File Number: 38903

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

BETWEEN:

CHEUNG WAI WALLACE LI

APPELLANT
(Appellant)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT, HER MAJESTY THE QUEEN

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

Public Prosecution Service of Canada
British Columbia Regional Office
900 - 840 Howe Street
Vancouver, British Columbia V6Z 2S9

Chris Greenwood & Edlyn Laurie
Tel.: 604-666-3985
Fax: 604-666-1599
Email: chris.greenwood@ppsc-sppc.gc.ca
edlyn.laurie@ppsc-sppc.gc.ca

Counsel for the respondent

Kathleen Roussel
Director of Public Prosecutions
160 Elgin Street, 12th Floor
Ottawa, Ontario K1A 0H8

Per: François Lacasse
Tel.: 613-957-4770
Fax: 613- 941-7865
Email: flacasse@ppsc-sppc.gc.ca

Ottawa agent for the respondent

Melville Law Chambers
1200-1111 Melville Street
Vancouver, B.C. V6E 3V6

Eric Purtzki
Tel.: 604-684-1311
Fax: 604-681-9797
Email: purtzki@gmail.com

Counsel for the appellant

Michael J. Sobkin
331 Somerset Street West
Ottawa, Ontario K2P 0J8

Michael J. Sobkin
Tel.: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

Ottawa agent for the appellant

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PART I: STATEMENT OF FACTS

Overview

1. The methods of drug traffickers have evolved since the doctrine of entrapment was outlined in *R. v. Mack*.[1] Drug dealers are no longer forced to ply their trade in defined areas or in the street under the watchful eye of the police. Consumers now simply call a drug line, and dealers drive to meet them with their drug of choice – a method that is prevalent across Canada and has come to be known as a dial-a-dope scheme.[2] Fentanyl, methamphetamine and crack cocaine are now commonly distributed in this fashion. The anonymity offered by this method of trafficking shields illegal enterprises from easy identification and detection, and such methods pose a significant public health and safety concern.[3]

2. Police investigate dial-a-dope operations in the only way that is reasonably available to them. When they get information that a particular phone number is a dial-a-dope line, they call the number and pose as a customer. If the person on the other end of the phone responds affirmatively to a complete stranger who is using strange but distinctive language that is recognized by those in the drug trade, a meeting is arranged. When the drug dealer meets the undercover officer at a predetermined time and place, and engages in a transaction, an arrest is made, either immediately or at a later date.

3. This case raises the same issue that came before the Court in *R. v. Ahmad & Williams* (SCC No.(s) 38165, 38304) and is currently on reserve. The Crown respondent takes the same position it advanced in those appeals: namely that this Court should dictate a unified national approach to this issue by (1) applying the concept of "reasonable suspicion" in a contextually correct way, and/or (2) modernizing the *bona fide* inquiry analysis to recognize that the police conduct in these cases falls within the bounds of permissible conduct contemplated in *Mack*, which was decided at a time when mobile phones were not accessible to the general public. The Court of Appeal's

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[1] *R. v. Mack*, [1988] 2 S.C.R. 903.
[2] *R. v. Dube*, 2017 N.W.T. J. No. 83; *R. v. Aubichon*, 2015 ABCA 242; *R. v. Khan*, 2017 SKPC 102; *R. v. Taylor*, 2015 NSSC 296; *R. v. Cortez*, 2010 QCCQ 3693.
[3] *R. v. Mann*, 2018 BCCA 265, para. 1; *R. v. Le*, 2016 BCCA 155, paras. 67-69, leave ref'd, [2016] 2 S.C.R. ix; *R. v. Swan*, 2009 BCCA 142, para. 34; *R. v. Franklin*, 2001 BCSC 706, para. 46.

approach in the court below was correct on both issues, and consistent with the foundational principles in *Mack*.

4. It is crucial to recall that the doctrine of entrapment is an aspect of the abuse of process doctrine. The state must be given enough room to develop reasonable techniques which assist it in the fight against crime. It is only when the police and their agents engage in conduct which offends basic values of the community that the doctrine of entrapment should apply. [4] Phoning a dial-a-dope line, and behaving as any drug user normally would, cannot reasonably be characterized as "conduct that the citizenry will not tolerate."[5] In the face of modern drug trafficking operations, it is essential police work that would be welcomed by the public.

5. The appellant's approach to reasonable suspicion, and the limits he would place on a *bona fide* inquiry would mark a significant departure of the doctrine of entrapment from its core purpose. Courts must be alive to both the nature of the criminal activity in issue, and the police response to it, in assessing whether police conduct carries with it the "risk that the police will attract people who would not otherwise have involvement in crime."[6] The police technique at issue in this appeal is the antithesis of random, arbitrary policing, and presents no real risk to an innocent person.

Factual background

Proceedings

6. The appellant was charged on a multi-count information with trafficking cocaine on 17 separate occasions.[7] At the outset of his trial, all of the allegations were combined in a single count.[8] The appellant then entered a guilty plea,[9] and the trial judge was invited by both parties to enter into an entrapment hearing.[10]

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[4] *R. v. Mack*, [1988] 2 S.C.R. 903, pp. 976-977.
[5] *R. v. Mack*, [1988] 2 S.C.R. 903, pp. 917-918.
[6] *R. v. Barnes*, [1991] 1 S.C.R. 449.
[7] *Information*, Appellant's Record ("AR"), Vol. I, pp. 33-37. The Crown stayed proceedings against one co-accused, and another pled guilty: *Proceedings*, AR, Vol. II, p. 9, l. 27-31.
[8] *Proceedings*, AR, Vol. II, p. 22, l. 15-33; *Reasons for Judgment*, AR, Vol. I, p. 3, paras. 5-7.
[9] *Proceedings*, AR, Vol. II, p. 24, l. 9-14.
[10] *Proceedings*, AR, Vol. II, p. 24, l. 16-38, p. 25, l. 38 to p. 26, l. 9.

The police methodology employed in the investigation

7. Cst. Pollock and Cpl. Chen, members of the Coquitlam detachment of the RCMP, were responsible for managing the incoming intelligence in the drug and organized crime unit.[11] Once the police received information about a particular phone number, an investigator was responsible for making the appropriate checks and ensuring that the reasonable suspicion standard was met. The police practice was to document each tip, and any follow-up inquiries, on a document they referred to as a "Swan sheet."[12] The assigned investigator would turn over the Swan sheet to Cpl. Chen (as team leader) who would double check that the reasonable suspicion standard was met.[13] If Cpl. Chen did not believe the reasonable suspicion standard was met, he would set aside or resubmit the Swan sheet for further follow up.[14]

8. Cpl. Chen would then attend briefings with only Swan sheets he believed had satisfied the reasonable suspicion standard, and turn them over to a cover person in charge of the undercover operator.[15] The cover person would then make his or her own assessment of the document and determine the appropriate action and which numbers to call.[16]

The tip received by the police

9. In September of 2015, Constable Pollock received a Crime Stoppers tip that 604-787-2313 was a drug line that one could purchase cocaine from.[17] Cst. Pollock prepared a Swan sheet, which was subsequently redacted to protect the identity of the tipster.[18]

10. The tipster advised that the suspects operating the line were selling cocaine using a tan coloured Honda Odyssey. The plate number (BCL 020) was also provided.[19] Sales were said to

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[11] *Constable Pollock,* AR, Vol. II, p. 28, l. 17-19, p. 28, l. 44 to p. 29, l. 1.
[12] *Corporal Chen,* AR, Vol. II, p. 57, l. 19-28.
[13] *Corporal Chen,* AR, Vol. II, p. 60, l. 12-22.
[14] *Corporal Chen,* AR, Vol. II, p. 58, l. 25-35.
[15] *Corporal Chen,* AR, Vol. II, p. 58, l. 30-35.
[16] *Corporal Chen,* AR, Vol. II, p. 58, l. 32 to p. 59, l. 2.
[17] *Constable Pollock,* AR, Vol. II, p. 28, l. 29-37, p. 32, l. 40-42.
[18] *Constable Pollock,* AR, Vol. II, p. 29, l. 17-24, p. 31, l. 29-32, p. 38, l. 19-29; *Swan Sheet,* ex. 2, AR, Vol. I, p. 47.
[19] *Constable Pollock,* AR, Vol. II, p. 30, l. 4-12.

take place in the area of Coquitlam Centre, a local shopping mall.[20] The tipster indicated a more specific area, but that information was redacted to protect the informant.[21] The tipster also stated the name or names of suspect(s) associated with the line ("at least one person's name"), but the names were also redacted.[22]

Follow up investigation of the tip

11. On September 25, 2015, Cst. Pollock followed up on the tip using police databases.[23] The police had no records in relation to the phone number provided.[24] Cst. Pollock ran the licence plate provided and confirmed that it did in fact come back to a tan Honda Odyssey.[25] The registered owner of the tan Odyssey was an individual by the name of Gavin Au Yang. Mr. Au Yang had five other vehicles registered in his name, and a recent history of suspected dial-a-dope activity in several PRIME files.[26] One of the PRIME files dated back to 2012, but most of them fell within the previous year.[27]

12. Cst. Pollock placed a phone call to the number to ensure that the number was still in service.[28] The phone number rang twice and then disconnected,[29] but there was no voicemail or automated recording saying the number had been disconnected. Cpl. Pollock believed it was an active telephone number.[30]

Police assessment of reasonable suspicion

13. Based on the content of the tip and his follow up investigation, Cst. Pollock believed the

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[20] *Constable Pollock*, AR, Vol. II, p. 30, l. 24-28, p. 40, l. 7-11.
[21] *Constable Pollock*, AR, Vol. II, p. 39, l. 23-30.
[22] *Constable Pollock*, AR, Vol. II, p. 40, l. 12-32, p. 41, l. 29-41, p. 42, l. 9-14, 23-37, p. 51, l. 4-11, 19-23, 31-34, *Sergeant Rettie*, AR, Vol. II, p. 78, l. 10-17.
[23] *Constable Pollock*, AR, Vol. II, p. 33, l. 35-37.
[24] *Constable Pollock*, AR, Vol. II, p. 30, l. 29-38; *Swan Sheet*, Ex. 2, AR, p. 13, p. 45, l. 8-24.
[25] *Constable Pollock*, AR, Vol. II, p. 30, l. 41-42.
[26] *Sergeant Rettie*, AR, Vol. II, p. 80, l. 18-25; *Constable Pollock*, AR, Vol. II, p. 30, l. 42 to p. 31, l. 4, p. 48, l. 4-6, 30-37, p. 49, l. 3-6. PRIME is a police database where police files are stored.
[27] *Constable Pollock*, AR, Vol. II, p. 31, l. 5-11.
[28] *Constable Pollock*, AR, Vol. II, p. 31, l. 15-21, p. 53, l. 27-32.
[29] *Constable Pollock*, AR, Vol. II, p. 31, l. 23-24.
[30] *Constable Pollock*, AR, Vol. II, p. 52, l. 20-47, p. 53, l. 4-26; *Corporal Chen*, AR, Vol. II, p. 61, l. 9-45.

