THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

Appeal No.: 61/2015

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Robert Mills

Appellant

Judgment of the Court delivered on the 21st day of December 2015 by Mr. Justice Mahon

Background
1. This is an appeal against conviction, notwithstanding the fact that the appellant pleaded guilty to the two offences in question. That plea of guilty was entered in the aftermath of the decision by the learned trial judge to admit certain evidence following a two day *voir dire*. No issue is taken by the respondent in relation to this aspect of the appeal, having regard to the decision in the case of *Geasley v. DPP* [2009] IECCA 22.

2. On 28th March 2013, the gardaí were engaged in an investigation in the Drimnagh area to identify individuals engaged in the sale and supply of illicit drugs. As part of that investigation, two undercover gardaí approached people on the street, and at random, seeking to buy a small consignment of drugs. One, a sixteen year old, made a telephone call, whereupon another person, the appellant, drove to the location where the gardaí were positioned and sold them a *"25-bag"*of *"weed"*.. One of the investigating gardaí asked the appellant for his phone number, and then telephoned him the following day and ordered another *"25 bag".* That second transaction duly took place. At the time the appellant had no previous convictions, and was unknown to the Gardaí.

3. Initially the appellant pleaded not guilty to six counts, all relating to the sale or supply of drugs contrary to s. 15 of the Misuse of Drugs Act 1977 (as amended). Following a *voir dire* heard over two days, and in respect of which the learned trial judge ruled against the appellant, the appellant, was on 18th December 2015 re-arraigned on the two counts to which he pleaded guilty, they were:-

- Possession of a controlled drug for the purpose of selling or supplying it to another contrary to s. 15 and to s. 27 (as amended by s. 6 of the Misuse of Drugs Act 1984) of the Misuse of Drugs Act 1977.

- Possession of a controlled drug for the purpose of selling or otherwise supplying it to another contrary to s. 15 and to s. 27 (as amended by s. 26 of the Misuse of Drugs Act 1984) of the Misuse of Drugs Act 1977.

4. The appellant received a sentence of two years on each count, both of which were suspended for a period of two years on certain conditions.

The Voir Dire
5. In the course of a *voir dire* on 14th and 17th November 2014, the learned trial judge heard sworn evidence from four members of An Garda Síochána.

6. The most senior of these four garda witnesses was Detective Sergeant Brian Roberts. He gave evidence in relation to the organisation of the garda operation which gave rise to the charges against the appellant, and the briefing of three members of An Garda Síochána in advance of that operation. Detective Sergeant Roberts described himself as *"a member in charge of the Test Purchasing Unit attached to the Garda National Drugs Unit"* and he stated that at the time, that unit was engaged in a *"specific and focused test purchasing operation"* in the Crumlin and Drimnagh areas of Dublin.

7. Detective Sergeant Roberts stated that he instructed the three undercover members of An Garda Síochána as follows:

> *". . There was an operation code named 'Operation Trident' and ultimately the focus was to assess the availability of controlled drugs in the specific area and to gather evidence against those who came to light who were involved in the sale of such substances. So on this date, I briefed the members, as I do on a daily basis in these types of operations, and I briefed them that their objective on this day was simply to go to the area at street level and assess if controlled drugs were being made available for sale."*

He also said:

> *"One of the key things in this briefing at the start of the operation is to be very clear with the unit, with the unit members, that any evidence that comes to light or transaction that takes place should only take place where there was no enticement to a suspect to commit an offence that wouldn't be otherwise committed, and this was made very clear in this briefing and understood by the members."*

And:

> *". . . It's ultimately that they don't entice an offence that wouldn't have otherwise happened. So if the offence was laid on and would have happened to a customer ringing a drug dealer in normal circumstances, that's within the parameters of the definition. An enticement would be something whereas, if we, for example, were to buy or Gda. Reddy was to buy three bags of heroin and meet somebody and offer them €200 that has a market value of €50 that would be a clear enticement. So initiating the offence is understood by Gda. Reddy and other members of the unit as perfectly okay once there is no enticement to commit an offence that wouldn't have happened in other circumstances."*

8. Detective Sergeant Roberts also told the court that *"all people who are qualified to test purchase members, meaning that they have successfully completed a pass or fail programme in the area of test purchase operations".*

9. Detective Sergeant Roberts described himself as the principal instructor for test purchase training.

10. When asked to identify the *"power"* which invested the authority in him to authorise the operation, he stated:-

> *"It is the protocol for test purchase operations in Ireland and the U.K. and indeed globally but when we embark on this type of operation, which we do and have done for sixteen years, we are very careful that there is no breach of the law in terms of the activities of the gardaí and then this final point and very important point with regard to Agent Provocateur that we have to be very clear that we do not engage somebody in activity that they would not have otherwise have been engaged in and it is something that we are very careful about."*

11. Detective Sergeant Roberts stated that *"Operation Trident" was "sanctioned at Commissioner level within our organisation".*

12. When requested to produce the official An Garda Síochána Code of Practice relating to Test Purchase Deployment, he said it did not exist.

13. Garda Reddy also gave evidence. He was involved with colleagues in the operation on the ground and in the course of his evidence he described how certain events unfolded. The following are extracts from his evidence:

> *". . at approximately 16.50, that's at the shops at Benbulben Road, there was two males. I said to the males, I think I recall, 'any weed around?' The exact dialogue is in my statement there. 'Any weed around?' I said to them, and they said, if I recall correctly, 'hang on, I'll bell a fella there for you'. He had a conversation then, one of the males, out of earshot and he returned to myself and McCarthy and said 'that fella is on the way down to you'.*
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> *At approximately 17.04 on that date at said shops, a silver Mini, partial Reg. 02D, I think, pulled up. There was a female driver, there was a male in the passenger seat across from us at the shops and the male leaned across and signalled at us to approach. He would have waved and gestured to come over to the car.*
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> *I approached the car, the passenger said, the front passenger side. And the male said, the accused said, 'what are you looking for?' and I said 'a 25 bag of weed'. He then handed me a clear plastic bag containing a green herb substance that I thought was cannabis herb. I then handed the male €25. If I recall correctly, I said 'nice one' and I asked him for his mobile phone number. He replied 'yeah, no bother, it's 085-8305010'. And he said 'save it as Bo'.*
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> *"Yes, he would have, I think, took it from his right pocket, not 100% certain but he produced a bag after I said I was looking for a 25 bag."*

