IN THE READING MAGISTRATES' COURT

BEFORE THE SENIOR DISTRICT JUDGE (CHIEF MAGISTRATE) EMMA ARBUTHNOT

BETWEEN

READING BOROUGH COUNCIL

Prosecution

And

MUDASSAR ALI

Defendant

DECISION – 10th JULY 2018

Introduction

1. On 6th July 2018 I heard the trial of Mudassar Ali who was charged with two offences. The first that in the early hours of 21st January 2017, in Reading, he was plying for hire with a Ford Galaxy, registration number LR12 ORZ on Kings Road, Reading for which vehicle a licence to ply for hire from Reading Borough Council had not previously been obtained. This was contrary to section 45 of the Town Police Clauses Act 1847. The second offence is in identical terms as the first but concerns the early hours of 22nd January 2017.

2. Mr Ali was an Uber driver, licensed by Transport for London. On the nights in question he was in Reading, Berkshire waiting for a passenger. The issue in the case is whether the Uber "model" using an App should lead me to conclude that I am sure that Mr Ali was plying for hire on the two dates above. Only licensed hackney carriages are allowed to do this. The essential difference between the two is that whilst you can hail a taxi (or hackney carriage), a private hire vehicle ("PHV") has to be booked via a licensed operator.

3. The problem is that the legislation and the authorities to which I have been taken have not kept pace with technological advances.

4. Counsel representing Reading Borough Council, Mr Charles Holland and Philip Kolvin QC for Mr Ali provided the court with two bundles, one of the arguments, agreed statements and exhibits and another containing the authorities. I was grateful to counsel for their assistance in the case.

Evidence

5. The court heard evidence from the two Reading Borough Council Licensing Enforcement Officers, Mr Chawama and Mr Wone and other evidence was read. There was no submission of no case. Mr Ali elected not to give evidence in the case. I then heard submissions. Both parties agree that this is a 'test' case.

Undisputed facts

6. The undisputed facts are the following:

- On the dates in question, Mr Mudassar Ali was a private hire vehicle ("PHV") driver licensed by Transport for London ("TfL").

- The defendant was working through a smartphone app ("the App") provided by Uber.

- Uber was an operator licensed by TfL.

- Uber had been refused a license by Reading Borough Council ("Reading").

- On 21st January 2017, at about 1.40am, about 60 Uber vehicles were showing on the Uber App map of Reading.

- On 21st January 2017, the defendant was stationary on Kings Road, Reading, in the early hours of the morning in a Ford Galaxy registration number LR12 0RZ.

- Two Licensing Enforcement Officers Mr Chawama and Mr Wone who were registered as Uber passengers, saw the car on their App, approached the car, introduced themselves and interviewed the defendant.

- The defendant said that he was waiting for a booking through the Uber app.

- A similar series of events happened just after midnight on 22nd January 2017 when the same Licensing Enforcement Officers approached Mr Ali again.

Submissions

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7. Reading argues that the factual findings made by the court will lead it to conclude that Mr Ali was plying for hire in a vehicle which was not a Reading licensed hackney carriage. Mr Holland contends that there was a market in Reading for Uber drivers and vehicles which would not exist if they were not there. The market was created by the exhibition on the Rider App of icons showing the location and availability of the Uber vehicles. Reading says that Mr Ali was in possession and control of the Ford Galaxy which was not a hackney carriage. Mr Ali chose to travel to and wait in Kings Road, Reading at a time when, and in a place where, members of the public were likely to wish to be immediately conveyed in a vehicle.

8. At the relevant times on 21st and 22nd January 2017, Mr Ali was logged on and shown as available on the Partner-Rider App. His location and availability were displayed to users of the Rider App by an icon on a map. That display, Mr Holland contends, constituted a solicitation. Reading pointed out that Uber describes itself as an agent of the drivers who are principals. The principals (the drivers) therefore are authorizing the soliciting of passengers via the Rider App.

9. Mr Ali hoped to receive requests for services from members of the public in possession of the Rider App for whom he was the best placed driver. He chose the location as it would be more likely that he would be hired and knew the presence of his vehicle would be advertised to potential passengers on the Rider App.

10. Mr Ali received the trip request via the Partner-Driver App which would show the passenger's name and pick up location. He could accept or refuse the request. If he accepted it the passenger would be told his name and the registration number and model of car. On having met the passenger, he would be told the destination and would drive to it. In short, Mr Ali was plying for hire.