threshold of reasonable suspicion was met. He identified the phone number in question along with several others for further follow-up with undercover operators.[31]

14. On December 4, 2015, the police held a briefing from 12:53 to 13:00 as part of an ongoing investigation into various dial-a-dope lines. They had a list of phone numbers that they believed based on reasonable suspicion were drug lines, and they intended to have undercover officers phone the lines and attempt to purchase drugs.[32] If successful, the objective would be to arrange a purchase that would take place under police surveillance, and to identify the person who sold the drugs to the undercover officer.[33]

15. Sgt. Rettie was the team commander and cover person for the undercover operator. After assessing the unredacted tip sheets, he directed the undercover officer to make contact with the phone numbers he believed were the most likely to work.[34] He determined that 604-787-2313 would be the first number called as he considered it the strongest.[35]

16. Sgt. Rettie considered the detail in the tip and noted that it included the specific drug being sold, a vehicle description and plate number, and the area or location where the drugs were being sold.[36] He also relied on the fact that the licence plate number provided belonged to a person (Gavin Au Yang) with a history of drug trafficking based on the PRIME checks.[37] The fact that Mr. Au Yang had six vehicles registered in his name was significant to Sgt. Rettie. He testified that in his experience, some drug trafficking groups register multiple vehicles in one person's name.[38]

17. Sgt Rettie testified that there was reasonable suspicion to "at the very least have an undercover operator call this number and make an assessment." He believed the threshold of

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[31] *Constable Pollock,* AR, Vol. II, p. 31, l. 33-43, p. 32, l. 19-26.
[32] *Corporal Chen,* AR, Vol. II, p. 56, l. 12-25.
[33] *Corporal Chen,* AR, Vol. II, p. 56, l. 41 to p. 57, l. 1, p. 57, l. 31-42, p. 62, l. 16-35; *Sergeant Rettie,* AR, Vol. II, p. 70, l. 3-15; *Constable Pollock,* AR, Vol. II, p. 34, l. 5-19.
[34] *Sergeant Rettie,* AR, Vol. II, p. 70, l. 20-44, p. 76, l. 24-35.
[35] *Sergeant Rettie,* AR, Vol. II, p. 72, l. 14-17.
[36] *Sergeant Rettie,* AR, Vol. II, p. 72, l. 28 to p. 73, l. 14.
[37] *Sergeant Rettie,* AR, Vol. II, p. 73, l. 6-10.
[38] *Sergeant Rettie,* AR, Vol. II, p. 73, l. 21-41.

reasonable suspicion was met or exceeded "to call the number and proceed with an investigation."[39] He explained that the phone conversation would allow the undercover officer to assess whether that individual was a drug trafficker, or whether the tip should be concluded or some further work needed to be done.[40] He testified that in his experience as an undercover officer, if a person had no idea what he was talking about, there would be no reason to ask them to purchase drugs, but sometimes it was necessary to ask to make a purchase.[41]

18. When asked about other ways to investigate the suspected dial-a-dope number, Sgt. Rettie explained that there was no connection in any of the police databases linking the phone number to the vehicle or Mr. Au Yang. While they could have done surveillance of Mr. Au Yang, it would have been separate from investigation of the phone number.[42]

The undercover phone call

19. Sgt. Rettie met with Cst. Cavanagh, the undercover officer, at 13:25.[43] He provided her with the number in the tip, and directed her to contact the number and attempt to purchase a half-gram of powder cocaine.[44] Based on the instructions she had received, she was calling the number to make a buy.[45]

20. Cst. Cavanagh was an experienced undercover operator who had arranged drug transactions over the phone and was familiar with drug terminology. [46] Her intention on the call was to portray

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[39] *Sergeant Rettie,* AR, Vol. II, p. 74, l. 14-22. Sgt. Rettie testified that he reviewed the tip with Cst. Cavanagh and she agreed that there was reasonable suspicion to call the phone number, but Cst. Cavanagh could not remember if she had seen or discussed the tip: *Sergeant Rettie,* AR, Vol. II, p. 74, l. 32-27, p. 82, l. 38 to p. 83, l. 1; *Cst. Cavanagh,* AR, Vol. II, p. 94, l. 1-18.

[40] *Sergeant Rettie,* AR, Vol. II, p. 83, l. 2-19.
[41] *Sergeant Rettie,* AR, Vol. II, p. 83, l. 2-33.
[42] *Sergeant Rettie,* AR, Vol. II, p. 83, l. 40 to p. 84, l. 13.
[43] *Constable Cavanagh*, AR, Vol. II, p. 86, l. 34-40.
[44] *Sergeant Rettie,* AR, Vol. II, p. 74, l. 37-39; *Constable Cavanagh*, AR, Vol. II, p. 86, l. 44 to p. 87, l. 18.
[45] *Constable Cavanagh*, AR, Vol. II, p. 95, l. 1-6.
[46] *Constable Cavanagh*, AR, Vol. II, p. 85, l. 35-47, p. 86, l. 20-28.

herself as a drug user.[47]

21. At 13:39, Cst. Cavanagh phoned the number in the tip and a male answered the phone. She asked him how he was doing and he said he was good. The male then asked Cst. Cavanagh who she was. She replied that her name was "J" or "Jen". She was not challenged further, so she asked for "half soft," which was drug terminology for half a gram of powder cocaine.[48] The male on the phone responded that he could come and meet her. Cst. Cavanagh asked if he could meet her by the Coquitlam mall at the T & T supermarket. The male agreed and said he would need 5 to 10 minutes and his name was William.[49]

22. Cst. Cavanagh testified about being asked who she was during the call. She said she had experienced that before, and "they're just trying to feel out who it is…" She testified that in her view it wasn't normal behaviour, because a civilian on the other side of a wrong number would not be "challenging as to who is on the other line…" She said the challenge in this case was "pretty soft" compared to some other cases and described it as "a bit of a challenge, but not [an] extremely in-your-face aggressive challenge."[50]

23. At 14:02, Cst. Cavanagh called the number again and asked the same male how long it would take for him to come to the T & T supermarket. He advised that he was there. Cst. Cavanagh then told him that she was in a Silver Honda and described where she was parked.[51]

24. At 14:06, Cst. Cavanagh received a call from a different number (778-918-9314) and spoke to a male who sounded like William and was looking for Cst. Cavanagh. She then observed the appellant on the phone and described in more detail where she was parked. The appellant got in the passenger side of the car. After introductions were made, the appellant asked Cst. Cavanagh how much she wanted. She told him she wanted "a half soft." He then reached in his jacket pocket and produced two Ziploc bags of cocaine. Cst. Cavanaugh asked how much it would be, and the

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[47] *Constable Cavanagh*, AR, Vol. II, p. 87, l. 43 to p. 88, l. 3.
[48] *Constable Cavanagh*, AR, Vol. II, p. 87, l. 18-47, p. 88, l. 6-12, p. 92, l. 43 to p. 93, l. 13, p. 95, l. 41 to p. 96, l. 2.
[49] *Constable Cavanagh*, AR, Vol. II, p. 88, l. 15-29.
[50] *Constable Cavanagh*, AR, Vol. II, p. 92, l. 1-27.
[51] *Constable Cavanagh*, AR, Vol. II, p. 89, l. 7-21.

respondent said "forty," after which the transaction took place.[52] The discussion inside the car was the first time that the price of the cocaine was ever discussed.[53]

25. After the transaction, the respondent confirmed that he now had Cst. Cavanaugh's phone number, and said "I'll add your number in." After a brief conversation, the appellant left.[54]

Undercover officer's testimony about reasonable suspicion

26. Cst. Cavanagh was never asked by the Crown in direct examination whether she had developed her own reasonable suspicion before the call. In cross-examination, she was asked about her level of suspicion before making the call and said in response that, "cover presented me with a phone number and the commodity to purchase, so..."[55] She agreed that her understanding of the phone number related to the instructions she had received to make the call.[56]

27. Cst. Cavanagh did describe her thought process at various points during the call. She testified that when the male on the other end of the phone challenged her by asking who she was, she thought that "we could have somebody here that's going to want to traffic to me."[57] Once the male responded positively to her request for half-soft by agreeing to meet, she suspected that the person was, in fact, a drug trafficker and they would be able to set up a deal.[58] After the call, she concluded that the male, who had introduced himself as William, would come out and sell her drugs.[59]

Continuation of the drug investigation

28. After December 4, 2015 undercover officers called (604) 787-2313, (778) 918-9314,[60] and a third number (provided by the appellant)[61] a total of 19 times to arrange drug transactions.

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[52] *Constable Cavanagh*, AR, Vol. II, p. 89, l. 27 to p. 91, l. 5.
[53] *Constable Cavanagh*, AR, Vol. II, p. 91, l. 28-35.
[54] *Constable Cavanagh*, AR, Vol. II, p. 91, l. 7-26.
[55] *Constable Cavanagh*, AR, Vol. II, p. 93, l. 19-26.
[56] *Constable Cavanagh*, AR, Vol. II, p. 94, l. 19-30.
[57] *Constable Cavanagh*, AR, Vol. II, p. 92, l. 5-8.
[58] *Constable Cavanagh*, AR, Vol. II, p. 88, l. 15-22.
[59] *Constable Cavanagh*, AR, Vol. II, p. 88, l. 24-33.
[60] This is the same number the appellant used to call Cst. Cavanagh on Dec 4, 2015.
[61] *Agreed Statement of Facts*, Ex. 1, AR, Vol. I, p. 43, para. 15.

