File No.: 38903

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

CHEUNG WAI WALLACE LI

APPELLANT
(RESPONDENT)

AND

HER MAJESTY THE QUEEN

RESPONDENT
(APPELLANT)

APPELLANT'S FACTUM

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Counsel for the Appellant:

Eric Purtzki
Melville Law Chambers
1200 – 1111 Melville Street
Vancouver, B.C. V6E 3V6
Telephone: (604) 684-1311
Facsimile: (604) 681-9797
Email: purtzki@gmail.com

Agent for the Appellant:

Michael J. Sobkin
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8
Telephone: (613) 282-1712
Facsimile: (613) 288-2896
Email: msobkin@sympatico.ca

Counsel for the Respondent:

Christopher W. Greenwood
Public Prosecution Service of Canada
900 – 840 Howe Street
Vancouver, B.C. V6Z 2S9
Telephone: (604) 666-0704
Facsimile: (604) 666-1599
Email: chris.greenwood@ppsc-sppc.gc.ca

Agent for the Respondent:

François Lacasse
Director of Public Prosecutions of Canada
12th Floor – 160 Elgin Street
Ottawa, ON K1A 0H8
Telephone: (613) 957-4770
Facsimile: (613) 941-7865
Email: francois.lacasse@ppsc-sppc.gc.ca

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This as of right appeal concerns the doctrine of entrapment.

2. The appellant, Cheung Wallace Li, was charged with one count of trafficking in cocaine. Following his guilty plea before Provincial Court of British Columbia, he sought a stay of proceedings under s.7 of the *Canadian Charter of Rights and Freedoms* on the basis that he had been entrapped into committing the offence. The trial judge found that the appellant was entrapped and stayed the charge. The Crown appealed the trial judge's decision. The Court of Appeal for British Columbia allowed the appeal and set aside the stay.

3. The Court of Appeal was wrong to overturn the trial judge's decision. The trial judge committed no error of law. He made no error in his assessment of the evidence.

4. The trial judge correctly found that under the first branch of the test for entrapment, as held by this Court in *R. v. Mack,* [1988] 2 S.C.R. 903, the police must have an individualized suspicion that the accused was engaged in criminal activity before the police offer him an opportunity to commit the offence by asking him for drugs over the telephone. By contrast, the Court of Appeal held that there did not have to be any individualized suspicion under the first branch of the test – it was enough that the police had reasonable suspicion that the telephone number itself was associated with a drug operation. This was incorrect and contrary to this Court's jurisprudence.

5. Here, there was one anonymous tip that indicated that one specific telephone number was tied to a drug trafficking operation and that drugs were being sold from a tan Honda Odyssey with a specific licence plate number. There was absolutely nothing tying the appellant to the tip itself. Moreover, the undercover police officer who placed the call to the appellant testified that she did not develop a reasonable suspicion that he was a drug trafficker until he agreed to supply the drugs that she had requested. The trial judge was right to find no individualized suspicion in these circumstances.

6. Similar to the *Ahmad* and *Williams* appeals which were recently argued before this Court (SCC Docket No.(s) 38165, 38304), this case also raises the question of whether the police were

acting pursuant to the *bona fide* inquiry exception – the second branch of the test for entrapment. The appellant agrees with the positions of the appellants in those companion appeals. However, the appellant emphasizes that the *bona fide* inquiry is an exception, and ought to be recognized and interpreted as such.

7. Whether the police were acting pursuant to a *bona fide* inquiry was not something that was ever raised at trial. The Crown did not argue it and no police officer ever testified that they were acting pursuant to a *bona fide* inquiry. And not surprisingly, there was no evidence led about the need for the police for conduct a *bona fide* inquiry. Rather, it was raised by the Crown for the first time on appeal. The Court of Appeal found that the police were acting pursuant to a *bona fide* inquiry when they called the appellant requesting to buy drugs.

8. That the exception was never raised at trial, and no evidence led to justify it, ought to be fatal to the application of the *bona fide* inquiry in this case. But even if the exception could be raised, the appellant submits that the circumstances of this case did not establish the necessary grounds for the application of the *bona fide* inquiry exception – this was a single and anonymous tip with a limited amount of detail and internal corroboration, and there was nothing tying the original tip to the appellant.

