SCC File No.: 38165

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

B E T W E E N:

JAVID AHMAD

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO and CANADIAN ASSOCIATION OF CHIEFS OF POLICE

INTERVENERS

FACTUM OF THE INTERVENER
(CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, INTERVENER)
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

GRANT & MARSHMAN LLP
116 Simcoe Street
Suite 100
Toronto, ON M5H 4E2

Ingrid Grant
Daniel Goldbloom
Jeff Marshman
Tel: (416) 977-5334
Fax: (416) 596-2597
E-mail: igrant@simcoechambers.com
dg@goldbloomlaw.ca
jmarshman@simcoechambers.com

Counsel for the Intervener, Criminal Lawyers' Association of Ontario

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: matthew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Criminal Lawyers' Association of Ontario

TO: THE REGISTRAR

AND TO:

BRAUTI THORNING ZIBARRAS LLP
161 Bay St., Suite 2900
Toronto, ON M5J 2S1

Michael W. Lacy
Bryan Badali
Tel: (416) 362-4567
Fax: (416) 362-8410
E-mail: mlacy@btzlaw.ca

Counsel for the Appellant, Javid Ahmad

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Appellant, Javid Ahmad

PUBLIC PROSECUTION SERVICE OF CANADA
700 - 6th St. S.W.
Suite 900
Calgary, AB T2P 0T8

Nick Devlin
Tel: (403) 299-3878
Fax: (403) 299-3966
E-mail: nick.devlin@ppsc.gc.ca

Counsel for the Respondent, Her Majesty the Queen

PUBLIC PROSECUTION SERVICE OF CANADA
160 Elgin Street
12th Floor
Ottawa, ON K1A 0H8

François Lacasse
Tel: (613) 957-4770
Fax: (613) 941-7865
E-mail: Francois.Lacasse@ppsc-sppc.gc.ca

Ottawa Agent for Counsel for the Respondent, Her Majesty the Queen

RITCHIE SANDFORD MCGOWAN
1200 - 1111 Melville Street
Vancouver, BC V6C 3V6

Marilyn E. Sandford, Q.C.
Kate Oja
Tel: (604) 684-0778
Fax: (604) 684-0799
E-mail: msandford@ritchiesandford.ca

Counsel for the Intervener, British Columbia Civil Liberties Association

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
E-mail: msobkin@sympatico.ca

Ottawa Agent for Counsel for the Intervener, British Columbia Civil Liberties Association

EDMONTON POLICE SERVICE
Legal Advisers Section
9620 103 A Ave. NW
Edmonton, AB T5H 0H7

Martine Sallaberry
Tel: (780) 421-3347
Fax: (780) 421-2867
E-mail:
martine.sallaberry@edmontonpolice.ca

Counsel for the Intervener, Canadian Association of Chiefs of Police

PERLEY-ROBERTSON, HILL & MCDOUGALL
1400 - 340 Albert Street
Ottawa, ON K1R 0A5

Lynda A. Bordeleau
Tel: (613) 238-2022
Fax: (613) 238-8775
E-mail: lbordeleau@perlaw.ca

Ottawa Agent for Counsel for the Intervener, Canadian Association of Chiefs of Police

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PART I: STATEMENT OF THE CASE

1. This appeal addresses the proper application of the entrapment doctrine to cold-call investigations of "dial-a-dope" operations, both under the doctrine's individualized reasonable suspicion branch and its *bona fide* inquiry branch. This Court is asked to clarify when the law forbids police from offering someone an opportunity to sell drugs over the phone on the basis of a bald tip, and whether an affirmative answer to a "coded" question like "you around?" can give rise to a reasonable suspicion. Finally, the Court must also evaluate whether this police technique risks ensnaring innocent people into committing crimes by merely talking on the phone.

PART II: POSITION ON QUESTIONS IN ISSUE

2. The Criminal Lawyers' Association of Ontario ("CLA") respectfully submits that the Court should apply a robust and rigorous approach to the concept of reasonable suspicion that police require both over an individual and over physical or virtual space under the *bona fide* inquiry branch of the entrapment doctrine, before they may offer someone the opportunity to commit a criminal offence. To do otherwise is offensive to *Charter* principles.