Generally speaking, these transactions followed the same pattern. The undercover officers called the number in question and requested cocaine. The appellant or his co-accused would then meet at an agreed upon location and complete the transaction.[62] In total, the appellant personally met undercover officers and completed drug transactions in response to phone calls received, on 16 separate occasions after the initial transaction on December 4, 2015.[63]

The decision of the trial judge

29. The trial judge found that entrapment was established on a balance of probabilities, and that he had no alternative but to enter a judicial stay of proceedings.[64] He described the issue before him as whether the authorities provided a person with an opportunity to commit an offence without acting on a reasonable suspicion that the person was already engaged in criminal activity or pursuant to a *bona fide* inquiry.[65]

30. The trial judge found that prior to the phone call the police had a mere suspicion. In his view, nothing had been corroborated.[66] The police had not connected the appellant personally with the vehicle or the phone number provided in the tip.[67] To establish reasonable suspicion, the police needed to "somehow" tie the person who answered the phone to the tip.[68] Cst. Cavanagh had not tried to do so, and had thus taken no investigative steps during the call.[69]

31. The trial judge found that Sgt. Rettie and Cst. Cavanagh subjectively believed they needed more grounds to establish reasonable suspicion.[70] The trial judge stated that Sgt. Rettie had "indicated that something more was needed before an opportunity was presented,"[71] and he found

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[62] *Agreed Statement of Facts*, Ex. 1, AR, Vol. I, p. 41-45, paras. 1-22.
[63] *Agreed Statement of Facts*, Ex. 1, AR, Vol. I, p. 41-45, paras. 1, 3, 4, 9, 10, 11, 12, 14-22. On one occasion, the co-accused arranged the meeting and the appellant attended the transaction (para. 9)
[64] *Reasons for Judgment*, AR, Vol. I, p. 15, para. 47.
[65] *Reasons for Judgment*, AR, Vol. I, p. 7, paras. 19-20.
[66] *Reasons for Judgment*, AR, Vol. I, p. 12, para. 36.
[67] *Reasons for Judgment*, AR, Vol. I, p. 12, para. 37.
[68] *Reasons for Judgment*, AR, Vol. I, p. 12, para. 39.
[69] *Reasons for Judgment*, AR, Vol. I, p. 13, paras. 41, 42.
[70] *Reasons for Judgment*, AR, Vol. I, p. 12, para. 38.
[71] *Reasons for Judgment*, AR, Vol. I, p. 12, para. 38.

that Cst. Cavanagh herself "did not have a reasonable suspicion until after the accused had agreed to traffic with her."[72]

32. The trial judge found that the police could develop reasonable suspicion in the course of a phone call, but their suspicion had to exist before the opportunity to commit a crime was presented.[73] The moment Cst. Cavanagh requested a "half-soft" was an opportunity to traffic and not an investigative step.[74] In his view, Cst. Cavanagh's request for a "half soft" was an opportunity to traffic, because she engaged in "transactional language" that only required the respondent to say yes for the offence to be complete. By doing so, she offered him an opportunity to traffic by offer without reasonable suspicion.[75]

The judgment of the Court of Appeal

33. The Court of Appeal unanimously allowed a Crown appeal from the judicial stay of proceedings and remitted the case to the trial court for sentencing.[76]

34. After summarizing the conceptual basis for the doctrine of entrapment, Groberman J.A. stated that the main issue to be decided was whether the police had a reasonable suspicion before providing the appellant with the opportunity to sell cocaine to an undercover officer.[77] There were several errors in the trial judge's analysis. The trial judge failed to consider the tip as a whole, and instead separated the information in the tip into separate parts and sought independent proof to link those parts together. The trial judge also erred in finding that it was necessary for the tip to identify the appellant personally, or to prove independently that the telephone number belonged to a dial-a-dope operation.[78]

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[72] *Reasons for Judgment*, AR, Vol. I, p. 13, para. 43.
[73] *Reasons for Judgment*, AR, Vol. I, p. 8, paras. 27, 28.
[74] *Reasons for Judgment*, AR, Vol. I, p. 13, para. 42.
[75] *Reasons for Judgment*, AR, Vol. I, p. 13, para. 42. In this respect the trial judge relied on the trial decision in *R. v. Williams*, 2014 ONSC 2370, rev'd 2018 ONCA 534 (on reserve, SCC No. 38304) and declined to follow *R. v. Le*, 2016 BCCA 155, leave ref'd, [2016] 2 S.C.R. ix.
[76] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 27, paras. 39, 42.
[77] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, pp. 19-20, paras. 12-14.
[78] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 21, para. 16.

35. In Groberman J.A.'s view, the question for the trial judge demanded a broader focus based on whether the details of the tip and the preliminary information discovered in the investigation of the tip gave the police a reasonable suspicion that the number called was dedicated to drug trafficking through a dial-a-dope operation.[79] The police were entitled to attach considerable weight to the tip because aspects of the tip enhanced its credibility, including its reference to a vehicle associated with an individual who appeared to have been involved in several dial-a-dope operations.[80] The trial judge erred in requiring specific corroboration of all elements of the tip. Such corroboration was unnecessary. What was required was that the police had sufficient information to harbour a reasonable suspicion that they were calling a phone number attached to a drug trafficking operation.[81]

36. Groberman J.A. held that the trial judge failed to appreciate that the police officers operated as a team, and Cst. Cavanagh was entitled to take action based on the advice of her fellow officers.[82] She was advised that police had a reasonable suspicion and her role was to call the number and attempt to make a drug purchase unless the conversation dispelled reasonable suspicion.[83] The suggestion that Cst. Cavanagh had a subjective belief that she needed more grounds to establish reasonable suspicion was not supported by her testimony.[84] Similarly, Sgt. Rettie's testimony did not suggest that he believed further investigation was necessary to meet the reasonable suspicion standard, but merely recognized the reality that the situation was fluid. If the person who answered the call acted in a manner that was inconsistent with a dial-a-dope transaction, he would expect Cst. Cavanagh to terminate the call.[85]

37. Groberman J.A. noted that the reasonable suspicion standard was not an onerous one. He noted that cases where the standard had not been met were generally cases where the police acted on anonymous tips where no attempt was made to investigate.[86] By contrast, in several cases, held

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[79] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 21, para. 17.
[80] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 22, para. 18.
[81] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 23, para. 24.
[82] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 22, para. 19.
[83] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 22, para. 20.
[84] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 22, para. 21.
[85] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 23, para. 23.
[86] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 23, para. 26.

that very limited confirmatory evidence had been found to transform an anonymous tip into reasonable suspicion.[87] Applying those authorities to the case before him, he held that confirmation between the licence plate number and the Honda Odyssey, and the apparent involvement of the vehicle's owner with dial-a-dope operations were sufficient to give the police a reasonable suspicion that the number called was associated with a dial-a-dope operation.[88]

38. Groberman J.A. did not agree with the reasoning of the Ontario Court of Appeal in *R. v. Ahmad*,[89] that it was necessary for the police to have evidence that connects a specific identifiable individual with a tip in order to meet the reasonable suspicion standard.[90]

39. Groberman J.A. went on to hold that the police conduct was also justified as part of a *bona fide* inquiry. Citing this Court's decision in *R. v. Barnes*, he noted that reasonable suspicion was not the only basis upon which the police could approach a person to propose a transaction.[91] Groberman J.A. noted that decided cases had given the exception fairly wide applicability.[92]

40. In this context, the Court of Appeal cited the decision of the Ontario Court of Appeal in *R. v. Imoro*, and its own prior decision in *R. v. Le*, and found that the call placed by Cst. Cavanagh was investigative in nature as opposed to providing an opportunity to commit a crime.[93] Thus, while the Court of Appeal was satisfied that the police had reasonable suspicion to justify their actions in attempting to purchase cocaine, the alternative analysis was also available. The limited inquiries made by Cst. Cavanagh were investigative in nature, and the actual transaction to purchase drugs occurred later after negotiations at the Coquitlam Centre mall.[94]

41. In the result, the trial judge had misapprehended portions of the evidence, misapplied the legal test for entrapment, and reached a conclusion that was not available on the evidence.[95]

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[87] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 24, paras. 27-31.
[88] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 25, para. 32.
[89] 2018 ONCA 534, (on reserve, SCC No.(s) 38165 & 38304).
[90] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 25, para. 33.
[91] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 25, para. 34.
[92] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 26, para. 35.
[93] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, pp. 26-27, paras. 35-38.
[94] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 27, para. 38.
[95] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 27, para. 39.

PART II: POSITION ON THE QUESTIONS IN ISSUE

42. The Crown's position on the preliminary jurisdictional issue is as follows:

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

No. Section 691(2)(*b*) of the *Criminal Code* does not give the appellant an appeal as of right because the Court of Appeal did not "enter a verdict of guilty against the person," which is a requirement of the section. While a stay may be tantamount to an acquittal for the purposes of applying s. 691(2), that does not resolve which subsection applies. An appeal from a reversal of a stay for entrapment is governed by s. 691(2)(*c*) which requires leave.

43. The Crown's position on the entrapment issues may be summarized as follows:

B) What is the correct approach to entrapment in the dial-a-dope context?

Police conduct in dial-a-dope cases must be assessed in light of the rationale for the entrapment doctrine. Where the police have an objective basis for their investigation and their actions are responsive and conform with the entrapment doctrine, as they were in this case, neither random virtue testing nor the risk of causing an otherwise innocent citizen to commit a crime ever arise.

C) Was the reasonable suspicion requirement satisfied before the police provided the appellant with an opportunity to commit an offence?

Yes. The police had reasonable suspicion before they presented the appellant with an opportunity to commit an offence. The detailed and corroborated tip gave rise to reasonable suspicion prior to the undercover call. Further, the call was part of the investigation into the tip and the appellant's willingness to transact with a complete stranger requesting cocaine in coded language added to the reasonable suspicion.

D) Alternatively, can the investigation in the case at bar be properly classified as a *bona fide* inquiry such that there was no entrapment?

Yes. The police were also engaged in a *bona fide* investigation based on a specific tip. Knowledge about dial-a-dope trafficking, combined with a strong objective basis to suspect the number in question met the requirements of a *bona fide* inquiry. The undercover call quickly confirmed the number was being used to arrange drug transactions, and ran no risk of entrapping individuals not already involved in drug dealing.

PART III: ARGUMENT

A. No jurisdiction to hear this appeal as of right

44. While the Crown consents to the granting of leave in the circumstances, it takes the position that there is no jurisdiction to hear the present appeal as of right and that leave is required. A stay for entrapment is fundamentally distinct from an acquittal at trial. The reasoning in *Jewitt*[96] and *Kalanj*,[97] that a stay is tantamount to an acquittal for the purposes of certain rights of appeal, does not fully address whether leave is required in light of the unique nature of entrapment and changes in the relevant legislation.

45. Entrapment only arises after a finding of guilt has already been made. There has never been an acquittal on the merits and there is thus no need for a court of appeal to enter a guilty verdict. Rather the effect of allowing an appeal and reversing a stay is to restore the guilty verdict that was made at trial. A stay of proceedings should only be equated with an acquittal where necessary to enable a Crown appeal or an appeal by the accused, but it does not dictate the form of appeal in the face of directly applicable and clear legislation. An appeal as of right under s. 691(2)(*b*) requires that the court of appeal enter a guilty verdict. In cases like the present case, where that never happened, leave is required under s. 691(2)(*c*).

