ONTARIO COURT OF JUSTICE

CITATION: *R. v.* [redacted], 2018 ONCJ 263
DATE: 2018 03 01
COURT FILE No.: Toronto
998-16-15009166-00

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

[redacted]

Before Justice H. Pringle
Heard on January 29th, 2018
Reasons for Judgment released on March 1st, 2018

Marina Elias .....counsel for the Crown
Andrew Stastny ..... counsel for the accused/applicant [redacted]

Pringle J.:

[1] The applicant acknowledged his guilt upon an agreed statement of fact. It established he committed the criminal offences of trafficking cocaine and possession of proceeds of crime. Guilt having been established, the applicant requests the charges be stayed on the basis of entrapment. The respondent resists this application.

[2] The preparation and co-operation of Crown and defence led to an organized presentation of evidence and argument, for which I am grateful. Indeed, the quality of written and oral argument was, simply put, exceptional on the part of both Crown and defence.

[3] The facts in this case are not controversial. The agreed statement of fact established an overview of the two criminal offences committed by the applicant. The relevant events began and ended on November 23, 2016. D/C Joshua Berry, a Toronto Police Service officer, was acting in an undercover capacity that day. He contacted the applicant by telephone and engaged in a drug-related conversation. During this conversation, the accused agreed to supply D/C Berry with a quantity of powder cocaine for $120 and directed him to a Walmart on Islington Avenue.

[4] At 7:05 p.m. the same day, D/C Berry met the applicant at the Walmart. Inside the undercover officer's car, the applicant supplied D/C Berry with 1.2 grams of cocaine in exchange for $100. The applicant was arrested, and the phone used to facilitate the drug transaction was found on him. He was also in possession of 2.83 grams of powder cocaine and $100 police buy money. On this factual basis, the parties agreed, the applicant should be found guilty of trafficking cocaine and possession of proceeds of crime under $5000.

[5] D/C Berry's testimony expanded on the contents of his phone call with the applicant. Back in November 2016, he was completing a 10-week secondment with the Toronto Drug Squad. He was not a T.D.S. officer and his training, for this secondment, appears to have been minimal and obtained on the job.

[6] On the date in question, D/C Berry was tasked with calling a certain phone number and engaging in drug-related conversation. He believed this phone number came from a confidential source handled by D/C Lee, who was a Toronto Drug Squad officer. D/C Berry had never made this type of investigative drug call before. He was not, to his recall, given any training or guidance on how to approach a call like this. None of his training officers discussed the concept of entrapment with him.

[7] In preparation for the call, D/C Lee advised D/C Berry that a male known as "Tiny" was dealing crack cocaine in the Lakeshore and Ninth area in Toronto. Tiny used the phone number [*vetted*]. D/C Lee advised D/C Berry that he could use a "drop name" of Donnie from Lakeshore, who was in his 40s, Portuguese and drives a truck. A "drop name" is a name literally dropped into the conversation to put the target at ease.

[8] D/C Berry knew nothing about the confidential informant who provided the information. He did not know if the CI was a reliable or unreliable CI. He did not know if the CI had been used in the past. He did no database searches to see if this phone number linked to any information in the TPS system. He had no knowledge if any other TDS officer attempted to corroborate the tip by doing such searches.

[9] His assignment was simply to call the number given to him and pretend to be a drug buyer. He did that. His call went to voice mail. He called again. A male picked up the phone. This conversation ensued:

Male: Hello?

Officer: You around?

Male: Who is this?

Officer: It's Mike I'm looking to pick up a half B.

Male: Mike? Who the fuck is Mike? How'd you get my number?

Officer: I got your number from Donnie.

Male: Donnie?

Officer: Yeah. Donnie from the Lakeshore. He drives me around.

Male: Who the fuck is Donnie?

Officer: Old Portuguese guy drives a truck says you deal near Ninth.

Male: I don't know a Donnie but what's up?

Officer: Can you hook me up with a half B?

Male: I don't have hard right now but I have soft.

Officer: That's fine.

Male: Come to Dixon and Islington. Call me when you are close. I will text you the address.

Officer: Okay.

[10] D/C Berry, after brief text exchanges with the male about where to meet, then attended a team briefing. There he was told the target was male, black, early 20s, with a stocky build, 5'10", black hair, and unshaven. His name was unknown.

[11] The undercover officer subsequently met with the applicant at the Walmart. A male matching the physical description entered D/C Berry's car, and sold him 1.2 grams of powder cocaine for $100. The applicant was then arrested by other officers on scene.

