Court File No. 38165

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Ontario)

BETWEEN:

JAVID AHMAD

Appellant

AND

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE INTERVENER CANADIAN ASSOCIATION OF CHIEFS OF POLICE

Martine Sallaberry
Edmonton Police Service
Legal Advisors Section
9620 103 A Ave NW
Edmonton, AB T5H 0H7

Telephone: 780-421-3347
Fax: 780-421-2867
E-mail: martine.sallaberry@edmontonpolice.ca

Counsel for the Intervener

Lynda A. Bordeleau
Perley-Robertson, Hill & McDougall, LLP
Barristers and Solicitors
1400-340 Albert Street
Ottawa, ON K1R 0A5

Telephone: 613-238-2022
Fax: 613-238-8775
E-mail: lbordeleau@perlaw.ca

Ottawa Agent for the Intervener

Michael W. Lacy
Bryan Badali
Brauti Thorning Zibarras LLP
161 Bay St., Suite 2900
Toronto, ON M5J 2S1

Telephone: 416-362-4567
Fax: 416-362-8410
E-mail: mlacy@btzlaw.ca

Counsel for the Appellant

Marie-France Major
Supreme Advocacy LLP
100-340 Gilmore Street
Ottawa, ON K2P 0R3

Telephone: 613-695-8855 Ext: 102
Fax: 613-695-8580
E-mail: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Appellant

Nick Devlin
Public Prosecution Service of Canada
700 6th St. S.W., Suite 900
Calgary, AB T2P 0T8

Telephone: 403-299-3878
Fax: 403-299-3966
E-mail: nick.devlin@ppsc.gc.ca

Counsel for the Respondent

François Lacasse
Public Prosecution Service of Canada
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8

Telephone: 613-957-4770
Fax: 613-941-7865
E-mail: Francois.Lacasse@ppsc-sppc.gc.ca

Ottawa Agent for the Respondent

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BETWEEN:

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FACTUM OF THE INTERVENER
CANADIAN ASSOCIATION OF CHIEFS OF POLICE

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PART I: OVERVIEW OF THE POSITION OF THE CANADIAN ASSOCIATION OF CHIEFS OF POLICE (CACP)

1. The CACP adopts the statement of facts as set out by the Respondent in Part I of its Factum.

2. The CACP intervenes on the issue of the proper application of the doctrine of entrapment as articulated by this Honourable Court in *R. v. Mack.*[1] The CACP submits that dial-a-dope investigations are an effective, non-intrusive technique used by police in enforcing drug laws.

3. It is the position of the CACP that dial-a-dope schemes are important investigative techniques that assist in addressing the ongoing opioid crisis. Courts have held that dial-a-dope trafficking is not a minor crime or offence, as it may be part of a larger criminal organization. In relation to traditional drug trafficking, "cases involving dial-a-dope operations [differ] markedly with respect to the amount of drugs involved, the number and circumstances of transactions, the diversity of offenders, and their criminal records."[2] Dial-a-dope operations also require, "forethought and planning, a cell phone, a drug supplier, packaging materials, sometimes measuring equipment, and usually a vehicle."[3] These operations have been characterized as requiring a level of "sophistication and planning".[4]

4. Given the complexity and prevalence of dial-a-dope trafficking, it is of national importance that police be given the flexibility to effectively respond to this easily accessible form of drug trafficking that has permeated society. Traditional police techniques have not proven effective in eradicating dial-a-dope trafficking.

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[1] *R v Mack*, [1988] 2 SCR 903.
[2] *R. v. Dickey*, 2016 BCCA 177 at para 45.
[3] *Ibid* at para 28.
[4] *R. v. Greenlees*, 2019 BCPC 3 at para 22.

PART II: STATEMENT OF ISSUES

5. The position of the CACP is that the majority of the Court of Appeal in *R. v. Ahmad*[5] did not err by determining that a telephone number could be treated as a location in dial-a-dope schemes when assessed using the proper principles of entrapment as set out in *Mack*.

6. The CACP will address the questions in issue as follows:

a. What is the proper application of *Mack* in the dial-a-dope context?

b. Can a phone number be used for the purposes of a *bona fide* inquiry?

PART III: STATEMENT OF ARGUMENT

A. Proper Application of *Mack*

7. In *Mack*, this Honorable Court confirmed that the doctrine of entrapment exists in Canada, and set out the rules for its application[6]. This Honorable Court found that entrapment will be made out if police provide a person with the opportunity to commit a crime without first having reasonable suspicion of that person or a location they are found in, and if police go beyond providing an opportunity and induce the commission of the crime[7].

8. This Honourable Court in *Mack* took issue with police acting randomly or with *mala fides*.[8] However, the Court noted that police are generally, "providing opportunities only in relation to targeted people or locations clearly, and therefore reasonably, suspected of being involved in or associated with criminal activity".[9] This is to say that once a court establishes that police had a target that was not random, the reasonable suspicion threshold was met. At this point, the assessment should move to the second branch of *Mack*.

