Neutral Citation Number: [2019] EWHC 200 (Admin)

Case No: CO/3959/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2019

Before:

LORD JUSTICE FLAUX
-and-
MR JUSTICE HOLGATE

- -

Between:

READING BOROUGH COUNCIL	**Appellant**
- and -	
MUDASSAR ALI	**Respondent**

- -
- -

Charles Holland (instructed by **Legal and Democratic Services, Reading Borough Council**) for the **Appellant**
Philip Kolvin QC (instructed by **WoodsWhur**) for the **Respondent**

Hearing dates: 24 January 2019

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Approved Judgment

Lord Justice Flaux:

Introduction and factual background

1. This is an appeal by way of case stated from the Decision of the Senior District Judge (Chief Magistrate) Emma Arbuthnot dated 10 July 2018 acquitting the respondent on two charges of plying for hire in a Ford Galaxy, registration number LR12 ORZ, without a licence to do so, contrary to section 45 of the Town Police Clauses Act 1847.

2. The respondent is an Uber driver, He, his vehicle and Uber are licensed by Transport for London to conduct private hire business pursuant to the "triple lock" system under the Private Hire Vehicles (London) Act 1998. Uber had been refused an operating licence by the appellant. However, if Uber, their vehicles and drivers were conducting a private hire business, they could lawfully operate in Reading with their private hire vehicle ("PHV") licences from Transport for London ("TfL"). What drivers were not permitted to do was ply for hire, which only licensed hackney carriages are permitted to do.

3. The relevant facts as found by the Chief Magistrate in her Decision are as follows. On the nights in question, some 60 Uber vehicles were in Reading. In the early hours of 21 January 2017, the respondent was parked in Kings Road in the centre of Reading waiting for a passenger to make a booking for his vehicle via the Uber smartphone App. Two of the appellant's Licensing Enforcement Officers who were registered as Uber passengers saw the outline of his vehicle on their App, approached the vehicle and interviewed the respondent. He said he was waiting for a booking through the Uber App. A similar series of events occurred just after midnight the following night when the same Officers interviewed the respondent again.

4. As the Chief Magistrate found, the respondent was parked lawfully. He was not waiting in a taxi stand, nor was he near a bus stop or stand. The car had no markings indicating it was for hire, but it had two small TfL roundels, one in the back window and one on the front windscreen, which were highly visible and which indicated it was licensed by TfL as a PHV. The car did not advertise a number to contact to hire it. The car was not available to anyone hailing it on the street but could only be hired via the Uber App. The respondent was not hooting or flashing his lights or otherwise drawing attention to his car. The respondent would not have taken any passengers other than via the App.

5. The App is available to anyone with a smartphone who downloads the App and registers with Uber. Any customer who used the App in Reading on the nights in question would have seen the outline of the respondent's vehicle on the map as one of a number in the area, although the App does not show any features which might identify a particular driver or a particular car.

6. A customer who has the App will open it and see a list of available vehicle types in the area. The customer requests the provision of a vehicle by entering a destination, for which he or she will get a fare estimate and, if he or she wants to proceed, will request a booking. A particular driver or car cannot be chosen. Rather, the nearest driver is informed of the request via the driver version of the App and then has ten

seconds to press a key on his smartphone to accept the request. At that point the driver is not informed of the destination.

7. If the driver accepts the request, Uber as licensed PHV operator confirms and records the booking and allocates the trip to the driver. The driver and passenger are then given details of each other via the Uber app. The driver then goes to the pick-up location and meets the passenger. We were told by Mr Philip Kolvin QC, who appeared for the respondent, that the driver only learns the destination upon pick-up. The journey then proceeds.

The questions of law

8. The questions of law on which our opinion is sought in the case stated are as follows:

(1) As a matter of law did the display of the respondent's vehicle as the outline of a car on the smartphone Apps of potential passengers constitute an invitation to book the respondent's vehicle?

(2) As a matter of law did the display of the respondent's vehicle as the outline of a car on the smartphone Apps of potential passengers constitute an invitation to book an Uber vehicle in the vicinity, even if it were not the respondent's?

