Indexed as:

R. v. Hong

IN THE MATTER OF the Tobacco Control Act, 1994, S.O. 1994, c. 10

Between
City of Toronto, and
Chen Pyo Hong, defendant

[2001] O.J. No. 568

Ontario Court of Justice
Toronto, Ontario
Quon J.P.

Heard: December 14, 2000.
Judgment: February 21, 2001.
(102 paras.)

Cases Considered or Referred To:

R. v. Amato, [1982] 2 S.C.R. 418 (S.C.C.)
R. v. Barnes, [1991] 1 S.C.R. 449, [1991] S.C.J. No. 17. (S.C.C.)
R. v. Mack, [1988] 2 S.C.R. 903, [1988] S.C.J. No. 91 (S.C.C.)
R. v. Myers, [2000] S.J. No. 313 (Sask. Q.B.) per McLellan J. at Regina, Saskatchewan, upholding trial judgment; [1999] S.J. No. 671 (Sask. Prov. Ct.) per Meagher J. at Regina.
R. v. Seaway Gas & Fuel Ltd. (2000), 47 O.R. (3d) 458, [2000] O.J. No. 226 (Ont. C.A.), per Carthy, Moldaver and MacPherson JJ.A.
R. v. Sobeys Inc., [2000] N.S.J. No. 32 (N.S.S.C.) per MacAdam J. at Antigonish, Nova Scotia.
R. v. Yung. [1997] A.J. No. 547 (Alta. Prov. Ct. (Crim. Div.)) per Ketchum J. at Edmonton, Alberta

Statutes, Regulations and Rules cited:

Tobacco Control Act, 1994, S.O. 1994, c. 10, s. 3(1).
General Regulation, O. Reg. 613/94 (Tobacco Control Act, 1994)

Exhibits Entered:

Exhibit "1" - one package of duMaurier Lite 25 king size cigarettes.
Exhibit "2" - certified document signed by Howard Bretton dated May 17, 2000 of Bloor Discount vendors permit.
Exhibit "3" - sign required to be posted (19? Prove It).
Exhibit "4" - affidavit of service regarding warning letter.
Exhibit "5" - City of Toronto warning letter dated June 5, 1999.

Counsel:

R. Kurowski, prosecutor.
G. Burd, for the defendant.

QUON J.P.: —

1. INTRODUCTION

¶ 1 Entrapment exists when the authorities provide an opportunity for a person to commit an offence without acting on a reasonable suspicion that this person is already engaged in illegal activity, or the activities of the enforcement officers are not part of a bona fide inquiry. It also exists where there is reasonable suspicion or the enforcement officers are acting in the course of a bona fide inquiry, but they go beyond providing an opportunity and induce the commission of an offence. An objective assessment of the conduct of the enforcement officials or its agents is required in determining whether there is entrapment.

¶ 2 The defendant in this request for a judicial stay was charged with selling tobacco to a minor under the Tobacco Control Act, 1994. He is the owner of a variety and convenience store. He sold cigarettes to a 17 year old test shopper employed by the City of Toronto. At trial, the prosecution proved all of the essential elements for a finding of the defendant's guilt.

¶ 3 After a finding of culpability, the defendant, if he believes the conduct of the state agents were improper surrounding the commission of the offence, may appeal for a stay of proceedings based on entrapment. It is up to the defendant at this point to prove entrapment. The entrapment defence to be proffered is not a defence that shows the defendant lacked the mental culpability in committing the offence. It is however, one that says the conduct of the enforcement officers or its agents in providing an opportunity for the defendant to commit an offence have gone beyond the permissible limits. The courts have maintained they do not want to be party to coercive or abusive behaviour of the state enforcement agents.

¶ 4 The defendant, who did not appear personally, but who was represented by an agent, now seeks to have the proceeding stayed. The defendant's grounds for this stay are that the enforcement officers and their agent were not acting in the course of a bona fide inquiry, but engaging in random virtue testing. In addition, they did not have the requisite "reasonable suspicion" that the defendant was recently selling tobacco to minors. Nor did they have information that his store was a place where tobacco sales to minors was occurring on a regular basis. These reasonable suspicions were required before they could justifiably employ an investigative entrapment technique or provide the opportunity for the defendant to commit an offence. In addition, it is argued the conduct of the underage test shopper used to purchase the cigarettes was mala fides or in bad faith. At trial, the test shopper averred that she would not be smoking today if vendors had not sold cigarettes to her. The defendant relies on two decisions of the Supreme Court of Canada: R. v. Mack [1988] 2 S.C.R. 903, [1988] S.C.J. No. 91 and R. v. Barnes [1991] 1 S.C.R. 449, [1991] S.C.J. No. 17.

¶ 5 The courts have found abuse of process in different situations and under various conditions. There is not an exhaustive list. If the behaviour of the test shopper or the enforcement officers in this case brings the administration of justice into disrepute, or if it offends the community's sense of fair play and decency, then a stay may be warranted for the abuse of process. A stay should only be entered in the clearest of cases. Therefore, did the test shopper because of her accusatory statement about the cause of her smoking habit, have an improper motive, or act with mala fides or bad faith against the defendant, that would support a finding of an abuse of process? Further, did the authorities have reasonable suspicion that the defendant or his store was recently involved in illegal conduct before the investigative entrapment technique was employed?

¶ 6 After the evidence was heard on December 14, 2000, I found the defendant guilty of selling tobacco to a minor. The application for a stay was then argued based on entrapment. The ruling on this application was reserved and adjourned until February 21, 2000 for pronouncement.

2. FACTS

¶ 7 The defendant was charged on April 28, 2000 for selling cigarettes to a person under 19 years old pursuant to section 3(1) of the Tobacco Control Act, 1994 S.O 1994, c. 10.

¶ 8 A 17 year old female high school student, employed by the City of Toronto as a "test shopper", entered the defendant's store on April 28, 2000. She entered the "Bloor Discount" store at 610 Bloor Street West in Toronto at 10:21 a.m. She entered the store alone and without any identification documents on her person. She only had a $20 dollar bill in her possession. She had left her identifying documents and other personal possessions with the enforcement officers who were outside in a van.