9. Under the second branch, the focus is on police conduct, and any factors relating to a particular accused are irrelevant. Police conduct will be "assessed with regard to what the average non-predisposed person would have done"[10], or as the British Columbia Court of Appeal in *R. v.*

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[5] *R. v. Ahmad*, 2018 ONCA 534.
[6] *Mack*, *supra* at note 1 at para 118.
[7] *Ibid* at para 119.
[8] *Ibid*.
[9] *Ibid*.
[10] *Ibid* at para 132.

Le stated, "innocent and otherwise law-abiding individuals."[11] Under this branch, it is not relevant whether any particular accused has a criminal history or was previously involved in the drug trade. The question is whether police conduct would have induced the average person, and not a particular accused. As stated in *Mack*, "[i]f this is accepted, then it follows that the focus must be on the police conduct."[12]

10. To determine if police conduct goes further than providing an opportunity to commit the offence, and in fact amounts to inducing the average person, *Mack* set out a number of factors to consider. These factors include such things as the number of attempts made by the police to contact the individual; whether police knowingly exploited emotions of compassion, sympathy or friendship; whether any threats were made by police; the type of crime being investigated; and the availability of other investigative techniques.[13]

11. Dial-a-dope investigations do not offend any of the listed factors. A typical investigation begins with a tip and involves a brief phone call or message from police in which the recipient can simply disconnect or not respond. These communications do not involve the exploitation of the accused's personal characteristics, nor are any threats made. There is not even a face-to-face interaction until after the drug transaction has been agreed upon.

12. When assessing the type of crime being investigated, appellate and lower courts have found dial-a-dope trafficking to be more grievous than other forms of trafficking. As summarized in *R. v. Henneh*:

> The fact that this is a dial-a-dope operation makes this a more serious form of trafficking. While our Court of Appeal has not addressed this issue, I agree with the lengthy line of cases decided by the British Columbia Court of Appeal that suggest that this form of trafficking is more serious: *R. v. Le* 2016 BCCA 155 (CanLII); *R. v. Oates*, 2015 BCCA 259 (CanLII); *R. v. Tran*, 2007 BCCA 613 (CanLII); *R. v. Franklin*, 2001 BCSC 706 (CanLII); *R. v. To* (1998), 109 B.C.A.C. 242.[14]

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[11] *R. v. Le*, 2016 BCCA 155 at para 95.
[12] *Mack*, *supra* note 1 at para 103.
[13] *Ibid* at para 133.
[14] *R. v. Henneh*, 2017 ONSC 5499 at para 14.

13. As stated in *Mack*, "[t]he state must be given substantial room to develop techniques which assist in its fight against crime in society. It is only when the police and their agents engage in a conduct which offends basic values of the community that the doctrine of entrapment can apply."[15]

14. Dial-a-dope schemes provide police with an effective investigative technique in the context of drug trafficking offences, and garner results that traditional techniques likely would not. Due to the disposable nature of cell phones and phone numbers, traditional techniques such as background checks may not reveal any leads that could be of assistance to police. As stated by the majority in *Ahmad*:

> The challenge police face in investigating a dial-a-dope scheme is that dial-a-dope operations are, by their very nature, difficult for the police to detect and prevent: see *R. v. Barrick*, 2012 BCCA 83 (CanLII), 316 B.C.A.C. 232, at para. 13; *Swan*, at para. 34. As the Court of Appeal for British Columbia Court of Appeal observed in *Le*, at para. 69:
>
> > The dial-a-dope system has made it easy for drug dealers to invade neighbourhoods, community parks and schools. There is no set "location" that drug dealers inhabit thanks to the use of the mobile telephone. The drug dealers travel throughout communities, and deliver their drugs as easily as someone would deliver a pizza. It goes without saying, and is apparent in the hundreds of reported cases in this province, that it is highly profitable, organized and insidious. It is also unfortunately difficult to investigate and detect.[16]

15. Of significant relevance for police forces today, investigations into dial-a-dope operations can also help detect and interrupt those dealing in opioids, which are "wreaking havoc in our community."[17] Police enforcement of drug-related crimes, including dial-a-dope operations, is a very important step in police's continued effort to address the current opioid crisis in Canada.

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[15] *Mack*, *supra* at note 1 at para 152.
[16] *Ahmad*, *supra* at note 5 at para 53.
[17] *Greenlees*, *supra* at note 4 at para 14.

16. It is the position of the CACP that the test as laid out in *Mack* is the appropriate test to apply in the context of dial-a-dope schemes. However, since *Mack*, trial and appellate courts have erroneously determined that the reasonable suspicion assessment in the dial-a-dope context is in fact a more robust review than what *Mack* originally intended.