(3) If the answer to questions (1) or (2) is yes:

(a) Did the Chief Magistrate err in law in holding it to be relevant to whether the respondent was plying for hire, that his vehicle had no distinctive markings, was not at a stand and was not available on the street to pick up passengers in the traditional way? and/or

(b) Did the Chief Magistrate err in law in holding it to be a relevant consideration that the whole of the transaction between the passenger and the driver, and the passenger and the licensed operator, was conducted via a smartphone App, where the booking process starts, is recorded and the fare estimated?

(4) On the facts agreed and found by her, did she err in law in finding that the prosecution had not proved that the respondent was plying for hire?

The statutory framework and the relevant legal principles

9. The regulation of hackney carriages outside London is effected by the Town Police Clauses Act 1847. Section 37 requires all hackney carriages to be licensed. Section 38 defines a hackney carriage as "every wheeled carriage…used in standing or plying for hire in any street within the prescribed distance". The section then contains a deeming provision whereby every carriage standing on the street within the prescribed distance which has the requisite licence plate or what purports to be such a plate is deemed to be a hackney carriage for the purposes of the Act.

10. Further sections of the Act then set out the licensing regime for hackney carriages. Section 45 sets out the penalty for plying for hire without a licence:

> "If the proprietor or part proprietor of any carriage, or any person so concerned as aforesaid, permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage, or during the time that such licence is suspended as hereinafter provided, or if any person be found driving, standing, or plying for hire with any carriage within the prescribed distance for which such licence as aforesaid has not been previously obtained, or without having the number of such carriage corresponding with the number of the licence openly displayed on such carriage, every such person so offending shall for every such offence be liable to a penalty not exceeding [level 4 on the standard scale]."

11. PHVs were not subject to licensing and regulation until the enactment of the Local Government (Miscellaneous Provisions) Act 1976, sections 48, 51 and 55 of which require a PHV vehicle, its driver and the PHV operator to be licensed. Section 46 of the Act is a similar provision to section 45 of the 1847 Act. It provides that knowing contravention of the requirements for such licences is an offence. The two licensing regimes for hackney carriages and PHVs are mutually exclusive, in the sense that section 80 of the 1976 Act defines "private hire vehicle" as a motor vehicle constructed or adapted to seat fewer than nine passengers other than a hackney carriage or public service vehicle. The section also provides that "hackney carriage" has the same meaning as in the 1847 Act. The section also defines "operate" as meaning "in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle".

12. The system of licensing of hackney carriages in London is effected by the Metropolitan Public Carriage Act 1869. Its provisions differ slightly from those of the 1847 Act but not in a manner material for present purposes. The provisions include the designation of ranks and the fixing of fares. The 1869 Act provides that it is an offence for any vehicle other than a hackney carriage to wait on a rank. Section 7 sets out the offence of unlawfully plying for hire in similar terms to section 45 of the 1847 Act. In turn, the system of licensing and regulation of PHVs in London is effected by the Private Hire Vehicles (London) Act 1998 which contains similar provisions to those of the 1976 Act applicable outside London.

13. The expression "plying for hire" is not defined in the 1847 Act or the 1869 Act and there has been a series of cases since the enactment of the statutes which have addressed the issue whether vehicles which were not licensed hackney carriages were nonetheless plying for hire and therefore an offence was being committed. The Chief Magistrate helpfully sets out the authorities and summarises their effect in [18] to [29] of her Decision. I do not propose to refer to all the authorities, but will only focus on those cases from which some principles relevant to the present case can be discerned. Many of the cases turn on their own particular facts.

14. *Sales v Lake* [1922] 1 KB 553 concerned a charabanc which had hackney carriage plates but was not licensed to ply for hire and which was used for excursions to Brighton. Tickets were sold and seats were booked by passengers. The charabanc then picked up those passengers in various public places. No-one who had not previously booked could obtain a seat. The Divisional Court upheld the decision of the

magistrate acquitting the driver and company of unlawfully plying for hire. Lord Trevethin CJ at 557 said:

> "In my judgment a carriage cannot accurately be said to ply for hire unless two conditions are satisfied. (1) There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them, and (2) the owner or person in control who is engaged in or authorizes the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers."