¶ 9 She exited the store a minute later with a package of "duMaurier Lite 25 king size" cigarettes (Exhibit 1) and $15.70 change from the $20 dollars.

¶ 10 The test shopper had received the cigarettes from the defendant who was minding the store. Only the test shopper and the defendant were in the store at the time of the sale transaction.

¶ 11 The defendant had a valid vendors permit (Exhibit 2) in his name to sell cigarettes.

¶ 12 The test shopper remembered doing a test purchase at the Bloor Discount store on an earlier occasion. She could not remember who had sold her cigarettes on that earlier occasion.

¶ 13 The underage test shopper smokes cigarettes. She has been smoking for 5 years. She regularly buys cigarettes at another store for her own consumption.

¶ 14 Other methods the City of Toronto uses to enforce section 3(1) of the Tobacco Control Act, 1994 include the use of surveillance, intercepting young persons who have purchased cigarettes or following up on teachers' and parents' complaints about stores selling to minors.

¶ 15 After 1995, the City of Toronto enforcement officers realized that using the surveillance technique was not as efficient as using test shoppers in checking for compliance with section 3(1).

¶ 16 Specific instructions given to the test shopper on April 28 and for other test purchases were not to carry identification in her pockets and not to lie. She was told to respond that she had nothing in her pockets except for $20, if a storekeeper or clerk should ask her for proof of her age. If she was asked for identification then she was to answer with: I don't have I.D. The test shopper was instructed to attempt to buy cigarettes from the clerk or store operator. She was not instructed to force a sale or to raise her voice. If she was refused a sale then she was to leave the store quietly.

¶ 17 There are no convictions for selling cigarettes to minors listed with the City of Toronto for the municipal address of 610 Bloor Street West or for the defendant. However, the defendant had been previously warned by the City of Toronto for selling cigarettes to an underage person.

¶ 18 The warning incident occurred on June 5, 1999. The same test shopper had entered the defendant's store and purchased cigarettes. The defendant was issued a "warning letter" (exhibit 5) on the same day. The defendant signed the letter indicating he received the letter and the warning not to sell to someone under 19 years of age.

¶ 19 The enforcement officers reason for returning to the defendant's store to do a test purchase (investigative entrapment technique using underage test shopper) on April 28, 2000 was that the defendant's store had been involved on June 5, 1999 with selling tobacco to a minor. They wanted to follow up on the defendant and to see if he was still complying with section 3(1) and asking for proof of age before selling cigarettes to anyone.

¶ 20 Mohammed Bennisa, an enforcement officer for Health Canada, was working in conjunction with the City of Toronto on April 28, 2000. He testified that the object of using test shoppers in their investigation of vendors was to get store owners to ask for identification from youthful persons to prove they were over 19 years old or to ask for the person's age, and not to keep score of their convictions. Bennisa also stated there was no randomness about attending the defendant's store on April 28, 2000. There had been a legitimate reason in

attending there. A written warning had been given to the defendant on June 5, 1999 as the result of tobacco being sold to a minor in his store.

ARGUMENTS

Defendant's position

¶ 21 The defendant submits that the enforcement officers provided an opportunity without reasonable suspicion. Neither the test shopper nor the enforcement officers knew who was going to be in the defendant's store on April 28. They did not know whether the person minding the store would be male or female. They did not know it was going to be the defendant that would be in the store on that day. This is why the defendant believes it was a form of "random virtue testing" conducted on him that day. Further to this argument that the enforcement officers did not have reasonable suspicion that he was committing offences, the defendant submits that the test shopper didn't recall which person had sold her cigarettes on June 5 from the defendant's store. Therefore, the City of Toronto had gone to the defendant's store randomly. Neither the enforcement officers nor the test shopper had any idea or reasonable suspicion that this defendant had been selling cigarettes to minors. Only because of this random check on April 28 and the test shopper's request for cigarettes that the defendant was found guilty.

¶ 22 In addition, the City of Toronto went beyond providing an opportunity. The defendant contends an agent, an underage test shopper, had been hired to induce the commission of the offence. He contends that at least 3 people on April 28 in the same position did the same thing. That is, on 3 occasions that day, people sold cigarettes to the test shopper. The test shopper testified that 20 out of 50 people tested would sell tobacco to her.

¶ 23 The defendant also wants the court to objectively view the conduct of the test shopper and the enforcement officers on that day. He stresses that the state takes minors and pays them to go to a store in order that people may be charged with an offence. The City of Toronto, he says, uses minors to induce people to commit offences. He emphatically states that it is shocking to use minors in this way to entrap storekeepers.

¶ 24 The defendant points out this is a clear case of entrapment. Were the authorities justified in providing an opportunity? The enforcement officers and the test shopper didn't know who sold cigarettes to the test shopper on June 5, 1999. A warning letter was given to the vendor (storeowner) and not to the person who commits the offence of selling. Again, the defendant contends, there is no evidence that the defendant had illegally sold cigarettes to a minor on June 5. Therefore, there was no reason to believe the defendant was selling cigarettes to minors when the City of Toronto investigated him on April 28, 2000. As part of their improper and random investigation, they sent a test shopper into his store to test his virtue.

¶ 25 Furthermore, it is contended there were other investigative tools the enforcement officers could have used on April 28, besides using the test shopper procedure (investigative entrapment technique). They could have used surveillance or acted on tips from parents or teachers that the defendant was selling tobacco to minors. They should have used those techniques instead to gather evidence to support a reasonable suspicion that the defendant was selling to minors. They however chose to use the most efficient way -- the underage test shopper (entrapment technique). The City of Toronto only has 3 enforcement officers. Using test shoppers is the easiest way to enforce section 3(1) that forbids selling tobacco to minors. The defendant maintains that the enforcement officials only made 2 attempts to investigate the defendant. Once on June 5, 1999 and then on the date the defendant was charged, April 28, 2000.