9. The appeal should be allowed and the trial judge's decision restored.

B. Statement of Facts

10. The appellant pleaded guilty in the Provincial Court of British Columbia to one count of trafficking in cocaine contrary to s. 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

11. Following his plea, the appellant sought a stay of proceedings on the basis that he had been entrapped into committing the offence. Specifically, the appellant argued that on December 5, 2015, Cst. Cavanagh of the Coquitlam RCMP, working as an undercover officer, entrapped the appellant when she contacted the appellant by telephone and asked him for "half of soft" - a street term for half a gram of powder cocaine. As detailed below, the trial judge heard evidence from four police officers, including Cst. Cavanagh, who were involved in the investigation as well as extensive submissions from counsel on the question of whether the police had reasonable suspicion

that the appellant was engaged in criminal activity at the time it offered the appellant an opportunity to commit a crime. The trial judge found that the appellant was entrapped and entered a stay of proceedings.

12. In early September of 2015, the Coquitlam RCMP received an anonymous Crime Stoppers tip. The tip identified a specific telephone number that allegedly belonged to a dial-a-dope operation. The tip indicated that one suspect, operating with that telephone number, was selling cocaine around Coquitlam Centre, a large shopping mall. The tipster indicated that the suspect was driving a tan Honda Odyssey with the licence plate number 020 XMX (Trial Reasons, Appellant's Record ("A.R."), vol. I, pp.3-4, at para.10).

13. Cst. Pollock was first assigned to investigate the tip. He found no record of the phone number being associated with any police files. Cst. Pollock made further inquiries in respect of the licence plate number provided by the tipster and determined that the plate number was indeed registered to a tan Odyssey. The registered owner of that vehicle was a male by the name of Gavin Au Yang. According to inquires made by the constable, Au Yang had five other vehicles registered to him and he had been suspected of dial-a-dope activities in 2012 based on entries on an internal police database known as PRIME (Transcript, A.R., vol. II, p.31).

14. On September 25, 2015, Cst. Pollock called the telephone number. It rang twice and the call was disconnected. He did not try calling back (Trial Reasons, A.R, vol.1, p.4, at para.11). After he completed his investigations, Cst. Pollock prepared what is known as a "*Swan* sheet", an internal police document which takes its name from the 2009 decision of the Court of Appeal for British Columbia in *R. v. Swan*, 2009 BCCA 142. The *Swan* sheet contained information about the tip and a redacted *Swan* sheet was entered as an exhibit at the entrapment hearing (*Swan Sheet*, A.R., vol. I, p.47).

15. The tip revealed names associated with the telephone number set out on the sheet, under the heading entitled "Targets Associated to Phone Number". Cst. Pollock testified that the tip disclosed that "at least one" person was associated with the telephone number. However, those names or "targets" had been redacted and the officer was not prepared to disclose the names of those individuals (Transcript, A.R., vol. II, pp.40-42).

16. On December 4, 2015, Cst. Pollock presented the *Swan* sheet at a police briefing at the Coquitlam RCMP detachment where other suspected telephone numbers were being considered for investigation. In between September of 2015 and the police briefing on December 4, 2015, no further investigation had been conducted in respect of the tip (Transcript, A.R., vol. II, p.32).

17. Cst. Pollock testified that based on the nature of the tip and his subsequent investigation into it, he believed there was a reasonable suspicion that the telephone number was in fact a dial-a-dope line (Transcript, A.R., vol. II, p.32, ll.24-26; *Swan Sheet*, A.R, vol. I, p.47).

18. Sgt. Rettie was present at the December 4th, 2015 police briefing and reviewed the (unredacted) *Swan* sheet prepared in respect of the telephone number. In his view, it was a detailed and viable tip. Sgt. Rettie testified that he "felt that there was reasonable suspicion to, at the very least, have an undercover officer call this number and make an assessment based on the undercover operator's interaction with a person who may or may not answer the phone" (Transcript, A.R., vol. II, p.74, ll.15-19).

19. Sgt. Rettie briefed the undercover officer, Cst. Cavanagh, and they reviewed the sheet. According to Sgt. Rettie, both he and Cst. Cavanagh agreed that there was "reasonable suspicion to call the phone number". He directed Cst. Cavanagh to call the phone number and attempt to buy cocaine (Transcript, A.R., vol. II, p.74, ll.32-40).

20. Cst. Cavanagh called the telephone number. A man, later identified as the appellant, answered the call. Cst. Cavanagh asked the man how he has doing. The appellant replied that he was "good" and asked who was calling. She said "J" or "Jen" and the appellant replied "okay". Cst. Cavanagh told the appellant that she wanted "half of soft". He said that he could meet her. At that point, Cst. Cavanagh testified that she formed a suspicion that the appellant was engaged in drug trafficking (Transcript, A.R., vol. II, pp.87-88).

21. Cst. Cavanagh told the appellant that she was by the Coquitlam mall and that he could meet her there. The appellant agreed. He arrived a half an hour later and approached Cst. Cavanagh who was waiting in a car in the parking lot. The appellant sold Cst. Cavanagh 0.75 grams of cocaine for $80 (Transcript, A.R., vol. II, pp.89-91).

