2006 IEHC 376

THE HIGH COURT

Record No. 2005 No. 198 SS

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961 (NO. 39 OF 1961)

BETWEEN/

CAITRIONA SYON, AN OFFICER OF THE NORTH WESTERN HEALTH BOARD APPOINTED BY THE MINISTER FOR HEALTH FOR THE PURPOSE OF SECTION 8 OF THE TOBACCO (HEALTH PROMOTION AND PROTECTION) ACT, 1988

PROSECUTOR

AND

YOLANDA HEWITT AND OLIVE McTIERNAN

DEFENDANTS

AND

THE OFFICE OF TOBACCO CONTROL

AMICUS CURIAE

Judgment of Mr. Justice Roderick Murphy dated the 10th day of November, 2006.

1. Background

This is a consultative case stated by Oliver McGuinness, judge of the District Court, Ballymote area, District No. 2, Sligo, arising out of the prosecution of the defendants for offences contrary to s. 3(1) of the tobacco (Health Promotion and Protection) Act, 1988, as amended by s. 2 of the Health (Miscellaneous Provisions) Act, 2001 (hereinafter called the Tobacco Act).

It was alleged that on 14th July, 2003 the first defendant (the proprietor) and the second defendant (an employee) sold or offered to sell a packet of ten Silk Cut cigarettes to a

minor volunteer of the prosecutor on a test purchase of tobacco products. The mother of the volunteer had filled out a consent form pursuant to a protocol for the test purchase of tobacco products issues by the North Western Health Board (the Health Board).

2. Summons

By summons dated 10th November, 2003 and 20th November, 2003 the first and second named defendants were requested to appear at the District Court on 9th December, 2003 and 13th January, 2004 respectively, as proprietor in the first case to answer the alleged offence at each, on 14th July, 2003 in a shop premises known as Gilmores, Gala Foodstore, Abbey Terrace, Ballymote, County Sligo did;

(a) sell

(b) offer to sell

a tobacco product to wit – ten Silk Cut Purple cigarettes – to a person under the age of 18 years, contrary to section 3(1) of the tobacco (Health Provision and Protection) Act, 1988 as amended by section 2 of the Health (Miscellaneous Provisions) Act, 2001.

3. Points of law

The matter having been heard before Judge Oliver McGuinness in a sitting of Sligo District Court on 1st April, 2004, and having heard the evidence in full for the prosecution and defence and having made findings of fact, elected to state a case to the High Court on the following points of law.

1. Is there a substantive defence of entrapment arising out of the use of the test purchase procedure available to the defendant in Irish law?
2. If there is, has it been raised in the circumstances of the case?

3. In the instant case, what is the significance of the non-statutory protocol established by the Officer of Tobacco Control?
4. Is it relevant that the defendant had not been the subject of any prior complaint?
5. Is it relevant that the prosecutor had departed from the strict terms of the protocol in that no list of target premises had been generated as envisaged in paragraph 2 and there was no evidence that if such a list had been generated, the defendant's premises would have been put on it by reference to any of the criteria laid down?
6. Is it material that neither the child nor the mother envisaged when consenting to her involvement in the process that it would be necessary for her to attend court and that part of the consent form had been deleted?
7. Did the evidence of the mother to the effect that she was now consenting get over any difficulty created for the prosecution in this regard?
8. Is the offence created by s. 3(1) of the Act as amended one of strict liability for which the first defendant bears vicarious liability for the act of her employee?
9. If there is no defence of entrapment, what discretion do I have to exclude evidence obtained by means of test purchase?
10. Is the use of children in the test purchase scheme contrary to public policy?
11. On whom is the onus of asserting the defence created by sub-s. (3) and what is the required standard of proof required?
12. Does the defence require some positive act on the part of the defendant or is it sufficient for her to have formed an opinion regarding the age of the child without taking any external step?

On 20th January, 2006, the notice party, having made an application to the court to be joined to the proceedings as *amicus curiae*, Quirke J. granted the relief sought.

4. <u>Relevant legislation</u>

The Tobacco (Health, Promotion and Protection) Act, 1988 (No. 24 of 1988) provides for the prohibition and restriction on the consumption of tobacco products in designated areas and facilities. It also restricts the sale to persons under 18 years of age.