14. Garda Reddy also gave evidence that he returned to the same location on the following day. The following are extracts from his evidence in relation to this second day:

> *".. at approximately 16.46 I dialled the number."*
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> *. . .*
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> *"I would have said 'what's up? It's Gerry. Have you any weed?' In response, the person stated 'yeah, I'm around, what are you looking for?'*

Garda Reddy said he responded *"a 25 bag".*

15. Garda Reddy said that the individual agreed to meet him at the same location as they had met on the previous day and his evidence continued as follows:

> *"At Benbulben Road, a silver Ford Focus pulled up to where myself and Garda McCarthy were standing . . . I approached the passenger side. Again, I would have spoken to the same male. I said along the lines of 'what's up?' just a general conversation. He said . . he agreed to a 25 bag and I would have . . . he produced a small clear plastic bag containing a green herb substance that I suspected to be cannabis herb. I handed this male then €25 and then another conversation occurred after then. I think the accused said 'you're better off getting 50 bags'."*

16. Garda Reddy went on to describe what occurred approximately three days later, on 2nd April 2013, as follows:-

> *". . again, the same date, I think it was approximately 17.10 or 17.11, we would have went, there would have been a briefing obviously previous to this, the same with Det. Sgt. Roberts . . . I went to the area, I dialled the mobile . . . approximately 17.11, I dialled the mobile phone number 085-8305010 and had a conversation with a male on the phone, and I think he said 'what's up?' It's Gerry, I said 'are you around?' and I said 'I'm looking for a 50 bag' which would be a 50 bag of cannabis herb,street terminology.*
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> *. . .*
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> *"At approximately 7.25 on Benbulben Road, this time near the shops, I wasn't down near the Marble Arch, the same car, O2 KE, a silver Ford Focus . . the accused was driving the car in the front driver seat . . . I think there was a male in the passenger seat, front passenger seat . . . I approached the driver's side door. I think the accused said 'what's the story boys?' I think I said 'sound, pal' and again a drugs transaction would have occurred . . . a clear plastic bag containing green substance that I suspected to be cannabis herb . . . I handed him €50 in return."*

Voir Dire Ruling

17. The learned trial judge ruled on 17th November 2014 against the appellant's application to exclude the garda evidence. In the course of so doing, she reviewed certain case law as well as Article 6(1) of the European Convention on Human Rights, and Article 38 of the Constitution. She stated as follows:-

"Now, the court in this case, having carefully considered the evidence in the case and what I did at the outset was a brief summary of the evidence, but I have carefully considered the evidence of Detective Sergeant Roberts and the three officers involved in this operation, and I have carefully considered the authorities handed into court and I determined that the gardaí provided an unexceptional opportunity for the accused to commit the crime and on that basis the evidence is admissible, and furthermore, confine themselves to investigating the criminal activity in an essentially passive manner, and the court is satisfied that on that basis, the evidence is admissible and it is not in breach furthermore of the European Convention on Human Rights. While there was no written protocol, there were safeguards. It was carried out under the supervision of Detective Sergeant Roberts who gave details, briefings and debriefings which were supported by the evidence of the members of An Garda Síochána and it was not in breach then of the European Convention Rights Act 2003. I refuse your application."

The Grounds of Appeal

18. The appellant appealed on seven grounds, namely:-

(i) That the learned trial judge erred in law in deeming admissible evidence against the appellant which was gathered by way of a "test purchasing operation" in which gardaí were involved in initiating or instigating the commission of a criminal offence, and in which they did so without any or any sufficient, independent authorisation.

(ii) That the admission of such evidence was in violation of the appellant's right in due course of law as required by Article 38 of the Constitution of Ireland.

(iii) That the admission of such evidence was in violation of the appellant's right to a fair trial as required by Article 6 of the European Convention on Human Rights.

(iv) That the learned trial judge failed to fulfil her obligations pursuant to s. 2 of the European Convention on Human Rights Act 2002 which required her to interpret the common law defence of entrapment in a manner compatible with the European Convention on Human Rights.

(v) That An Garda Síochána acted in breach of their duties under s. 3 of the European Convention on Human Rights Act 2003, such that evidence gathered by gardaí should have been ruled as inadmissible.

(vi) That the prosecution of the appellant for the commission of criminal offences which were initiated by gardaí was contrary to law, an abuse of process and/or a violation of the appellant's rights under the Constitution, s. 3 of the European Convention Rights Act 2003, and/or Article 6 of the European Convention on Human Rights.

(vii) That the learned trial judge erred in law and in material fact in holding that there was independent authorisation of the "test purchasing operation", and erred in law in failing to provide an adequately reasoned ruling in respect of the case made on behalf of the appellant, and the evidence gathered by gardaí should be ruled inadmissible.

Article 38 of the Constitution

19. Article 38 of the Constitution is entitled "Trial of Offences". It provides that :-

"1. No person can be tried save in due course of law.

2. Minor offences may be tried by Courts of summary jurisdiction.

3.1 Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.

3.2 The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.

4.1 Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion.

4.2 A member of the Defence Forces not on active service shall not be tried by any court martial or other military tribunal for an offence cognisable by the civil courts unless such offence is within the jurisdiction of any court martial or other military tribunal under any law for the enforcement of military discipline.

5. Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.

6. The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article.

Article 6, European Convention of Human Rights

20. Article 6 of the European Convention of Human Rights is entitled "Right to a Fair Trial". It provides as follows:-

1. 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Section 3(1) of the European Convention on Human Rights Act 2003
21. Section 3(1) of the European Convention on Human Rights Act 2003 provides that:-

> *"Every organ of the State shall perform its functions in a matter compatible with State's obligations under the Convention provisions."*

Discussion and decision
22. Although the practice of "test purchasing" of drugs has been in existence in this jurisdiction for many years, there is little if any Irish case law which specifically and comprehensively deals with the issue. In submissions to the court reference was made to a case of *DPP v. Mbeme*, an *ex tempore* judgment of the Court of Criminal Appeal on 22nd February 2008. No copy of this judgment is available and other than a passing reference to the case in an edition of the Bar Review, no further detail is available.