A finding of guilt is a condition precedent to an entrapment ruling

46. In *R. v. Pearson*, this Court found that resort to the doctrine of entrapment presupposes a finding of guilt.[98] Additionally, in *Pearson*, this Court adopted the dissenting views of Justice Sopinka in *R. v. Scott*,[99] that where an appellate court reverses a trial court on a finding of entrapment, "the substantive verdict of guilty rendered by the trial judge need not be disturbed."[100]

47. A finding of guilt and the entry of a conviction are distinct steps in a criminal proceeding.[101] For example, a court may make a finding of guilt yet decline to convict an accused under s. 730 of

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[96] [1985] 2 S.C.R. 128.
[97] [1989] 1 S.C.R. 1594.
[98] [1998] 3 S.C.R. 620, para. 10.
[99] [1990] 3 S.C.R. 979, p. 1019.
[100] *R. v. Pearson*, [1998] 3 S.C.R. 620, para. 18.
[101] *R. v. Bérubé*, 2012 BCCA 345, paras. 42-49.

the *Criminal Code*. By contrast, "conviction", unlike a finding of guilt, is a judgment of the court.[102]

48. In *Pearson,* this Court highlighted the distinction between a finding of guilt and conviction in cases of entrapment:[103]

> A court of appeal which orders a new trial limited to the issue of entrapment exercises its statutory jurisdiction under s. 686 of the *Criminal Code* in the following manner: where an accused successfully impugns the finding of no entrapment at his or her first entrapment hearing, the court of appeal "allows an appeal against conviction," in accordance with the wording of s. 686(1). Then, pursuant to s. 686(2), the court of appeal "quashes the conviction" and "orders a new trial". However, the quashing of the formal order of conviction does not, without more, entail the quashing of the underlying verdict of guilt. In most successful appeals against conviction, the court of appeal which quashes the conviction will also overturn the finding of guilt; however, the latter is not a legally necessary consequence of the former. Under s. 686(8), the court of appeal retains the jurisdiction to make an "additional order" to the effect that, although the formal order of conviction is quashed, the verdict of guilt is affirmed, and the new trial is to be limited to the post-verdict entrapment motion. [Emphasis added]

49. In the case at bar, the Court of Appeal did not "enter a verdict of guilty", which is a requirement for an appeal as of right under s. 691(2)(*b*). The trial judge did that, as a result of the appellant's guilty plea. The Court of Appeal's correction on the legal question of entrapment nullified the stay and allowed for a conviction to be entered, but in the absence of a verdict of guilt entered by the Court of Appeal no right to appeal arises.

The decisions in *Jewitt* and *Kalanj* do not reflect important subsequent legal developments

50. The appellant's position that a stay of proceedings in the case at bar is tantamount to an acquittal for all purposes so as to attract the application of s. 691(2)(*b*) should be rejected. The legal landscape has changed since *Jewitt* and *Kalanj* were decided. This Court's ruling in *R. v. Jewitt,*[104] was premised on the Crown's rights of appeal which have since changed. Further, though it was an entrapment case, it arose from a finding of entrapment by a jury and before *Mack* decided that entrapment would only arise after a finding of guilt. The appellant's proposition that a stay of proceedings is tantamount to an acquittal for all purposes is inconsistent with this Court's decision in *Pearson*.

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[102] *R. v. Bérubé*, 2012 BCCA 345, para. 44.
[103] *R. v. Pearson*, [1998] 3 S.C.R. 620, para. 16.
[104] [1985] 2 S.C.R. 128.

51. The appellant's submission that this Court has typically heard appeals like this on an as of right basis does not have strong support in the authorities, and fails to account for the fact that the Court has not directly addressed the issue. In *R. v. Imoro*, which the appellant relies on as an example of an appeal as of right, the issue was never considered. More recently, in *R. v. Bellusci*, the Quebec Court of Appeal set aside a stay of proceedings imposed after a finding of guilt and the appeal proceeded before this Court with leave.[105]

Jewitt was directed at Crown appeals and was intended to have limited application

52. This Court's ruling in *Jewitt* and subsequent cases citing *Jewitt* do not support the broad proposition that a stayed finding of guilt amounts to an acquittal for all purposes.[106] This Court's analysis in *Jewitt* focused on the Crown's right of appeal. Dickson C.J.'s judgment explicitly stated that his reasoning for permitting the Crown's route of appeal had no broader application:[107]

> While a stay of proceedings of this nature will have the same result as an acquittal and will be such a final determination of the issue that it will sustain a plea of *autrefois acquit*, its assimilation to an acquittal should only be for purposes of enabling an appeal by the Crown. Otherwise, the two concepts are not equated. [Emphasis added].

53. At the time, the Crown could only appeal to a court of appeal "against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone".[108] Since *Jewitt* was decided, the Crown's rights of appeal under the *Criminal Code* have been amended.

54. Section 676(1)(*c*) now grants the Crown an express right of appeal where a trial judge stays proceedings on an indictment. This Court's judgment in *Jewitt* essentially fashioned an ability for the Crown to appeal a finding of entrapment in a context where there was no other express route to appeal a stay of proceedings. Moreover, while *Jewitt* may inform the ability of an accused to appeal the reversal of a stay, nothing in the reasoning extends to whether such an appeal is as of right under s. 691(2)(*b*), or requires leave under s. 691(2)(*c*). The Court in *Jewitt* was faced with a

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[105] *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509 (SCC Docket No. 34054).
[106] See *R. v. Kalanj*, [1989] 1 S.C.R. 1594; *R. v. Puskas*, [1998] 1 S.C.R. 1207.
[107] *R. v. Jewitt*, [1985] 2 S.C.R. 128, p. 148.
[108] *R. v. Jewitt*, [1985] 2 S.C.R. 128, p. 137.

stark choice: either the stay was tantamount to an acquittal for the purposes of a Crown appeal or there was no ability to appeal whatsoever.

55. Assuming that *Jewitt* retains interpretive value in defining the rights of appeal of those found guilty of criminal offences, it must be read in light of subsequent legal developments. Section 691(2)(*b*) in its present form stipulating that it applies where the Court of Appeal enters a guilty verdict did not exist when *Jewitt* was decided.[109] The former provision allowed an appeal as of right on any question of law in any case where an acquittal was set aside – it did not divide appeals into those that existed as of right and those that required leave.[110] Further, this Court clarified in *Pearson* that a trial court's finding of guilt is undisturbed when an appeal is taken from a stay imposed for entrapment.

56. The appellant's reliance on *R. v. Kalanj* illustrates the point. In that case, this Court held that a stay was tantamount to an acquittal and thus allowed the accused to appeal as of right to this Court. However, once again, the right to appeal to this Court under what was then s. 618(2)(*a*) did not differentiate between appeals as of right, and those requiring leave. An accused whose "acquittal" was set aside had an automatic right to appeal. The statutory requirement that the court of appeal enter a verdict of guilt for an appeal as of right did not exist until 1997.[111] In *Kalanj*, the Court of Appeal had ordered a new trial, so there is little doubt that under the current legislative framework Mr. Kalanj would have required leave pursuant to s. 691(2)(*c*).

57. Properly interpreted, the Court of Appeal in this case was relying on s. 686(4) and s. 686(8) in allowing the Crown appeal and remitting the case to the trial court for sentencing in accordance with the original finding of guilt. Section 686(8) provides that "where a court of appeal exercises any powers conferred by subsection… (4), it may make <u>any</u> order, in addition, that justice

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[109] See: *Criminal Code of Canada*, R.S.C., 1985, c. C-46, s. 691; *Criminal Law Improvement Act*, 1996, S.C. 1997, c. 18, s. 99.
[110] *Criminal Code*, R.S.C., 1985, c. C-46, s. 691 (prior to amendment).
[111] *Criminal Code*, R.S.C., 1970, c. C-34, s. 618(2)(a) as amended by *Criminal Law Amendment (No. 2), 1976*, S.C. 1974-75-76, c. 105, s. 18. The section was unchanged and re-enacted as s. 691 in the revised statutes of 1985. The present form of section 691 was introduced with the enactment of the *Criminal Law Improvement Act*, 1996, S.C., 1997, c. 18, s. 99.

requires." The appellant argues that the Court of Appeal was necessarily acting under s. 686(4)(*b*)(ii).[112] However, in *Bellusci*, this Court held that an appellate court can exercise a power under s. 686(4) without the need to order a new trial or enter a verdict of guilty, and can rely on the general remedial power in s. 686(8).[113] Similarly, in *R. v. Provo*, this Court held that where a conditional stay imposed as a result of the *Kienapple* principle was set aside by a court of appeal, the situation was analogous to entrapment, and the appropriate remedy was for the court of appeal to remit the case to the trial judge relying on the general remedial power rather than entering a verdict itself.[114]

58. This Court's decision in *Pearson* cannot be ignored when determining the proper route of appeal regarding entrapment. The fact that guilt is a prerequisite to a finding of entrapment entails that a court of appeal does not enter a finding of guilt when it sets a stay aside. A distinction must be made between cases where guilt is a prerequisite to obtaining a stay, such as entrapment, as opposed to cases where no such prerequisite exists.

A purposive interpretation of s. 691(2) supports a leave requirement

59. Section 691(2)(*b*) was enacted as a safety valve for those rare situations in which the trier of fact acquits, but an appellate court substitutes a finding of guilt to the acquittal. This provision honours two principles: (1) that triers of fact have a unique role in the administration of criminal justice, which should not be lightly set aside; (2) that every person convicted should have resort to at least one level of appeal from the finding of guilt. Neither principle is at play in this case.

60. There is no reason why persons who are factually guilty, and whose stays for extraneous circumstances are reversed on appeal due to errors of law, should have a right of appeal to the Supreme Court. Criminal cases ordinarily require leave, and there is no principled reason why those in the appellant's situation should be treated differently. Appellate correction of trial-level errors in the application of entrapment principles are in no way special or different from other errors in law. Moreover, injustices that might otherwise arise may be addressed by the granting of leave in appropriate cases under s. 691(2)(*c*).

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[112] Appellant's Factum, para. 39, s. 686(4)(b)(ii) contemplates entering a verdict of guilt.
[113] *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, paras. 39-40.
[114] *R. v. Provo*, [1989] 2 S.C.R. 3, p. 17-22.

B. Police conduct must be assessed in light of the rationale for the entrapment doctrine

61. It is fundamentally important to remember that entrapment is an aspect of the abuse of process doctrine,[115] and exists because "the administration of justice must be kept free from disrepute" arising from "judicial condonation of unacceptable conduct by investigatory and prosecutorial agencies."[116]

62. The doctrine of entrapment has two branches. The first branch applies where the police engage in impermissible "random virtue testing" by providing an opportunity to commit an offence in the absence of either (a) reasonable suspicion to believe the individual is involved in the criminal activity which is the subject of the investigation, or (b) a *bona fide* inquiry. The second branch applies where the police, although acting on reasonable suspicion or in the course of a *bona fide* inquiry, go beyond merely providing an opportunity by impermissibly inducing the commission of the offence.[117] Only the first branch of entrapment is at issue on this appeal.

63. Any analysis of the entrapment doctrine must be firmly grounded in the two mischiefs it was designed to prevent: (1) arbitrary police conduct, and (2) investigative strategies that run the risk of attracting innocent and otherwise law-abiding citizens into the commission of criminal offences.[118] As Bennet J.A. stated in *Le*:

> [94] 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).[119]

64. The doctrine of entrapment is only meant to apply to the "clearest of cases."[120] Thus while entrapment will be established where the authorities provide an opportunity without reasonable suspicion or in the course of a *bona fide* inquiry, those concepts must be interpreted in light of the

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[115] *R. v. Mack*, [1988] 2 S.C.R. 903, p. 938-942; *R. v. Ahmad*, 2018 ONCA 534, para. 31 (on reserve, SCC No.(s) 38165 & 38304).
[116] *R. v. Mack*, [1988] 2 S.C.R. 903, p. 940.
[117] *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Barnes*, [1991] 1 S.C.R. 449.
[118] *R. v. Mack*, [1988] 2 S.C.R. 903, pp. 956-957.
[119] *R. v. Le*, 2016 BCCA 155, leave ref'd, [2016] 2 S.C.R. ix.
[120] *R. v. Mack*, [1988] 2 S.C.R. 903, p. 976.

rationale for the doctrine in the first place. As Lamer J. stated in *Mack*:

> 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.[121]

65. Undercover calls to suspected drug lines in which the police act as any drug purchaser normally would pose no risk to otherwise innocent citizens. The "spectacle of an accused being convicted of an offence which is the work of the state"[122] simply does not arise.