¶ 26 Next, the defendant argues that the enforcement officers exploited particular human characteristics of the defendant. The defendant is a storeowner who makes his livelihood from selling products like tobacco. Cigarettes are legal products to be sold, but not to anyone under 19 years of age (except to aboriginal minors). Therefore, it is argued that the officers exploit persons who make a living from selling that product.

¶ 27 The defendant also submits that the enforcement officers' involvement in the offence is disproportional to the involvement of the defendant. He argues that the defendant is pitted against the power of the state, the

City of Toronto, 2 inspectors and a minor test shopper who entice storekeepers to commit offences. He also suggests the City of Toronto using minors to induce commission of offences would shock the Community.

¶ 28 In whether there existed any threats made by the enforcement officers or the test shopper to the defendant, the defendant submits that a warning was given to the defendant on June 5, 1999, not because he was the seller of the tobacco to a minor but because he was the permit holder or owner of the store. There was no evidence the defendant had sold tobacco to a minor previously. This action also undermines other constitutional values as suggested in R. v. Mack.

¶ 29 Tobacco is a legal product, not like criminals who traffic in illicit drugs. Offences prosecuted under the Provincial Offences Act are on a lower rung than criminal charges. The charge is selling to a person under 19. Selling to someone over 19 is legal.

¶ 30 Echoing his earlier argument, he contends the City of Toronto did not have a bona fide reason to investigate him. There has to be the existence of other recent sales by the defendant to minors for a reasonable suspicion. On June 5, 1999, there is no evidence of who in the defendant's store sold to a minor. Was there a history or evidence of willingness by the defendant to sell to minors to raise suspicion for a bona fide inquiry? The defendant may have made a simple mistake in the June 5 incident in which there had been a warning. Therefore, this warning should not count against the defendant in the same light as a previous conviction would. The educational exercise with the defendant, as described by the prosecution on June 5, is not a bona fide reason to go back to his store on April 28, 2000. Evidence for June 5 was that he was the vendor holding the permit to sell cigarettes and not the actual seller of tobacco to a minor on June 5. Therefore, a warning should not be treated like a conviction. It should be treated as a nonentity and should not support a finding of reasonable suspicion for a bona fide inquiry of the defendant.

¶ 31 The defendant also wanted the court to be reminded of the consequences of a second conviction on the defendant for selling tobacco to minors. Upon a second conviction, the defendant would have his licence to sell cigarettes suspended. If the licence was suspended, the store would cease to exist. The defendant then refers to section 6 of the Charter. I presume he is referring to section 6(2) that states: "Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right to pursue the gaining of a livelihood in any province".

¶ 32 Finally the defendant submits the burden for proving entrapment is on a balance of probabilities and not on an acquittal's test. A stay of proceedings is to be decided in only the clearest of cases.

Prosecution's position

¶ 33 The prosecution submits that the investigation on April 28 at the defendant's store was bona fide, because there had been a prior offence committed there. Although there is no prior conviction against the defendant, there had been a sale transaction in his store to a minor on June 5. No charges had been laid against anyone on that date. The defendant had been only given a warning as part of the educational policy of the department. The City of Toronto wanted to give the defendant a chance to comply with section 3(1) and therefore only issued a warning to the defendant on June 5.

¶ 34 The test shopper is only part of the investigation. She was utilized for her age. The prosecution contends there had been a bona fide reason to be at that address. It was not a random occurrence although the test shopper said it was. The test shopper was not aware of what stores she was to attend that day. The officers had the list of stores to investigate, and that is why she said the stores they attended on that day were done randomly.

¶ 35 The prosecution also submits that the test shopper in obtaining the cigarettes from the defendant did not force, coerce or make demands from the defendant. She asked politely to purchase the cigarettes. If the defendant had refused to sell her the cigarettes then she was to leave the store politely.

¶ 36 The test shopper was involved in 3 test purchase situations on April 28 in which 2 charges were laid and one warning letter issued.

¶ 37 The investigators have to use a minor because using someone over 19 is not in the legislation. The offence is based on age criteria. The offence is for selling or supplying tobacco to someone under 19.

¶ 38 The defendant's vendors licence to sell tobacco at this store is in his name. It is a privilege granted by the City of Toronto to sell tobacco products. Vendors are given breaks as part of the education program and the investigations are not a way to induce entrapment.

¶ 39 The City of Toronto uses the test shopper technique because there are only 3 licensing officers available and 1900 stores to regulate. It is unreasonable for officers to wait and watch for infractions when there are that many stores to monitor. Using a test shopper is not entrapment. This is the way the City of Toronto chose to enforce this law. It is part of the education program and is more efficient. The City of Toronto does not lay charges each time someone is found to be selling cigarettes to the test shopper who is a minor.

¶ 40 In regards to the issue of exploiting human characteristics, there is only one case before the court and other businesses are not relevant. The defendant makes a profit from a legalized product. Neither the enforcement officers nor the test shopper has exploited the defendant. He chose to sell tobacco.

¶ 41 The enforcement officers were not persistent. They were involved with the defendant on two occasions: in June 1999 and April 2000. There were only 10 months between visits. Once again, there was a bona fide reason to be there on April 28.

¶ 42 The defendant alludes to the failure of the enforcement officers in determining if there were other persons in store at time of the sale to the test shopper. Whether there were other people in store is not relevant. There had been a sale transaction.

¶ 43 In the issue of proportionality between the enforcement officers and the defendant, it takes a number of people to do investigation and this type of investigation requires using a minor. It is not disproportional in any way. In addition, the City of Toronto educates the sellers.

¶ 44 On the issue of other constitutional matters, it is submitted that entrapment is not at issue in this case. It is a privilege to have licence to sell tobacco.

3. ISSUES

¶ 45 Does a statement made by the test shopper accusing vendors of cigarettes as the cause of her present smoking habit, lead to a reasonable inference of bad faith conduct or improper motive on her part in the investigation?

¶ 46 Was there reasonable suspicion that the defendant or his store had been recently involved in selling tobacco to minors prior to the authorities providing an opportunity for a commission of an offence at the defendant's store?