23. A gardaí undercover operation was, in part, the subject of a decision of the Court of Criminal Appeal in *DPP v. Van Onzen and Loopmans* (judgment of the court delivered by O'Flaherty J. on 5th December 1995). That case involved the seizure of over IR£19m. worth of drugs off the Co. Kerry coast in July 1993. Inspector Fitzgerald, the head of the Drugs Squad, in Co. Kerry had come into possession of a mobile telephone, and he had grounds for believing that the phone would be contacted from a vessel off shore. Inspector Fitzgerald in due course received a call from an individual who was one of a crew on the yacht Brime which was hovering on the seas off Loop Head, Co. Clare. Inspector Fitzgerald proceeded to have a number of conversations with this man in the course of which he did not disclose his true identity. Those on board the vessel were led to believe that Inspector Fitzgerald was their pre-arranged contact person on shore, and in due course, when the vessel had moved inside Irish territorial waters, it was boarded and arrested by the Irish Navy. One of the grounds of appeal involved a submission that the vessel and its crew had been lured into Irish territorial waters, and what had occurred was entrapment. This ground of appeal was dealt with and dismissed in relatively brief terms towards the end of the judgment, when the following was stated:-

> *"…the second answer is that nothing said by Inspector Fitzgerald constituted any "luring" of the crew of the vessel into territorial waters. Inspector Fitzgerald was anxious to keep a "fix" on the vessel. For that purpose he obviously did not disclose who he was and may have lulled the crew along. That did not constitute "luring" or "entrapment"; on the contrary, he was carrying out his duties for the detection of crime absolutely properly."*

24. There is, however, a dearth of case law in Europe, the U.K. and Australia in relation to the issue and it is appropriate that a number of these decisions be considered in some detail.

25. In the case of *Vaselov v. Russia* (App. Nos. 23200/10, 234009/07 and 556/10, 2nd October 2010), the facts involved an undercover police operation and a test purchase of drugs. X informed the police that the applicant (Veselov) and another individual was selling hashish at 600 Russian Roubles per gram. Official records indicated that the police ordered a test purchase of the drug on receipt of this information from X. The order identified the applicant and the police suspicion that he was selling hashish. At the behest of the police, X telephoned a third party who then paid the applicant 1,200 roubles to purchase a consignment of drugs. The bank notes were photocopied prior to payment. Later the applicant was arrested and found to be in possession of bank notes which matched the photocopied banknotes. Prior to receiving the information from X, the applicant was not known to the police as a drug dealer. At trial, X claimed that his purchase of the drugs was on the basis of police incitement. He claimed that while he occasionally smoked hashish, he had not previously sold or supplied the drug to anyone else. X was found guilty of selling drugs and was sentenced to four and a half years imprisonment. He appealed his conviction. The appeal court rejected the plea of entrapment and upheld the conviction.

26. In the course of its judgment, the European Courts of Human Rights identified "general principles" in relation to undercover police operations as follows :-

> "88. General principles relating to the guarantees of a fair trial in the context of undercover investigative techniques used to combat drug trafficking and corruption are set out in the Courts extensive case law summarised in the case of *Bannikova v. Russia* (18757/06), 33-65, 4th November 2010."
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> "89. While the court accepts the use of undercover agents as a legitimate investigative technique for combating serious crimes, it requires that adequate safeguards against abuse be provided for, as the public interest cannot justify the use of evidence obtained as a result of police incitement. More particularly, the convention does not preclude reliance at the preliminary investigation stage and where the nature of the offence may warrant it, on sources such as anonymous informants. However, the subsequent use of such sources by the trial court to found a conviction is a different matter and is acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question
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> 90. In cases where the main evidence originates from a covert operation, such as a test purchase of drugs, the authorities must be able to demonstrate that they had good reasons for mounting the covert operation. In particular, they should be in possession of concrete and objective evidence showing that initial steps have been taken to commit the acts constituting the offence for which the applicant is subsequently prosecuted.. The court has specified that any information relied on by the authorities must be verifiable.. .

91. Where the authorities claimed that they acted upon information received from a private individual, the court draws a distinction between an individual complaint and information coming from the police collaborator or informant. The latter would run a significant risk of extending their role to that of *agents provocateurs*, a possible breach of Article 6.1 of the Convention, if they were to take part in a police controlled operation. It is therefore crucial in each case to establish if the criminal act was already underway at the time when the source began in collaboration with the police.

92. Furthermore, any covert operation must comply with the requirement that the investigation be conducted in an essentially passive manner. This rules out, in particular, any conduct that may be interpreted as pressure being put on the applicant to commit the offence, such as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, raising the price beyond average or appealing to the applicant's compassion by mentioning withdrawal symptoms..

93. The court has found that the line between legitimate infiltration by an undercover agent and instigation of a crime was more likely to be crossed if no clear and foreseeable procedure was set up by the domestic law for authorising undercover operations; all the more so if the proper supervision was also missing. In cases against Russia the court has found in particular that neither the Operational Search Activities Act or other instruments provided for sufficient safeguards in relation to test purposes and stated the need for their judicial or other independent authorisation and supervision.

94. Finally, the court has emphasised the role of domestic courts dealing with criminal cases where the accused alleges that he was incited to commit an offence. Any arguable plea of incitement places the courts under an obligation to examine it in a manner compatible to a fair hearing. The procedure to be followed must be adversarial, thorough, comprehensive and conclusive on the issue of entrapment, with the burden of proof on the prosecution to demonstrate that there was no incitement.. The scope of the judicial review must include the reasons why the covert operation was mounted, the extent of the police involvement in the event and the nature of any incitement to which the applicant was subjected. As regards Russia, in particular, the court has found that the domestic courts had capacity to examine such pleas, in particular under the procedure for the exclusion of evidence.

27. In the course of its judgment, under the heading "Comparative Law" (at p. 12 of the judgment), the court referred to a comparative study of the legislation of the twenty two member states of the Council of Europe, including Ireland, and noted as follows:-

> "The comparative studies show that in all of these countries it is possible for the police to carry out undercover operations, in particular in drug trafficking case, according to the procedures set out in the relevant laws and regulations. Only in Ireland is there no formal legislative or regulatory basis for the use of undercover police".