Section 3 (as amended by s. 2 of the Health (Miscellaneous Provisions) Act, 2001.

(1) Any person who sells, offers to sell, or makes available in relation to the sale of any other product, any tobacco products to a person under the age of 18 years, whether for his own use or otherwise, or who sells to any person, acting on behalf of a person under the age of 18 years, any tobacco products, shall be guilty of an offence and shall be liable, on summary conviction, to a fine not exceeding £2000.

…

3) Whenever a person is prosecuted for an offence under this section, it shall be a defence for him or her to establish that he or she had taken all reasonable steps to assure himself or herself that the person to whom the tobacco products were sold, offered for sale or made available had attained the age of 18 years.

4) Where, in a prosecution of an offence under this section, it is alleged that the person in respect of whom the offence was committed is under the age of 18 years, and such person appears to the court to have been, at the date of the commission of the alleged offence, under the age of 18 years, such person shall for the purposes of this section be presumed, until the contrary is proved, to have been at that date under that age.

Section 8

Summary proceedings in relation to an offence under this Act may be brought and prosecuted by the Minister or by an officer, appointed by the Minister for that purpose, of the Minister or of a Health Board.

5. Protocol for test purchase of tobacco products

A Health Board project team approved a protocol dated 7th February, 2002 which was drawn up by the Office of Tobacco Control (OTC), the *amicus curiae* established under s. 9 of the 2002 Act. This Act gave prosecutorial powers to the OTC and to the Health Boards to bring proceedings. It also provided that the OTC would have various advisory, investigative and educational functions under ss. 10 and 11. The protocol provided that the primary concern for the Environmental Health Officers involved in what is termed "the test purchase campaign" was the welfare of its volunteer minor who should be 14-16 years of age, be representative of their age group and be dressed appropriately to their age. They are not to be asked to take part in test purchases in their home area or town and are to be accompanied by two health board officers. If refused, they must leave the premises immediately.

Other matters are also provided for the in the protocol. The Environmental Health Officer, in consultation with their principal, generates a list of target premises based on

previous test purchases

complaints received

inspections

priority targeting

location of premises and

results of independent surveys

No time scale is indicated for such list.

6. Facts admitted or proved

1. The prosecutor is an officer of the North Western Health Board appointed by the Minister for Health for the purpose of the relevant legislation.

2. A document entitled 'Protocol for the Test Purchase of Tobacco Products' has been published by the Office for Tobacco Control (*amicus curiae* in the within proceedings), creating a procedure for the purchase of tobacco products by volunteer minors. No legislation exists to support this protocol or the use of test purchase procedures.

3. The prosecutor (or her superiors in the Health Board) recruited the services on a voluntary basis of a girl aged 14, having regard to the procedures created by the protocol.

4. The mother completed a consent form, dated 11th July, 2003, in according with Appendix V of the 'Protocol for the Test Purchase of Tobacco Products' but with an amendment in the form of a deletion of the paragraph consenting to the appearance of the minor in a court proceedings arising out of the test purchase.

Subsequently a date was agreed for the minor to appear to give evidence and the mother consented to the minor giving evidence on that date.

5. On 14th July, 2003, the minor – accompanied by the prosecutor and another Environmental Health Officer, Ms. Caroline Cassidy – visited approximately 30 shops for the purposes of completing test purchases. A total of 20 prosecutions have followed from those visits and the subject cases are a specimen of eight cases that have been brought in various courts within District No. 2.

6. In cross-examination, the prosecution acknowledged that the Health Board had not received any complaint about the first defendant's premises and that as far as the Health Board were concerned the premises had no history of selling tobacco to under-aged persons.

7. Upon arrival at the first defendant's premises, the prosecutor entered the shop and behaved as an ordinary customer. She was followed shortly afterwards by the volunteer minor, who sought to purchase 10 Silk Cut Purple cigarettes from the shop assistant, the second defendant. The sale was observed by the prosecutor.

Without making any inquiry of the girl regarding her age or otherwise the second defendant sold the cigarettes to the volunteer minor who paid for them with monies provided for that purpose by the prosecutor. The volunteer minor left the shop and gave the cigarettes to the other Environmental Health Officer, to be retained and the cigarettes were produced as evidence in the hearing of the within prosecution.