Positions of counsel at the entrapment hearing

22. Defence counsel argued that the appellant was entrapped into selling drugs to Cst. Cavanagh because he was provided the opportunity to commit the offence before there was any reasonable suspicion that he was selling drugs. Counsel based this submission on the first branch of the test for entrapment articulated in *Mack.* As there was nothing connecting the appellant to the information provided in the initial Crime Stoppers tip, it was argued that there no reasonable suspicion that the appellant was engaged in trafficking before the offer was made.

23. The Crown submitted that there was no entrapment. Under the first branch of *Mack*, the Crown argued that there was a reasonable suspicion that the appellant was engaged in drug trafficking by the time Cst. Cavanagh provided him with the opportunity to commit the offence. The Crown did not argue the alternate position, that is, short of establishing a reasonable suspicion on the part of the appellant, that there was no entrapment because the police were engaged in a *bona fide* investigation when they called the telephone number.

Trial judge's decision

24. The trial judge found that the defence of entrapment was established and stayed the charge. Consistent with the positions of both counsel, he determined the issue of entrapment solely on the basis of the first branch of the *Mack* test.

25. The trial judge found that there was no reasonable suspicion that the appellant was engaged in drug trafficking by the time that Cst. Cavanagh made the offer to purchase drugs from him. He found that the police did not connect the original tip to the appellant either in terms of the telephone number itself, or the vehicle indicated in the tip. (Trial Reasons, A.R., vol. I, p.12, at para.37). As the trial judge held, "the police needed to have reasonable suspicion that the person who answered the phone was a drug trafficker by somehow tying that person to the initial Crime Stoppers tip" (Trial Reasons, A.R., vol. I, pp.12-13, at para.39). He found that such a reasonable suspicion was missing in this case.

26. The trial judge further found that Sgt. Rettie and Cst. Cavanagh did not subjectively believe that they had acquired the requisite grounds. In respect of Cst. Cavanagh, the trial judge found, based on her own evidence, that before requesting drugs, Cst. Cavanagh did not have reasonable

suspicion. She testified that it was only after the appellant agreed to provide her with drugs that she had grounds to believe that he was a drug trafficker (Trial Reasons, A.R., vol. I, pp. 13-14, at para.43).

On appeal to the Court of Appeal for British Columbia

27. The Crown appealed the trial judge's decision to stay the charge to the Court of Appeal.

28. The Court of Appeal (*per* Groberman J.A.) found that the trial judge erred in several respects. Most significantly, Groberman J.A. found that trial judge wrongly based his analysis on the mistaken understanding that it was somehow "necessary for the tip to identify Mr. Li personally, or for the police to establish, independently of the tip itself, that the telephone number belonged to a dial-a-dope operation" (BCCA Reasons, A.R., vol. I, p.21, at para.16).

29. Instead, Groberman J.A. held that the tip itself was credible and, as such, the "the police had sufficient information to harbour a reasonable suspicion that they were calling a phone number attached to a drug trafficking operation" (BCCA Reasons, A.R., vol. I, p.23, at para.24 – emphasis added).

30. Groberman J.A. addressed the Ontario Court of Appeal's decision in *R. v. Ahmad*, 2018 ONCA 534. He held that to the extent that *Ahmad* stood for the proposition that it was necessary for the police to have evidence connecting a specific identifiable individual with a tip, such a requirement was, in his view, neither persuasive nor reflective of the law in British Columbia. This was because the reasonable suspicion standard could be met if the phone number itself was attached to a drug trafficking operation. In any event, as Groberman J.A. pointed out, *Ahmad* was not a case decided under the first branch of the *Mack* test, like the case at bar. Rather, *Ahmad* was decided on the basis that the police were engaged in a *bona fide* investigation (BCCA Reasons, A.R., vol. I, p. 25, at para.33).

31. The Court of Appeal also found that the trial judge misapprehended the evidence of the police officers. In particular, the Court of Appeal found that the trial judge misapprehended the evidence of the officer who made the call, Cst. Cavanagh, in finding that she did not have subjective belief that a reasonable suspicion was established. The Court of Appeal found that the

trial judge's finding was not supported by the constable's evidence at the hearing (BCCA Reasons, A.R., vol. I, p.22, at para.21).

32. Apart from the first branch of the *Mack* test, the Court of Appeal found, in the alternative, that the police were engaged in a *bona fide* investigation. Groberman J.A. said that the *bona fide* inquiry exception has been given "fairly wide" application in recent cases and that the police had enough information in this case to label the telephone number as "suspicious" and that the "limited inquiries" made by Cst. Cavanagh were properly characterized as investigative in nature (BCCA Reasons, A.R., vol. I, p.27, at para.38).