[12] The applicant says D/C Berry presented him with the opportunity to commit a crime at the outset of the phone call, when he said, "It's Mike. I'm looking to pick up a half B". It is the applicant's position that when D/C Berry said "I'm looking to pick up a half B", he did not have a reasonable suspicion the applicant was dealing drugs and he was not engaged in a *bona fide* inquiry. The applicant was thus entrapped into committing these offences.

[13] The respondent argues that when D/C Berry said, "I'm looking to pick up a half B", he was not presenting an offer to commit crime. He only presented the opportunity to commit a crime at the end of the call, when he said "Can you hook me up with a half B?" The conversation that took place beforehand was nothing more than legitimate investigation into a tip about the cell phone number. By the time D/C Berry said, "Can you hook me up with a half B", he had a reasonable suspicion the person he was speaking with was engaged in drug trafficking. D/C Berry also had a basis to offer the opportunity to commit crime at the end of the call, because he was engaged in a *bona fide* inquiry into the cell phone number.

Overarching Principles of Entrapment

[14] The general principles that apply when considering the defence of entrapment are not in dispute. The onus rests on the defence to establish entrapment on a balance of probabilities. The overarching test to be applied is succinctly set out in *R. v. Barnes* [1991] 1 S.C.R. 449 at para. 15:

> The defence is available when:
>
> (a) The authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity, or pursuant to a *bona fide* inquiry;
>
> (b) Although having a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence.

[15] This test, appearing simple at first blush, is the subject of conflicting approaches. For my part, I perceive the entrapment analysis as answering the following questions:

1. Did the police provide a person with the opportunity to commit a crime?
    - If yes, go on to consider question #2.
    - If no, entrapment has not occurred.

2. At the time police provided the opportunity to commit crime, did police have:

    (a) A reasonable suspicion this *person* was already engaged in that same crime?
    - If yes, consider question #3.
    - If no, consider (b) *bona fide* inquiry.

    (b) A reasonable suspicion that this type of criminal activity was occurring at a defined, particularized *place* through a *bona fide* inquiry?
    - If yes, consider question #3.
    - If no, that person was entrapped.

3. If police had a reasonable suspicion about the person OR were acting in the course of a *bona fide* investigation, the person was not entrapped unless inducement applies. Consider if question #4 is applicable.

4. Did police, acting either on a reasonable suspicion or in the course of a *bona fide* inquiry, go beyond providing opportunity to commit crime and actually induce the commission of crime?
    - If yes, that person was entrapped.
    - If no, that person was not entrapped.

[16] Realistically, entrapment applications will be based on *either* inducement *or* absence of reasonable suspicion as to person or place. In the case at bar, the parties agree that inducement need not be considered.

[17] I am advised, as an overarching principle governing me, that my application of the doctrine of entrapment "must be rooted in its mischief". This mischief, the respondent submits, is described in the British Columbia Court of Appeal decision of *R. v. Le,* 2016 BCCA 155, at paras. 94 and 95:

> In *Mack*, the Court stated the mischief of random virtue-testing is "'the serious unnecessary risk of attracting innocent and otherwise law-abiding individuals into the commission of a criminal offence'" (at 957). "'Ultimately,…there are inherent limits on the power of the state to *manipulate* people and events for the purpose of …. obtaining convictions'". (emphasis added) (at 941).
>
> Objectively speaking, innocent and otherwise law-abiding individuals would not be "'manipulated'" or tempted to enter the dangerous and illicit drug trade if asked by a stranger over the phone to sell him drugs. It defies common sense to suggest that asking whether an individual is willing to sell specific types, quantities, or values of illicit drugs runs the "'serious unnecessary risk'" that an otherwise innocent person would then go out, procure the drugs, meet with and sell them to a stranger.

[18] As I understand this rationale, *R. v. Mack*, [1988] 2 S.C.R. 903, says the entrapment doctrine was meant to address the danger of ensnaring innocent people into committing crime when the opportunity was presented to them. Because of this, the improbability of ensnaring an innocent on these facts must govern my entrapment analysis.

[19] However, I do not read *Mack* to say that ensnaring the innocent is the sole rationale for the underlying the doctrine of entrapment. At para. 28, Lamer J. referenced Estey J.'s earlier decision in *Amato v. R.,* [1982] 2 S.C.R. 418:

> Later in the opinion, Estey J. stated at p. 447 that the root of the defence (of entrapment) was the same as that for the exclusion of involuntary confessions: "The integrity of the criminal justice system demands the rule."