8. The prosecutor then identified herself to the second defendant and asked to speak to the proprietor but was told by the manager of the shop that the proprietor was on holidays. The prosecutor informed the manager that she had witnessed a test purchase to an underage minor and that a prosecution might follow. The first defendant later identified herself to the prosecutor as the proprietor.

9. The volunteer minor had been instructed to state her correct age if asked. She was dressed in a tee-shirt and tracksuit bottoms and she stated in evidence that she was not wearing make-up although this was disputed by the second defendant. In July, 2003 she had completed second year in a local secondary school.

10. A similar test purchase had been carried out by the Health Board in the defendant's shop (among others) approximately 18 months previously, using a 12 year old boy. On that occasion he had been requested for proof of age and no sale had taken place.

11. The prosecutor was asked in cross-examination whether prosecutions had followed in respect of sales that had taken place in the course of that scheme. They had not, as the intention was to provide warnings that the Board was enforcing the legislation. She was asked whether the Board ever received complaints from the public about sales to minors and whether prosecutions had followed. She confirmed that they had received a small number, but no prosecutions had followed. She went on to say that parents tended to be reluctant to agree to allow children to attend court to give evidence. She also perceived a difficulty with prosecuting on the uncorroborated evidence of a minor.

12. The evidence of the first defendant was that

she was the proprietor of the shop and

that she had been in her nearby home at the time of the alleged sale.

She was aware of her obligations with regard to the sale of tobacco to minors and that her staff were trained to request identification and proof of age.

That she had posted notices in her shop to state that sales would not be made to minors and had also posted a notice behind the counter to remind staff of their obligations.

She had received some literature from the Health Board relating to the sale of tobacco to minors and that she had to put this literature on the staff notice board; she had been unable to deal with literature that had arrived a few days prior to the date of the alleged offence because she had been on holidays from the shop.

That she would have expected her staff to challenge the volunteer minor and that she would have challenged her had she been working in the shop.

13. The evidence of the second defendant was that

She had received instruction not to sell tobacco products to a minor.

She had not made a request for identification.

She believed the volunteer minor looked over 18 and was wearing make-up at the time of the purchase.

6.1 <u>Decision of the Court</u>

I have considered the written and oral submissions of counsel for the prosecution, defendants and *amicus curiae* in relation to the questions posed.

The questions posed deal comprehensively with issues of enforcement of provisions relating to the sale of tobacco products to minors.

The manufacture and sale of such products are already subject to licence since the Excise Licences Act, 1825. Manufacturers' licenses were granted under the Tobacco Acts of 1840 (C.18), of 1842 (C.95) and 1863 (C.7). These enactments were repealed and substituted by the Finance (Excise Duty on Tobacco Products) Act, 1977 (No. 32 of 1977).

The legislation, the subject of the case stated, reproduced at 4 above, restricts the sale of tobacco products to minors and provides for the prosecution of offences by way of summary proceedings.

6.2 The protocol as drafted and approved, while it has not the force of statute, was devised as part of the functions of the OTC pursuant to ss. 10 and 11 of the 2002 Act.

The issue common to the questions in the case stated is the degree to which the element of entrapment is relevant to a defence where the powers of the OTC are being exercised pursuant to the protocol. While one Irish case (*O'Callaghan*, 1969) is relevant, the more searching decisions are recent English cases especially that of the House of Lords decision in *Loosely* (2000) (see 6.6 below).

6.3 In *Dental Board v. Gerard O'Callaghan* [1969] I.R. 181, the Dental Board, having been authorised by s. 47 of the Dentist Act, 1928 to prosecute persons for offences under that Act, by way of an inspector, had invited the services of the defendant without revealing that the inspector was engaged in an investigation on behalf of the Board.

The District Judge, being of the opinion that the inspector had acted as an accomplice in the commission of an offence and that the law implicating an accomplice made the evidence unreliable unless corroborated, dismissed a complaint but stated a case to the High Court.