¶ 47 Was the use of the test shopper on April 28, 2000 part of a bona fide inquiry or was it random virtue testing of the defendant?

4. ANALYSIS OF FACTS AND LAW

¶ 48 The defendant was charged and found guilty by this court of selling or supplying tobacco to a person who is less than 19 years old contrary to section 3(1) of the Tobacco Control Act, 1994.

¶ 49 The defendant now seeks a stay of proceedings for an abuse of process based on the doctrine of entrapment. He relies on R. v. Mack [1988] S.C.J. No. 91 and R. v. Barnes [1991] S.C.J. No. 17 to support his argument.

¶ 50 I see two lines of analysis to pursue in this entrapment debate: the bad faith conduct of the test shopper leading to a finding of abuse of process and the issue of reasonable suspicion and random virtue testing leading to a finding of entrapment.

¶ 51 The Supreme Court of Canada has established the proper approach to the doctrine of entrapment in R. v. Mack [1988] S.C.J. No. 91. Lamer J., as he was then, writing for the Supreme Court set out at para. 125 the two branches of the test for unlawful entrapment:

> the proper approach to the doctrine of entrapment is that which was articulated by Estey J. in Amato, [1982] 2 S.C.R. 418, supra, and elaborated upon in these reasons. As mentioned and explained earlier there is entrapment when,
>
> (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry;
> (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.

¶ 52 To begin, there is no evidence from the defendant on what happened in the store between the test shopper and himself. There is only evidence from the test shopper that she just asked to purchase a particular brand of cigarettes. No conversation ensued and the defendant sold her the cigarettes without asking her for proof of age or any other questions. She then left the store with her purchase and change from a $20 bill.

¶ 53 The defendant has the burden on the balance of probabilities to prove the entrapment defence as outlined in R. v. Mack. I only wish to comment here that it seems a challenge for the defence to show entrapment when the only evidence before this court all comes from the prosecution. Only two people were in the store during the sale of the cigarettes. One has spoken to this court for the prosecution.

¶ 54 However, one may still find or infer a basis for entrapment solely from the testimony of the prosecution's witnesses.

Bad faith motive imputed to the test shopper

¶ 55 There is one statement made by the test shopper that requires scrutiny. The test shopper had stated that she had already been smoking for 5 years. When asked if she considered it a serious offence for vendors to sell to underage persons, she replied that she would not be smoking today if they didn't sell it to her. Has she cast some stone at all vendors of cigarettes? Has her blaming vendors of cigarettes as being one of the causes of her smoking habit imputed bad faith onto her conduct to support the entrapment defence?

¶ 56 Lamer J. in R. v. Mack [1988] S.C.J. No. 91 states that where there is the lack of reasonable suspicion the defence of entrapment may be established when the enforcement officers are engaged in conduct for dubious motives unrelated to the investigation and are such mala fides. I would find in the present case that improper motives may also be imputed to a test shopper employed by these officers. His Lordship talks about bad faith or improper motives at para. 107 [emphasis is mine below]:

> the police are entitled to provide opportunities for the commission of offences where they have reasonable suspicion to believe that the individuals in question are already engaged in criminal conduct. The absence of a reasonable suspicion may establish a defense of entrapment for two reasons. First, it may indicate the police are engaged in random virtue testing, or worse, are carrying on in that way for dubious motives unrelated to the investigation and repression of crimes and are as such mala fides."

¶ 57 The first inquiry centers on the statement made by the test shopper blaming tobacco-selling vendors as the cause of her smoking habit. The query to resolve is whether bad faith or mala fides, viewing the overall

situation objectively, may be imputed to the conduct or behaviour of the test shopper. Particularly, does the test shopper have a motive that can be adjudged negatively at various stages of her involvement in the investigation of the defendant or the prosecution of the charge? Moreover, is her testimony tainted by her possible resentment towards tobacco sellers or has her purchase of cigarettes from the defendant fallen under a cloud of suspicion, considering she was the only person in the store with the defendant? Now, has her integrity come into question because of her possible enmity toward storekeepers who sell tobacco to minors? Bear in mind, the test shopper blames these storekeepers for her present penchant for smoking.

¶ 58 Whether to impute bad faith to the test shopper should be based on the court objectively viewing the test shopper's statement of blame. Would a reasonable person believe the administration of justice would be brought into disrepute, if the court would allow a defendant to be convicted of a charge, when the test shopper, acting as an agent for the enforcement officers, may have acted in bad faith or had a improper motive towards the defendant?

¶ 59 Lamer J. for the Supreme Court in R. v. Mack [1988] S.C.J. No. 91 at para. 127 believes an objective assessment must be made of police conduct and their agents in considering the entrapment defence [emphasis is mine below]:

> Since I am of the view that the doctrine of entrapment is not dependant upon culpability, the focus should not be on the effect of the police conduct on the accused's state of mind. Instead, it is my opinion that as far as possible an objective assessment of the conduct of the police and their agents is required.

¶ 60 Would the administration of justice be brought into disrepute if the court accepted the testimony of the test shopper who may be harbouring a grudge against tobacco sellers? Having an ulterior motive that is improper would impute bad faith and mala fides to her conduct. The enforcement officers using a test shopper that may have a bias towards vendors of tobacco would also make the bona fides of their investigation suspect. This is analogous to the unreliability of using jailhouse confessions to convict someone accused of a crime. The use of jailhouse confessions is losing favour, and their reliability suspect, because of the self-interest and ulterior motives of the person who hears a jailhouse confession. How can testimony be trustworthy from a person who has a monetary stake, has received special consideration or has beneficial interest in the outcome of a trial?

¶ 61 When there is a monetary or self-serving interest in testifying against someone then motive becomes relevant. The testimony becomes suspect. This scenario would support a finding of bad faith that would lead to a finding of entrapment.