28. In their study, it was noted that a number of countries provided for authorisation of undercover operations by a judge or a public prosecutor. It noted that a small number of countries authorisation for such activities was the responsibility of a senior police figure, while in the United Kingdom undercover operations are subject to administrative rather than judicial authorisation. It was noted that in Ireland there is no judicial authorisation procedure and that the police or other enforcement agencies both take and carry out all operational decisions concerning undercover operations.

29. In *Furcht v. Germany* (App No. 54648/09, 23rd October 2014), the "relevant principles" applicable to undercover operations were again referred to (at para 48 onwards). In this context the following was stated :-

> "46. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court, for its part, must ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair..
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> 47. The use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards. While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience. The public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset.
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> 48. When faced with a plea of police incitement, or entrapment, the Court will attempt to establish whether there has been such incitement or entrapment. Police incitement occurs where the officers involved do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution. The rationale behind the prohibition on police incitement is that it is the police's task to prevent and investigate crime and not to incite it.
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> 49. In order to distinguish police incitement, or entrapment, in breach of Article 6.1 from the use of legitimate undercover techniques in criminal investigations, the Court has developed the following criteria.
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> 50. In deciding whether the investigation was "essentially passive" the Court will examine the reasons underlying the covert operation and the conduct of the authorities carrying it out. The Court will rely on whether there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence.
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> 51. The Court has found, in that context, in particular, that the national authorities had had no good reason to suspect a person of prior involvement in drug trafficking where he had no criminal record, no preliminary investigations had been opened against him and there was nothing to suggest that he had a predisposition to become involved in drug dealing until he was approached by the police. In addition to the aforementioned, the following may, depending on the circumstances of a particular case, also be considered indicative of pre-existing criminal activity or intent: the applicant's demonstrated familiarity with the current prices for drugs and ability to obtain drugs at short notice and the applicant's pecuniary gain from the transaction
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> 52. When drawing the line between legitimate infiltration by an undercover agent and incitement of a crime the Court will further examine the question whether the applicant was subjected to pressure to commit the offence. In drug cases it has found the abandonment of a passive attitude by the investigating authorities to be associated with such conduct as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, raising

the price beyond average or appealing to the applicant's compassion by mentioning withdrawal symptoms..

53. When applying the above criteria, the Court places the burden of proof on the authorities. It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In practice, the authorities may be prevented from discharging this burden by the absence of formal authorisation and supervision of the undercover operation. The Court emphasised in that context the need for a clear and foreseeable procedure for authorising investigative measures, as well as for their proper supervision. It considered judicial supervision as the most appropriate means in case of covert operations

30. In the case of *Bannikova v. Russian* (App No. 18757/06, 4th November 2010) the facts of the case are, briefly stated, as follows. The applicant agreed in a series of telephone conversations with S, to supply her with cannabis which she would then sell. In due course, S delivered the consignment of cannabis to the applicant who then prepared it for sale. In an undercover operation authorised by the acting chief of the Kursk Regional Department of Federal Security Service, an undercover operative acting as a buyer, met the applicant and purchased a consignment of drugs from her. She was paid with marked bank notes. Subsequently the applicant was arrested and the marked bank notes found in her possession. Her home was then searched and additional drugs found. The Kursk District Court convicted the applicant of selling cannabis to the undercover agent. An Appeal Court dismissed the applicant's appeal. The court rejected the applicant's argument concerning the incitement by State agents on the grounds that her participation in the drugs sale on 29th January 2005 had been established on the basis of multiple items of evidence and was not denied by her.

31. In the course of the court's judgment, the relevant *"general principles"* were set out in some detail. In the course of its judgment, the *"substantive test of incitement"* was explained in the following terms:-

37. When faced with a plea of entrapment the Court will attempt, as a first step, to establish whether the offence would have been committed without the authorities' intervention. The definition of incitement given by the Court in *Ramanauskas* (Grand Chamber App No. 74420/01, 5th February 2008) as follows:

"Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution ..."

38. In deciding whether the investigation was "essentially passive" the Court will examine the reasons underlining the covert operation and the conduct of the authorities carrying it out. The Court will rely on whether there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence

32. In the course of the judgment in *Bannikova* it was also stated:-

"As regards the previous criminal record of the person concerned, the Court has specified that even if the applicant did have a criminal conviction in the past, this was not by itself indicative of any ongoing criminal activity.."

33. In para 50 of its judgment, the court stated:-

"As regards the authority exercising control over covert operations, the Court has held that judicial supervision would be the most appropriate means; however, with adequate procedures and safeguards other means may be used, such as supervision by a prosecutor."

34. In the case of *Scholer v. Germany* (App No. 14212/10, 18th March 2015), the police at Trier received a tip off to the effect that the applicant was engaged in the sale of large amounts of amphetamines. The police organised for a police informer to arrange for the purchase of a consignment of drugs from the applicant who was subsequently charged and convicted for the offence of dealing in illicit drugs.

35. The court held, by a majority that there had been no violation of Article 6 of the Convention on account of alleged police incitement. In its judgment, the court stated, *inter alia:-*

"88. As regards the manner in which the police investigated the applicant's activities, the Court observes that it had been the police, via its informer S., who approached the applicant to inquire about the possibility to conclude a drug transaction. However, it has not been shown that police informer S., supervised by police officer K., and subsequently working in cooperation with C., a trained undercover police officer who participated in the operation following a court order, went beyond the conduct of an "ordinary" customer of a drug dealer throughout the investigations. The police informer did not subject the applicant to undue pressure to conclude the drugs transactions.

89. The Court notes in this respect that the police informer, who had only asked the applicant about his readiness to sell drugs, has not been shown to have prompted the applicant to sell him drugs. The applicant, for his part, immediately consented to concluding drug transactions following the informer's inquiry. Furthermore, as regards the applicant's argument that he had been incited to sell drugs by having been offered an exceptionally high purchase price at the upper end of what was usual, the Court notes that according to the Trier Regional Court's findings (see ..), which have not been substantially challenged by the applicant, the price offered by the police informer was the average price for that amount and quality of amphetamine in the region. Moreover, the Court is not convinced by the applicant's argument that he had been incited to conclude a drug transaction in order to facilitate the sale of a motorbike…" .