Later, at para. 138 of *Mack*, Lamer J. held that:

> The absence of a reasonable suspicion or a *bona fide* inquiry is significant in assessing the police conduct because of the risk that the police will attract people who would not otherwise have any involvement in a crime *and because it is not a proper use of the police power to simply go out and test the virtue of people on a random basis.*
>
> [emphasis added]

[20] Respectfully, I think it dangerous to place too much emphasis on whether the target's mind is innocent and his history blameless. For example, in *Mack*, the appellant was a reformed drug dealer. While I appreciate that he was induced, the fact remained that because of his prior life experience, he understood drug trafficking transactions and retained drug contacts that could secure him $27 000 worth of cocaine.

[21] A reformed drug dealer could get a call from police asking for drugs, based entirely on a stale tip, and fall off the rehabilitative wagon because he struggles to pay rent that month. The little brother of a drug dealer could pick up his phone, understand the street language, and decide that what he hears is an easy way to make $100. This kid can intend to sell the caller baking soda, even, but once he says "yes" on the phone, he has committed a criminal offence.

[22] I read *Mack* as directing trial judges to focus on whether police had reasonable suspicions to target the person or place. The "money-filled wallet planted in a random park" example in *Mack* was an example of random virtue testing and *why* the focus should be on whether police had reasonable suspicion. At paragraph 118, Lamer J. stated:

> In my opinion, whether or not we are willing to say the average person would steal the money, this policeman has acted without any grounds, and his conduct carries the unnecessary risk that otherwise law-abiding people will commit a criminal offence.

[23] The emphasis, in my opinion, is not on what the "innocent" person would do, but what information police relied upon when they provided someone with the opportunity to commit a crime. This passage in *Mack* makes clear that when police do this without a proper basis, meaning without reasonable suspicion, this will *always* carry the risk of ensnaring the innocent.

When did D/C Berry provide the applicant with the opportunity to commit a crime?

[24] The compelling societal interest in detecting crime provides police with "considerable latitude" in their investigative techniques. To this end, police officers are permitted to initiate the commission of criminal offences in order to detect people engaged in crime. But "[t]here is a crucial distinction, one which is not easy to draw, however, between the police or their agents – acting on reasonable suspicion or in the course of a *bona fide* inquiry – providing an opportunity to a person to commit a crime, and the state actually creating a crime for the purpose of prosecution" (emphasis in original): see *Mack, supra,* at para. 19. The former is acceptable, while the latter is not.

[25] As our Court of Appeal in *R. v. Imoro,* 2010 ONCA 122, clarified at para. 13, this meant that when inducement is not at issue, entrapment requires two findings:

(i) whether police provided an opportunity to commit an offence, and;

(ii) a finding that they did so without reasonable suspicion.

[26] Courts since have divided on what it means to “provide an opportunity” to commit crime in the context of “dial-a-dope” cases. Some courts have found certain phrases, used by an undercover officer during a drug call, are investigative inquiries as opposed to providing the opportunity to sell drugs. For example, in *Imoro,* our Court of Appeal found the phrase “Can you hook me up?” was querying whether the person was a drug dealer. It was not, the Court found, a request to buy drugs.

[27] The British Columbia Court of Appeal, by contrast, has decried the notion of “parsing the words” spoken by police officers during these “dial-a-dope” calls. In the case at bar, the Crown argued that I should adopt this approach, and in particular the reasoning found in *R. v. Le,* at para. 93:

> Defence counsel argued that there is a meaningful distinction between veiled statements asking if the other party is a drug dealer and more specific requests for types, quantities, or values of drugs. It was argued that the former statement is an investigatory step while the latter is an offer to commit an offence. Parsing the language of undercover drug calls in dial-a-dope investigations in this way takes an unnecessarily narrow approach. It ignores the surrounding circumstances, but more importantly, it strays far from the core principle underlying *Mack*.

[28] *Le* has picked up traction in some Ontario trial courts. For example, in *R. v. Henneh,* 2017 ONSC 4835, Ducharme J. stated at para. 21 that:

> I readily concede that several decisions of this Court involve scrutinizing exactly what was said by the police officer making the call. General inquiries about whether the individual was involved in trafficking drugs have been viewed as acceptable investigative steps that might provide the police officer with a reasonable suspicion that would support making a more direct offer to purchase drugs. However, if the police officer starts the conversations with a more direct invitation to sell drugs, in some cases this has been interpreted as providing the opportunity to commit a criminal offence and entrapment has been found.

At para. 24 he observed that:

> Asking someone if he is dealing drugs is really no different from asking if he will sell you a specific kind and amount of drugs. While less precise, asking a person something that means ‘are you dealing drugs’ still involves random virtue-testing. The question clearly presents an opportunity to commit a crime even if the specifics of that crime remain to be determined.