66. The police investigation in the case at bar (a) falls within a proper contextual interpretation of reasonable suspicion in the dial-a-dope context, and (b) fits precisely into the *bona fide* inquiry framework:

a. Reasonable suspicion: A tip localizing suspicion to a single phone number satisfies the reasonable suspicion standard when sufficiently confirmed. Such confirmation must be assessed against the totality of the circumstances and may flow from various factors such as the detail level of the tip, corroboration through police investigation or the nature of the undercover police call made to the suspect phone number. With respect to the call, the immediate willingness of an individual answering the phone to engage with a total stranger using coded drug language can contribute to satisfying the reasonable suspicion standard; it also serves as a further safeguard against randomly tempting otherwise innocent citizens, because if the individual does not respond, then no transaction, arrest, or prosecution ever takes place. In this case, the reasonable suspicion standard was met by the fairly detailed tip partly corroborated by the police, and was further confirmed by the nature of the initial call made by Cst. Cavanagh, the undercover officer.

b. *Bona fide* inquiry: Knowledge that dial-a-dope trafficking is taking place by phone, combined with an objective basis to narrow that concern to a single phone number is sufficient justification for the police to present a willing individual with an opportunity to meet and consummate a drug transaction. In neither scenario does the police conduct

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[121] *R. v. Mack*, [1988] 2 S.C.R. 903, pp. 965-966.
[122] *R. v. Mack*, [1988] 2 S.C.R. 903, p. 942.

offend "basic values of the community' the only situation in which the doctrine of entrapment can apply.[123]

C. The reasonable suspicion requirement was satisfied

67. The Court of Appeal was correct in its assessment of reasonable suspicion. Dial-a-dope investigations are fundamentally different from in-person undercover operations based on suspicion of known individuals and require a contextual analysis. Anonymity is the hallmark of dial-a-dope trafficking. In that respect, the Crown says (1) reasonable suspicion that a particular phone line is a dial-a-dope line is sufficient and need not relate to an identified individual, (2) the reasonable suspicion standard was met by the police in the present case before any substantive conversation with the appellant ever took place, and (3) brief undercover calls in which the undercover officer uses coded drug language and acts as any drug purchaser would, may be characterized as investigative in nature and may be used to confirm or refute the existence of reasonable suspicion without infringing the core principles in *Mack*, as occurred in this case.

Reasonable suspicion is not onerous and must not be equated with reasonable grounds to believe

68. Reasonable suspicion is a lesser standard than reasonable belief. In *Mack*, Lamer J. noted that it is not an unduly onerous standard.[124] The totality of circumstances need only establish a reasonable possibility of crime instead of a reasonable probability.[125] The amount of information that gives rise to reasonable suspicion may be less, and reasonable suspicion can arise from information that is less reliable than that required for reasonable belief.[126]

69. One of the trial judge's errors was to approach the tip as if elements of the tip had to be proved on a balance of probabilities, or as if reasonable grounds to believe had to be established. This is evidenced by his focus on the fact that "external police investigation" had not connected

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[123] *R. v. Mack*, [1988] 2 S.C.R. 903, p. 976.
[124] *R. v. Mack*, [1988] 2 S.C.R. 903, p. 958.
[125] *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, para. 27; *R. v. Williams*, 2010 ONSC 1698, para. 44(3); *R. v. Olazo*, 2012 BCCA 59, para. 16; *R. v. Ahmad*, 2018 ONCA 534 (on reserve, SCC No.(s) 38165, 38304), para. 41.
[126] *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, para. 75.

the appellant to the information in the tip.[127] The appellant takes a similar approach.[128] However, it was not necessary to specifically corroborate all elements of the tip in order to meet the reasonable suspicion standard as the Court of Appeal recognized.[129]

70. In *R. v. Cahill***,** the British Columbia Court of Appeal rejected an argument that information in the hands of police needed to be "compelling" and "confirmed either by recourse to the established reliability of the informant, or by other means such as independent confirmation," in order to meet the reasonable suspicion standard. Wood J.A. explained that such an analysis which equates reasonable suspicion with the reasonable grounds to believe applicable in the context of search and seizure, is misplaced:

> [32] …to impose on the police a standard of "suspicion" equivalent to a belief based on reasonable and probable grounds, before they could provide a suspect with an opportunity to commit a crime, would seriously impede their ability to combat certain types of crime effectively. [130]

71. In entrapment cases, reasonable suspicion must be evaluated contextually so as to prevent abusive police conduct, while at the same time allowing the police to pursue legitimate investigations. As Lamer J. recognized from the outset in *Mack*, the ingenuity of criminals must be matched by the police, who must be given considerable latitude in their effort to enforce the criminal law, particularly when investigating consensual crimes like drug trafficking.[131]

<u>The reasonable suspicion standard was met before any substantive conversation took place</u>

72. In this case, while the tipster was anonymous and therefore the reliability of the tip was unknown, the information provided was sufficiently compelling and sufficiently corroborated to

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[127] *Reasons for Judgment*, AR, Vol. I, p. 12, paras. 36-37, p. 13, para. 39.
[128] Appellant's factum, paras. 55-57, 80-83.
[129] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 23, para. 24.
[130] 1992 CanLII 2129 (B.C.C.A.). The confusion between a grounds based analysis and reasonable suspicion as an aspect of entrapment has also been criticized in the academic literature: S. Penney, "Entrapment Minimalism: Shedding the 'No Reasonable Suspicion of Bona Fide Inquiry' Test" (2019) 44:2 Queens LJ. 95, p. 110.
[131] *R. v. Mack*, [1988] 2 S.C.R. 903, pp. 916-917.

meet the relatively low standard of reasonable suspicion before any conversation ever took place with the appellant. The tipster provided considerable detail including identifying a suspect or suspects who were operating the line, the drug sold, the vehicle used to deliver drugs including the make, model and plate number, and a specific location. Sgt. Rettie put it best when he explained that in his assessment of the information, "the tipster had a good knowledge of the information that he or she was providing."[132]

73. In addition, there was significant corroboration of the information provided. The police verified that the plate number did in fact match a tan Honda Odyssey as described by the tipster. More importantly, the plate was linked to an individual with a recent history of suspected drug trafficking, and six vehicles registered in his name, a factor consistent with organized drug trafficking.[133]

74. A tip from an informant of unknown reliability can give rise to reasonable suspicion when some objective or extrinsic piece of information in the tip is confirmed,[134] as it was in the present case. The Court of Appeal was correct that the detail and confirmation that did exist was sufficient to meet the relatively low threshold of reasonable suspicion.

The trial judge's errors in assessing reasonable suspicion

75. The trial judge erred in his assessment of reasonable suspicion in two additional ways as the Court of Appeal recognized. First, he failed to appreciate that the police officers operated as a team, rather than as separate individuals.[135] Second, he misapprehended the police evidence on reasonable suspicion. His conclusion that the police themselves did not believe they had reasonable suspicion was not supported on the record.

76. The reasonable suspicion standard is properly assessed by reference to what is known to the police as a whole, and not just one police officer.[136] That is particularly important in an

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[132] *Sergeant Rettie*, AR, Vol. II, p. 73, l. 11-14.
[133] *Sergeant Rettie*, AR, Vol. II, p. 73, l. 21-41.
[134] *R. v. Olazo*, 2012 BCCA 59, para. 17.
[135] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, pp. 22-23, paras. 19-23.
[136] *R. v. Shier*, 2018 ONSC 2425, para. 34; *R. v. Franc*, 2016 SKCA 129, paras. 38-39; *R. v. Olazo*, 2012 BCCA 59, para. 28 ("the police"); *R. v. Sawh*, 2016 ONSC 2776, paras. 31-33, 96-100, 112.

entrapment context where the focus is on the legitimacy of the overall police conduct. The trial judge overlooked the critical fact that Cst. Cavanagh played a specific role as an undercover officer and acted on instructions from her cover officer. She did not participate in the investigation or assessment of the tip. It was not necessary that she herself have a reasonable suspicion. In this respect the situation is no different than an arrest, where a police officer who exercises the power of arrest on the request of another officer may assume that the officer who ordered the arrest had reasonable grounds for doing so.[137]

77. Assessing reasonable suspicion by reference to the information that was available to the team as a whole, there was never any doubt that the police considered the standard to have been met. Cst. Pollock, whose role it was to investigate the tip, testified that he believed the threshold of reasonable suspicion was met.[138] Sgt. Rettie, who instructed Cst. Cavanagh to make the call and attempt a buy, testified that he believed the threshold of reasonable suspicion was met or exceeded to call the number and proceed with the investigation.[139]

78. Sgt. Rettie recognized that the undercover officer would have to confirm whether the person who answered the phone was "in fact" a drug trafficker. This did not detract from reasonable suspicion. The undercover call would quickly confirm or potentially invalidate the police belief that they were calling a drug line, but this last investigative step did not erase reasonable suspicion grounded in the tip and its corroboration. The Court of Appeal was correct to find that the trial judge had misapprehended the evidence in that regard.

79. Nor did Cst. Cavanagh directly testify that she had not developed reasonable suspicion until after the call.[140] She was never asked in direct examination whether she had developed her own reasonable suspicion before the call. In cross-examination, she was asked about her level of suspicion before making the call and said only, "cover presented me with a phone number and the commodity to purchase, so…"[141] Her understanding of the phone number was limited to the

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[137] *R. v. Debot*, [1989] 2 S.C.R. 1140, p. 1166.
[138] *Constable Pollock*, AR, Vol. II, p. 32, l. 19-26.
[139] *Sergeant Rettie*, AR, Vol. II, p. 74, l. 14-22.
[140] Appellant's Factum, paras. 5, 64, 86.
[141] *Constable Cavanagh*, AR, Vol. II, p. 93, l. 19-26.

instructions she had received to make the call.[142] The appellant himself acknowledged in argument that she did not appear to have "an independent understanding of the grounds of reasonable suspicion" before the call.[143]

80. Cst. Cavanagh's testimony about her thought process at various points during the call was limited to her reaction to the conversation, and did not include any assessment of the totality of the circumstances. Even so, she developed suspicions early in the conversation, which only grew stronger as the conversation progressed. For example, she testified that as soon as the male challenged her by asking who she was, she thought it might be somebody who wanted to traffic to her.[144] Once the male agreed to meet in response to her request for "half-soft," she suspected that the person on the phone was "in fact", a drug trafficker.[145] After the call, she concluded that he would come out and sell her drugs.[146]

Reasonable suspicion that the phone line is a dial-a-dope line is sufficient

81. The appellant's argument that reasonable suspicion requires demonstration that a specific *identified* individual be involved in crime, cannot be sustained in this context. The very purpose of dial-a-dope lines is to ensure the anonymity of those who would traffic drugs in the community.