¶ 62 Therefore, I find the statement, made by the test shopper concerning tobacco sellers being the cause of her present smoking habit, although it may have been made innocuously, is objectively damaging to the test shopper's integrity. To allow the defendant to be convicted of the charge now would bring the administration of justice into disrepute. I find that this statement made by the test shopper imputes mala fides or bad faith to her conduct in the investigative entrapment technique of April 28 and tarnishes her testimony. I conclude there is the existence of dubious motives and mala fides on the part of the test shopper in this matter. This supports a finding of entrapment and abuse of process.

Reasonable suspicion and random virtue testing

¶ 63 The second line of analysis concerns whether the enforcement officers had reasonable suspicion that the defendant had been selling tobacco to minors, prior to instigating the investigative entrapment technique of using an underage test shopper against the defendant on April 28. The defendant maintains, since there was the absence of reasonable suspicion, the use of the test shopper on April 28 was not justified. Furthermore, the entry of the test shopper into the defendant's store would be in the realm of random virtue testing. The defendant contends it was this random testing on April 28 that caught the defendant selling tobacco to a minor and since it was not part of a bona fide inquiry, it is clearly entrapment.

¶ 64 In R. v. Mack [1988] S.C.J. No. 91 at para. 128-129, Lamer J. writes that it is not a proper use of police powers to test the virtue of people on a random basis. His Lordship then lists factors to consider, though not an exhaustive list, for the application of the entrapment doctrine [emphasis is mine below]:

> 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. The presence of reasonable suspicion or the mere existence of a bona fide inquiry will, however, never justify entrapment techniques: the police may not go beyond providing an opportunity regardless of their perception of the accused's character and regardless of the existence of an honest inquiry. To determine whether the police have employed means which go further than providing an opportunity, it is useful to consider any or all of the following factors:
>
> * the type of crime being investigated and the availability of other techniques for the police detection of its commission;
> * whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;
> * the persistence and number of attempts made by the police before the accused agreed to committing the offence;
> * the type of inducement used by the police including: deceit, fraud, trickery or reward;
> * the timing of the police conduct, in particular whether the police have instigated the offence or became involved in ongoing criminal activity;
> * whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;
> * whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
> * the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;
> * the existence of any threats, implied or express, made to the accused by the police or their agents;
> * whether the police conduct is directed at undermining other constitutional values.
>
> This list is not exhaustive, but I hope it contributes to the elaboration of a structure for the application of the entrapment doctrine.

¶ 65 If there was the absence of reasonable suspicion that the defendant was engaged in selling tobacco to minors when the test shopper entered the defendant's store on April 28, 2000, as part of an investigative entrapment technique, then it would be deemed to be random virtue testing and not part of a bona fide investigation. Alternatively, if the use of the test shopper on April 28, 2000 were not part of a bona fide inquiry then it would also be deemed random virtue testing.

¶ 66 There has been a tobacco selling to a minor case in Canada where the courts have stayed the proceedings for entrapment, namely R. v. Myers [1999] S.J. No. 671 (Sask. Prov. Ct.) per Meagher J.

¶ 67 In the Myers case, the employee of a service station sold a 17-year-old male test shopper cigarettes. The employee did not question the male test shopper about his age nor was he asked for identification. Neither the owner of the service station nor the employee was under suspicion for previous violations. Meagher J. found the employee clearly did not attempt to verify with identification or other documentation the age of the male test shopper. He found no illegal activity was carried out by the Tobacco Enforcement Officer or the test shopper.

¶ 68 Meagher J. pointed to Lamer J.'s finding in R. v. Mack, that the proper approach to the doctrine of entrapment was stated by Estey J. in R. v. Amato, [1982] 2 S.C.R. 418. Estey J. stated there could be entrapment when "the authorities provide a person with an opportunity to commit an offence without acting on the reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry".

¶ 69 Meager J., the trial judge in Myers at para. 14 found [emphasis is mine below]:

> I find there was no suspicion on the part of the Tobacco Act Investigator that the Defendant had been committing the offence of selling tobacco to minors and as such the investigation was an act of random virtue testing. There were admittedly other methods of investigation that could have been used but were not. As a result, the procedure used by the investigator amounted to entrapment resulting in abuse of process.

¶ 70 Meagher after finding an abuse of process then had to decide whether a stay of proceedings should be entered. He concluded a stay was warranted at para. 15-16:

> My understanding of the procedure is to consider abuse of process only after finding the facts lead to guilt and as already stated I have made that finding. Next I must consider, after finding there was abuse of process, whether or not there should be a stay of proceedings entered. The Crown has argued that the problem of sales of tobacco to minors is a serious one and such needs the method of investigation as was used to investigate sales to minors. I reject that argument when reviewing cases where stays of proceedings have been entered in cases of entrapment involving far more serious crimes than the offence before me.
> For reasons given, there will be a stay of proceedings and no finding of guilt entered.

¶ 71 Lamer J. in R. v. Mack [1988] S.C.J. No. 91 at para. 75 explained why the courts do not accept a investigative technique that amounts to entrapment [emphasis is mine below]:

> It is essential to identify why we do not accept police strategy that amounts to entrapment. There could be any number of reasons underlying what is perhaps an intuitive reaction against such law enforcement techniques but the following are, in my view, predominant. One reason is that the state does not have unlimited power to intrude into our personal lives or to randomly test the virtue of individuals. Another is the concern that entrapment techniques may result in the commission of crimes by people who would not otherwise have become involved in criminal conduct. There is perhaps a sense that the police should not themselves commit crimes or engage in unlawful activity solely for the purpose of entrapping others, as this seems to militate against the principle of the rule of law. We may feel that the manufacture of crime is not an appropriate use of the police power. It can be argued as well that people are already subjected to sufficient pressure to turn away from temptation and conduct themselves in a manner that conforms to ideals of morality; little is to be gained by adding to these existing burdens. Ultimately, we may be saying that there are inherent limits on the power of the state to manipulate people and events for the purpose of attaining the specific objective of obtaining convictions. These reasons and others support the view that there is a societal interest in limiting the use of entrapment techniques by the state.