Butler J. at 185-7 reviewed English cases which held that the actions of police officers in obtaining evidence differed from that of a true accomplice who was somebody who has intended to carry out an important part of the offence. It was this reason why the latter ought to be corroborated and the judge had an obligation to give a corroboration warning. The judgment concluded as follows:

> "It appears to me that the principle stated in those decisions is correct and that the reasons which have led to the requirement as to corroboration in the case of a true accomplice do not apply in the case of a person acting in the course of his duty for the purpose of obtaining evidence of an illegal transaction.
>
> Counsel for the respondent has submitted that, even accepting the correctness of the English decisions, the principle ought not to be extended to persons other than police officers. I do not think it can be so limited. Undoubtedly the principle must be applied with discretion and should not be extended to persons acting for merely private as opposed to public interest, but where a witness is employed as a official body to secure evidence of the commission of an offence which it is the duty of that body to investigate with a view to prosecution, I think his evidence is not to be treated as the evidence of an accomplice which needs corroboration. In the present case the Board is a body established by statute to regulate and control an important professional service. The Oireachtas has thought fit to make it an offence for an unqualified person to provide dental treatment and has empowered the Board to prosecute such offence. Clearly it is also charged with the duty of prevention and detection and I cannot see why its agents in that regard should be treated any differently from police officers who are likely engaged in the detection and prosecution of other crimes.

…

> Where, however, as in this case, it is generally thought by those in authority that it is necessary having regard to the nature of the offence and the circumstances of its commission, the evidence thus obtained should be accepted and evaluated on its own merits without requiring as a matter of law that it should be corroborated."

6.4 *R. v. Latif: R. v. Shazard* [1996] 1 W.L.R. 104 at 112-3 held that entrapment was not a defence under English law. If a court refuses to stay such proceedings the perception would be that the courts condone criminal conduct and malpractice by law enforcement agencies. If the court were always to stay proceedings it would incur the reproach that it is failing to protect the public from serious crime. The court has a discretion and performs a balancing exercise. Where the court concludes that a fair trial is not possible it will stay the proceedings.

6.5 In *Sherman v. United States* 356 US 369 (1958), Byrne C.J. at 371 referred to *Sorrells* which recognised the defence of entrapment in the Federal Courts and referred to the function of law enforcement, not including the manufacturing of crime and differentiated that from stealth and strategy as necessary weapons in the arsenal of the police officer.

In that case a police informer induced the petitioner, by repeated requests, to provide drugs in circumstances where the petitioner had defeated a drug habit and was himself trying to avoid any further with drug use or sale.

Warren J. at 371 stated:

> "However, where the criminal design originates with the officials of the government then stealth and strategy become as objectionable police methods

> as the coerced confession and the unlawful search. However, the fact that government agents merely afford opportunities or facilities for the commission of the offence does not constitute entrapment."

6.6 *Loosely*: Attorney General's reference No. 3 of 2000 (2001) UKHL 53; (2001) 1 WLR 2060 concerned a case in which the undercover officers established contact with a supplier of contraband cigarettes. The officers asked him to provide them with heroin where the supplier had no previous dealing history. The supplier eventually capitulated and sourced heroin. The trial judge concluded that the officers had acted in such a way that went beyond the action of undercover agents because they instigated the offence. There was nothing to suggest that the offence would have been committed otherwise. The Attorney General referred a point of law to the Court of Appeal for its opinion, asking whether the judicial discretion to exclude evidence under s. 76 and the power to stay proceedings as an abuse of process had been modified by article 6 of the Convention. Kennedy L.J. stated that the approach adopted by the English courts was consistent with the application of article 6 of the Convention.

The Court of Appeal, in turn, referred the point of law to the House of Lords. Lord Nicholls reviewed the law and referred to the legislative reform in s. 78 of the Police and Criminal Evidence Act, 1984. In relation to what might warrant the ordering of a stay Lord Nicholls stated that the objection to criminal proceedings founded on entrapment lies deeper than exercising disciplinary power over the police:

> "For the same reason, entrapment is not a matter going only to the blameworthiness or culpability of the defendant and, hence, to sentence as distinct from conviction. Entrapment goes to the propriety of there being a prosecution at all for the relevant offence, having regard to the State's

involvement in the circumstances in which it was committed." [2001] 1 WLR 2066 at 2067, 2068.

Lord Nicholls continued at 2069, paras. 23 and 24 as follows:

"On this a useful guide is to consider whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime. I emphasise the word 'unexceptional'. The yardstick for the purpose of this test is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances. Police conduct of this nature is not to be regarded as inciting or instigating crime, or luring a person into committing a crime. The police did no more than others could be expected to do. The police did not create crime artificially.