15. Avory J, referring to the judgment of Montague Smith J in the earlier case of *Allen v Tunbridge* (1871) LR 6 CP 481 said: "As [the judge] said in [that] case "plying for hire" is very different from a customer going to a job-master to hire a carriage, and I think [counsel] was right in his argument in that case when he said "plying for hire" means soliciting custom without any previous contract."

16. *Cogley v Sherwood* [1959] 2 QB 311 concerned appellants who conducted a business at London Airport for hiring out cars with chauffeurs which could be hired out on the spot or booked in advance. The appellants had desks at both the then terminals and the service was well-advertised throughout the airport. The desks were clearly visible to arriving passengers. The cars were parked on a standing on the roadway at each terminal. At the central terminal the public did not have access to the roadway. The cars had the appearance of being private cars with no indication they were for hire. The appellants were convicted by the magistrates of unlawfully plying for hire contrary to section 7 of the 1869 Act. That conviction was overturned by the Divisional Court.

17. Lord Parker CJ considered at 324 that: "today, as a matter of common sense, I do not think that anyone would say that vehicles belonging to the many car hire concerns are plying for hire in the ordinary sense of the word". Having reviewed earlier authorities, including *Allen v Tunbridge*, the Lord Chief Justice said at 325-6:

> "In the ordinary way, therefore, I should, apart from authority, have felt that it was of the essence of plying for hire that the vehicle in question should be on view, that the owner or driver should expressly or impliedly invite the public to use it, and that the member of the public should be able to use that vehicle if he wanted to. Looked at in that way, it would matter not that the driver said: 'Before you hire my vehicle, you must take a ticket at the office,' aliter, if he said: 'You cannot have my vehicle but if you go to the office you will be able to get a vehicle, not necessarily mine.'"

18. He then noted that some cases pointed in a different direction, but considered that it was unnecessary to go into them because, in all cases where it was held a carriage was plying for hire, it was in fact there and on view. He continued: "For myself I think that it is of the essence of plying for hire that the carriage should be exhibited". He considered that the cars were not exhibited in this sense. The only cars on view were

at one terminal, "they did not appear to be for hire; they appeared to be ordinary private cars with private chauffeurs."

19. In his concurring judgment, Donovan J said at 329: "the term ['plying for hire'] does connote in my view some exhibition of the vehicle to potential hirers as a vehicle which may be hired."

20. Salmon J, also concurring, said at 331:

> "But for authority, I should have thought that a vehicle plies for hire if the person in control of the vehicle exhibits the vehicle and makes a present open offer to the public, an offer which can be accepted, for example, by the member of the public stepping into the vehicle."

He considered that it was quite wrong to conclude that a car-hire service which was the modern equivalent of the job-master in 1869 was plying for hire. He said at 331-2: "I do not feel compelled by any authority to find that a vehicle plies for hire unless it is exhibited".

21. That case is thus clear authority for the proposition that it is of the essence of plying for hire that the vehicle in question is exhibited with an express or implied invitation to hire it. Nothing in *Rose v Welbeck Motors* [1962] 1 WLR 1010, on which Mr Charles Holland for the appellant placed particular emphasis, detracts from that proposition. In that case, the defendant's unlicensed minicab, a distinctive red Renault Dauphine with the inscription "Welbeck Motors, Minicabs" on its sides and a telephone number and radio aerial on the roof, was parked in a stand in Walthamstow where buses turned round. When a bus wanted to turn around, the driver of the car pulled out of the stand and parked about ten yards away. A licensed taxi driver called the police. When the police arrived and told the driver he was not allowed to be there to ply for hire, he disagreed with them saying he had been there 50 minutes and his control had told him he was allowed to be there.