33. The Court of Appeal allowed the Crown appeal, set aside the stay imposed, and remitted the matter to the trial court for sentencing.

On appeal to this Court

34. On November 21, 2019, the appellant filed a Notice of Appeal, as of right, pursuant to s. 691(2)(b) of the *Criminal Code* ("*Code*") along with a notice of motion for extension of time for filing the notice of appeal.

35. On January 16, 2020, Karakatsanis J. granted the motion for extension of time and, as part of that order, invited the parties to provide "written submissions in their appeal factums addressing this Court's jurisdiction to hear this appeal as of right" (Order of Karakatsanis J., January 16, 2020).

PART II – QUESTIONS IN ISSUE

36. This appeal raises the following issues:

(1) Does this Court have the jurisdiction to hear this appeal as of right?

(2) Was there a reasonable suspicion that the appellant was engaged in criminal activity before the offer was made to supply drugs?

(3) Does the *bona fide* inquiry exception apply in this case?

PART III – STATEMENT OF ARGUMENT

Preliminary Issue – There is jurisdiction to hear this appeal as of right

37. There is jurisdiction to hear this appeal as of right pursuant to s. 691(2)(b) of the *Code*. That section provides that if the court of appeal sets aside an "acquittal" on appeal, the person may appeal to this Court as of right if the court of appeal "enters a verdict of guilty against the person":

> **691 (2)** A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada
>
> …
>
> **(b)** on any question of law, if the Court of Appeal enters a verdict of guilty against the person …

38. While s.691(2)(b) refers to setting aside a verdict of "acquittal", this Court has held that for the purposes of appeals a stay is equivalent to an acquittal (*R. v. Bellusci*, 2012 SCC 44, at para.34; see also: *R. v. Jewitt*, [1985] 2 S.C.R. 128 at p.148 and *R. v. Kalanj*, [1989] 1 S.C.R. 1594 at p.1601, where this Court confirmed, relying on *Jewitt*, that an accused has an appeal as of right to this Court where a court of appeal has set aside a stay of proceeding as that stay is "tantamount to an acquittal"). That is sufficient to demonstrate the appellant has a right of appeal to this Court pursuant to s.691(2)(b). But there is more.

39. In this case, the Crown had appealed to the Court of Appeal under s.676(1)(c) of the *Code*. This provision authorizes a Crown appeal "against an order of a trial court that stays proceedings on an indictment or quashes an indictment". Where an appeal is successful, the Court of Appeal's powers are found in s.686 of the *Code*. When the Court of Appeal allowed the Crown's appeal and set aside the stay, it acted pursuant to s.686(4)(b)(ii) of the *Code*. That section provides that, if the court of appeal sets aside an "acquittal", the court has the power to "enter a verdict of guilty" and remit the matter back to the trial court for sentencing. Even though this section refers to an "acquittal" and not a stay, because a stay is equivalent to an acquittal for the purposes of appeals, the Court of Appeal obviously had jurisdiction to allow the Crown appeal of the stay and remit the matter for sentencing. The same reasoning must apply to s. 691(2)(b) of the *Code* – an acquittal is the equivalent to a stay.

40. This Court has typically heard appeals like this on an as of right basis. In *R. v. Imoro,* 2010 ONCA 122, the Ontario Court of Appeal allowed a Crown appeal against a finding of entrapment and a resulting stay imposed at trial. The accused appealed to this Court as of right (2010 SCC 50, SCC Docket No. 33649).

41. Even more recently, in the companion case to *Ahmad – Williams* – the Ontario Court of Appeal allowed the Crown appeal and set aside the stay imposed at trial. The Crown in *Williams* moved to quash the as of right appeal for want of jurisdiction, however, this Court dismissed the motion and heard the *Williams* appeal as of right (SCC Docket No. 38304).

42. As this Court explained in *Jewitt* (at p. 418), a stay of proceedings in cases of entrapment "is given as a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction." However, for the purposes of an appeal, a stay is regarded as "tantamount to a judgment or verdict of acquittal" if it "effectively brings the proceedings to a final conclusion in favour of an accused".

43. This is what happened in the case at bar. The proceedings against the appellant were brought to "a final conclusion" in his favour in the Provincial Court of British Columbia. The result of the decision in the Court of Appeal is that a verdict tantamount to an acquittal has been set aside. An appeal therefore lies to this Court as of right under s. 691(2)(b) of the *Code*.