3. The CLA advances three arguments. First, a bald tip from an anonymous tipster or a confidential source of unproven reliability does not, without more, give rise to a reasonable suspicion. Second, "coded" police questions are actually part of the opportunity to commit an offence and thus cannot assist in generating a reasonable suspicion *prior to* police providing a criminal opportunity. Third, reliance on opaque "coded" drug language to screen out innocent people carries an intolerable risk that drug addicts and other vulnerable people not involved in *selling* drugs will be improperly entrapped.

PART III: ARGUMENT

A. Reasonable suspicion requires more than a bald tip and an ambiguous exchange

4. A bald, unconfirmed tip from an untested source that an individual is selling drugs at a certain phone number does not give the police reasonable suspicion that this is happening. A positive response from the person at that phone number to a "coded" but facially innocuous question like "you around?", "can you help me out?", or "are you working?" also fails to give the police reasonable suspicion that the speaker is a drug dealer. This is the position of Courts of

Appeal for Alberta and British Columbia, as well as the majority opinion in the case below.[1] This Court should confirm that a bald, unconfirmed tip coupled with an ambiguous exchange does not meet the standard for reasonable suspicion affirmed in *R. v. Chehil*.[2]

5. In addition, this Court should specifically reject the contention that the police in this case had reasonable suspicion that their interlocutor was selling drugs (or speaking on a phone line used for this purpose), whether as part of a *bona fide* inquiry or otherwise. The three factors relied on by the Crown for reasonable suspicion – "(i) the knowledge of a pervasive criminal problem in a virtual space; (ii) localization of that suspicion to a single specific telephone number; and (iii) the immediate responsiveness of that number to the names contained in the tip and/or the coded language of the drug sub-culture"[3] – must all be rejected.

6. First, the Crown asks this Court to recognize "the virtual space of dial-a-doping" generally.[4] Such recognition would be pointless. Selling drugs by phone is an activity, not a place. The potential virtual space associated with the activity includes every phone in Canada. The proffered existence of "a pervasive criminal problem" on phones does not give rise to even a generalized suspicion of drug dealing by phone users. In 2019, almost everyone has a phone. Owning one does not materially increase the likelihood of selling drugs. Using police knowledge of phone crime as the base ingredient for reasonable suspicion in a dial-a-dope investigation supports the limitless extension of police powers.

7. The Crown's second factor – the use of a tip to "localize" the above-mentioned suspicion to a single phone number – is also untenable. It imbues the bald, uncorroborated tip with more

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[1] See *R. v. Swan*, 2009 BCCA 142 at para. 28; *R. v. Gladue*, 2012 ABCA 143 at para. 11; leave to appeal refused, [2012] 3 S.C.R. xii.; *R. v. Pucci*, 2018 ABCA 149 at paras. 11-12; and *R. v. Ahmed*, 2018 ONCA 534 at paras. 43-45.

[2] *R. v. Chehil*, 2013 SCC 49. On this point, the CLA adopts and relies on the submissions at para. 38 of the Appellant's factum and at paras. 55-63 of the Appellant's factum in the companion case of *Williams*.

[3] Respondent's Factum at para. 76, ("Factum of the Crown").

[4] Factum of the Crown at para. 69.

weight than it can bear. Contrary to the Crown's submissions, anonymous tips do not have an "inherent likelihood of truth".[5] As the British Columbia Court of Appeal held in *R. v. Jir*:

> There are obvious dangers in relying on anonymous tips to supply grounds for arrest or for other incursions on the liberties of suspects. The anonymous informer may have maliciously fabricated information or may have had weak sources. The tipster may have drawn the wrong inference from whatever information he or she had, or may simply have been relaying a hunch. To allow all anonymous tips to be relied on as grounds for arrest would be to seriously undermine the protections that individuals have against arbitrary incursions on their liberties.[6]