¶ 72 McLellan J. in R. v. Myers [2000] S.J. No. 313 (Sask. Q.B.) upheld the trial court on appeal. He went further and wrote that testing all retailers without any reasonable suspicion that any particular retailer had been committing violations is "clearly random virtue testing". He stated this at para. 10:

> I cannot accept the appellant's argument that testing all retailers who sell tobacco products in the City of Regina constituted a bona fide investigation. Testing all retailers without any reasonable suspicion that any particular retailer has been committing violations of the Act is clearly random virtue testing.

¶ 73 On the other hand, Ketchum J., the trial judge in an Alberta case, R. v. Yung [1997] A.J. No. 547 (Alta. Prov Ct. (Crim. Div.)), stated that entrapment was not argued before him because the store had sold cigarettes to minors on two previous occasions and had received written warnings to that effect.

> Entrapment is not argued as a defence because there is evidence before me that the business had sold cigarettes to other test shoppers and had received warning letters following each of those occasions. The warning letters are marked Exhibits 4 and 5 and are dated December 21, 1995 and May 7, 1996.

¶ 74 In the case at bar, the defendant received personally a warning letter on June 5, 1999. He was warned about selling tobacco to minors and reminded to ask for proof of age. Is this one warning letter resulting from a sale transaction to a minor at the defendant's store on June 5 enough to satisfy the criteria of reasonable suspicion to employ the investigative entrapment technique used on April 28, 2000?

¶ 75 In R. v. Sobeys Inc. [2000] N.S.J. No. 32 (N.S.S.C.), MacAdam J. held that because the statute specifically allowed the technique of random virtue testing, there would not be entrapment because the legislators allow it. He stated at para. 19:

> Clearly the statutory provisions anticipate the type of activity undertaken by Mr. Donegani and, as such, any issue of entrapment or abuse of process would of necessity involve an examination of the validity of the statutory provisions contained in Section 10. Though counsel for the respondent suggests the defence of entrapment is applied differently in respect to criminal offences, as opposed to regulatory offences, we are not satisfied there is necessarily a distinction.

¶ 76 Section 10 referred to by MacAdam J. in Sobeys Inc. reads:

> 10. For the purpose of enforcing this Act and the regulations, an enforcement officer may
>
> (a) make test purchases ...
> (c) from time to time and at all reasonable times, enter upon the business premises of a vendor or any other person if it is reasonably necessary to do so in order to determine whether or not this Act and the regulations are being complied with;

¶ 77 MacAdam J. then wrote at para. 20 and 21 that absent an attack of the provisions of the Act authorizing test purchases he was satisfied that the defence of entrapment does not apply:

> Having regard to Section 10 of the Act, is it clear Mr. Donegani, together with Ms. MacKay, were engaged in a "bona fide inquiry" to determine whether there was compliance with the Act and on the evidence accepted by the trial judge, it is clear Mr. Donegani did nothing other than ask to buy cigarettes. He did nothing more to induce Ms. Andrews to act as she did in facilitating the completion of the transaction and therefore the sale by the appellant to himself. Absent a challenge to the provisions of the Act authorizing "test purchases" and "entry into the premises" of the appellant for the purpose of determining whether the Act and its regulations were being complied with, I am satisfied the defence of entrapment does not apply.

¶ 78 After reviewing the Tobacco Control Act, 1994, S.O. 1994, c. 10 and the General Regulation (Tobacco Control Act, 1994), O.Reg. 613/94, I conclude there is no similar legislation in Ontario similar to the provisions in Nova Scotia that allow random virtue testing.

¶ 79 In addition, R. v. Mack speaks about the relevance of previous convictions and past illegal conduct in deciding whether "reasonable suspicion" exists. Lamer J. at para. 111-115 states [emphasis is mine below]:

> The past criminal conduct of an individual is relevant only if it can be linked to other factors leading the police to a reasonable suspicion that the individual is engaged in a criminal

> activity. Furthermore, the mere fact that a person was involved in a criminal activity sometime in the past is not a sufficient ground for "reasonable suspicion". But when such suspicion exists, the police may provide that person with an opportunity to commit an offence. Obviously, there must be some rational connection and proportionality between the crime for which police have this reasonable suspicion and the crime for which the police provide the accused with the opportunity to commit.
> ...
> There should also be a sufficient temporal connection. If the reasonable suspicions of the police arise by virtue of the individual's conduct, then this conduct must not be too remote in time. I would note, however, that the reasonable suspicions of the police could be based on many factors and that it is not necessary for one of these factors to be a prior conviction. If the police have obtained information leading to a reasonable suspicion that a person is engaged in criminal activity, it will be enough of a basis for them to provide that person with the opportunity to commit an offence -- the presence of a prior criminal record is not a prerequisite to the formation of reasonable suspicion. I do not think the requirement that the police act on reasonable suspicion is unduly onerous;
> ...
> To summarize then, the police must not, and it is entrapment to do so, offer people opportunities to commit crime unless they have a reasonable suspicion that such people are already engaged in criminal activity or, unless such an offer is made in the course of a bona fide investigation. In addition, the mere existence of a prior record is not usually sufficient to ground a "reasonable suspicion". These situations will be rare, in my opinion.
> ...
> The reasoning does not go so far as to imply that the accused is therefore less blameworthy; rather, it suggests that the state is involved in the manufacture as opposed to the detection of crime.

¶ 80 Now was there "reasonable suspicion" that justified the enforcement officers using the investigative entrapment technique on April 28, 2000?

¶ 81 The prosecution submits that the defendant's store or business had a warning letter given to the defendant for a selling tobacco to a minor infraction that occurred on June 5, 1999. No conviction resulted, as the warning given was part of the City of Toronto's education policy. As well, it has been submitted there was only 10 months between June 5 and April 28. Thus, the City of Toronto believes it had the prerequisite "reasonable suspicion" to target the defendant's place of business on April 28, 2000. The defendant argues that there is no evidence that the defendant was engaged in selling tobacco to minors, past or recently, that would justify the entrapment technique. I also agree with the defendant that there is no evidence that he was the seller of tobacco to a minor on June 5.