Given the “nonsensical” distinctions being drawn by parsing the words spoken during dial-a-dope calls, Ducharme J. endorsed the approach of Bennett J.A. in *Le* as the correct one.

[29] I appreciate why Ducharme J. concluded that asking a person if they are a drug dealer is essentially the same as presenting an opportunity to commit a crime. Asking a stranger “Are you a drug dealer?” is not a conversational ice-breaker that leads into discussion about where to buy shoes. That said, I cannot reconcile the approach of *R. v. Le* with binding appellate jurisprudence in Ontario and so I decline to follow *Le*. Our Court of Appeal has instructed trial judges to parse the words spoken by an undercover officer during a dial-a-dope call, and to draw these linguistic distinctions. Accordingly, parse the words I must.

[30] I derive this conclusion from *Imoro,* where the Court held that the words “Can you hook me up?” did not provide the appellant with the opportunity to sell drugs. Indeed, the trial judge’s contrary view of the meaning of those words was legal error. When the trial judge concluded that “Can you hook me up?” had provided the appellant with the opportunity to sell drugs, he had failed, as per para. 15:

> …to properly distinguish between legitimately investigating a tip and giving an opportunity to commit a crime.

At para. 16, the Court continued:

> By the question ‘Can you hook me up?’ all the officer really asked Mr. Imoro was whether he was a drug dealer. The question was simply a step in the police’s investigation of the anonymous tip. It did not amount to giving Mr. Imoro an opportunity to traffic in drugs.

I do not know how it is possible to conclude that trial judges should not “parse the words” spoken by police, when in *Imoro* the trial judge’s failure to properly interpret the words spoken by police was an error.

[31] I am further bound, in my conclusion, by our Court of Appeal’s decision in *R. v. Ralph,* 2014 ONCA 3*.* In *Ralph,* Rosenberg J.A. found the words spoken by police, during a dial-a-dope call, did not amount to presenting the opportunity to commit a crime. He said, at para. 2, that:

> The charges against the appellant arise out of an undercover operation initiated by a tip that a person with a particular telephone number was selling drugs. The undercover officer called the number and 41 minutes later received a call back. **The exact words of the telephone conversation are important for the entrapment issue and I will set them out later when I deal with that issue.**
>
> [emphasis added]

[32] In *Ralph,* the Court analyzed the words spoken in the telephone conversation and concluded the officer was not presenting the opportunity to commit crime. He was legitimately investigating a tip about that phone number. The target’s response to this legitimate investigative step led to the officer forming a reasonable suspicion. Reasonable suspicion having been established, the officer was *then* permitted to present the opportunity to commit an offence by saying:

I need a half [meaning one half of an eight-ball of crack cocaine].

[33] There is nothing opaque about what the Court of Appeal said in *Ralph, supra.* It is a clear appellate instruction for trial judges to closely analyze the words spoken during a dial-a-dope investigation. This must be done in order to determine whether police presented the opportunity to commit crime, a key aspect of every entrapment analysis.

[34] In addition, the reason for drawing a distinction between asking someone if they are a drug dealer and asking them for a specific quantity and type of drug is justified when one considers s. 2 of the *Controlled Drugs and Substances Act*. It defines trafficking as:

> (a) to sell, administer, give, transfer, transport, send or deliver the substance
>
> (b) to sell an authorization to obtain the substance, or
>
> (c) ***to offer to do anything mentioned in paragraph (a)*** or (b).
>
> [emphasis added]

[35] Asking someone whether they are a drug dealer does not present an opportunity to commit an offence, as that term is understood in law. While the reply may be an admission of criminal liability, the words used to reply are unlikely, *in and of themselves*, to constitute a criminal offence. Asking someone to procure a specific quantity and type of illegal drug is different. The answer to that, if yes, constitutes the criminal offence of offer to traffic. So when police specifically ask someone to procure a certain quantity and type of illegal drug, they are *directly soliciting* an offer to traffic. As per Trotter J. (as he then was) in *R. v. Williams,* 2014 ONSC 2370 at para. 21:

> …properly characterizing the actions of the police for entrapment purposes requires careful attention to the details of what was said. I conclude that the words of D.C. Canepa in this case, "I need 80", uttered almost immediately out the gate, provided an opportunity for Mr. Williams to commit an offence; and which he did. By his agreement, Mr. Williams engaged in trafficking: see s. 2 of the *Controlled Drugs and Substances Act,* S.C. 1996, c. 19, s. 2(1).

