

# English law and entrapment



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Analyse the approach of the English courts towards entrapment evidence. How far is it consistent with the jurisprudence of the European Court of Human Rights?

Before we can analyse the English Courts approach to entrapment evidence, we must define what entrapment is. It can be defined as “ *An agent of the state ....., cause some to commit an offence. For he should be prosecuted.* [1] ”

Over the years, the common-law approach on entrapment has evolved. The courts took it as if the evidence is relevant than the court would deem it admissible. In R v Leatham it was said ‘ it matters not how you get it; if you steal it even, it would be admissible in evidence[2].’ Of course, we can’t imagine it being like that now. We have The European Convention of Human Rights, which guarantees everyone a fundamental right to a fair trial in criminal courts cases. We also have the Human Rights Act[3], which also gives the defendant to a right to fair trial.

*“ In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law* [4]

It has always been clear that there is no defence for entrapment, someone who has committed the crime should be convicted of such crime. This is shown R V Sang[5] “ *the fact that the counsellor or procurer is a policeman or informer, although it may be of relevance in mitigation of penalty for the offence, cannot affect the guilt of the principal offender* [6] .” Any

entrapment should be taken into mitigation when deciding the appropriate sentence. Even though there is no defence to there is a chance for entrapment, for the case to be stayed, meaning to have the case stopped if there has been an abuse of court processes.

This shown in R V Loosely:

*“ Although entrapment is not a substantive defence, English law has now developed remedies in respect of entrapment: the court may stay the relevant criminal proceedings, and the court may exclude evidence pursuant to s. 78. In these respects, Sang has been overtaken. Of these two remedies the grant of a stay, rather than the exclusion of evidence at the trial, should normally be regarded as the appropriate response in a case of entrapment [7] “*

However, even though a judge has the power to stay proceedings if there is an abuse of process. This cannot be seen an acquittal as an it is not, but just the judge stopping the case. As he believes the case must be stopped, as continuing with the abuse of process would make the trial of the defendant unfair. Which would be a breach of Article 6 of The Convention on European Human Rights. It should be noted that even though it is not an acquittal, it would be very unlikely for the case to go back to court. If this is done without a change to the facts and circumstances of the case, and the prosecutor tries to bring the charge again. This could also be an abuse of process.

Even though the English common law has evolved over time in regards to entrapment and protecting the defendant's human rights to a fair trial. Several leading cases have made it to the European Court of Human Rights.

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One of them being *Teixeira de Castro v. Portugal*[8] in this case the applicant was asked to buy drugs, for two undercover police officers. The applicant did buy these drugs for them after which he did he was arrested. He was convicted and appeals in Portugal went against him, he took his case to The European Court of Human Rights, they held that Portugal did breach article 6.

The court held that: “ . *In the light of all these considerations, the Court concludes that the*

*two police officers’ actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed. That intervention and its use in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial. Consequently, there has been a violation of Article 6 § 1. [9] “*

Even though it seems that The European Court of Human Rights, believes that using entrapment evidence. Does infringe Article 6 of the Convention of Human Rights, right to a fair trial, as shown in *Teixeira de Castro v.*

*Portugal*[10]. However, it is also worth pointing out that entrapment as a whole and inadmissibility of evidence does not automatically breach Article 6. This can be shown in *Schenck v. Switzerland*[11] where the court said “

*“ While Article 6 (art. 6) of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.*

*The Court, therefore, cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr Schenk's trial as a whole was fair. [12] "*

At this stage, it is fair to state there is a number occasions where entrapment by the police is genially allowed. As long as the is evidence that the suspect is doing something illegal and the entrapment of the suspect is not the only evidence. One of these occasions is where police or other state officials, go into a shop and conduct test purchases. Another occasion is where police or other state officials act as passengers to catch out unlicensed taxi drivers. Entrapment of unlicensed taxi driver is shown in East Riding of Yorkshire Council v Dearlove,[13]

In this case Dearlove placed an advert for Chauffeur services, a licensing officer saw this advert and noticed that he was not licenced for these services. The licensing officer emailed Mr Dearlove on several occasions reminding him of licensing obligations. A test purchase was made and the booking did happen. Mr Dearlove was taken to court and they came to the following descion:

*" We were of the opinion that the actions of the local authority were excessive in the absence of any criminal activity on Mr Dearlove's part and as such we found it would be unfair to allow the proceedings to continue and ordered a stay of the proceedings. [14] "*

When the case was appealed, they decided that the actions of the council was not entrapment, as they only did what a normal member of public would do in booking the service. They went on to say the following:

*“ It does not seem to me that there was, in the conduct of the council’s officers, anything that could amount to impermissible entrapment. They booked the service just as an ordinary member of the public would do ..... In my view the officers simply provided the opportunity for commission of an offence by the provision of the very kind of service that Mr Dearlove had advertised [15] .”*

They went on to say:

*“ Mr Dearlove had an express warning that a test purchase might be made and there can be no unfairness in those circumstances in initiating a test purchase a few weeks later. There is, moreover, a strong public interest in ensuring that only licensed operators supply taxi services of this kind. [16] “*

In conclusion with the European Conviction on Human Rights and the European Court of Human Rights, only allowed to focus on the trial being fair. The approach of the English Courts does seem to be consistent with the jurisprudence of the European Court of Human Rights. This is because English common law has evolved, to help make trials fairer in regards to evidence and entrapment. This has been done the Police and Criminal Evidence Act[17]and the Abuse of Process Doctrine. Which has given the courts to the power so stay an case, for an abuse of process, which has come from entrapment.

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[1]R V Loosely, [2001] UKHL 53 as per Lord Hoffmann paragraph 35.

[2]R v Leatham (1861) 25 JP 468, Crompton ]

[3]Article 6, Human Rights Act 1998

[4]ARTICLE 6, Right to a fair trial, European Convention on Human Rights

[5]R v Sang [1980] AC 402

[6]R v Sang [1980] AC 402

[7]R V Loosely, [2001] UKHL 53 as per Lord Nicholl paragraph 16

[8]Teixeira de Castro v. Portugal, (25829/94 (1999) 28 EHRR 101)

[9]Teixeira de Castro v. Portugal, (25829/94 (1999) 28 EHRR 101) at  
Paragraph 39

[10]Teixeira de Castro v. Portugal, (25829/94 (1999) 28 EHRR 101)

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[11]Schenck v. Switzerland, (10862/84 (Series A No. 140; (1988) 13 EHRR 242))

[12]Schenck v. Switzerland, (10862/84 (Series A No. 140; (1988) 13 EHRR 242))

[13]East Riding of Yorkshire Council v Dearlove [2012] EWHC 278 (Admin), CO/8593/2010.

[14]East Riding of Yorkshire Council v Dearlove [2012] EWHC 278 (Admin)

[15]East Riding of Yorkshire Council v Dearlove [2012] EWHC 278 (Admin)

[16]East Riding of Yorkshire Council v Dearlove [2012] EWHC 278 (Admin)

[17]Police and Criminal Evidence Act 1984