¶ 82 Lamer J. in R. v. Mack at para. 111 stated that "the mere existence of a prior record is not usually sufficient to ground a "reasonable suspicion"" and at para. 112, "[i]f the reasonable suspicions of the police arise by virtue of the individual's conduct, then this conduct must not be too remote in time". On the other hand, his Lordship also states in para. 112, that "the reasonable suspicions of the police could be based on many factors and that it is not necessary for one of these factors to be a prior conviction. If the police have obtained information leading to a reasonable suspicion that a person is engaged in criminal activity, it will be enough of a basis for them to provide that person with the opportunity to commit an offence."

¶ 83 Before this court, there is only evidence that the defendant's store had just one prior incident regarding selling tobacco to a minor and that resulted in a written warning. Even in the Alberta case of R. v. Yung there were 2 written warnings which prompted the trial judge to speculate that the entrapment defence was not available, although the defence never broached the entrapment defence with that court. There was also 10 months between the first incident and April 28, 2000. That is too much in the past and not recent enough. In addition, there was no recent information obtained from surveillance, or obtained from intercepting minors leaving a store with cigarettes, or from teacher or parent complaints indicating the defendant or the store was involved in selling tobacco to minors. As such, I find there is the absence of recent compelling evidence that the

defendant or his store was involved in selling tobacco to minors that would raise "reasonable suspicion" to justify the investigative entrapment technique used on April 28, 2000.

¶ 84 The City of Toronto believes using test shoppers is the most efficient technique in checking whether vendors are complying with section 3(1) of the Tobacco Control Act, 1994 and for following up on previous vendors who have sold to minors in the past. It also requires the use of the test shopper purchase or investigative entrapment technique to monitor 1900 stores. Thus the prosecution submits, the use of the underage test shopper going into stores to purchase tobacco is required as part of a bona fide inquiry. That argument, I would have to say is not sustainable. To subject every vendor to this scrutiny and to the state's use of covert investigative procedures is unfair. Testing all vendors with an underage test shopper without prior reasonable suspicion a particular vendor is selling tobacco to minors is random virtue testing. Therefore, I find in the case at bar, the use of the test shopper on April 28 was random virtue testing and not part of a bona fide inquiry, as the appeal judge McLellan J stated at para. 10 in R. v. Myers [2000] S.J. No. 313:

> Testing all retailers without any reasonable suspicion that any particular retailer has been committing violations of the Act is clearly random virtue testing.

¶ 85 Lamer J. in R. v. Mack [1988] S.C.J. No. 91 at para 107 also found that where there is absent "reasonable suspicion" the defence of entrapment may be established, and it may indicate that the enforcement officers are engaged in random virtue testing [emphasis is mine below]:

> the police are entitled to provide opportunities for the commission of offences where they have reasonable suspicion to believe that the individuals in question are already engaged in criminal conduct. The absence of a reasonable suspicion may establish a defense of entrapment for two reasons. First, it may indicate the police are engaged in random virtue testing, or worse, are carrying on in that way for dubious motives unrelated to the investigation and repression of crimes and are as such mala fides."

¶ 86 Therefore, the absence of recent evidence that the defendant or his store was involved in selling tobacco to minors does not justify the use of the investigative entrapment technique employed on April 28, 2000 against the defendant. There was not the "reasonable suspicion" present to send in the underage test shopper to investigate whether the defendant was selling to minors or that he was complying with section 3(1) of the Tobacco Control Act, 1994. In addition, the testing of all vendors of tobacco in Toronto by use of test shoppers without prior reasonable suspicion are not bona fide inquiries. It is clearly random virtue testing.

¶ 87 Nonetheless, the defendant does not have to be specifically suspected of committing offences and the enforcement officers may employ the investigative entrapment technique if they reasonably suspected illegal activity is likely occurring at the defendant's store. Lamer J, in R. v. Mack at para. 108 wrote about bona fide inquiries specific to a location [emphasis is mine below]:

> Of course, in certain situations the police may not know the identity of specific individuals, but they do know certain other facts, such as a particular location or area where it is reasonably suspected that certain criminal activity is occurring. In those cases it is clearly permissible to provide opportunities to people associated with the location under suspicion, even if these people are not themselves under suspicion.

¶ 88 At para. 23 in R. v. Barnes [1991] S.C.J. No. 17, Lamer C.J.C. clarifies the availability of random virtue testing by the police at a particular location within the scope of a bona fide inquiry [emphasis is mine below]:

> The basic rule articulated in Mack is that the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a bona fide investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the

> police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a bona fide inquiry.

¶ 89 Lamer C.J.C. then states when the investigative entrapment technique used becomes random virtue testing at para. 24 in R. v. Barnes:

> Random virtue-testing, conversely, only arises when a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that:
>
> (a) the person is already engaged in the particular criminal activity, or
> (b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.

¶ 90 The City of Toronto argued that on April 28, 2000 they were conducting a bona fide inquiry at the defendant's store as there are 1900 stores to regulate with only 3 investigators to conduct investigations. Using test shoppers to check for compliance of section 3(1) is the method of investigative procedure that the City of Toronto has chosen.

¶ 91 Now, are the enforcement officers conducting a bona fide inquiry at the defendant's store? Once again, the defendant's store or location of business only had one prior sale to a minor. That one sale ten months earlier is not enough to justify using the investigative entrapment technique at the particular location of the defendant's store. I cannot conclude that the enforcement officers for the City of Toronto could have reasonably suspected that the defendant's store is a particular location or area that certain illegal activity such as selling tobacco to minors is likely occurring. Therefore, since the enforcement officers failed to have a reasonable suspicion the defendant was engaged in selling tobacco to minors or that his store was reasonably suspected of being a place where the illegal activity of selling tobacco to minors was likely occurring, I conclude the use of the test shopper on April 28 was random virtue testing.

¶ 92 McLachlin J., dissenting, in Barnes at para. 70 writes about balancing individual and state interests in the determination of entrapment:

> Mack therefore stands for the proposition that determination of entrapment must involve a balancing between the individual interest in being left alone and the state's interest in the repression of crime. Only where considerations such as fairness, justice and the need for protection from crime tip the balance in favour of the state will police conduct which offends the individual interests at stake be acceptable.