22. Rather surprisingly, on those facts, the magistrates found there was no case to answer in relation to an offence under section 7 of the 1869 Act. That decision was reversed by the Divisional Court and the case was remitted to the magistrates with a direction that they should continue hearing the case. Lord Parker CJ again gave the lead judgment. He referred to and followed *Cogley v Sherwood* saying at 1014-5:

> "Again, in *Cogley's* case this court held that it was essential before one could say that a vehicle was plying for hire, first, that it should be exhibited or be on view to the public, and secondly, that it should while on view expressly or impliedly solicit custom in the sense of inviting the public to use it. The fact that, if those conditions were proved, a ticket had to be obtained from an office or a booking made other than through the driver was immaterial. It is right to say that a further possible question, namely, what was to be the result if the obtaining of a ticket or a booking involved a vehicle other than that on view was left open. Reference, however, was made to *Gilbert v. McKay* [1944] 1 All ER 458 and in the argument to

> *Foinett v. Clarke* (1877) 41 JP 359, which cases suggest that, at any rate in certain circumstances, that fact would not of itself prevent a finding that the vehicle in question was plying for hire.
>
> That the vehicle in the present case was on exhibition in the sense that it was on view to the public is undoubted. The real question, as it seems to me, is whether a prima facie case was made out that the vehicle in question was impliedly inviting the public to use it. Whether in any case such a prima facie case is made out must, of course, depend upon the exact circumstances, and I certainly do not intend anything I say in this judgment to apply to any facts other than those here. What are the facts here? One starts with the fact that this vehicle was of a distinctive appearance, regarding its colour, its inscriptions, its equipment in the form of radio communication, and its type. Secondly — and this is equally important — it was standing with the driver at the steering wheel for some fifty minutes in a public place on public view and at a place where buses turned round: in other words, at a place where many members of the public would be getting off the buses and where many members of the public would forgather to board the buses. Moreover, when requested to leave, the driver drove away only to return immediately almost to the same place."

23. The Lord Chief Justice then dealt with the argument on behalf of the defendant that the car was merely advertising the owners:

> "It is perfectly true, of course, that the inscriptions were advertising the owners, Welbeck Motors, Ltd., and also saying, 'and if you ring up Welbeck 4440 you can have one of the vehicles that they hire known as a minicab.' In my judgment, however the inscriptions on and appearance of the vehicle coupled with the place where it was on view and its conduct during the relevant period were saying more than that. The vehicle was saying: 'Not only do I,' if I may personify the vehicle, 'recommend you to Welbeck Motors, Ltd., where you can hire a minicab, but further I am one of those minicabs and I am for hire.'"

24. Winn J agreed and dealt with a short point of his own, which was that there was no difference as matter of law:

> "…whether the vehicle was to be taken to be saying: 'I am here available for you to step into and hire me as a cab,' or whether it must be taken to be saying: 'I am here available to be hired by you conditional upon my owner's approval and his ordering me to take you where you want to go.'
>
> …

> At the very lowest, the evidence in the present case discloses behaviour and appearance on the part of this vehicle which amounts to an invitation, 'Get in touch one way or another with my owner and see whether he is willing for you to take me as a vehicle which you are hiring.'"

25. It is unnecessary to refer to the more recent cases since they can all be analysed as examples of the application to the particular facts of the individual cases of the principle established by *Cogley v Sherwood* and *Rose v Welbeck* that to be plying for hire (a) the vehicle must be exhibited or on view and (b) while so exhibited it is expressly or by implication soliciting custom in the sense of inviting the public to use the vehicle without a prior contract.

The Chief Magistrate's Decision

26. Having referred to the various authorities, the Chief Magistrate noted at [34] that, on her findings, the respondent's car did not have a distinctive appearance. A member of the public seeing it might have guessed it was minicab because it was dark-coloured with darkened windows, but it had no outward signs such as telephone numbers. The TfL roundels were not so prominent that the vehicle was crying out "I am for hire" like the car in *Rose v Welbeck*. At [35] she said that the respondent was not parked near a hackney carriage stand and she accepted that, if he had been approached by passengers from the street, he would not have contacted Uber to make the booking for them.