[36] In my view, Trotter J. correctly stated in *Williams* at para. 27 that:

> The distinction between statements such as "I need product" / "Can you hook me up?" / "Are you around?" / "Where are you?", on the one hand, and "I need 80" / "I need 40" / "I need 6 greens" / "I need half a B", on the other, might appear quite subtle. However the latter statements, involving requests to purchase a specific quantity of drugs, are more definite and less exploratory. With the former, the possibility of a deal still needs to be explored and developed; with the latter, all the accused needs to say is "yes". That is what happened in this case. That is where the line appears to be currently drawn.

[37] Returning to the case at bar, and recalling how the conversation began between D/C Berry and the applicant, I have concluded D/C Berry offered the applicant the opportunity to traffic drugs when he said "It's Mike I'm looking to pick up half a B". This was a specific request to buy a particular type of drug – crack cocaine. This was a specific request to buy a particular quantity of a specific drug – a half ball of crack cocaine. Similar to *Williams,* D/C Berry's request to buy a specific quantity and type of drug occurred "almost immediately out of the gate". At this juncture, all the applicant said, before D/C Berry said he was looking to buy a certain quantity of crack cocaine, was "Hello?" and "Who is this"? Similar to *Williams,* all the applicant had to do was say "yes" to this request and the offence of offer to traffic cocaine was complete. I thus move to the next question.

Did police have a reasonable suspicion in relation to the applicant, before presenting him with the opportunity to commit crime?

[38] The guiding principles in this analysis are found in *Mack,* as well as in *R. v. Chehil,* 2013 SCC 49*. Mack* explicitly states, at para. 116, that reasonable suspicion of a person cannot rest on past criminal activity alone:

> …the mere fact that a person was involved in a criminal activity sometime in the past is not a sufficient ground for "'reasonable suspicion'".

This does not render past criminal activity irrelevant. It simply cannot stand alone as proof of reasonable suspicion. As Lamer J. held at para. 116 of *Mack,* reasonable suspicion must also have "a sufficient temporal connection. If the reasonable suspicions of the police arise by virtue of the individual's conduct, then this conduct must not be too remote in time."

[39] In *R. v. Chehil,* at para. 3 the Supreme Court described the reasonable suspicion standard as:

> …a robust standard determined on the totality of the circumstances, based on objectively discernible facts, and is subject to independent and rigorous judicial scrutiny. As Doherty J.A. said in *R. v. Simpson* (1993), 12 O.R. (3d) 182 (C.A.), at p. 202, the standard prevents the indiscriminate and discriminatory exercise of police power.

[40] Again, the only police witness was D/C Berry. He had no information whatsoever about the source of the tip. He did not know if the contents of the tip were reliable. He did not know if the source of the tip was reliable. He did not know if attempts had been made to prove the tip reliable, and if so what the results of those attempts were. He did not know if the tip was recent or stale. The use of the nickname "Tiny" was uncorroborated, since D/C Berry did not attempt to confirm the use of that nickname during the call.

[41] Ducharme J., in *Henneh,* was presented with similar facts and concluded that reasonable suspicion about the target was not established. There, police received a Crime Stopper's tip about a male named James dealing drugs from a certain telephone

number. Like in the case at bar, there was no information about the reliability of the tip. The undercover had, unlike the case at bar, confirmed the use of the name "James" by calling up, asking for "James", and receiving an affirmative answer. Even still, Ducharme J. concluded at para. 14:

> The man's name, gender and the accuracy of the phone number were all confirmed once Mr. Henneh gave an affirmative answer to Canepa's first question "James?" However, I accept that this information alone did not provide Det. Canepa with a reasonable suspicion that the individual who answered the phone call was trafficking in narcotics.

[42] Similar circumstances arose on the facts of *Williams.* Police had a phone number, the name of "Jay", a photograph, a date of birth, a physical description of the target, and a home address. They knew he had prior involvement with drug possession. A source advised that "Jay" was dealing cocaine near 389 Church Street and Yonge and Dundas. He or she had provided police with "Jay's" phone number.