82. While Lamer J. in *Mack* considered reasonable suspicion in the context of police knowing the identity of specific individuals,[147] reasonable suspicion in relation to somebody on the other end of a phone line did not arise. *Mack* was decided long before mobile phones were commonly used and before dial-a-dope lines were run as businesses. It is hardly surprising that this Court considered reasonable suspicion on the basis of identified individuals, since the investigation in that case targeted a known person.

83. If the police observed an unknown individual on the street engaged in suspicious activity they might well be able to demonstrate reasonable suspicion for that *particular individual* without

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[142] *Constable Cavanagh*, AR, Vol. II, p. 94, l. 19-30.
[143] Submissions of the Appellant, AR, Vol. II, p. 126, l. 39-47.
[144] *Constable Cavanagh*, AR, Vol. II, p. 92, l. 5-8.
[145] *Constable Cavanagh*, AR, Vol. II, p. 88, l. 15-22.
[146] *Constable Cavanagh*, AR, Vol. II, p. 88, l. 24-33.
[147] *R. v. Mack*, [1988] 2 S.C.R. 903, p. 956.

being in a position to identify the person.[148] The same is true for someone who answers a dial-a-dope line when there is a pre-existing reasonable suspicion about the line. That person is still an "individual who arouses a suspicion that he or she is already engaged in the particular criminal activity."[149]

84. The entrapment jurisprudence in dial-a-dope cases is instructive, as in many cases, courts have found reasonable suspicion based on information related to the phone line rather than a correspondence between the specific accused and information in the tip.[150] The appellant's argument, if driven to its logical conclusion, would mean that no matter how detailed and compelling a police tip was in relation to a particular line, and no matter how much corroboration there was, there would be no means by which the police could meet the reasonable suspicion standard without verifying the identity or involvement of the person they were speaking to.

85. The trial judge's approach that the police had to "somehow" tie the person who answered the phone to the information in the original tip,[151] would doom the undercover investigation from the start. Rather than behave as any other drug user would, which is critical to the success of any undercover operation (and should not be regarded as inciting or creating crime),[152] police would be forced to ask unnatural questions of the person on the other end of the line in a futile attempt to elicit background information.

86. The appellant's reliance on *Olazo* and *Le* as examples of entrapment cases in which there was a demonstrated connection between the information in the tip and the accused[153] is unfounded. In *Olazo*, it was not "the accused" who answered the 2:00 A.M. call that was found to contribute

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[148] *R. v. Gladue*, 2012 ABCA 143, para. 10, leave ref'd, [2012] 3 S.C.R. xii; *R. v. Le*, 2001 BCCA 658, paras. 23, 26-27, 33.
[149] *R. v. Barnes*, [1991] 1 S.C.R. 443, p. 463.
[150] *R. v. Le*, 2016 BCCA 155, paras. 86-97, leave ref'd, [2016] 2 S.C.R. ix; *R. v. Olazo*, 2012 BCCA 59, paras. 15-26; *R. v. Ralph*, 2014 ONCA 3, paras 28-32, leave ref'd, [2014] 3 S.C.R. x; *R. v. Pepper*, 2010 BCSC 611, paras 26-37; *R. v. Reid*, 2016 ONSC 954; *R. v. Bedi*, 2015 BCPC 229, paras. 14-35; *R. v. Salvona*, 2011 BCPC 197; *R. v. Cordero*, 2012 BCPC 280; *R. v. Bolender*, 2014 BCPC 194.
[151] *Reasons for Judgment*, AR, Vol. I, p. 13, para. 39.
[152] *R. v. Looseley*, [2001] UKHL 53, para. 23.
[153] Appellant's Factum, paras. 61-62.

to reasonable suspicion, but an unidentified male.[154] The call that led to an arranged meeting and the arrest of the accused took place 4 days later.[155] Similarly, in *Le* it was not "the accused" who answered, but simply "a man with a heavy Asian accent."[156] In both cases it was general corroboration that gave rise to reasonable suspicion.

87. In the context of a dial-a-dope trafficking operation, if the police have a reasonable suspicion that a phone number is a dial-a-dope line, it only makes sense that they also have a reasonable suspicion that whoever answers the line may be engaged in criminal activity. An approach that artificially separates the two ignores the fundamental fact that for dial-a-dope operations to work, someone has to monitor the line and answer the phone when orders come in.

88. The comments of Himel J.A. in concurring reasons in *R. v. Ahmad,*[157] are instructive:

> [109] First, to suggest that an undercover officer can reasonably suspect that a particular phone line is being used for a dial-a-dope scheme, but not reasonably suspect that the person who answers that phone is engaged in such a scheme is to ignore a fundamental reality: phone lines are increasingly personal. Although some people might pick up their friend or relative's phone when it rings, an undercover officer can still reasonably suspect that the person who answers is the user or owner of that phone. After all, in assessing reasonable suspicion "[w]e are looking…at possibilities, not probabilities". *MacKenzie*, at para. 72. Accordingly, in the dial-a-dope context, there is little difference between information that the police obtain about the phone line and information they obtain about the person who answers it. Quite often, information about one is information about the other.[158] [Emphasis added]

89. The approach to reasonable suspicion adopted by Groberman J.A. in the court below, and Himel, J.A.'s concurring reasons in *Ahmad* is the correct approach. Consistent with this approach, the Court of Appeal in the case at bar correctly concluded that based on the tip received and the details that were confirmed, the police had a reasonable suspicion not only that the phone number was a dial-a-dope line but that whoever answered the phone was engaged in drug trafficking.[159]

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[154] *R. v. Olazo*, 2012 BCCA 59, paras. 8, 26.
[155] *R. v. Olazo & Storteboom*, 2010 BCPC 455, paras. 3, 5.
[156] *R. v. Le*, 2016 BCCA 155, leave ref'd, [2016] 2 S.C.R. ix.
[157] 2018 ONCA 534 (on reserve, SCC No.(s) 38165 & 38304).
[158] *R. v. Ahmad*, 2018 ONCA 534 (on reserve, SCC No.(s) 38165 & 38304), paras. 108-110.
[159] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 25, paras. 32-33.

Undercover calls may contribute to reasonable suspicion in entrapment cases

90. Undercover calls to suspected dial-a-dope lines based on objective tips may confirm or invalidate police suspicions. Thus, even if the reasonable suspicion standard was not met prior to placing of the call, the call was correctly characterized by the Court of Appeal as investigative in nature and did not constitute an opportunity to commit a crime.[160]

91. No dial-a-dope cases would even arise if the person answering the phone responded like a normal, law-abiding citizen would. The dial-a-dope trafficker assumes the reason for the call and is only interested in who is on the other end of the line to ensure it is not the police. They don't ask, "why are you calling me?" or "what are you talking about?" or advise the caller that they have dialed the wrong number. If they did, then any suspicions the police had regarding the number would quickly dissipate and none of the concerns about attracting otherwise innocent people – the animating principle behind the doctrine of entrapment – would even arise.

92. This case illustrates the point. The appellant responded immediately and positively to a total stranger speaking cryptically and in coded drug language. After asking who she was and apparently being satisfied with the answer, the appellant was asked for "half-soft." Rather than ask any questions, the appellant immediately agreed that he could come and meet a total stranger at Coquitlam Centre mall in the next five to ten minutes. Only an individual who was already engaged in drug trafficking would behave in such a fashion.

93. An approach must be adopted that accounts for the nature of the police conduct, the legitimate objectives of the investigation, the response on the other end of the phone, and whether the interaction gives rise to any of the recognized risks associated with entrapment.

94. The growing body of jurisprudence that allows the police to engage in the preliminaries of a drug transaction without risking entrapment is the correct approach.[161] Initial drug conversations to confirm the willingness of a target to engage, that are not random or otherwise abusive, should

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[160] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, pp. 26-27, paras. 37-38.
[161] *R. v. Olazo*, 2012 BCCA 59, paras. 25-26; *R. v. Le*, 2016 BCCA 155, leave ref'd, [2016] 2 S.C.R. ix. See also: *R. v. Imoro*, 2010 ONCA 122, aff'd 2010 SCC 50, [2010] 3 S.C.R. 62; *R. v. Townsend*, [1997] O.J. No. 6516 (Gen Div.), paras. 40, 50. *Contra*: *R. v. Ahmad*, 2018 ONCA 534 (on reserve, SCC No.(s) 38165 & 38304), para. 42.

be seen as investigative steps rather than an opportunity in and of themselves.

95. Thus, in *Imoro,* the Ontario Court of Appeal held that an initial conversation in which an undercover officer asked an accused if he could "hook me up?" did not amount to providing the accused with an opportunity to sell drugs. Laskin J.A. could not accept that the conversation amounted to offering the accused an opportunity to commit an offence. It was merely a step in investigation of the anonymous tip. The opportunity was given later inside the accused's apartment where the transaction took place. [162] This Court approved of that distinction, unanimously holding that "the brief conversation between the police officer and the appellant could not ground a finding of entrapment."[163]

96. In *Olazo*, in a call to a suspected dial-a-dope line several days before the transaction involving the accused, an undercover operator asked either "Can you meet me?" or "Where are you?" and then if the male on the phone "could do a half?" The male responded that he could do "two 40s". In allowing a Crown appeal from a stay imposed by the trial judge, the Court accepted that the trial judge "failed to appreciate the nature and effect of the first call," which was not "an opportunity to commit an offence," but rather "a step in the investigation leading to reasonable suspicion".[164] The initial dialogue was "designed to set up a deal," and if the person who answered the call was willing, it could be seen as "investigative steps rather than opportunity."[165]

97. Similarly in *Le*, the British Columbia Court of Appeal held that the question "can you hook me up with an eight ball?" in an undercover call to a suspected dial-a-dope number did not amount to entrapment as it did not constitute an opportunity to commit a crime: [166]

> [92] Second, even if there was not reasonable suspicion, this minimal conversation can only amount to part of the investigation of the tip to see if the target responded. It was not an opportunity to commit a crime. Mr. Le's own expression of willingness to transact during the phone call raised a reasonable suspicion: see *Olazo*; *Imoro*. Afterwards, a deal was struck in person. In my view, asking someone if he can "hook a person up with drugs" is not, in and of itself, entrapment.

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[162] *R. v. Imoro*, 2010 ONCA 122, paras. 15, 16, aff'd 2010 SCC 50, [2010] 3 S.C.R. 62.
[163] *R. v. Imoro*, 2010 SCC 50, [2010] 3 S.C.R. 62, para. 1.
[164] *R. v. Olazo*, 2012 BCCA 59, paras. 5-6.
[165] *R. v. Olazo*, 2012 BCCA 59, paras. 25, 26.
[166] *R. v. Le*, 2016 BCCA 155, para. 66, leave ref'd, [2016] 2 S.C.R. ix.