…

The investigatory technique of providing an opportunity to commit a crime touches upon other sensitive areas. Of its nature this technique is intrusive, to a greater or lesser degree, depending on the facts. It should not be applied in a random fashion, and used for wholesale 'virtue-testing', without good reason. The greater the degree of intrusiveness, the closer will the court scrutinise the reason for using it. On this, proportionality has a role to play."

The House of Lords stated that the court should take into account certain considerations:

- the nature of the offence;
- the reason for the particular police operation;
- the nature and extent of police participation in the crime; and
- the defendant's criminal record.

Lord Hoffman was of the opinion that there was no single factor or device or formula and that, while it is possible to identify a cluster of relevant factors, in the end, their relative weight and importance depends on the particular facts of the case. In *Nottingham City Council v. Amin* the test was whether the law enforcement officer behaved like an ordinary member of the public. Lord Hoffman believed that this worked well and was likely to be decisive in many cases of regulatory offences committed with ordinary members of the public, such as selling liquor in unlicensed quantities (*D.P.P. v. Marshall* [1988] 3 all E.R. 683); selling videos to children under age *Ealing London Borough Council v. Woolworths Plc.* [1998] Crim. L.R. 58) and operating private hire vehicle without a licence (*Taunton Deane Borough Council v. Brice* [1997] 31 Licensing Review 24).

Lord Hoffman recognised that in the case of some regulatory offences, the effective administration of the law may require enforcement officers to have power to make random tests:

> "Closely linked with the question of whether the police were creating or detecting crime is the supervision of their activities. To allow policemen or controlled informers to undertake entrapment activities unsupervised carries great danger, not merely that they will try to improve their performances in court, but of oppression, extortion and corruption. As we shall see, the European Court of Human Rights in *Teixeire de Castro v. Portugal* 28 EHRR 101 attached great importance to the fact that the police were not acting in the course of an officially authorised investigation." [2001] 1 WLR 2060 at 2077.

In relation to active and passive conduct, Lord Hoffman stated:

> "A good deal of active behaviour in the course of an authorised operation may therefore be acceptable without crossing the boundary between causing the

> offence to be committed and providing an opportunity for the defendant to commit it." (at 2080, para. 69)

Lord Hoffman referred at length to the undercover operation's code of practice issued by the U.K. police authorities and H.M. Customs and Excise in response to the Human Rights Act, 1998. In it, procedures and guidelines are laid down for the carrying out of test purchases. The use of a test purchaser must be authorised by a superintendent of the police and the authorising officer must be satisfied that the test purchase is "required in support of an investigation into a criminal offence concerning the possession, supply or use of a commodity or service and that reasonable grounds have been established prior to the deployment of the test purchaser …"

The authorising officer must also be satisfied that the desired result of the test purchase cannot reasonably be achieved by other means. It was emphasised that:

> "Test purchase should not be used as a speculative means of search for the existence of a commodity or service where no other reasonable grounds exist to suspect that criminal offences have been or are being committed."

In the present case the use of the test purchaser was authorised by the Health Board pursuant to its protocol. However, the evidence is that there were no grounds to suspect that criminal offences had been or were being committed prior to the test purchase. The establishment of reasonable grounds prior to the employment of the test purchaser may not be possible where no complaints have been made. It is unlikely that a young person purchasing tobacco products contrary to law is going to complain when that person is complicit in the wrongdoing.

In relation to test purchase schemes sometimes random testing may be the only practicable way of policing a particular trading activity.

However, the protocol does provide a basis by which reasonable grounds for suspicion can be established. The obligation of the Board to generate a list of target premises necessarily depends, *inter alia*, on previous test purchases in addition to five other bases.

Hoffmann L.J. observed in *R. v. Loosley* at 2075 at para. 37:

> "37. The fact that the accused was entrapped is not inconsistent with him having broken the law. The entrapment will usually have achieved its object in causing the prohibited act with the necessary guilty intent. In so far as I know, the contrary view is held only in federal jurisdiction in the United States. It is unnecessary to discuss the cogent criticisms which have been made at this doctrine, notably by Frankfurter J. in his dissenting judgment in *Sherman v. United States* 356 U.S. 369, because it has never had any support in authority or academic writing in this country, the majority judgment of Rehnquist J. in the *United States v. Russell* [1973] 411 U.S. 423, 433 describes the criticisms as 'not devoid of appeal' and suggests that its survival in the federal jurisdiction owed more to *stare decisis* and its perceived constitutional and pragmatic advantages than to its intellectual coherence.