ISSUE #1 – There was no reasonable suspicion that the appellant was engaged in criminal activity before the offer to purchase was accepted

44. The Court of Appeal was wrong to overturn the trial judge's finding of entrapment. The Court of Appeal held that the police had a reasonable suspicion that the appellant was engaged in criminal activity when they asked him to provide drugs because the telephone number itself was associated with a drug trafficking operation. As explained below, the Court of Appeal's decision cannot be sustained. The trial judge's finding of entrapment and the stay of proceedings he entered should be restored.

Reasonable suspicion and the need to connect the suspicion to the accused

45. The Court of Appeal held that the police had a reasonable suspicion that the "number they called was associated with a dial-a-dope operation" and that therefore the police had the requisite grounds under first branch of the *Mack* test (BCCA Reasons, A.R., vol. I, p.25, at para.32 – emphasis added).

46. The Court of Appeal was wrong to find that the reasonable suspicion only had to relate to the phone line and not the individual on the other end of the line. That approach – stripped of any individualized consideration – is contrary to this Court's decision in *Mack.* And as discussed below, while the appellant disagrees with the majority's application of the *bona fide* investigation exception in *Ahmad* at the Ontario Court of Appeal, at least on this point the majority is right – there must be an individualized suspicion that the person is already engaged in criminal activity by the time the police offer to purchase drugs is made. Here, there was no reasonable suspicion that the appellant was already engaged in criminal activity by the time the offer to purchase drugs was made.

47. In *Mack,* and again in *R. v. Barnes*, [1991] 1 S.C.R. 449 this Court articulated two principal branches of the test for entrapment:

> (1) the 'reasonable suspicion' branch: the police can only provide the opportunity to commit the offence once they have a reasonable suspicion that a specific individual is already engaged in criminal activity.
>
> (2) the *bona fide* inquiry exception: if police do not have reasonable grounds to believe the individual is engaged in crime, there is no entrapment where the police are acting pursuant to a *bona fide* investigation.
>
> *Mack*, at pp.964-965; *Barnes*, at p.463

48. Finally, aside from these two branches of the *Mack* test, even if the police do have a reasonable suspicion or are acting under a *bona fide* inquiry, a person will be entrapped when the police go beyond providing that person with an opportunity, and induce the commission of an offence.

There was no reasonable suspicion in this case

49. The Court of Appeal found, contrary to the trial judge, that there did not have to be a connection between the phone line and the appellant. Rather, the tip itself, the phone number it revealed, and the fact that the appellant answered the call were enough to give rise to a reasonable suspicion that he was engaged in criminal activity.

50. This approach, however, is flawed. It is not supported by *Mack* and other authorities which have applied the first branch of the *Mack* test in this context.

51. Under the first branch of the test, when the police call to purchase drugs, the police must necessarily have a reasonable suspicion that the individual on the other end of the call is already engaged in criminal activity. In *Mack,* Lamer J. (as he then was) emphasized that this branch of the test is focused on grounds relating to a specific person and that the first branch of the test is dependent on knowing the "identity of specific individuals" (at p.956). As Lamer C.J. summarized three years later in *Barnes*: "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" (at p.463).

52. By contrast, under the second branch of the test, the *bona fide* inquiry exception applies where it is reasonably suspected that criminal activity is occurring over a given area and not in respect of a specific individual (*Barnes,* at pp.460-461; *Mack,* at p.956).

53. In other words, it is the presence of an individualized suspicion that distinguishes between the first branch of the test and the second, the *bona fide* inquiry exception.

54. The Court of Appeal overlooked this critical distinction and found that in this case the tip itself was enough to generate an individualized reasonable suspicion as against the appellant. This was wrong. In the circumstances of this case, the police did not have a reasonable suspicion that the appellant was in fact a drug trafficker until he agreed to provide the drugs that Cst. Cavanagh purchased. In short, the only thing the appellant had to do was answer the phone and affirmatively respond to the offer to supply "half of soft" – a recognized street term for cocaine – in order to demonstrate an individualized suspicion on his part. This was a misapplication of the first branch

of the *Mack* test. In order for there to be an individualized suspicion, it is necessary for there to be some sort of link between the tip and the appellant.

55. The trial judge was correct to find that there was no such link in this case. It could not be said that there were "objectively discernable facts" capable of supporting a reasonable suspicion that the appellant was already engaged in criminal activity before Cst. Cavanagh made the offer to purchase cocaine from him (see *R. v. Chehil*, 2013 SCC 49, at para.3).

56. Moreover, there was nothing in the tip itself which tended to identify the appellant. The tip revealed a telephone number was involved in trafficking drugs in the area of the Coquitlam Centre shopping mall. The tip further disclosed that the sales were from a tan Honda Odyssey with a specific license plate number. According to inquiries made by Cst. Pollock, that license plate number was associated to a man, Gavin Au Yang, who had been suspected of dial-a-dope activities three years earlier.