[43] Trotter J. found that any suspicion, based on this information, that "Jay" was trafficking drugs was not a reasonable one. At para. 14, he said:

> Nothing was conveyed to D.C. Hewson, or anyone else involved in the investigation, about the reliability of the source or the information that he/she provided. For instance, no information was provided about:
>
> - The source's criminal history (if any);
> - Whether the source provided credible information to the police in the past;
> - The circumstances in which the source provided the information to P.C. Fitkin (*i.e.,* gratuitously or in exchange for some present or future benefit);
> - Whether the source's information was acquired through first-hand observations or based on information received from others, and
> - *When* the information was acquired by the source and *when* it was provided to P.C. Fitkin. [Emphasis in original]

[44] In the case at bar, D/C Berry had absolutely no knowledge about the source of the information or the reliability of the tip. While D/C Lee, who was apparently the source handler, may have, we did not hear evidence from D/C Lee and he did not pass on any knowledge he may have had to D/C Berry. Based on what D/C Berry knew – or rather, based on what the evidence established he did *not* know – I find that before he presented the opportunity to commit the crime of traffic cocaine by offer, he did not have

a reasonable suspicion that the person answering his call was trafficking illegal drugs. I move to the next question.

Was D/C Berry engaged in a bona fide inquiry when he provided the opportunity to commit crime?

[45] If police did not have a reasonable suspicion about the person prior to providing him/her with the opportunity to commit a crime, that person was entrapped unless the *bona fide* inquiry exception applies. This is defined in *Mack* as an exception to the rule that police must reasonably suspect a person of being already engaged in a crime before presenting them with the opportunity to commit that crime. The subsequent Supreme Court case of *R. v. Barnes* governs the application of this exception.

[46] In *Barnes,* the police targeted a six-block area in Vancouver where they suspected drug trafficking was occurring. At trial, there was statistical evidence supporting their suspicion. Some 22% of drug offences in Vancouver arose from that specific area. A significant portion of arrests made in that specific area were for drug offences. The evidence established that drugs were sold as people walked up and down this specific location. Accordingly, an undercover officer walked up and down this specific location, asking random people to sell her drugs. This, the Supreme Court found at paras. 21-23, was legally permissible because it fit within the *bona fide* inquiry exception and thus could not be random virtue testing:

> The accused argues that although the undercover officer was involved in a *bona fide* inquiry, she nevertheless engaged in random virtue testing since she approached the accused without a reasonable suspicion that he was likely to commit a drug-related offence. She approached the accused simply because he was walking near Granville Street.
>
> In my respectful opinion, this argument is based on a misinterpretation of *Mack.* I recognize that some of my language in *Mack* might be responsible for this misinterpretation. In particular, as noted above, I stated, at p. 956:
>
> > In those cases [where there is a particular location where it is reasonably suspected that certain crimes are taking place] it is clearly permissible to provide opportunities to people associated with the location under suspicion, even if these people are not themselves under suspicion. This latter situation, however, is only justified if the police acted in the course of a *bona fide* investigation and are not engaged in random virtue-testing.
>
> This statement should not be taken to mean that the police may not approach people on a random basis, in order to present the opportunity to commit an offence, in the course of a *bona fide* investigation. The basic rule articulated in *Mack* is that the police may only present the

> opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a *bona fide* investigation *directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision*, the police may present <u>any</u> person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a *bona fide* inquiry.
>
> Random virtue testing, conversely, only arises when a police officer presents a person with the opportunity to commit an offence <u>without</u> *a reasonable suspicion* that:
>
> (a) the person is already engaged in the particular criminal activity, or
>
> (b) the physical location with which the person is associated is a place where the particular criminal activity is *likely* occurring.
>
> [Italicized emphasis added; underlined emphasis in original.]

[47] The respondent persuasively argues that the concept of *bona fide* inquiry should apply to police officers investigating "dial-a-dope" operations. In today's day and age, drug traffickers are just as likely, if not more likely, to run their illegal operations from one end of a mobile phone. The conversations are anonymous and phone numbers can be transitional, factors which serve to insulate criminals from police detection. It makes no sense, the Crown argued, to interpret the *bona fide* investigation exception restrictively.

[48] I agree with the Crown on this point. Reading *Mack* and *Barnes* together, the intention was to *create* an exception to the requirement for reasonable suspicion about an individual before extending the opportunity to commit a crime. But it was not *prohibiting* any interpretation of *bona fide* inquiry that differed from targeting a physical geographic location. Indeed, the applicant fairly acknowledged an internet chat room could be a non-physical "place" where police might properly engage in *bona fide* inquiries.

[49] I also do not see the language creating the *bona fide* exception as placing rigid, immutable limits around it. Such an approach would be unduly formalistic and contrary to one of the Court's purposes in *Mack,* as stated at para. 16:

> One need not be referred to evidence to acknowledge the ubiquitous nature of criminal activity in our society. If the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police; as crimes become more sophisticated so too must be the methods employed to detect their commission. In addition, some crimes are more difficult to detect.