6.7 In the European Court of Human Rights the matter was dealt with in *Teixeire de Castro v. Portugal* 28 EHRR 101 (1998) where, at 115-6, the court held that the conduct of undercover police officers in the circumstances of an approach to a petty drug trafficker for several kilograms of hashish which the petty drug trafficker was unable to locate. The police again approached the trafficker saying that they were now interested in buying heroin and the trafficker mentioned the name of the applicant who agreed to procure the heroin. The court held at 115-6 that the conduct of the undercover police officer amounted to entrapment. The court noted that the government had not contended that the officers' intervention took place

as part of an anti-drug-trafficking operation ordered and supervised by a judge. The applicant was not a suspect. He had no criminal record. No preliminary investigation concerning him had been opened. He was not known to the police officers. The re was no evidence that the applicant was predisposed to commit offences.

Having considered those findings the court held as follows:

> "38. …
>
> The necessary inference from the circumstances is that the two police officers did not confine themselves to investigating Mr. Teixeire de Castro's criminal activity in an essentially passive manner, but exercised an influence such as to incite the commission of the offence. […] The court notes that in their decision the domestic courts said that the applicant had been convicted mainly on the basis of the statements of the two police officers.
>
> 39. In the light of all of the circumstances, the court concludes that the two police officers' action 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 had been a violation of article 6(1)."

6.8 In Australia (*Ridgeway v. The Queen* [1995] 184 CLR 19) a stay was regarded as inappropriate once it was accepted that entrapment was not a substantive defence. However, a trial judge has a discretion to exclude evidence of an offence where its commission was brought about by unlawful or improper conduct on the part of law enforcement officers. The same approach would appear to apply in New Zealand (*Police v. Lavalle* [1979] 1 NZLR 45).

In Canada the remedy is one by way of stay of proceedings (*R. v. Mack* [1988] 44 CCC (3d) 513).

6.9 The defendants referred to *Teixeire* and submitted that the question is whether the operation was so authorised by statute or statutory instrument (the equivalent of supervision by the court in the Portuguese case). They submit that the protocol of the health board had no statutory backing. The functions of the Office of Tobacco Control, the notice party, did not extend to the bringing of prosecutions of the type brought in the present case. Even if they were relying on the protocol to justify test purchases they must comply with the safeguards contained therein. With regard to target premises, propensity to offend and grounds for suspicion were therefore relevant factors in the absence of which a test purchase would not accord with the provisions of article 6(1) of the Convention.

The defendant further submitted that in *R. v. Loosley*, referred to above, the obligation under article 6(1) was met sufficiently by the judicial discretion afforded under s. 78 of the Police and Criminal Evidence Act, 1984. There is no similar legislation in this jurisdiction.

Moreover, the defendants argued that the use of an *agent provocateur* who appeared significantly older than fourteen years was the type of conduct disapproved of by the courts.

6.10 Smith J. in the Northern Ireland case of *R. v. Bellingham* [2003] NICC 2, at para. 22, referred to the *R. v. Loosley* decision in relation to a planned police operation involving the purchase of ecstasy tablets on three occasions from the defendant, notwithstanding that the officer had to persist in his request for drugs before they were supplied. Where there was an inducement consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity a prosecution should not be stayed. Smith J. concluded that the evidence was admissible:

> "It is relevant giving the circumstances and the timescale. If there were not three separate charges of supply there might well be legal difficulties, perhaps not insurmountable, in admitting this as relevant evidence. In my view this is something that is best dealt with in mitigation if it comes to that."

The court recognised the difficulty of less than three charges of supply. Smith J. also held that the incorporation of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Human Rights Act had not modified the existing law.

The protocol drawn up, published and disseminated by the Office of Tobacco Control was, as submitted by the Office itself, as *amicus curiae*, a guideline or code of "best practice" offered to health boards around the country, setting out procedures to be adopted in the carrying out of the health board's function under the Act. It seems to the court that the best practice of listing target premises is by way of random testing prior to prosecution. Section 10 of the Act provides for the implementation of a programme for inspection. Such programme should have regard to the list of targeted premises and as a result of surveys as provided for in paragraph 2 of the protocol.