57. There was no information that the appellant was identified in the course of the tip, even though the police were able to identify some individuals or "targets" who were associated with the suspected drug line. Those unnamed individuals were recorded on the *Swan* sheet prepared by Cst. Pollock. The police, however, did not disclose the identity of those individuals, and there was no evidence that the police conducted any investigation into those individuals or corroborate the tip itself.

58. When Cst. Cavanagh called the telephone number; she did not ask for anybody. She instead asked the appellant how he has doing and the appellant replied that he was "good". The appellant asked who was calling, she said "J" or "Jen", and the appellant replied "okay". After those initial pleasantries, Cst. Cavanagh then proceeded to offer purchasing "half of soft" and the appellant replied that he could meet her.

59. In contrast to *Williams,* there was even less of a connection between the tip and the recipient of the call. At least in *Williams,* the tip revealed that a person named "Jay" was operating a drug line. The police called the number and asked for "Jay" and the accused responded in the affirmative. Even with that evidence, the majority found that these circumstances did not establish a link between the tip and the accused, and as such, there was no reasonable suspicion that the

accussed was engaged in criminal activity by the time the police made the offer to purchase (see, *Ahmad*, at paras. 42-43, 46).

60. Not only was there no connection between the tip and the appellant, there was absolutely no connection between the information disclosed in the tip and circumstances or content of the telephone conversation that the appellant had with Cst. Cavanagh on December 4, 2015.

61. For example, in *R. v. Olazo,* 2012 BCCA 59, the Court of Appeal for British Columbia found that the tip in that case was confirmed and connected to the accused because the tip revealed that the drug line operated on a "24-hour" basis, and the accused answered the call at 2:00 am. The information in the tip (that it was operating 24/7) and the circumstances of the telephone call (that the appellant answered the line at 2:00 am), served to corroborate the tip and establish a connection to the accused. While the connection in *Olazo* seems tenuous, it does demonstrate that in order to show a reasonable suspicion under the first branch of the *Mack* test, courts are looking for something in the accused's actions which corroborates the information in the tip itself.

62. Such a connection was also found to exist in *R. v. Le,* 2016 BCCA 155. In that case, the tip revealed the existence of a drug line and the tip stated that an Asian male would answer the call. When the police called the phone number, the accused answered and had what was described as a "heavy Asian accent" (at para.89). Again, the point is that in order to demonstrate an individualized reasonable suspicion under the first branch of the *Mack* test, there must be something connecting the tip and the individual accused <u>before</u> the police create the opportunity to commit a crime by making the offer to purchase.

63. The trial judge rightly held that there was no such connection in this case. The existence of an individualized reasonable suspicion only crystallized when the appellant agreed to provide Cst. Cavanagh with the cocaine that she requested.

64. Contrary to what the Court of Appeal held, the trial judge did not misapprehend Cst. Cavanagh's evidence on whether she had subjective grounds (BCCA Reasons, A.R., vol.1, p.22, at para.21). The trial judge correctly found that Cst. Cavanagh did not have the subjective grounds because she testified that it was only <u>after</u> the appellant agreed to provide her with drugs

that she had the grounds to believe that he was a drug trafficker (Trial Reasons, A.R., vol.1, pp.13-14 at para.43).

65. This was, indeed, exactly what Cst. Cavanagh said in her evidence. She testified when the appellant agreed to sell her drugs and arranged to meet her, that it was "at that point, you know, I -- I had a suspicion that the person I was speaking to on the phone was, in fact, a drug trafficker" (Transcript, A.R., vol. II, p.88, ll.17-19). Cst. Cavanagh was, of course, present during the December 4th police briefing where the *Swan* sheet was presented, and she reviewed the contents of the sheet with Sgt. Rettie prior to placing the call (see, Transcript, A.R., vol. II, p.74, ll. 14-40).

66. Having already reviewed the *Swan* sheet and been appraised of the details of the tip, the fact that Cst. Cavanagh was only able to say that she formed a suspicion that the appellant was a drug trafficker after her offer to purchase was accepted, was relevant to the trial judge's assessment of whether the requisite grounds were met under the first branch of *Mack*.

67. In any event, even if Cst. Cavanagh or any of the other police officers thought they had the necessary grounds, a reasonable suspicion still had to be based on "objectively discernable facts" having regard to the test under the first branch of *Mack* (*Chehil*, at para.3). As discussed above, the "objectively discernable facts" did not support a reasonable suspicion under the first branch of the *Mack* test.

68. The appellant therefore submits that the trial judge was correct to find that the appellant was entrapped in the absence of a reasonable suspicion under the first branch of the *Mack* test.