8. A tip without detail cannot be compelling, especially where there is no indication of the tipster's source of knowledge, the information's age, and whether the tipster has obtained the information through personal observation, rumour, or second or third hand information.[7] Likewise, the fact that *some* tipsters act in the hope of financial gain (implied without evidence by the Crown to be all or most tipsters), and that *some* will only receive the reward if their tip is accurate, does not increase the likelihood that the tip is in fact accurate. A tipster motivated by financial gain (or other motives) has nothing to *lose* from providing an uncertain tip in the hope that it pans out. They also have a clear motivation to use a shotgun approach – provide every name and number they have in the hope that someone will be ensnared. There is no statistical evidence before this Court to support the assertion that anonymous or other unsupported tips are always or usually accurate. The courts will, of course, only see the cases where an arrest was made.

9. It is an error of law to presume that a witness testifying at trial under oath is telling the truth.[8] This Court should not confer a presumption of honesty on an anonymous tipster hoping for a financial reward or other benefit when that same presumption is denied to people who swear to tell the truth in open court on penalty of perjury. Unlike a witness at trial who is subject to cross-examination, the accused has no means of challenging the veracity of the anonymous tipster, or in many cases, of proving that the tip was not manufactured by unscrupulous police officers. This

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[5] Factum of the Crown at para. 53.
[6] *R. v. Jir*, 2010 BCCA 497 at para. 46.
[7] *R. v. Hosie* (1996), 1996 CanLII 450 (ON CA) at 392.
[8] *R. v. Thain*, 2009 ONCA 223 at para. 32 per Sharpe J.A.

stands in contrast to the scenario in *Barnes* in which the accused can challenge through evidence the police assertion of reasonable suspicion over a specific geographic area.

10. The Crown's third factor – the speaker's failure to deny the name in the tip, or their affirmative response to "the coded language of the drug sub-culture" – cannot shift the balance in favour of reasonable suspicion. First, when a bald tip consists solely of a name, a phone number, and an allegation of drug dealing, corroboration of the name and number cannot corroborate the drug dealing allegation.[9] A tipster motivated to provide false information about someone is likely to know that person's name. The same analysis applies to the "coded language" aspect. An affirmative answer to the question "are you around?" or "are you working?" could as easily come from the mouth of a busy plumber as a drug dealer. Such an answer, even when combined with a bald tip, may "go both ways". It fails to rise above characteristics that "apply broadly to innocent people". Without more, it cannot make out reasonable suspicion.[10]

B. The question is itself part of the opportunity to commit an offence

11. If, on the other hand, ambiguous questions like "you around?" are coded drug language, then they are an inextricable part of offering an opportunity to traffic drugs. In this linguistic code, the undercover officer is asking, effectively, "will you sell me drugs?" Some courts have found that an affirmative answer to one of these coded questions can give rise to reasonable suspicion, but does not constitute a police offer of an opportunity.[11] However, it is precisely because these opening lines are an essential part of a coded drug purchasing conversation that they are indistinguishable from offering an opportunity. To the extent that cases like *Ralph* and *Imoro*[12] suggest that such questions are merely investigative, the CLA submits that this Court should reconsider.

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[9] *R. v. Arriagada*, [2008] O.J. No. 5791 (S.C.J.) at paras. 24-26. See also, by analogy, *R. v. Zammit*, 1993 CanLII 3424 (ON CA) at p. 121.
[10] *R. v. Chehil*, *supra*, at paras. 31-32.
[11] See, for example, *R. v. Imoro*, 2010 ONCA 122, aff'd 2010 SCC 50; *R. v. Ralph*, 2014 ONCA 3, leave to appeal refused.
[12] *Ibid*.

12. While some courts have carefully distinguished the opening lines of a call from a subsequent specific request for a quantity of drugs,[13] others have deemed such parsing artificial.[14] The reason the lower courts have had such difficulty parsing 20-second dial-a-dope cold calls for the moment the officer switches from investigative steps to providing a criminal opportunity is that the moment generally does not exist; from start to finish, the *entire call* in this case and others like it is an opportunity to traffic drugs.

