *Williams v DPP* (1993) 98 Cr App R 209 where, during an investigation into a series of vehicle thefts in Essex, the police left an unattended transit van with the back doors open and cartons of cigarettes visible. In his analysis he stated:

If the trick had been the individual enterprise of a policeman in an area where such crime was not suspected to be prevalent, it would have been an abuse of state power. It was justified because it was an authorised investigation into actual crime and the fact that the defendants may not have previously been suspected or even thought of offending was their hard luck. (at [2079])

In applying these principles from Looseley, the Lord Chief Justice recognised that Mr U had committed no offences in his investigation. It was accepted that there may have been confusion brought about by the date of birth on the profile of Bexie, but in the communications it was made explicitly clear that Bexie was 14. Mr U provided information about Bexie, including age and sexual experience but at no stage did he induce L to commit the offence. His Lordship adding that it was the user of L's phone who made all the running. He added:

J. Crim. L. 437 … Mr U appears to have been scrupulous to avoid encouraging his interlocutor in the proposed sexual activity and at no time did he take the lead. This is far removed from a case of incitement in the sense of one person pushing another towards committing an offence which he would otherwise not commit, for example by badgering someone to engage in unlawful sexual or other activity. (at [34])

His Lordship determined that the deciding factor on whether the actions of this private individual could amount to a stay of proceedings was to ask whether the same conduct, if carried out by the police would do so. He conceded that this would be difficult to determine as a non-state actor would not be subject to the same codes of conduct or oversight as the police. Lord Burnett of Maldon CJ suggested that if carried out by the police, Mr U's conduct would have been:

… an example of the type of investigation of potentially serious criminal activity where he absence of suspicion of an individual, but intelligence to suggest that a dating site was being used for criminal purposes, would provide a proper basis for targeting that site …. If officers had engaged in broadly similar conduct an application to stay the proceedings as abuse of process would have failed. (at [36-37])

What supported Mr U's conduct was not only that he was able to abstain from crossing the line

between providing an opportunity to offend and actively inducing the behaviour of L, but that his choice of site was not random and was based on intelligence that it was being used for the purpose of procuring children for sexual encounters. In applying both the tests of the behaviour and reasonable suspicion, Mr U had, in the eyes of the appeal court, done nothing to suggest that his "conduct was so egregious that the integrity of the court would be compromised by allowing the prosecution to succeed' (at [38]).

The court were keen to point out that they were dealing with the question before them in relation to the conduct of L as a potential entrapment and not acting as a tribunal as to whether his actions were to be encouraged. During the original trial, the respondent argued that by using evidence obtained by vigilante groups that they were encouraging their activity. It was argued that vigilante groups ought not to be encouraged by the police, prosecution and ultimately the courts. In response, his Lordship warned that he did not seek to undermine the position that private individuals should refrain from seeking to identify and capture those who groom children for sexual purposes. He stated that the police's "own investigations might be compromised, that private investigations may not produce admissible evidence, that there may be risks to the safety of their investigators and the subjects of their investigations and the zeal of some "vigilantes" may lead them to seriously improper conduct' ([at 39]). His Lordship strongly suggested that Mr U would have been better to have passed his suspicions immediately to the police, allowing them to investigate them in his place.

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J. Crim. L. 2018, 82(6), 434-437