ISSUE #2 – The bona fide investigation exception should not be applied in this case

69. The appellant further submits that the *bona fide* inquiry exception has no application here. The Court of Appeal erred in finding that the exception has "fairly wide" application and in applying it to this case. The Court of Appeal said (at para.38):

> The police had information that was sufficient to label the telephone number "suspicious". The limited inquiries made by Cst. Cavanagh can properly be characterized as investigative in nature. The actual transaction to purchase the drug occurred later, and only after negotiations at the Coquitlam Centre mall.

70. The breadth, scope and application of the *bona fide* inquiry exception in this very context is raised in the *Ahmad* and *Williams* appeals both of which were argued before this Court on October 11, 2019. The appellant agrees with the positions of each of the appellants in those companion appeals, and those of the supporting interveners, that the *bona fide* inquiry exception (1) ought to be restricted in its scope and narrowed by imposing a heightened standard of reasonable and probable grounds; or (2) that the reasonable suspicion standard under the exception, if it is to remain, must be strictly applied and involve an objective assessment of the totality of the circumstances.

71. While not reiterating these submissions, the appellant emphasizes that the *bona fide* inquiry is an exception to the requirement that the police must have an individualized reasonable suspicion. The existence of an individualized reasonable suspicion – as opposed to an area or location-based suspicion, under the *bona fide* inquiry exception – ought to be the norm and the primary means by which police investigations are conducted in a free and democratic society.

72. For example, in *R. v. A.M.*, 2008 SCC 19, this Court emphasized the importance of personal privacy in finding that an individualized reasonable suspicion was required for "sniffer dog" searches in schools, rather than a search that was random and location-based where sniffer dogs were deployed throughout the entire school grounds. Lebel J. found that while a random school-based search was efficient from a law enforcement perspective and an effective way of advancing the "zero-tolerance" drug policy within the school, "these objectives were achieved at the expense of the privacy interest (and constitutional rights) of every student in the school" (at para.15).

73. Because it is exceptional, police opportunities presented to people to commit crimes under a *bona fide* inquiry in the absence of any individualized suspicion, can only be justified based on specific circumstances where there is a compelling state interest in combatting crime in high-crime areas.

74. In *Barnes,* for example, this Court relied on evidence and statistics which established that compelling state interest, the frequency of drug trafficking in the targeted geographic area, and the effectiveness of police "buy and bust" operations in that area. And in the context of dial-a-dope operations, in *R. v. Swan,* 2009 BCCA 142, while the Court of Appeal found that there was no *bona fide* inquiry, the trial judge was still provided with expert evidence in that case on the endemic

nature of drug trafficking and the difficulties in investigating such crimes, in addition to other factors (*Swan*, at para. 30).

75. This, the appellant submits, demonstrates the kind of specific evidence that is required for the police to rely on the *bona fide* inquiry, whether the police target a physical area or a virtual space like a telephone number or a website.

76. The appellant submits that, in order to justify police conduct under a *bona fide* inquiry exception, there must be some evidence that an individualized investigation would not give effect to the compelling state interest based on the specific circumstances of that case, as established in the evidence. The appellant submits that the state should bear the onus of showing why the *bona fide* inquiry exception should be applied and why it is necessary. This is entirely in keeping with *Barnes* and the evidence the Crown led in that case.

77. A broad application of the exception, like that endorsed by the Court of Appeal and by the majority of the Ontario Court of Appeal in *Ahmad,* creates perverse incentives for the police not to bother targeting individuals who are suspected of committing crimes, because they can just instead target an entire physical and virtual space. In that case, the exception is no longer an exception. A broad application of the exception would, in effect, swallow up the first branch of the *Mack* test thus denuding it of any practical application.

78. In this case, whether the police were engaged in a *bona fide* inquiry was never raised in the testimony of any officer, no evidence was led by the Crown to that effect, and most importantly, the Crown at trial never raised the *bona fide* inquiry exception. And, because it was never raised, the trial judge did not address it. The exception was instead raised by the Crown for the first time on appeal, as a back up submission for why there was no entrapment. The Court of Appeal followed suit and found that, even if there was no reasonable suspicion, the "alternative analysis" of the *bona fide* inquiry applied in this case.

79. As submitted above, in order to rely on the *bona fide* inquiry exception, as in *Barnes*, the Crown at trial must lay an evidentiary groundwork for why the exception should apply. This evidence may come from the officers themselves, or in the form of statistics that demonstrate why in this case there was a compelling state interest in offering an opportunity, in tailored

circumstances, to unknown people to commit offences, in the absence of an individualized reasonable suspicion. Not only was the exception never raised by the Crown, there was no such evidence to that effect. This, the appellant submits, is fatal to the application of the *bona fide* inquiry exception in this case.