36. The issue was also considered in *Teixeira de Castro v. Portugal* [1998] EHRR101. The facts of this case, briefly stated, are that the Public's Security Police initially approached a suspected drug dealer named VS in order to obtain hashish from him. He had, despite a number of approaches, failed to put them in touch with the hashish supplier. They approached him again to see if he could put them in touch with a supplier of heroin. At this stage he mentioned the name of the applicant, as a result of which an approach was made to the applicant which lead to a drugs deal being done on the strength of which the applicant was prosecuted, convicted and sentenced.

37. The court summarised the domestic law of Portugal and also the progress of the proceedings in Portugal. In para 27 it drew attention to a distinction in Portuguese law between an undercover agent and an *agent provocateur*:-

"The former is someone who confines himself to gathering information, where the latter is someone who actually incites people to commit a criminal offence."

38. The court then summarised the proceedings before the Commission and it is clear from para 28 of the judgment that the complaint made by the applicant was that the police officers had incited him to commit the offence. The Commission, whose opinion is set out on page 109 of the report, recorded him as complaining that he did not have a fair trial insofar as the police officers acting as *agents provocateurs* incited him to commit an offence for which he was subsequently convicted. He submitted, they recorded, that he would never have been convicted of the offence if the police had not incited him to do so. The applicant emphasised that the officers were acting on their own initiative and were not subject to any judicial supervision. He submitted that their conduct was therefore that of *agents provocateurs*. He denied the allegation that he was already pre-disposed to commit the offence.

39. The government, on the other hand (whose submissions to the Commission are reported beginning at para 40 of the report) submitted that the police officers in question could not be regarded as *agents provocateurs*. A distinction was to be drawn, the government argued, between cases where an undercover agent creates a previously non existent criminal intention from those where the suspect is already pre-disposed to commit an offence. The Commission considered that the case must be examined as a whole and repeated, yet again, that the conduct of prosecuting authorities in the prevention and investigation of criminal offences was primarily a matter for regulation by domestic law. The Commission, however, recognised that it had a duty to ascertain whether the proceedings considered as a whole were fair.

40. In para 47 of its judgment the Commission noted a number of aspects which it considered of particular importance. These included such matters as the fact that the police officers in question were not carrying out an anti drug trafficking operation under the supervision of a judge, but rather acting on their own initiative. They further placed reliance on language used by the Supreme Court. All these matters led the Commission to consider that the police officer's actions were *"essentially if not exclusively the cause of the offence being committed and the applicant being sentenced to a fairly heavy penalty".*

41. The judgment also observed that:-

"... he had no criminal record and no preliminary investigation concerning him had been opened. Indeed, he was not known to the police officers, who only came into contact with him through the intermediary of V.S. and F.O. ... Furthermore, the drugs were not at the applicant's home; he obtained them from a third party who had in turn obtained them from another person ... Nor does the Supreme Court's judgment of 5 May 1994 indicate that, at the time of his arrest, the applicant had more drugs in his possession than the quantity the police officers had requested thereby going beyond what he had been incited to do by the police. There is no evidence to support the Government's argument that the applicant was predisposed to commit offences."

42. *In Nottingham City Council v. Amin* [2001] 1WLR1071, Lord Bingham C.J. commenting on the decision in the *de Castro* case stated the following:-

"References made to the Commission's decision and the court re-iterated that the admissibility of evidence was primarily a matter for regulation by national law. The court's task under the Convention was not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken were fair."

43. He also identified *"various matters to which the court attached significance in the passage quoted, which would not be readily applicable in English proceedings",* and went on:-

"For example (and obviously) no anti drug trafficking operation would be ordered or supervised by a judge. Similarly, if there were evidence pointing to the propensity of a given defendant to commit an offence of a certain kind, that would not be adduced in evidence before the trial court. Nor in the ordinary course would there be evidence of whatever report or suspicion had given rise to the presence of the two police officers who were in Nottingham on the occasion in question."

44. The case of *R.B. Loosely* [2001] 1WLR2060 provides a useful and comprehensive consideration of the issue by The House of Lords. There were some similarities in the facts of that case and the facts of the case under appeal. In *Loosely,* the facts were as follows (as *per* the headnote):-

"During the course of an authorised police operation relating to the trade in Class A controlled drugs, an undercover police officer was at a public house which was a focus of the operation when he was given the defendant's name and telephone number as a potential source of drugs. The officer telephoned the defendant, who confirmed that he could obtain drugs. After they had agreed a price for the supply of heroin, the defendant took the officer to an address where the defendant obtained a quantity of heroin and gave it to the officer in exchange for the agreed sum. On two further occasions, the officer contacted the defendant and bought two more quantities of heroin from him. The defendant was charged with supplying or being concerned in the supplying to another of a Class A controlled drug.. At his trial, a voir dire was held on a preliminary issue, and the defence submitted that the indictment should be stayed as an abuse of the process of the court or alternatively that the officer's evidence should be excluded pursuant to the judge's discretion under s. 78 of the Police Criminal Evidence Act 1984. The judge declined either to stay the indictment or to exclude the evidence. The defendant then changed his plea to guilty. The Court of Appeal upheld the judge's ruling on the voir dire and dismissed the defendant's appeal against conviction"

45. At the commencement of his judgment, Lord Nicholls stated the following:-

"Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the State through its agents should lure its citizens into committing acts forbidden by the 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. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the State and its citizens and make sure this does not happen."

and

"These propositions I apprehend are not controversial. The difficulty lies in identifying conduct which is caught by such

imprecise words as "lure" or "incite" or "entice" or "instigate". If police officers acted only as detectives and passive observers there would be little problem in identifying the boundry between permissible and impermissible police conduct. But that would not be a satisfactory place for the boundary line. Detection and prosecution of consensual crimes committed in private would be extremely difficult. Trafficking in drugs is one instance. With such crimes there is usually no victim to report the matter to the police. And sometimes victims or witnesses are unwilling to give evidence."