[50] I agree with Ducharme J.'s conclusion in *Henneh,* at para. 17:

> ….keeping in mind the nature of a dial-a-dope operation, I think an analogy can be drawn between a particular telephone number and a geographic location. Indeed, I think the use of a phone number, especially given the ubiquity of cell phones in our society, may be more accurate than a general geographic description.

This makes eminent sense. Officers who present opportunities to commit crime to any random person in a specific physical location will cast a far broader net than officers who present the opportunity to commit crime to someone who uses a particular phone number. The Supreme Court says the former is permissible. It logically stands to reason that the latter is too.

[51] What protects any *bona fide* inquiry from straying into impermissible random virtue testing is the need for objective analysis into the question of reasonableness. Just as police must have a reasonable suspicion about an individual before presenting them with the opportunity to commit crime, police must have a reasonable suspicion that crimes are taking place at a specific, targeted location before presenting people in that location with the opportunity to commit crime.

[52] *Barnes* explains that randomness is sometimes permissible when police present the opportunity to commit crime. *Mack* and *Barnes* both say that random virtue testing is not. The difference between the two is that where there is randomness as to person, there must be a targeted, precise, and objectively reasonable suspicion as to place.[i] This is why, in *Barnes,* the statistical information justifying police suspicion about that geographic area was pivotal. In addition, in our Court of Appeal's decision in *R. v. J.S.* (2001), 139 O.A.C. 326 at para. 4, Weiler J.A. set out the test for non-induced entrapment as "whether the authorities acted on a reasonable suspicion that drug trafficking was occurring when they targeted the individual or area."

[53] I find that "area" or "place" or "location", in this context, permits police to offer the opportunity to commit crime to any person who picks up a cell phone number for which reasonable suspicion exists. In other words, *there must be a reasonable suspicion that this particular cell phone number is being used to commit that same crime*.

[54] I find comfort, in this conclusion, by reference to the British Columbia Court of Appeal's decision in *R. v. Swan,* 2009 BCCA 142. In *Swan,* the Court held entrapment was made out where police "overstepped the bounds of a *bona fide* police investigation". As in the case at bar, police were investigating dial-a-dope operations. This type of operation had become "epidemic" in Vancouver and one senior officer, in response, initiated a dial-a-dope project. He received approximately 150 to 250 telephone numbers by the following methods:

> [a]sking them (other officers) to speak to their informants or sources, people they've arrested, basically anywhere you can, get me names or phone numbers of the best tip that you can on a dial-a-dope, and forward

> it to me in whatever method you choose, and then I'll gather them up and put them in a pile on my desk, until the day of the dial-a-dope project (at para. 23)
>
> Unfortunately, it's not always in an e-mail from police officers. They tend to get them from a variety of different sources. I'll get an anonymous envelope from somebody with a matchbook of a phone number on it. I'll get napkins, teared off piece of paper, sometimes a nice concise e-mail and sometimes Crimestoppers tips, as well, so the gamut of just a number on a piece of paper all the way to extensive tips (at para. 24).

The dial-a-dope project involved calling up all these numbers and asking, in coded language, to buy drugs. It was not clear what precise source provided Mr. Swan's phone number, and the trial judge found that the officer who called him up had only the "barest of information from an anonymous source that drugs were being sold by whomever was using the cellular telephone" (para. 26). Police phoned him and offered the opportunity to sell drugs by requesting "40 up", meaning a quantity of cocaine. The Court found the offer to criminally offend should not have been made prior to the crystallization of reasonable suspicion (at para. 43):

> I accept that dial-a-dope investigations present different problems in terms of detection and enforcement than the buy and bust investigations described in *Barnes.* I also agree with the trial judge that the police in this investigation were operating *bona fides* to the extent they were conducting their operations with the genuine goal of pursuing serious crime, namely the trafficking in hard drugs, without ulterior motives. I conclude, however, that in pursuing their goal, they overstepped the bounds of a *bona fide* police investigation, as that expression is used in *Barnes,* by proceeding armed only with mere suspicion and the hope that their unknown targets will provide the "something more" which was a necessary precursor to the invitation to traffic in drugs. They pursued their investigative goals in circumstances where more information was, or could have been, available to them, but which they chose to disregard for reasons of expediency.

[55] Appreciating that some courts have treated the notions of *bona fide* inquiry and the absence of random virtue testing as two separate analyses, in my respectful view they mean the same thing. Random virtue testing is defined as presenting the opportunity to commit crime absent reasonable suspicion that either the person is committing this criminal activity already or the physical location associated with the person is a place where this particular criminal activity is "likely occurring". A *bona fide* inquiry is defined as an investigation directed at a defined, specific location where it is reasonably suspected that a specified criminal activity is occurring. Practically speaking, both mean that the question to be assessed is whether police held a reasonable suspicion about the person and/or the place. I have found that "place", in this context, includes a cell phone which is used to traffic drugs.