27. She accepted at [40] that the respondent decided when and where to work. She noted that Uber describes the drivers as principals and Uber as their agent, but she did not find those agency concepts helpful in determining whether he was plying for hire in the context of the Uber App. She did not think it appropriate to consider when the contract to provide a service was made. At [41] she said that the fact that the car had no distinctive markings, was not at a stand and was not available to pick up passengers in the street, combined with the fact that the whole transaction was conducted via an App where the booking starts and is recorded and the fare estimated led her to conclude that the respondent was not plying for hire. At [43] she said that the App followed on from the job-master, then the telephone booking system and is the most up-to-date way of booking a minicab. She found the respondent not guilty on both charges.

The parties' submissions

28. The core submission advanced by Mr Holland on behalf of the appellant was that the exhibition of the vehicle's location on the Uber App was the equivalent to displaying a "for hire" sign on the vehicle. The suggestion that the map was merely showing the outline of the vehicle downplayed the significance of the App. The depiction of the vehicle indicated that there was a vehicle available for immediate hire which constituted an invitation to members of the public who had downloaded the App to use the vehicle immediately. This was plying for hire and the App simply used the internet to facilitate that plying for hire.

29. He submitted that traditional private car hire where bookings were made over the telephone was the equivalent of the job-master in the nineteenth century, with the

invitation to use a minicab coming from the proprietor of the firm acting as a principal, accepting a pre-booking and contracting as principal at that point. By contrast, Uber was a laisser-faire system where the drivers were autonomous. The App was a trading platform to match drivers with customers.

30. The depiction of the vehicle on the App was exhibition of the vehicle in the same way as in cases such as *Rose v Welbeck*. It was merely an extension of the same concept by use of modern technology. In fact, exhibition of the vehicle on the App was far more effective and powerful in terms of soliciting potential customers than having the vehicle on physical view. Accordingly, there had been no prior contract made before the exhibition of the vehicle and solicitation of the potential customers and what had occurred was an unlawful plying for hire. If exhibition of the vehicle amounted to plying for hire, it made no difference that there was then a booking through the Uber App. That was the modern equivalent to taking a ticket from the office before getting in the cab which Lord Parker CJ said made no difference in *Cogley v Sherwood* in the passage cited at [17] above.

31. Mr Kolvin QC submitted on behalf of the respondent that the depiction of the vehicle on the App was for the benefit of the private hire customer who used the App, to show a potentially available vehicle, and was not plying for hire. The App did no more than show the location of various vehicles in the vicinity of the customer, who could only make a booking through the Uber App without being able to select a particular vehicle. The fact that an unidentified depiction of the respondent's vehicle appeared on the App was not express or implied solicitation of custom so as to amount to plying for hire. This was simply the use of modern technology to do what had been happening lawfully over the telephone for decades, when a customer rang a PHV business to ask for a car in, say, five minutes and the staff at the PHV operator informed the customer that there were a number of cars within five minutes of his pick-up point and one would be despatched.

32. Mr Kolvin QC submitted that neither the legislation nor the case law required the driver to vanish between jobs in order to avoid plying for hire, so the result in this case should not turn on where the respondent was. Nevertheless, he submitted that the respondent whilst parked in Reading waiting for a booking over the App was not soliciting custom or plying for hire. The Chief Magistrate had been quite right to contrast the waiting by this vehicle with that of the car in *Rose v Welbeck*. Here the waiting was of a completely different character. It was not waiting for a customer from the street to get into the car, but waiting for the purpose of a private hire booking which would come exclusively via the Uber App.

Discussion

33. In my judgment, there was no unlawful plying for hire in this case for a number of reasons. First, the mere depiction of the respondent's vehicle on the Uber App, without either the vehicle or the driver being specifically identified or the customer using the App being able to select that vehicle, is insufficient to establish exhibition of the vehicle in the sense in which that phrase is used by Lord Parker CJ in formulating the two stage test for plying for hire in *Cogley v Sherwood* and *Rose v Welbeck*. That requires not just exhibition of the vehicle but its exhibition expressly or implicitly soliciting custom, inviting members of the public to hire the vehicle.