MR ALI - UBER

11. Mr Kolvin responded by pointing out that if Reading's analysis was correct any booking using an App would be plying for hire. He contended that the essence of the private hire contract was that the member of the public books the vehicle first and then meets the vehicle before the journey proceeds. That is not plying for hire. He pointed out the technological advances from a time when a job-master was used to book a carriage through telephone booking and in recent times App based booking services. All of which were and are lawful. He said that the Licensed Taxi Drivers Association had brought a private prosecution in London on the same basis as argued by Reading Borough Council and the Crown Prosecution Service had taken over and discontinued the prosecution.

12. Mr Kolvin argued that the facts do not amount to plying for hire as there is a prior booking or pre-booking in this case. Mr Ali was waiting for the next private hire booking through the Uber App. His services could only be booked by a member of the public who had downloaded the Uber Rider App and then entered into a private hire booking through the App. The case should be dismissed.

Findings from the evidence

13. From the evidence I found the following:

- Mr Ali's car had no markings indicating it was for hire although it had two small TfL roundels one in the back window and one in the front windscreen which were highly visible. Specifically, the car did not advertise a number to contact to hire the car (see tab 33, page 161 of the bundle for a photograph of the car).

- Mr Ali's car was parked lawfully on both occasions.

- Mr Ali's car was not waiting in a taxi stand nor was he next to a bus stop or stand.

- Mr Ali was not available to a person hailing him on the street.

- Mr Ali did not hoot or flash his lights towards any persons nearby.

- Mr Ali's windows were closed.

- Mr Ali's vehicle was one of a number shown on the Rider App.

- Mr Ali's vehicle was visible to any Uber customer on the App.
- Mr Ali's vehicle was depicted as the outline of a car on the App (see tab 18 page 103).
- This vehicle outline advertises the presence of an Uber driver.
- The App does not show any features which might identify a particular driver or a particular car.
- The only way Mr Ali was going to pick up a passenger was via the Uber app.

The way the App works

14. I find the App works in the following ways (see tab 31 page 153):

- The App is provided by Uber (I am not distinguishing between various Uber companies).
- An Uber customer who has downloaded the App communicates over the Internet with Uber's servers to request the provision of a vehicle with a driver. When opening the App the customer can see a list of available vehicle types in their area. The rider enters a destination, gets a fare estimate from Uber and requests a booking.
- The nearest driver is informed via the driver version of the App of the request and that driver has ten seconds to accept the request. At that point the driver is not told the destination.
- If the driver accepts the ride, Uber (the licensed PHV operator) then confirms and records the booking and allocates the trip to the driver.
- Uber then provides to the driver and passenger (or "rider" as passengers are called) the details of the other.
- The driver then goes to the pickup location to meet the rider and the journey proceeds.
- The rider cannot choose a specific driver or the specific car.

Law

15. Section 45 of the Town Police Clauses Act 1847 (tab 28 page 184 of the authorities bundle) says:

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, …every such person so offending shall for every such offence be liable to a penalty not exceeding…"

16. The definition of plying for hire has been considered extensively as the courts have, in the face of new technology, tried to interpret an Act which dealt with horse-drawn

carriages. The courts have avoided defining the term but instead have considered what might or might not constitute plying for hire.

17. I consider some of the relevant authorities below.

18. *Case v Storey* (1868-69) LR 4 Ex 319, lays down the duties of a licensed hackney carriage driver, he is obliged "*to take any person who desires to engage him*" (tab 1 page 6 of the authorities' bundle).

19. *Clarke v Stanford* (1871) LR 6 QB 357, considered unlawful plying for hire in relation to an unlicensed carriage at Harrow railway station on private land. The Chief Justice held that where "*a person has a carriage ready for the conveyance of passengers, in a place frequented by the public, he is plying for hire, although the place is private property*" (tab 2 page 11). Mr Justice Mellor held that even if the driver made no sign, he was there to be hired by arriving passengers and there is no restriction on those who arrive who can hire the carriage. It was plying for hire in the circumstances.

20. In *Cavill v Amos* (1900) 64 JP 309, Mr Cavill had a licensed carriage which could carry five but his customers wanted a carriage for nine. He went and fetched it, carrying five of the customers, providing an unlicensed wagonette, Mr Cavill took his badge off and carried the nine in the wagonette. This was held not to be a case of the appellant touting for customers. He did not solicit person to go in his unlicensed wagonette, and there was no plying for hire.