[56] Returning to the case at bar, and applying the test of reasonableness to what little information D/C Berry had linking the cell phone number with drug trafficking, the applicant has persuaded me that D/C Berry did not have a reasonable suspicion that the phone number [*vetted*] was being used to traffic drugs. He knew very little, as he frankly admitted. He was told to call a number and engage in drug related conversation, and so he did. D/C Berry believed that a source had given D/C Lee the phone number but he knew nothing beyond that. He therefore knew nothing about the reliability of the source, the timing of the tip, whether the source received this information first hand or in the form of gossip, or whether the source had any motive to give false information.

[57] D/C Berry, the only witness on this application, did no checks to corroborate the tip. In particular, he did not run the phone number through police databases to try to obtain corroborating information. Although during the briefing D/C Berry was given information about a nickname, a relevant neighbourhood, and a "drop name" to use, he did not corroborate any of this information before presenting the applicant with the opportunity to commit a crime. (In fact, none of this information was overtly confirmed during the call.) Unlike *Henneh,* where the use of the name "James" was at least confirmed, by the call taker at the outset of the conversation, D/C Berry did not seek to confirm he was speaking with "Tiny".

[58] I do not fault D/C Berry for following D/C Lee's instructions to the letter during his brief secondment period with the Toronto Drug Squad. However, I cannot describe any suspicion he had about the phone number as objectively reasonable. Again, this is described in *R. v. Chehil,* at para. 3 as:

> …a robust standard determined on the totality of the circumstances, based on objectively discernible facts, and … subject to independent and rigorous judicial scrutiny.

[59] Based on this evidentiary record, the applicant has satisfied me that police did not have an objectively reasonable suspicion that the cell phone number was being used to traffick drugs and, as a result, the *bona fide* inquiry exception does not apply here.

The Imposition of Remedy

[60] The respondent disagrees that this is one of the "clearest of cases" but, respectfully, *Mack* dictates a stay is the only remedy I can impose, based on my findings. At para. 77, Lamer J. held that:

> In the entrapment context, the court's sense of justice is offended by the spectacle of an accused being convicted of an offence which is the work of the state (*Amato,* at p. 447). The court is, in effect, saying it cannot condone or be seen to lend a stamp of approval to behaviour which transcends what our society perceives to be acceptable on the part of the state. The stay of the prosecution of the accused is the manifestation of the court's disapproval of the state's conduct. The issuance of the stay

> obviously benefits the accused but the Court is primarily concerned with a larger issue: the maintenance of public confidence in the legal and judicial process. In this way, the benefit to the accused is really a derivative one. We should affirm the decision of Estey J. in *Amato,* that *the basis upon which entrapment is recognized lies in the need to preserve the purity of the administration of justice.*
>
> [Emphasis in original]

[61] At paragraph 167, Lamer J. concluded:

> Before turning to the particular case at bar I would like to comment on the requirement in *Amato* that "In the result the scheme so perpetrated must in all the circumstances be so shocking and outrageous *as to bring the administration of justice into disrepute"* (at p. 446, emphasis in original). I would, upon reconsideration, prefer to use the language adopted by Dickson C.J.C. in *Jewitt* and hold that the defence of entrapment be recognized in only the "clearest of cases". The approach set out in these reasons should provide a court with the necessary standard by which to judge the particular scheme. Once the accused has demonstrated that the strategy used by the police goes beyond the limits described earlier, a judicial condonation of the prosecution would by definition offend the community. It is not necessary to go further and ask whether the demonstrated entrapment would "shock" the community, since the accused has already shown that the administration of justice has been brought into disrepute.

[62] This passage is not open to any other interpretation. Once the components of entrapment are made out, the "clearest of cases" threshold is met and a stay must be entered. This was affirmed by the Court of Appeal in *R. v. J.S.,* at para. 9.

[63] In the case at bar, therefore, I am ordering both charges stayed.

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[i] As per *R. v. J.S., supra,* I find a simpler articulation of the test for non-induced entrapment to be whether there was a reasonable suspicion as to individual or area. In *obiter,* I note that references to '*bona fide*' and 'mala fides' may lead to confusion about what role the good or bad intentions of police play, when the main emphasis in this analysis should be whether the suspicions of police were *reasonable*. If police had no reasonable suspicion then their good faith cannot excuse this, and if police were motivated by improper purposes, I cannot see how their suspicions could be described as objectively reasonable.