98. There is no difference between a request for "a half" (*Olazo*), a request to be "hooked up" with an "eight ball" (*Le*), and the request for "a half soft" in the case at bar. They were all mere investigative steps designed to set up a deal. The opportunity to commit an offence was presented when the undercover officer and the appellant met in person to consummate the transaction, by which time the appellant had clearly expressed his willingness to meet the undercover officer, a complete stranger, in response to a request for drugs.

99. In *R. v. Ralph*, the Ontario Court of Appeal considered an undercover officer's statement ending in the phrase "I need product," to be a legitimate investigative step as opposed to an opportunity to commit an offence. The accused's response together with the anonymous tip was sufficient to give rise to reasonable suspicion. [167]

100. That a purposive and contextual approach is needed is demonstrated by the trial judge's narrow technical conclusion that requesting "half-soft" was itself an opportunity to commit an offence because it might have elicited an offer to traffic.[168] That overlooks the overall context of the investigation. The stated goal was not to elicit an offer, or to arrest or charge an individual for words spoken over the phone. The objective was to arrange a purchase under police surveillance and identify the individual who sold drugs in person to the undercover officer. At the time of the call, the police had no idea who the appellant was, much less any ability to arrest or charge him for words spoken over the phone. Nor was an "offer" the inevitable result of a request for "half-soft" as the facts demonstrate. Rather than offering,[169] the appellant immediately agreed to meet in person. Negotiations over the price and the actual exchange only took place later when he met Cst. Cavanagh at the mall as the Court of Appeal noted.[170]

101. In assessing police conduct, a principled approach that looks at the totality of the circumstances should be adopted as opposed to one which focuses primarily or solely on the narrow language used by undercover officers. A technical approach such as that employed by the trial judge in the case at bar which focused on "transactional language" is inconsistent with the foundational principles of entrapment as Bennett J.A. succinctly noted in *Le*:

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[167] 2014 ONCA 3, paras. 29-32, leave ref'd, [2014] 3 S.C.R. x.
[168] *Reasons for Judgment*, AR, Vol. I, p. 13, para. 42.
[169] *R. v. Campbell*, [1999] 1 S.C.R. 565, para. 25; *R. v. Murdock*, 2003 CanLII 4306 (Ont. C.A.).
[170] *Reasons for Judgment*, B.C. Court of Appeal, AR, Vol I, p. 27, para. 38.

> [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 drugs 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*. [emphasis added]. [171]

102. In *Ahmad*, the majority of the Ontario Court of Appeal accepted that specific language might amount to an opportunity, but also recognized that "an overly technical approach to the entrapment doctrine risks detaching the doctrine from its purpose and unduly restricting police conduct."[172] They also decided the appeals before them in the Crown's favour on the basis of a *bona fide* inquiry. Himel J.A. concurring adopted the analysis in *Le* and found the initial conversation at issue ("I need 80") did not amount to an opportunity, and the accused's response solidified reasonable suspicion.[173] Those cases where a strict transactional approach has been adopted, have been overtaken by the reasoning in *Imoro*, *Olazo*, and *Le*, and the fact that in the context of the drug trade there is no meaningful distinction between general requests such as whether someone can "hook up" an undercover officer with drugs, and more specific requests that mention the specific amount or drug the undercover officer is looking for.

103. The actions of the police in calling a suspected dial-a-dope line and engaging in the preliminaries of a drug transaction in a manner that would only be meaningful to someone who was already involved in the drug trade, is much less random, and much less likely to ensnare an innocent person than, for example, leaving a wallet in plain view in a park to see if anyone will steal it – the classic hypothetical from *Mack*.

104. A principled application of the entrapment jurisprudence supports the conclusion arrived at by the Court of Appeal that the undercover call was investigative in nature. By the time the appellant and Cst. Cavanagh met in person, the detailed nature of the tip, the follow up

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[171] *R. v. Le*, 2016 BCCA 155, para. 93, leave ref'd, [2016] 2 S.C.R. ix.

[172] *R. v. Ahmad*, 2018 ONCA 534, para. 39 (on reserve, SCC No.(s) 38165 & 38304). See also: *R. v. Gladue*, 2012 ABCA 143, para. 11, leave ref'd, [2012] 3 S.C.R. xii, where it was common ground that "four for a hundred" was an opportunity as opposed to "are you working?" or "are you rolling?"

[173] *R. v. Ahmad*, 2018 ONCA 534 (on reserve, SCC No.(s) 38165 & 38304), paras. 113-123.

investigation, and the respondent's own expression of willingness to meet a complete stranger in response to a coded request for drugs firmly established reasonable suspicion.

D. The police conduct was justifiable as part of a *bona fide* inquiry

105. The police conduct at issue on this appeal also falls within the bounds of permissible conduct contemplated in *Mack* on the basis of a *bona fide* inquiry. There is broad support for the application of the *bona fide* inquiry analysis to dial-a-dope cases. Both the Ontario Court of Appeal and the B.C. Court of Appeal have endorsed such an analysis,[174] as well as numerous trial courts.

106. In *Le*, the British Columbia Court of Appeal accepted that the undercover call in that case, which was substantially the same as the call in the case at bar, was part of a *bona fide* inquiry. As Bennett J.A. explained:

> [96] Third, Constable Wark's phone call did not amount to entrapment given the analysis and conclusions in *Swan*. The call was not part of hundreds of random calls, like Swan, but fell within a *bona fide* investigation or inquiry, having regard to the difficulty of investigating dial-a-dope offences and not confining dial-a-dope to a known location because of the mobile nature of the crime. Therefore, the conduct of the police in this case did not amount to entrapment.

107. In *Ahmad*, the Ontario Court of Appeal recognized the importance of the dial-a-dope context in assessing a *bona fide* inquiry.[175] Dial-a-dope operations are by their very nature difficult for the police to detect and prevent. The interpretation of the entrapment doctrine must account for the nature of the crime being investigated as Hourigan J.A. stated:

> [56] The entrapment doctrine must be sensitive to the particular context in which crime occurs: *Mack*, at p. 964. A rigid rule that there can be no *bona fide* inquiry unless the police target a specific geographic location is inconsistent with the principles underlying the doctrine. The mischief the entrapment doctrine seeks to prevent is the danger that police conduct will amount to random virtue-testing and attract innocent and otherwise law-abiding individuals to commit a crime that they would not have otherwise committed: *Mack*, at p. 957. Entrapment seeks to prevent arbitrary and abusive police tactics, not the legitimate investigation of a tip concerning suspected drug trafficking activity. [Emphasis Added].

108. Applying the majority's approach in *Ahmad*, the same factors that led that court to find

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[174] *R. v. Virgo*, [1993] O.J. No. 2618 (C.A.), para. 9; *R. v. Le*, 2016 BCCA 155; *R. v. Ahmad*, 2018 ONCA 534 (on reserve, SCC No.(s) 38165 & 38304).
[175] *R. v. Ahmad*, 2018 ONCA 534, paras. 52-56 (on reserve, SCC No.(s) 38165 & 38304).

reasonable suspicion and a *bona fide* inquiry are present here. Hourigan J.A. relied on the fact that the police were (1) acting on a tip directed at a particular phone line, (2) the male on the phone did not confirm he was "Romeo" but did not challenge the name, and (3) the male on the phone engaged in a conversation with an apparent stranger using coded language familiar to the drug trade.[176] In the case at bar, the police were acting on a tip directed at a particular phone line, the male on the other end of the phone asked Cst. Cavanagh who she was but did not challenge the name "Jen or J", and engaged in a conversation with a perfect stranger that included coded language familiar to the drug trade.

109. The *bona fide* criterion provides proper protection if the police step out of line in a dial-a-dope case, as illustrated by the finding of entrapment for the random calling seen in *Swan*.[177] Moreover, if the police did go beyond acceptable limits and exert undue pressure on the individual on the other end of the phone, they would run the risk of infringing the second branch of the entrapment doctrine which prohibits the police from going beyond an opportunity and inducing the commission of an offence.[178] Finally, the police conduct would always be subject to the general discretion to stay the proceedings as an abuse of process.[179] There is no merit to the appellant's contention that recognition of a *bona fide* inquiry in this context would create a "perverse incentive" for the police to engage in misconduct;[180] the integrity of the judicial process would be fully protected.

<u>*Bona fide* inquiry is an alternative analysis that had to be considered</u>

110. It is clear from *Mack* and *Barnes* that a *bona fide* inquiry is an alternative to individualized reasonable suspicion; it is not a "last resort" test.[181] Notably, in *Barnes*, Lamer J. described a *bona fide* inquiry as one of two "principal branches of the test for entrapment."[182] There is no support for the appellant's argument that reasonable suspicion ought to be the "norm" and the "primary

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[176] *R. v. Ahmad*, 2018 ONCA 534, para. 78 (on reserve, SCC No.(s) 38165 & 38304).
[177] *R. v. Swan*, 2009 BCCA 142.
[178] *R. v. Mack*, [1988] 2 S.C.R. 903, p. 965, See: C. De Sa, "Entrapment: Clearly Misunderstood in the Dial-a-Dope Context," (2015) 65 Crim. L.R. 200.
[179] *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, para. 31.
[180] Appellant's Factum, para. 77.
[181] *R. v. Mack*, [1988] 2 S.C.R. 903, p. 958.
[182] *R. v. Barnes*, [1991] 1 S.C.R. 449, p. 460.

means" by which police investigations are conducted,[183] or that there must be some evidence that an individualized investigation would not suffice in the circumstances.[184] Such an approach would unjustifiably restrict the conduct of police investigations.

111. The appellant's argument fails to appreciate that entrapment is concerned with imposing limits on the ability of the police to participate in the commission of an offence,[185] and not with dictating how the police ought to conduct their investigation within those limits.[186] There is no principled reason why, in addition to observing the parameters outlined by this Court in *Mack* and *Barnes*, the police should be required to treat reasonable suspicion as their "primary means" of investigating crime, and to engage in a *bona fide* inquiry as a last resort.

112. As a matter of law, the trial judge was obliged to consider both reasonable suspicion and *bona fide* inquiry as he recognized at the very outset of his reasons.[187] The appellant's argument that the Crown's failure to raise *bona fide* inquiry at trial should be fatal, overlooks two important points. First, the appellant himself addressed whether the police investigation qualified as a *bona fide* inquiry in argument before the trial judge.[188] Second, and more importantly, as the moving party the burden of establishing entrapment was on the appellant[189] and entrapment only exists in the absence of reasonable suspicion or a *bona fide* inquiry.