46. He also observed (at p. 2068):-

"Questions such as these have generated extensive overseas judicial utterances and also academic literature, both in this country and abroad. The several suggested answers have different emphases and, to a limited extent, different practical consequences. Underlying some of the learning is the notion that expressions such as "state-created crime" and "lure" and "incite" focus attention on the role played by the police in the formation of the defendant's intent to commit the crime in question. If the defendant already had the intent to commit a crime of the same or a similar kind, then the police did no more than give him the opportunity to fulfil his existing intent. This is unobjectionable. If the defendant was already presently disposed to commit such a crime, should opportunity arise, that is not entrapment. That is not state-created crime. The matter stands differently if the defendant lacked such a predisposition, and the police were responsible for implanting the necessary intent."

47. On p. 2069, Lord Nicholls stated as follows:-

"Accordingly, one has to look elsewhere for assistance in identifying the limits to the types of police conduct which, in any set of circumstances, are acceptable. 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.

48. In the course of his judgment, Lord Hoffmann considered, *inter alia*, the *de Castro* decision, and, more particularly, whether current English law was consistent with the decision of the European Court of Human Rights in that particular case. He concluded that the relevant principles in English law were entirely consistent with the decision of the European Court of Human Rights in the *de Castro* case. He stated (at p. 2080):-

"Both the Commission and the court stressed the fact that the policemen, although not acting unlawfully, were not authorised to use undercover operations. Unlike Ludi v. Switzerland [1992] 15EHRR173, no investigation had been opened by a judge and there was no judicial or other supervision of the officers. Although the United Kingdom's technique for authorising and supervising such operations (as described in the Code of Practice) is very different from the judicial supervision in continental countries, the purpose is the same namely to remove the risk of extortion, corruption or abuse of power by policemen operating without proper supervision. The European Court obviously had these risks very much in mind when it condemned the methods used to prosecute Mr. de Castro.

The court also recorded that the "competent authorities", that is to say the authorities who would normally be expected to authorise such an investigation, had no good reason to suspect that Mr. Teixeira de Castro was a drug trafficker. Nor had the police heard of him until an intermediary told them that he was a person who might be able to supply heroin. They immediately drove to his house in the middle of the night, said that they wanted to buy 200,008 escudos worth of heroin and produced a role of bank notes. Mr. Teixeira de Castro obtained the heroin from an intermediary and, apart from the intermediary's suggestion that he might be able to supply, there was no other evidence that he had been dealing in heroin.

My Lords, every case depends upon its own facts but there is nothing in the general principle applied by the European court or the cluster of factors to which it attached importance which suggests any difference from the current English approach to entrapment. The contrary submission depends upon an excessively literal and technical analysis of some of the language used by the court. So, for example, the court said at page 116, para 38, that "the two police officers did not confine themselves to investigating Mr. Teixeira de Castro's criminal activity in an essentially passive manner, but exercised an influence such as to incite the commission of the offence.

This sentence is relied upon for the proposition that even in an authorised undercover operation, the officer must take no active step such as offering to buy an illegal substance. Such conduct amounts to "incitement" of the offence. I do not believe that the court intended to lay down such a rigid and prescriptive rule. The description of the policemen's conduct must be seen as one of the various factors which led to the court's conclusion that there had been an abuse of police power which denied the defendant a fair trial."

49. Lord Hoffmann analysed the current principles of English law. He did so under various headings, including:-

- Causing and providing an opportunity
- Suspicion and supervision
- The nature of the offence
- Predisposition
- Active and Passive Conduct

50. In relation to "causing and providing an opportunity" Lord Hoffmann cited with approval the following extract in that case of Lord Bingham C.J.

"On the one hand it has been recognised as deeply offensive to ordinary notions of fairness if a defendant were to be convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded, pressurised or wheedled into committing it by a law enforcement officer. On the other hand it has been recognised that law enforcement agencies have a general duty to the public to enforce the law and it has been regarded

as unobjectionable if a law enforcement officer gives a defendant an opportunity to break the law, of which the defendant freely takes advantage, in circumstances where it appears that the defendant would have behaved in the same way if the opportunity had been offered by anyone else."

51. Lord Hoffmann went on to say:-

"The test of whether the law enforcement officer behaved like an ordinary member of the public works well and is likely be decisive in many cases of regulatory offences committed with ordinary members of the public, such as selling liquor in unlicensed quantities .. selling videos to children under age.. and operating a private hire vehicle without a licence."

52. In relation to the principle of *"suspicion and supervision"* he observed:-

"In the case of some regulatory offences, the effective administration of the law may require enforcement officers to have the power to make random tests. But normally it is not considered a legitimate use of police power to provide people not suspected of being engaged in any criminal activity with the opportunity to commit crimes. The 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."

and

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.. The need for reasonable suspicion and proper supervision are both stressed in the Undercover Operations Code of Practice issued jointly by all UK police authorities and HM Customs and Excise in response to the Human Rights Act 1998. It deals with the employment of "undercover officers", "test purchasers" and "decoys".

and

"The use of a test purchaser must be authorised by a superintendent in the police or National or Scottish Crime Squads .." -

53. He also stated at (at p. 2078):-

"The requirement of reasonable suspicion does not necessarily mean that there must have been suspicion of the particular person who happens to have committed the crime. The police may, in the course of a bona fide investigation into suspected criminality, provide an opportunity for the commission of an offence which is taken by someone to whom no suspicion previously attached. This can happen when a decoy (human or inanimate) is used in the course of the detection of crime which has been prevalent in a particular place."

54. A further principle of English law concerned the nature of the offence. He said:-

"The provision in the Code of Practice which requires the authorising officer to be satisfied that the desired result of deploying an undercover officer or test purchaser cannot reasonably be achieved by other means shows that the justification for such methods will partly depend upon the nature of the offence. Consensual offences such as dealing in unlawful substances or offences with no immediate victim like bribery or offences which victims are reluctant to report are the most obvious candidates for such methods. So is the infiltration of conspiracies. But the fact that the offence is a serious one is not in itself a sufficient ground for the police to ignore the provisions of the Code or the courts to condone their actions by allowing the prosecution to proceed."