13. In her concurring opinion in the decision appealed from, Himel J. finds that there is no meaningful distinction between veiled statements asking if the other party is a drug dealer ("Can you hook me up?" or "I need product") and specific requests for quantities of drugs ("I need 80.").[15] The CLA submits that this conclusion is correct. Both types of comments make clear that the undercover officer is calling to offer the opportunity to sell drugs. The whole point of the veiled statement is that it is *designed* to tell the person on the phone that this is an illegal sales opportunity.

14. That said, Himel J.'s subsequent conclusion that neither a veiled statement nor a specific request for a quantity of drugs constitutes an offer to commit an offence cannot stand. The *Controlled Drugs and Substances Act* makes clear that merely agreeing to fulfill a request to sell drugs is trafficking.[16] Saying "yes" to words that mean "will you sell me illegal drugs?" is trafficking under the *CDSA* regardless of whether the speaker provides the requested drugs.[17]

15. Because there is no meaningful distinction between the coded opening line (e.g. "I need product [meaning I'm looking to buy drugs.]") and the particular drug order (e.g. "I need a half [meaning one half of an eight-ball of crack cocaine.]")[18] the opportunity to commit an offence

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[13] See, for example, *R. v. Williams*, 2014 ONSC 2370 and cases cited therein at paras. 23-29.
[14] See, for example, *R. v. Le*, 2016 BCCA 155 at para. 93, leave to appeal refused, [2016] S.C.C.A. No. 272; and *R. v. Henneh*, 2017 ONSC 4835 at paras. 25-26.
[15] *R. v. Ahmad*, 2018 ONCA 534 at paras. 115, 119-120.
[16] *Controlled Drugs and Substances Act,* S.C. 1996, c. 19, s. 2, defines trafficking in a controlled substance as "(a) to sell, administer, give, transfer, transport, send or deliver the substance, (b) to sell an authorization to obtain the substance, or (c) to offer to do anything mentioned in paragraph (a) or (b), otherwise than under the authority of the regulations".
[17] See *R. v. Murdock*, 2003 CanLII 4306 (ON CA) at para. 41 per Doherty J.A.
[18] *R. v. Ralph*, 2014 ONCA 3 at para. 29.

begins with the coded opener. *A positive response is itself an offence*. Relying on a positive response to the first statement to find that the officer had reasonable suspicion that the speaker is selling drugs puts the cart before the horse. The police technique in this case begins by offering an opportunity to commit the offence of trafficking without reasonable suspicion, and then casts the speaker's failure to rebuff the offer as reasonable grounds to suspect that they are selling drugs. This is exactly the type of police behaviour that *Mack*[19] was intended to guard against.

16. It may be that the broad definition of trafficking under s. 2 of the *CDSA* makes these offences more difficult for police to investigate without resorting to entrapment. Were the definition of trafficking more limited, the police might have broader scope to take investigative steps that did not provide an opportunity to commit an offence. It is for Parliament, not the Court, to address this consequence of their legislative choices. *Mack* prohibits the police from testing the virtue of members of the public by providing them an opportunity to commit an offence without reasonable suspicion. We must not torture and unduly limit the meaning of "provide an opportunity" to give the police free rein.

C. Relying on knowledge of coded drug language for reasonable suspicion risks ensnaring innocent and vulnerable people, namely drug users.

17. This Court should reject the Crown's submission that the police techniques used in this case "run zero risk of ensnaring the otherwise innocent" because "[t]he way police speak on these calls renders the temptation opaque to anyone not versed in the local hard drug trade."[20] This argument unduly constricts who qualifies as innocent. It ignores the fact that most people "versed in the local hard drug trade" are necessarily drug users/purchasers rather than dealers; every dial-a-dope customer knows how to "get a wary drug dealer to engage"[21] over the phone. If the law cannot prevent random virtue testing of vulnerable drug users, it permits offensive police conduct.