34. It seems to me that depiction of the vehicle on the App does not involve any exhibition of that kind, but is for the assistance of the Uber customer using the App, who can see that there are vehicles in the vicinity of the type he or she wishes to hire. I agree with Mr Kolvin QC that the App is simply the use of modern technology to effect a similar transaction to those which have been carried out by PHV operators over the telephone for many years. If I ring a minicab firm and ask for a car to come to my house within five minutes and the operator says "I've got five cars round the corner from you. One of them will be with you in five minutes," there is nothing in that transaction which amounts to plying for hire. As a matter of principle, I do not consider that the position should be different because the use of internet technology avoids the need for the phone call.

35. Second, it does not seem to me that the position is different because, as between Uber and the driver, the latter is a principal and Uber is an agent. Whether this agency analysis is correct has not been finally decided. However, like the Chief Magistrate and contrary to Mr Holland's submissions, I do not consider that it has any bearing on the issue in this case. On the findings she made as to how the Uber App works, the customer has to confirm the booking after he or she is given the fare estimate and the driver in turn has to accept the booking before either of them knows the identity of the other and before the car actually comes to the pick-up point.

36. The parties did not make submissions as to whether there was a contract between the passenger and the driver and, if so, precisely when the contract is made, whether it is when the driver accepts the booking or when the driver comes to the pick-up point. The majority of the Court of Appeal in the recent case of *Uber BV v Aslam* [2018] EWCA Civ 2748 would have inclined to the view that if there was a contract between the passenger and the driver, it did not take effect until the driver learnt of the destination at the pick-up point, but they were content not to decide the point; see [76] to [79] of the judgment of Sir Terence Etherton MR and Bean LJ. They considered that there was a contract between the passenger and Uber at the moment of the acceptance of the passenger's request: see [80]-[81] of the judgment. Since that case had not been referred to at the hearing before us, we invited submissions on it from counsel after the conclusion of the hearing. Mr Holland took the opportunity to restate his oral submissions and make reference to some further authorities, but his essential point remained the same point about exhibition which I have rejected. Ultimately it seems to be common ground that the reasoning in that case is of no assistance in the present case. I agree.

37. Whatever the correct contractual analysis, in my judgment it has no impact on the question we have to decide. On any view, there is a pre-booking by the customer, which is recorded by Uber as PHV operator, before the specific vehicle which will perform the job is identified. This is all in accordance with the transaction being PHV business, not unlawful plying for hire. There was no soliciting by the respondent without some prior booking, as he only proceeded to the pick-up point after the customer had confirmed the booking and the respondent as driver had accepted the job. Whenever any contract was concluded, I have little doubt that this was not plying for hire, because on the facts found in this case, the customer could not use the respondent's car without making a prior booking through the App. As with the charabanc in *Sales v Lake*, the customer would make a booking to be picked up at a

pre-arranged point. On the evidence in this case, all the Uber App did was to facilitate that booking.

38. This leads on to the third reason why this was not plying for hire, which is the character of the waiting. The respondent was waiting in his vehicle until a customer confirmed a booking on the Uber App and he accepted that booking. There was no question of his soliciting custom during the period of waiting. His vehicle did not advertise itself as available for hire nor did he do anything which would have suggested to the public that he was available for hire. Indeed, as the Chief Magistrate found, if a member of the public had approached the vehicle and sought a ride, the respondent would have refused to take such a passenger off the street without a prior booking through the Uber App.

39. The waiting here was of a completely different character to that in *Rose v Welbeck*. Unlike in that case, the respondent was not waiting to solicit custom from passing members of the public, but he was waiting for a private hire booking via the Uber App. Putting the example given by Lord Parker CJ in *Cogley v Sherwood* of what would not be plying for hire into the context of the Uber App, if approached in the street, the respondent would have been saying: 'You cannot have my vehicle, but if you register for the Uber App and make a booking on it, you will be able to get a vehicle, not necessarily mine.'

Conclusion

40. In all the circumstances, the appeal must be dismissed.

41. I would answer the questions posed by the case stated as follows:

(1) No, because the identity of the vehicle could not be seen from the App and the specific vehicle could not be booked;

(2) No, because on the facts found the App merely informed Uber customers who wished to book a private hire vehicle that there were such vehicles in the vicinity;

(3) (a) and (b) No, in any event;

(4) No.

Mr Justice Holgate

42. I agree.