55. On the question of pre-disposition, Lord Hoffmann stated:-

"Since the English doctrine assumes the defendant's guilt and is concerned with the standards of behaviour of the law enforcement officers, predisposition is irrelevant to whether a stay should be granted or not. The facts which lead the police to suspect that crimes are being committed and justify the use of an undercover officer or test purchaser may also point to the accused and show predisposition. But that is a coincidence."

56. Finally, Lord Hoffmann considered the active and passive principle in English law. He said at p. 2080:-

"The need for an authorised and bona fide investigation into suspected criminality is sufficient to show that the question of entrapment cannot be answered simply by asking whether the defendant was given an opportunity to commit the offence of which he freely availed himself. That is important but not enough. The matter is more complicated and other factors have to be taken into account."

And

"Drug dealers can be expected to show some wariness about dealing with a stranger who might be a policeman or informer and therefore some protective colour in dress or manner as well as a certain degree of persistence may be necessary to achieve the objective. And it is been said that undercover officers who infiltrate conspiracies to murder, rob or commit terrorist offences could hardly remain concealed unless they showed some enthusiasm for the enterprise. 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."

57. In his judgment Lord Hutton (at p. 2095) stated the following:-

"Therefore, I am of opinion that the court did not intend to state as a general principle that there was a breach of article 6 of the Convention whenever police officers gave a person an opportunity to break the law and he took advantage of that opportunity in circumstances in which it appeared that he would have behaved in the same way if some other person had given him the opportunity to commit a similar crime. In my opinion, if a person freely takes

advantage of an 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 in the context of the prohibition of entrapment. The conduct of the police officer should not be viewed as constituting incitement or instigation where, as McHugh J states in "the Ridgeway case", that conduct is "consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity", and I do not consider that the judgment of the court lays down a principle to the contrary."

58. The position in English law is perhaps most distinctly put by Roch L.J. in the course of his judgment in *Loosely* when he observed:-

"In our judgment the law is clear, and the law is consistent with the European Convention of Human Rights and the judgment of the European Court of Human Rights, namely that if an accused person's involvement in an offence is due to that person being incited by a law enforcement officer to commit the offence, or by that person being trapped into committing the offence by a law enforcement officer, then the evidence of that law enforcement officer should be excluded by the trial judge exercising his power under section 78 of the 1984 Act. In many cases were such a ruling to be made the case against the accused would not be able to proceed further. On the other hand, if the law enforcement officer has done no more than give an accused the opportunity to break the law, of which the accused has freely taken advantage in circumstances where it appears that the accused would have behaved in the same way if the opportunity had been offered by anyone else, then there is no reason why the officer's evidence should be excluded and the accused's trial should proceed with that evidence being admitted. No doubt there will be cases, of which this was one, where such a ruling will lead to a change of plea."

59. In *R. V. Bellingham* [2003] NICC2, the subject matter of the case concerned test purchase of drugs by a police officer in Portrush, Northern Ireland. The facts of this case were remarkably similar to the case under appeal. In his defence, Mr. Bellingham argued that he sold the drugs to the police officer because of two things, firstly, the initial temptation presented by the police officer and the persistence of the police officer in coming back to him, and secondly a desire of his part to make easy money. In his judgment, Smyth J., having reviewed a number of authorities (including the de Castra and Loosely cases) identified the following principles:-

1. The incorporation of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Human Rights Act has not modified the existing law here (both at common law and Article 76 of the Police and Criminal Evidence Order (N.I.) 1987). However, in applying the existing law here on stays for abuse of process and in excluding evidence under Article 76 of the Police and Criminal Evidence Order the court should have regard to Article 6 and the Corpus of Strasburg case law on entrapment.

2. Texeira de Castra v. Portugal makes it clear that entrapment, and the use of evidence obtained by entrapment ("as a result of police incitement"), may deprive a defendant of the right to a fair trial embodied in Article 6 ECHR and, since it is unlawfully for the court, as a public authority to act in a way that is incompatible with a convention right, statutory and common law developments of abuse of process and fairness of trial have been re-enforced (R v. Loosely at para. 15). Entrapment is not a substantive defence but the developing rules on fairness may mean that either a prosecution may be stayed or evidence excluded under Article 76 of PACE.

3. In considering whether to exercise these powers the court is not seeking to discipline the police. Nor is entrapment to be considered as a matter going merely towards mitigation of sentence. Entrapment goes to the priority of there being a conviction at all because of the State's involvement in the way the crime came to be committed. At the heart of this is the concept that policy conduct that induces crime is "unacceptable and improper". To allow such a prosecution would be an affront to conscience, and, no matter what the culpability of the defendant, would be unfair both at common law under Article 6(1) ECHR and separately under Article 76 of PACE (N.I.) Order 1989.

4. Common sense suggests that not all police activity designed to encourage criminal activity (for instance police decoys in areas where rape or muggings have been frequent) will be regarded as unfair.

5. Pre-disposition on the part of the accused is not the criterion by which the acceptability of police conduct is to be decided. For this very reason the defendant's past record is of limited value. (I would however imagine that in a case like this past offences of possession with intent to supply relevant drugs could be put into the equation but the court has to concentrate on the nature of the police conduct rather than the susceptibility of the accused).

6. The test in Texeira v. Portugal was whether officers had "exercised an influence such as to incite the commission of the offence". The test in R. v. Loosely, is whether, having regard to all the circumstances of the case, the conduct of the police is so seriously improper as to bring the administration of justice into disrepute.

7. The court should look at the nature of the office, the reason for the police operation, the presence or absence of malice, and the nature and extent of the police participation in the crime. The greater the inducement held out by the police is, and the more forceful or persistent the police overtures are, the more readily may a court conclude that the police overstepped the mark. It will not, however, normally be regarded as objectionable for the police to be behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant. If having considered all these matters, the court adjudges that this amounts to "State created" crime than the prosecution will be stayed or, less frequently, the evidence excluded under Article 76. On the other hand, where it is not such an affront the matter goes to mitigation of sentence if that is a relevant consideration."

60. In*. R. v. Shahzad* [1996] 1AER353 at 360, Lord Steyn stated:-

"The weaknesses of both extreme positions leave only one principle to solution. The court has a discretion: it has to perform a balancing exercise… the judge must weight and balance the public interest in ensuring those that are charged with serious crimes should be tried and the competing public interest in not convening the impression that the court will adopt approach that any end justified any means."