80. In any event, the facts at trial failed to reach the stringent reasonable suspicion threshold, let alone the reasonable grounds threshold suggested by the appellant, for the *bona fide* exception to apply. In the circumstances of this case, there were no reasonable grounds to suggest that the telephone number was associated with a drug trafficking operation.

81. First, the tip about the phone number was anonymous and it was a single tip. The anonymous nature of a tip always raises reliability concerns and there ought to be consideration given to the amount of detail in the tip, the source of the tipster's knowledge, and other *indicia* as to the tipster's reliability. As Groberman J.A. correctly observed in his concurring reasons in *R. v. Jir*, 2010 BCCA 497, there are "obvious dangers" in relying on anonymous tips because "[t]he anonymous informer may have maliciously fabricated information or may have had weak sources. The tipster may have drawn the wrong inference from whatever information he or she had, or may simply have been relaying a hunch" (at para.46).

82. Second, the only detail in the tip was that the phone number was being used by one suspect – not the appellant – and that one person was using a certain vehicle. There was no indication that the appellant was ever driving that vehicle, or anything else tying the appellant to the original tip.

83. Third, information about the registered owner of the vehicle being suspected of dial-a-dope drug trafficking was very dated and lacked any detail of that alleged trafficking.

84. Compared to *Williams* and *Ahmad,* there was far less information here to support a reasonable suspicion that the phone number itself was being used in a drug operation. This is because there was nothing in the course of the call itself to develop a reasonable suspicion. As a result, the Crown's case for the application of the *bona fide* inquiry exception, whatever the outcome in *Williams* and *Ahmad*, cannot be made out here.

85. In *Williams,* the majority found that the phone call made by police was a "focused investigation" in that the source's information about "Jay" was confirmed when the person who

answered the call responded to that name. This led the majority to conclude that a reasonable suspicion under the *bona fide* inquiry may be "developed in the course of the phone call, such as when the person who answers the call confirms the source's information" (at para.75). Similarly, in *Ahmad* the majority found that although the accused in that case did not confirm that he was "Romeo" (the name provided in the tip), at the same time, the accused did not question the name and engaged in conversations about the sale of drugs (at para.78).

86. This was not the case here. There was no evidence Cst. Cavanagh had any idea who would answer the phone when she placed the phone call. Nor did she develop in the course of the call a reasonable suspicion prior to offering to purchase drugs from the appellant. On her own evidence, her reasonable suspicion only crystallized after she and the appellant made the arrangements to purchase drugs. Even though the tip revealed that "one or more" specific individuals were linked to drug line, the police conducted no investigations in relation to those individuals.

87. The appellant submits that the evidence of Cst. Cavanagh and Sgt. Rettie was important as their evidence, in effect, suggested that "something more" was required in order to "raise mere suspicion to reasonable suspicion before the encoded request for drug was made" (*Swan*, at para.36).

88. Sgt. Rettie testified that based on the information within the tip itself that there were so-called reasonable grounds to "at the very least, have an undercover operator call this number and make an assessment based on the undercover operator's interaction with a person" (Transcript, A.R., vol. II, p.74, ll.14-19).

89. Moreover, Sgt. Rettie's evidence suggested that the reasonable grounds to believe that the line itself was associated with drug trafficking was dependent on the undercover officer's later interaction with the person who answered the call. In effect, the placement of the call amounted to a further investigative step. Indeed, when Cst. Cavanagh called the number, she testified that it was only at the point that the appellant agreed to provide her drugs that she formed a reasonable suspicion.

90. There can be no *bona fide* inquiry in these circumstances as there was no reasonable grounds to believe that the line itself was associated with a drug trafficking operation before the call was made; nor was there a reasonable suspicion before the specific offer for drugs was made.

91. The Court of Appeal erred in law by overturning the trial judge's decision finding of entrapment and in applying the *bona fide* inquiry exception in this case. The appeal should be allowed and the stay restored.

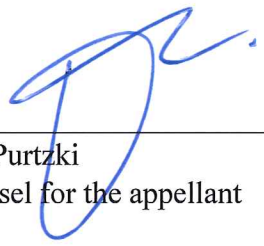
PART IV – COSTS

92. The appellant does not seek costs and asks that no costs be awarded against him.

PART V – ORDER SOUGHT

93. The appellant asks that the appeal be allowed and the stay imposed at trial restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Eric Purtzki
Counsel for the appellant

February 27, 2020
Vancouver, BC

PART VI – TABLE OF AUTHORITIES

Cases **Paragraph(s)**

Statutory Provisions **Paragraph(s)**

Statutory Provisions (Cont'd) **Paragraph(s)**