21. *Sales v Lake* [1922] 1 KB 553, is the first case where plying for hire is clearly considered. A charabanc which had hackney carriage plates but was not licensed to ply for hire was used for excursions to Brighton. Tickets were sold and the charabanc then proceeded to pick up the already ticketed passengers in public places. The Chief Justice found this was not plying for hire. At tab 4 page 19, the Chief Justice explained "*a carriage cannot accurately be said to ply for hire unless two conditions are satisfied. (1) There must be 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… the proper phrase would be that a man is soliciting or waiting for persons to make a contract with him which he proposes to fulfil by providing the necessary carriage*". Mr Justice Avory said (page 24), (1) "plying for hire" was very different from a customer going to a job-master to hire a carriage. In an earlier case counsel Mr Meadows White was right when he said (2) "plying for hire" means soliciting custom without any previous contract.

22. The then Chief Justice in *Armstrong v Ogle* [1926] 2 KB 438 approved the sentence of Mr Justice Montague Smith in *Allen v Tunbridge* LR 6 CP481 referring to an earlier case: "*It appears to have been held there, that, if the proprietor of a carriage sends it to a place for the purpose of picking up passengers, that is a plying for hire within the Act. That is very different from a customer going to a job-master to hire a carriage*". The contrast was said to be between a particular and definite private hiring as opposed to the public picking up of passengers. He goes on to explain that the contract would

have to be a particular and precise contract to carry a particular person for a particular journey by means of a particular vehicle.

23. *Cogley v Sherwood* [1959] 2 QB 311, is authority for the proposition that "plies for hire" connotes some exhibition of the vehicle to the public as being available for hire. The Chief Justice Lord Parker having reviewed the authorities explained that he had been unable to extract a comprehensive definition of "plying for hire". He held it was inadvisable to attempt to lay down an exhaustive definition. He says that "*it seems to me that the Act is prima facie dealing with a particular carriage whose owner or driver invites the public to be conveyed in it*.".

24. The Chief Justice endorsed too Montague Smith J's distinction between a proprietor of a carriage sending it to a place for the purpose of picking up passengers and a customer going to a job-master to hire a carriage. The former is plying for hire. He set out at page 51, that it was of the essence of plying for hire, that the vehicle 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*.".

25. Mr Kolvin for Mr Ali contends that the case of *Rose v Welbeck Motors Ltd* [1962] 1 WLR 1010, is the high watermark of Reading's case. As the Chief Justice Lord Parker says, whether a prima facie case is made out depends on the exact circumstances and "*I certainly do not intend anything I say in this judgment to apply to any facts other than those here*".

26. The facts in *Rose v Welbeck* were that the vehicle in question was of distinctive appearance, with an inscription showing the name and telephone number of the minicab company. It was waiting near a place where buses turned around and there would be members of the public. The owners of the vehicle argued that the inscription and its appearance did not convey an invitation "I am for hire", it was merely advertising the owners of the vehicle. The Chief Justice disagreed and held that the inscriptions and appearance of the vehicle coupled with the place it was on view and its conduct (returning to the same place when moved on), was saying could he recommend them to Welbeck Motors Ltd where you can hire minicabs and he was one of the minicabs for hire. He found that the vehicle was exhibiting itself as a vehicle for hire.

27. *Milton Keynes Borough Council v Barry* is an unreported case referred to in *Button on Taxis: Licensing Law and Practice*. In *Barry*, the vehicle had the name of the company, Quick Cars displayed on the door. The driver had stopped near a Hackney carriage stand and remained there once his passengers had disembarked. He told his controller that he was clear and was waiting for further instructions from the employer. He was approached by some members of the public and he contacted the controller who gave him the go-ahead to take them on board. The High Court found that there was a strong prima facie case that he was plying for hire based on the visibility of the sign saying "Quick Cars" and the place he was parked. "*It cannot be without his contemplation that he would be approached*" bearing in mind the hallmarks on his cab and the position he was in (per Watkins LJ). "*There was a strong presumption that he was intending to exhibit his vehicle to potential hirers as a vehicle which might there and then be hired*" (per McCullough J).

28. The next relevant case is *Chorley Borough Council v Thomas* [2001] EWHC Admin 570. The District Judge found there had been no plying for hire on the following facts. The passenger had asked whether the driver was free and then had entered the vehicle. The driver then asked where he was going and before he set off the driver contacted the controller to book the journey. The district judge upheld a submission of no case but the appeal by way of case stated succeeded.