113. If there is a *bona fide* inquiry, police may offer individuals they encounter in the course of an investigation the opportunity to commit a crime, even if they do not have reasonable suspicion that any particular individual is engaged in criminal activity.[190] Thus, in *Barnes*, the police were entitled to present "any person" within a six-block radius of the Granville mall an opportunity to

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[183] Appellant's Factum, para. 71.
[184] Appellant's Factum, para. 76.
[185] *R. v. Barnes*, [1991] 1 S.C.R. 449, p. 459.
[186] *R. v. Swan*, 2009 BCCA 142, para. 38.
[187] *Reasons for Judgment*, AR, Vol. I, pp. 6-7, para 19.
[188] *Proceedings*, AR, Vol. II, pp. 130, 133-135.
[189] *R. v. Mack*, [1988] 2 S.C.R. 903, pp. 975-976.
[190] *R. v. Le*, 2016 BCCA 155, para. 68, leave ref'd, [2016] 2 S.C.R. ix; *R. v. Barnes*, [1991] 1 S.C.R. 449, p. 462-463; *R. v. Ahmad*, 2018 ONCA 534, para. 49 (on reserve, SCC No.(s) 38165 & 38304).

commit an offence. In the context of a *bona fide* inquiry, such randomness is permissible.[191]

114. There is no principled reason to impose a heightened standard of reasonable and probable grounds to believe,[192] before the police can be said to be engaged in a *bona fide* inquiry. This argument is inconsistent with the core principles in *Mack* and *Barnes.* There are two paths to police legitimately offering a suspect the opportunity to commit a crime and both require reasonable suspicion. A belief based upon reasonable grounds to believe would impose too high a standard and "seriously impede," the ability of the police to "combat certain types of crime effectively."[193] Moreover, it overlooks the fact that entrapment is an aspect of abuse of process and the focus is on the legitimacy of police conduct and not individual rights.

115. Unlike the search and seizure context where the question is whether the police have "enough" information to invade an individual's privacy,[194] entrapment is concerned with the nature of the police conduct and what kind of behavior they are engaged in.[195] What entrapment seeks to prevent is police conduct that is arbitrary and abusive. Its purpose is not to prevent the police from legitimately investigating crimes.[196]

116. A reasonable belief standard would also be unworkable in practice. In the vast majority of dial-a-dope cases, it would be difficult if not impossible for the police to achieve reasonable belief without at least calling the number to further the investigation. While the police may be able to run some checks on police databases as they did in the present case, there are generally no alternative investigative techniques that would generate grounds. The police must be given "considerable latitude" in their effort to enforce the criminal law.[197]

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[191] *R. v. Barnes*, [1991] 1 S.C.R. 449, p. 463.
[192] Appellant's Factum, para. 70.
[193] *R. v. Cahill*, 1992 CanLII 2129 (B.C.C.A.), p. 18. See also: *R. v. Virgo*, [1993] O.J. No. 2618 (ONCA) where the court reversed the trial judge's decision finding entrapment based on reliance on cases involving the standard of reasonable grounds.
[194] *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 SCR 456, para. 8.
[195] *R. v. Pearson*, [1998] 3 S.C.R. 620, para. 11.
[196] *R. v. Ahmad*, 2018 ONCA 534, para. 56 (on reserve, SCC No.(s) 38165, 38304).
[197] *R. v. Mack*, [1988] 2 S.C.R. 903, pp. 916-917.

The suspected dial-a-dope line as a virtual "area" where drug trafficking is taking place

117. In the dial-a-dope context, the *bona fides* of the investigation arise from the police knowledge that drug trafficking is commonly or routinely taking place on phone lines, combined with a specific tip that localizes suspicion to a single line, and the immediate responsiveness of the line to coded requests for drugs. The analogy of a phone line to a geographic area is strengthened by the fact that dial-a-dope lines are frequently run as businesses and the lines are run by multiple individuals.[198] Who answers is less important than the use being made of the phone line.

118. The decision in *Barnes* does not stand for the proposition that an investigation must be confined to a narrow geographic area.[199] The concept is broader and may be applied in the dial-a-dope context in a manner that is consistent with the rationale underlying the doctrine of entrapment. The police are aware that drug trafficking takes place by phone, they can localize the suspected locale based on a tip, and quickly confirm whether the line is or is not being used to set up drug meetings where transactions will take place, all without risk to an innocent person on the other end of the phone.

119. The key feature of a *bona fide* inquiry is that the reasonable suspicion need not relate to an individual. It forms from a broader awareness of how and where crime is taking place in the community.[200] So long as an individual is associating themselves with the particular "place" in question, nothing more in the way of reasonable suspicion is required.[201] In the context of a *bona fide* inquiry, some risk of attracting innocent persons into committing a crime is acceptable, and was described by Lamer J. in *Mack* as "inevitable if we are to afford our police the means of coping with organized crime such as the drug trade…"[202]

120. The police conduct in dial-a-dope cases, and in this case in particular, is not random virtue testing because the call is confined to a specific number derived from an objective tip. The investigation and others like it pose less risk of manipulating individuals into committing crimes

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[198] *R. v. Latrace*, 2017 MBQB 75, paras. 5-6; *R. v. Currie*, 2016 BCCA 404, para. 12; *R. v. MacNeil*, 2013 BCCA 162, para. 3, leave ref'd, [2013] 3 S.C.R. ix; *R. v. McWhirter*, 2018 BCSC 2239, para. 4.
[199] *R. v. Swan*, 2009 BCCA 142, para. 42.
[200] *R. v. Barnes*, [1991] 1 S.C.R. 449, p. 460-462.
[201] *R. v. Barnes*, [1991] 1 S.C.R. 449, p. 463-464.
[202] *R. v. Mack*, [1988] 2 S.C.R. 903, p. 956.

than the undercover operation this Court approved of in *Barnes*, as the following chart demonstrates:

Factual Feature	*BARNES*	*LI*
Basic source of reasonable suspicion	Police knowledge of drug sales in Granville Mall	Police knowledge of the prevalence of dial-a-doping
Scope of targeted area	6 square blocks of downtown Vancouver	1 phone number
Connection of individual	Barnes found on street	Appellant answered the phone
Drug request	Request for "weed"	Request for "half-soft"
Police thought process	Hunch based on scruffy appearance	Belief based on detailed tip and confirmation
Further corroboration of criminal involvement	None	Appellant responds to coded drug language
Physical circumstances of the police interaction	Undercover officer stands inches away from the target	Appellant is an unknown person in unknown place, can simply hang up anytime
Further events before arrest of suspect	Accused arrested on the spot	Suspect only arrested if they drive to the meet location and deliver the drugs
Number of persons affected by the investigative technique	"literally thousands"[203]	One

[203] *R. v. Barnes*, [1991] 1 S.C.R. 449, p. 484 (per McLachlin J.).

Seriousness of the crime being investigated	Small amount of hash	Ongoing sales of crack cocaine
Alternative investigatory techniques available?	Observation/surveillance	None

No expert or statistical evidence was required

121. The nature of dial-a-dope trafficking and its prevalence in Canada is so well-known that it cannot reasonably be doubted. The Crown says that it was not necessary to call evidence to demonstrate what has already been judicially recognized in many cases. The appellant's argument that it was necessary for the Crown to call evidence justifying resort to a *bona fide* inquiry[204] should be rejected.

122. Judges can take judicial notice of the contexts in which they perform their duties.[205] A court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.[206] A court may rely on case law where judges have previously considered evidence or taken judicial notice of the same facts.[207]

123. Courts throughout Canada have adjudicated dial-a-dope cases and the jurisprudence is replete with descriptions of this simple but sophisticated form of drug trafficking.[208] For example in *Le*, the Court of Appeal described this social problem, comparing it to a pizza delivery service,

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[204] Appellant's Factum, paras. 8, 78-79.
[205] *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, para. 95.
[206] *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, paras. 53, 60-65, citing *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, para. 48; *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, para. 99.
[207] *R. v. Williams*, [1998] 1 S.C.R. 1128, para. 54.
[208] For example: *R. v. Le*, 2016 BCCA 155, paras. 67-69, leave ref'd, [2016] 2 S.C.R. ix; *R. v. Franklin*, 2001 BCSC 706, paras, 45-46; *R. v. Swan*, 2009 BCCA 142, para. 34; *R. v. Latrace*, 2017 MBQB 75, paras. 5-6; *R. v. Ahmad*, 2018 ONCA 534, paras. 52-53 (on reserve, SCC No.(s) 38165 & 38304); *R. v. Mitchell*, 2017 NLCA 26; *R. v. Sawatsky*, 2007 ABCA 353; *R. v. Peters*, 2015 MBCA 119; *R. v. Jones*, 2006 NSCA 50; *R. v. McIntyre*, 2012 SKCA 111.

which has "made it easy for drug dealers to invade neighbourhoods, community parks and schools…thanks to the use of the mobile phone." The Court of Appeal also acknowledged that it is "apparent in the hundreds of reported cases" in British Columbia that dial-a-dope operations are "highly profitable, organized and insidious."[209] In *Latrace*, a Manitoba trial court, in describing a sophisticated dial-a-dope operation, observed that it involved "numerous dealers working around-the-clock shifts and conducting sales from various motor vehicles."[210] Courts have almost universally accepted that because of the very nature of dial-a-dope trafficking operations, they are difficult to investigate and detect.[211]

124. In the case at bar, the evidence established that the police were legitimately engaged in an investigation of a dial-a-dope line arising from a specific tip. The Court of Appeal was entitled, as were the respective appellate courts in *Le* and *Ahmad*, to rely on the body of jurisprudence dealing with dial-a-dope trafficking operations in support of its conclusion that the police were engaged in a *bona fide* investigation when they presented the appellant with an opportunity to commit a crime. To require explicit evidence about the nature of dial-a-dope investigations would have been a superfluous and needless exercise, and would prolong trials for no good reason.

Conclusion

125. The Court of Appeal correctly held that the police conduct did not amount to entrapment. The correct approach to entrapment focuses on the purpose of the rule, which is to prevent police conduct that is arbitrary and abusive. Put simply, there was nothing abusive, or random about the police conduct. There was never any real risk that an innocent person would be tempted to sell drugs as a result of a request for a specific quantity of a particular type of drug in coded language when the call was made to a specific number that came from a detailed tip that was corroborated by independent police inquiries.

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[209] *R. v. Le*, 2016 BCCA 155, para. 69, leave ref'd, [2016] 2 S.C.R. ix. See also: *R. v. Franklin*, 2001 BCSC 706, paras. 18-21, 45-46.
[210] *R. v. Latrace*, 2017 MBQB 75, paras. 5-6.
[211] *R. v. Le*, 2016 BCCA 155, para. 69, leave ref'd, [2016] 2 S.C.R. ix; *R. v. Ahmad*, 2018 ONCA 534, paras. 52-53 (on reserve, SCC No.(s) 38165 & 38304).

PART IV: COSTS

126. In accordance with the usual practice in criminal matters, no costs should be ordered.

PART V: NATURE OF ORDER SOUGHT

127. The respondent requests that the appeal be dismissed, without costs.

DATED at the City of Ottawa, in the Province of Ontario, this 12th day of May, 2020.

Chris Greenwood Counsel for the respondent	Edlyn Laurie Counsel for the respondent

PART VII: TABLE OF AUTHORITIES