18. For the purpose of the entrapment analysis, drug users who are not engaged in selling drugs *are* innocent people. Before giving someone an opportunity to commit an offence, the police must have reasonable suspicion that the person is already engaged not just in criminal behaviour

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[19] *R. v. Mack*, [1988] 2 SCR 903, 1988 CanLII 24
[20] Factum of the Crown at paras. 3, 41.
[21] Factum of the Crown at para. 50.

generally, but in the "particular criminal activity" on offer.[22] As this Court held in *Mack*, frequent possession of marihuana cannot justify the police providing an opportunity to commit a much more serious offence like importing narcotics.[23] Similarly, selling drugs to others is a much more serious offence than possession for personal use. Whereas offering to sell drugs is a criminal offence, offering to buy them is not.[24]

19. When courts have explained why an innocent person would not be ensnared by the techniques at issue in this case, they have sketched an innocent person who is baffled by the police officer's call, and is therefore expected to either ask "what are you talking about?" or simply hang up.[25] This hypothetical innocent person excludes, among others, dial-a-dope *customers*, who would understand immediately that the person is calling to offer them the opportunity to sell drugs, a reversal of their normal role. The British Columbia Court of Appeal's conclusion in *R. v. Le* that "Objectively speaking, innocent and otherwise law-abiding individuals would not be "manipulated" or tempted to enter the dangerous and illicit drug trade if asked by a stranger over the phone to sell him drugs"[26] falls apart when the innocent person is a destitute drug user suffering from addiction.

20. The risk of the police ensnaring innocent people is realistic because drug trafficking is an offence that can be committed through talking alone, where the speaker has neither the intent nor the ability to actually do anything discussed. Whether the speaker intends or is able to provide the officer with the requested drugs is irrelevant to whether a crime has been committed: She need only intend that her agreement to sell be taken as genuine.[27]

21. The entrapment principle is particularly important in the context of drug trafficking to protect against poor and desperate people, including addicts, being randomly tempted to commit crime by state actors offering them money. Small scale drug trafficking can be committed with

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[22] *R. v. Barnes*, [1991] 1 S.C.R. 449 at p. 463.
[23] *R. v. Mack*, [1988] 2 S.C.R. 903 at para. 116.
[24] *Controlled Drugs and Substances Act*, s. 2. See also *R. v. Greyeyes*, [1997] 2 S.C.R. 825, 1997 CanLII 313 at para. 8 for the proposition that a purchaser is not a party to trafficking.
[25] See, for example, *R. v. Ahmad*, 2018 ONCA 534, at para. 121; Crown Factum at para. 55.
[26] *Ibid.* at para. 95.
[27] *R. v. Murdock*, 2003 CanLII 4306 (ON CA) at para. 41 per Doherty J.A.

little planning and with no prior involvement in selling drugs. As set out above, the target of the phone call, tempted by the offered payment, may then commit the offence over the phone by agreeing to provide the drug, before they even have the chance to decide if they intend to go through with the offer. An opportunity to sell a small quantity of drugs to fund a slightly larger quantity for themselves could be a very tempting one.

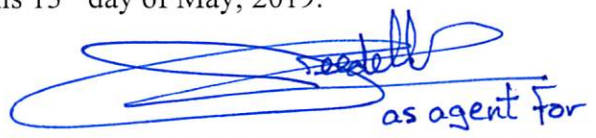
22. The Court below's approach casts the net too wide and allows for impermissible random virtue testing. To be clear, when the police offer an opportunity to commit an offence without either individualized reasonable suspicion or the reasonable suspicion required for a *bona fide* inquiry,[28] the result is *always* random virtue testing. Randomness is not meant in the statistical sense that every citizen has an equal chance of being investigated, but in the normative sense that police must not attempt to involve a person in a state-initiated crime without the reasonable suspicion that makes such state action tolerable. Police techniques that limit the scope of an investigation below statistical randomness – such as calling the number contained in a tip – are not themselves sufficient to meet the standard required by *Mack*. For the purpose of the entrapment analysis, there is no acceptable middle ground between statistical randomness and reasonable suspicion.

PART IV AND V: COSTS AND ORDER SOUGHT

23. The CLA takes no position on the disposition of this appeal. The CLA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario this 13th day of May, 2019.



Ingrid Grant
Daniel Goldbloom
Jeff Marshman
Counsel for the Intervener,
Criminal Lawyers' Association

[28] *R. v. Gladue*, 2012 ABCA 143 at para. 12.

PART VI: TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

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