29. Collins J in *Brentwood Borough Council v Gladen* [2005] RTR 152 (tab 16 page 120) defines a hackney carriage at p126. It is a vehicle that can be flagged down, it plies for hire or can be found at a stand or outside an office where anyone can go.

30. Mr Kolvin also relied on definitions in paragraph 2.11 to 2.12 of *Paterson's Licensing Acts 2018*. The commentary sets out the difference between taxis and PHVs. Licensed taxis may 'ply for hire' and be hailed whilst PHVs have to be pre-booked via an operator. Paterson's explains that the line is blurred by the pre-booking of taxis and the PHVs being booked immediately before hire.

31. Paragraph 2.12 of Paterson's sets out "in general terms", what behaviour amounts to plying for hire: (a) inviting and attracting customers for immediate hire while driving around; (b) stopping on a taxi rank to pick up customers; (c) stopping on a street in order to attract customers; (d) picking up customers who approach the vehicle in the street. Paterson's goes on to suggest that it is a question of fact whether or not a vehicle is being used to ply for hire.

32. Finally, I was referred by Mr Kolvin to the Law Commission's Report of May 2014 on Taxi and Private Hire Services.

Conclusions

33. The burden of proving the case is on Reading Borough Council and the standard of proof is a high one. I have to be sure of the defendant's guilt on each charge before I can convict him of plying for hire. These are separate offences and I consider them separately. I have given myself a good character direction which means in this case that he is less likely to have committed these offences.

34. I have set out above the findings I have made. Mr Ali's vehicle did not have a distinctive appearance. A member of the public seeing the vehicle on Kings Road at that time of night (in the early hours of 21st or 22nd January 2017) may have guessed that it was a mini-cab because it was a dark coloured car with darkened windows but there were no outward signs, for example, no company telephone numbers were displayed. The TfL roundels were not of such prominence that it could be said that there was something on the vehicle which cried out "I am for hire" in the way described in the *Rose v Welbeck* case, which I find, in any event, turned on its own facts.

35. Mr Ali was not near a hackney carriage stand and if he had been approached by passengers from the street, I accept he would not have contacted Uber to make the booking for them. The facts concerning Mr Ali are very different to those set out in *Milton Keynes Borough Council v Barry*.

36. Mr Ali would never have accepted to take a passenger before contact had been made via the Uber App. The facts here are far from the facts of *Chorley Borough Council v Thomas*. Mr Ali would never have allowed a passenger to get into the vehicle from the street before a booking via Uber had been made.

37. Mr Ali's vehicle could not be hailed nor did it wait at a stand. He did not drive around looking for passengers nor did he wait on the street, flashing his lights or hooting at members of the public.

38. Mr Ali's passengers or riders come via the Uber App. Mr Ali was in central Reading waiting to be contacted by Uber. An Uber customer goes onto the Uber App which shows a number of TfL licensed Uber vehicles, the drivers of which are logged on nearby. Mr Ali is not identified nor is his car but it is shown in outline on a map. It is not the driver but Uber which gives a fare estimate depending on the vehicle type chosen by the passenger.

39. Uber's server tells the nearest driver about the request, he or she has 10 seconds in which to accept or reject the trip. If the driver accepts then Uber confirm the booking, records it (see tab 31 page 157) and the trip is allocated to him or her. The details of the passenger are then provided to the driver and the driver goes to the pick-up location to meet the rider. The rider cannot choose a specific driver or vehicle.

40. I accept that Mr Ali decides when and where to work. I accept that Uber describes him as the principal whilst they are said to be his agent. I don't find the concept of principal and agent helpful in determining whether Mr Ali was plying for hire in the context of the Uber App. I have not thought it appropriate to consider where and when the contract to provide a service is made.

41. The fact that Mr Ali's vehicle had no distinctive markings, was not at a stand and was not available to pick up passengers on the street combined with the fact that the whole transaction was conducted via an App where the booking process starts, is recorded and the fare estimated, leads me to find that Mr Ali was not plying for hire.

42. I am conscious that this decision prevents Reading from determining how many mini cab drivers are for hire at any time but this is a consequence of the legislation and of my view of the authorities relied on by the parties.

43. I find the App follows from the job-master, then the telephone booking system and is the most up-to-date way of booking a mini-cab. I have no doubt that the technology will move forward and be susceptible to challenge in the future. So far as the App based booking system in this case I do not find that I can be sure that Mr Ali was plying for hire in those circumstances.

44. On these facts I dismiss both charges.

Senior District Judge (Chief Magistrate) Emma Arbuthnot
10th July 2018