¶ 93 In sum, I cannot conclude after considering the existence of only one prior dated incident which resulted in a warning to the defendant, the lack of recent sales to minors by the defendant or from the store, and considering the use of covert investigative tactics on the defendant, the balance is tipped in favour of the state. Therefore I find the defendant has met his burden of proving the defence of entrapment, since there was no reasonable suspicion the defendant was already engaged in selling tobacco to minors nor were the enforcement officers acting in a bona fide inquiry nor was the defendant's store reasonably suspected of being a place where tobacco was likely being sold to minors. As a result, the City of Toronto on April 28, 2000 was conducting random virtue testing and using an unjustified investigative entrapment technique that caught the defendant.

5. CONCLUSION

¶ 94 In the first line of analysis, although it may have been innocuous, the statement by the test shopper that her present smoking habit was caused by tobacco sellers created an improper motive when viewed objectively. Therefore this statement imputes an improper motive on the test shopper, taints her involvement in the investigation and prosecution of the defendant's matter, and tarnishes her testimony in this matter. To allow the defendant to be convicted of this charge, where there is the presence of mala fides or bad faith conduct, now imputed to the test shopper, would bring the administration of justice into disrepute.

¶ 95 Evidence from persons who may have a self-serving or vindictive motives, or monetary incentives have to be carefully considered. Their evidence may be tainted by their improper motives. Objectively viewed this would bring the administration of justice into disrepute and it would offend the community's sense of fair play and decency, if a person is convicted on the testimony of someone who may have self-serving interests in a conviction. The test shopper in the case at bar may be perfectly innocent, and her testimony may be irrefutable, but on an objective examination, the fact that she blames vendors of tobacco as the cause of her smoking habits, provokes the court to impute bad faith onto her conduct in this case. I, however, restrict my finding of bad faith regarding this test shopper only to this particular case. It may be unjust to paint her as an untrustworthy person without more evidence.

¶ 96 On the second line of analysis, I find there is the absence of recent compelling evidence that the defendant or his store was involved in selling tobacco to a minor that would justify the investigative entrapment technique used on April 28, 2000.

¶ 97 There was not the "reasonable suspicion" present to send in the underage test shopper to investigate whether the defendant was selling to minors or that he was complying with section 3(1) of the Tobacco Control Act, 1994. In addition, the testing of all vendors of tobacco in Toronto by use of test shoppers without prior reasonable suspicion a particular vendor is selling tobacco to minors are not bona fide inquiries. It is clearly random virtue testing.

¶ 98 After reviewing the Tobacco Control Act, 1994, S.O. 1994, c. 10 and the General Regulation (Tobacco Control Act, 1994), O.Reg. 613/94, I conclude there is no legislation in Ontario that allows random virtue testing of licensed tobacco sellers.

¶ 99 Moreover, the enforcement officers were not conducting a bona fide inquiry at the defendant's store on April 28, 2000. The reason being, as espoused in R. v. Barnes, the defendant's store was not a particular location reasonably suspected of having recurring illegal activity that would justify random virtue testing there.

¶ 100 Finally, after reviewing the two branch test for unlawful entrapment adopted in R. v. Mack, I find the City of Toronto on April 28, 2000 unlawfully entrapped the defendant. There existed objectively viewed, bad faith conduct by the test shopper and the lack of reasonable suspicion as a prerequisite to employing the investigative entrapment technique that had been used on the defendant. In addition, the City of Toronto by sending in the underage test shopper on April 28 was engaged in random virtue testing of the defendant. The use of random virtue testing was not justified as the defendant's store or location had not been reasonably suspected as a place where illegal activity was likely occurring. Therefore, the authorities were not acting as part of a bona fide inquiry on the day the defendant was charged.

¶ 101 In conclusion, the defendant's case is of the clearest cases of abuse of process and no other remedy short of a stay of proceeding would be appropriate in this matter. Further, the administration of justice would be brought into disrepute and the community's sense of fair play and decency would be offended, if a conviction were to be registered against the defendant. Therefore staying this proceeding for abuse of process based on entrapment is the proper remedy.

6. ORDER

¶ 102 The motion by the defendant to stay the proceedings for an abuse of process based on the doctrine of entrapment is granted. This court therefore stays the proceedings against Chen Pyo Hong.

QUON J.P.

List of Cases

¶ 103

Cases Considered or Referred To:

1. R. v. Amato, [1982] 2 S.C.R. 418 (S.C.C.)
2. R. v. Barnes [1991] 1 S.C.R. 449, [1991] S.C.J. No. 17. (S.C.C.)
3. R. v. Mack [1988] 2 S.C.R. 903, [1988] S.C.J. No. 91 (S.C.C.)
4. R. v. Myers [2000] S.J. No. 313 (Sask. Q.B.) per McLellan J. at Regina, Saskatchewan, upholding trial judgment; [1999] S.J. No. 671 (Sask. Prov. Ct.) per Meagher J. at Regina.
5. R. v. Seaway Gas & Fuel Ltd. (2000), 47 O.R. (3d) 458, [2000] O.J. No. 226 (O.C.A.), per Carthy, Moldaver and MacPherson JJ.A.
6. R. v. Sobeys Inc. [2000] N.S.J. No. 32 (N.S.S.C.) per MacAdam J. at Antigonish, Nova Scotia.
7. R. v. Yung [1997] A.J. No. 547 (Alta. Prov. Ct. (Crim. Div.)) per Ketchum J. at Edmonton, Alberta

Exhibits Entered:

1. Exhibit "1" - one package of duMaurier Lite 25 king size cigarettes.
2. Exhibit "2" - certified document signed by Howard Bretton dated May 17, 2000 of Bloor Discount vendors permit.
3. Exhibit "3" - sign required to be posted (19? Prove It).
4. Exhibit "4" - affidavit of service regarding warning letter.
5. Exhibit "5" - City of Toronto warning letter dated June 5, 1999.

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