Section 10 of the Act provides that the general functions of the Office should include:

> "(h) Prepare and implement a plan for the co-ordination nationally of the activities of the Office and of health boards in relation to this Act and the co-operation of the Office and the health boards in the performance of their functions under this Act …
>
> (j) Co-ordinate and implement a programme for the inspection of all premises in which tobacco products are manufactured, stored, subjected to any process or sale by retail, and all premises to which the public have access, either as of right or with the remission of the occupier or person in charge of

the premises concerned for the purposes of ensuring that there is compliance with the provisions of this Act. …"

6.11 The court accepts that public policy and the interests of the common good require that children are protected from the dangers of smoking and addiction to tobacco products. This policy would seem to accord with international practice based on published research findings.

It is clear that the protocol requires parental consent and certain safeguards in the use of children as was applied in the present case.

6.12 The court accepts that it is unlikely that those involved in consensual crime will report the matter to the authorities. It is, accordingly, difficult to ascertain outlets that are acting contrary to the legislation. In this context not alone is it permissible to carry out random test purchases and to commission independent surveys so as to generate a list of target premises, it is the function of the Office of Tobacco Control to do so. The purpose of the legislation is to protect children such as the minor volunteer.

6.13 In the circumstances a court will answer the questions posed as follows:

(a) Is there a substantive defence of entrapment arising out of the use of the test purchase procedure available to the defendant in Irish law? No.

(b) If there is, has it been raised in the circumstances of this case? No.

(c) In the instant case, what is the significance of the non-statutory protocol published by the Office of Tobacco Control?

The protocol ensures that the test purchase scheme is authorised and furthermore, protects the use of children by requiring parental control together with the safeguards included therein. However, the prosecutor, having provided for the

generation of a list of target premises as provided for in paragraph 2 of the protocol, should proceed by reference thereto.

(d) Is it relevant that the defendant had not been subject to any prior complaint?

No. It would appear to this Court that that is not relevant given that the practice of random test purchases is permissible and, indeed, necessary in such cases.

(e) Is it relevant that the prosecutor has departed from the strict terms of the protocol in that no list of target premises has been generated as envisaged in paragraph 2 as there was no evidence that if such a list had been generated, the defendant premises would have been put on it by reference to any of the criteria laid down?

Yes, see (c) above. Section 10 of the Act provides for the implementation of a programme for inspection. Such programme should have regard to the list of targeted premises.

(f) Is it material that neither the child nor her mother envisaged that it would be necessary for her to attend court and that part of the consent form had been deleted? Yes.

(g) Did the evidence of the mother to the effect that she was now consenting get over any difficulty created for the prosecution in that regard? Yes.

(h) Is the offence created by s. 3(1 of the Act (as amended):

a. one of strict liability and

b. one for which the first defendant bears vicarious liability for the act of her employee?

Yes, subject to the defence in s. 2(3) of the Health (Miscellaneous Provisions) Act, 2001. The defence of an accused taking reasonable steps to assure that the buyer has attained the requisite age as provided for in s. 2(3) of the Health, Miscellaneous Provisions) Act, 2001:

> "(3) Whenever a person is prosecuted for an offence under this section, it shall be a defence for him or her to establish that he or she had taken all reasonable steps to assure himself or herself that the person to whom the tobacco products were sold, offered for sale or made available had attained the age of 18 years."

(i) If there is no defence of entrapment, what discretion do I have to exclude evidence obtained by means of test purchase?

None, other than the application of the rules of evidence.

(j) Is the use of children in the test purchase scheme contrary to public policy?

No. It is necessary for the protection of children themselves subject to the provisions of the protocol.

(k) On whom is the onus of asserting the defence created by s. 3(3) and what is the standard of proof required?

On each of the defendants on the balance of probabilities.

(l) Does this defence require some positive act on the part of the defendant or is it sufficient for her to have formed an opinion regarding the age of the child without taking any external step?

Section 3(3) does require more than the forming of an opinion. She must take all reasonable steps to ensure herself that the person to whom the tobacco products were sold, offered for sale or made available had attained the age of 18 years.

Approved: Murphy J.