61. In the Australian case of *Ridgeway v. The Queen* 184CLR19,92, McHugh J. stated:-

"I do not think that it is possible to formulate a rule that will cover all cases that arise when an accused person seeks to stay a prosecution on the ground that the offence was induced by or was the result of the conduct of law enforcement authorities. The ultimate question must always be whether the administration of justice will be brought into disrepute because the processes of the court are being used to prosecute an offence that was artificially created by the misconduct of law enforcement authorities. That question should be determined after considering four matters:

(1) Whether conduct of the law enforcement authorities induced the offence.

(2) Whether, in proffering the inducement, the authorities had reasonable grounds for suspecting that the accused was likely to commit the particular offence or one that was similar to that offence or were acting in the course of a bona fide investigation of offences of a kind similar to that with which the accused has been charged.

(3) Whether, prior to the inducement, the accused had the intention of committing the offence or a similar offence if an opportunity arose.

(4) Whether the offence was induced as the result of persistent importunity, threats, deceit, offers of rewards or other inducements that would not ordinarily be associated with the commission of the offence or a similar offence."

62. It is a common theme of the decisions in the European Court of Human Rights that operations which involve the initiation by police of activity which culminate in prosecutions, should be the subject of formal authorisation and supervision (see for example the decisions in *de Castro, Bannikova v. Russian* (App No. 18757/06 4th November 2010), *Furcht v. Germany* (App No. 45648/09, 23rd October 2014) and others).

63. In Europe there is, in some civil law jurisdictions, provision for the judicial authorisation of such operations. In the U.K. there has been in operation for many years a Code of Practice governing the authorisation and supervision of such operations. In *Loosely,* Lord Hoffmann, (at p. 2081) stated:-

> *"Although the United Kingdom technique for authorising and supervising such operations (as described in the Code of Practice) is very different from the judicial supervision in continental countries, the purpose is the same, namely to remove the risk of extortion, corruption or abuse of power by policemen operating without proper supervision."*

64. Certain crimes, such as, for example, selling drugs or weapons, do not, as a general rule, produce immediate victims who might be expected to seek garda assistance or otherwise prompt an investigation and prosecution. Yet the commission of such crimes are enormously damaging to the fabric and well being of society, and, especially in the case of drugs, often severely damaging the lives of many young people. There is therefore a clear public interest that such criminality be amenable to effective professional police work, and in that respect undercover operations of the type evident in this case are both necessary and effective. What is wrong with providing a person with the opportunity to commit a crime which he is in the practice of committing anyway? The key is to ensure that such operations are appropriately authorised, controlled and supervised and that undercover operatives do not themselves precipitate criminal conduct that would not otherwise occur.

65. In Ireland, the existence of a formal system for the authorisation and supervision of this type of undercover operation does not appear to exist. Such operations appear to be undertaken with a degree of informality which might reasonably be described as unsatisfactory. That is not to say however that such undercover operations are inappropriate, or that they are not undertaken in a manner which would, in general terms, satisfy the principles enunciated in the various European and other decisions, and more particularly in a manner which contravenes the relevant provisions of the European Convention on Human Rights or Article 38 of the Constitution. However it would be preferable if in this jurisdiction the authorisation and performance of such undercover operations were approached with a greater degree of formality and record keeping than currently appears to be the case, and that a Code of Practice be established, possibly based on the U.K.'s Code of Practice, (in this case Det. Sgt. Roberts stated that there was no Code of Practice in relation to undercover Garda operations for test purchasing illegal drugs, but that Gardaí operated under a "protocol… in Ireland and the U.K.", and that the particular operation had been sanctioned at "Commissioner level"). It is also desirable that the details of such operations be recorded in a dedicated manner. Dedicated recording of such information would undoubtedly assist a court when called upon to make a determination as to the lawfulness of prosecutions or the admissibility of evidence arising from such undercover operations.

66. The evidence in the case under appeal established the following:-

(i) the undercover operation was sanctioned at "Commissioner level".

(ii) the undercover gardaí who participated in the purchase of illicit drugs from the appellant were adequately trained and advised as to their conduct and the need to avoid entrapment or enticement to commit crime.

(iii) the purpose of the undercover garda operation was clear; namely the investigation of drug dealing and the identification of individuals selling drugs within a specific area.

(iv) the sixteen year old individual initially approached by the undercover gardaí and who then apparently made contact with the appellant was not himself the subject of a prosecution.

(v) The inquiry made by the undercover gardaí to the sixteen year old (and his companion) was a general injury as to the availability of *"weed".* The words used by Garda Reddy were *"any weed around".* Equally, words uttered by him in the first confrontation with the appellant, namely *"a 25g of weed",* were in response to the appellant asking *"what are you looking for?"*

(vi) the appellant was provided with no more than an unexceptional opportunity to commit a crime, an opportunity which he freely took advantage of in circumstances and where it appears that he would have behaved in the same way if the same opportunity had been offered by anyone else.

(vii) the appellant was not incited, instigated, persuaded, pressured or wheedled into committing a crime.

67. The practice of test purchasing in relation to alcohol and tobacco products for the purposes of enforcing the law relating to the under age purchasing of such products is well established in this jurisdiction. There is in existence Guidelines On Test Purchasing Of Intoxicating Liquor issued by the Minister for Justice and Law Reform pursuant to s. 37C(4) of the Intoxicating Liquor Act 1998 (as inserted by s. 14 of the Intoxicating Liquor Act 2008). There is also a Health Board (now the HSE) approved protocol for the test purchase of tobacco products prepared by the Office of Tobacco Control. The latter was the subject of a Consultative case stated to the *High Court, Syon v. Hewitt and McTiernan, and the Office of Tobaco Control* [2006] IEHC 376.

68. Notwithstanding the criticism of the absence of, at least, an identifiable Code of Practice regulating the authorisation and conduct of the undercover test purchasing of drugs and/or other illicit substances or material, for the reasons referred to above, the court is satisfied that in the particular circumstances of this case there was no infringement of Article 6 of the European Convention of Human Rights or Article 38 of the Constitution, and that the learned trial judge was correct in her decision to admit the evidence of the undercover gardaí. The appeal is therefore dismissed.