17. Despite this intent, courts have insisted on imposing a heavier burden on police in meeting the random virtue testing threshold. For example, in assessing reasonable suspicion, the courts have considered whether police used veiled statements suggesting that they may want to purchase drugs, as opposed to more directed statements asking for a specific type of drug. However, this approach is too restrictive and places an unwarranted burden on police investigations in dial-a-dope schemes.

18. The Court in *Le* also agreed that the distinction between veiled statements and asking for specific drugs was unnecessary:

> 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*.[18]

19. In doing this, courts are unnecessarily dissecting the language used by police, and have lost sight of what the doctrine of entrapment was intended to protect the public from. Police require flexibility in the language they are allowed to use in order to "gain the trust and confidence of the people trafficking or supplying the drugs"[19], and ultimately to conduct a successful investigation.

20. As stated in *R v Walsh*:

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[18] *Le*, *supra* at note 11 at para 93.
[19] *Mack*, *supra* at note 1 at para 157.

> [24] Courts have repeatedly been called upon in the context of entrapment applications to determine the boundary between phrases that are purely investigative and phrases that provide a suspect with an opportunity to commit an offence. What becomes very evident is that this is not an easy distinction to draw, particularly in the context of a single call from an undercover officer to a suspected drug dealer. […][20]
> […]
> [26] These cases demonstrate that focusing exclusively on the particular wording used by undercover officers in his/her initial conversation often leads to conflicting results.[21]

21. Similarly, the court in *R. v. Clarke* stated:

> Asking a stranger "Are you a drug dealer?" is not a conversational ice-breaker that leads into discussion about where to buy shoes. ... Our Court of Appeal has instructed trial judges to parse the words spoken by an undercover officer during a dial-a-dope call, and to draw these linguistic distinctions. Accordingly, parse the words I must.[22]

22. Once police have obtained a tip, the only meaningful way to target dial-a-dope trafficking is to have police conduct an investigation by contacting the number. It is respectfully submitted, that once the police obtain a tip, reasonable suspicion has been formed, thus meeting the first branch of *Mack*. Conducting an analysis of the language used by police during the conversation is unwarranted and imposes additional burdens on police and trial judges unintended by *Mack*.

B. A Phone Number as a *Bona Fide* Location

23. The CACP submits that in certain situations, a phone number may be the actual target of a police investigation, as opposed to a particular person. As such, it is the position of the CACP that phone numbers may also be viewed as a location for the purposes of satisfying the *bona fide* inquiry requirement. By limiting *bona fide* inquiries to physical locations, courts would unduly hamper dial-a-dope investigations, and also potentially other types of criminal investigations.

24. There may be situations in which the facts support a finding that the phone number is the primary target, as opposed to the person answering the phone. Although the concurrent decision

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[20] *R. v. Walsh*, 2018 ABPC 293 at para 24.
[21] *Ibid* at para 26.
[22] *R. v. Clarke*, 2018 ONCJ 263 at para 29.

in *Ahmad* find that phones are becoming "increasingly personal"[23], that does not mean that phones cannot be shared, or that phone numbers may not be forwarded to other phones. In the British Columbia Court of Appeal case of *R. v. Rutter*, the two accused were found to have jointly operated a dial-a-dope scheme using one phone.[24]

25. As stated by the majority in *Ahmad*, police should not be precluded from attempting to establish the facts necessary to support a *bona fide* inquiry into a phone number:

> Today's drug dealers conduct their business in both physical and virtual spaces. Limiting bona fide police inquiries to a specific physical location would unduly restrict their ability to combat dial-a-dope schemes in a manner inconsistent with the entrapment doctrine.[25]

26. It is submitted that this Honourable Court recognize the myriad of factual situations that may arise in the context of a dial-a-dope operation. Given how quickly technology is advancing, and how the drug trafficking world is evolving in response, it is respectfully submitted that phone numbers, along with other virtual locations, be considered as a location for the purposes of a *bona fide* inquiry.

C. Conclusion

27. The CACP respectfully submits that:

a. The proper application of the doctrine of entrapment in the dial-a-dope context is as set out in *Mack.*
b. When assessing under *Mack*, phone numbers, or other virtual locations, must be considered a location for the purposes of satisfying the *bona fide* inquiry requirement.

PART IV: SUBMISSION ON COSTS

28. The CACP seeks no costs and asks that no costs be awarded against it.

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[23] *Ahmad*, *supra* at note 5 at para 109.
[24] *R. v. Rutter*, 2017 BCCA 193 at para 9.
[25] *Ahmad*, supra at note 5 at para 57.

PART V: ORDER SOUGHT

29. The CACP is not requesting any further orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, ON MAY 13, 2019.

per Lynda A. Bordeleau
Ottawa Agent for the Intervener
Canadian Association of Chiefs of Police

PART VI: TABLE OF AUTHORITIES

CASE	**PARAGRAPHS**
R. v. Ahmad, 2018 ONCA 534	**5, 14, 24, 25**
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