Amato v. *The Queen*[1]: A Precedent For Entrapment

In 1977 Victor Amato was arrested and charged with two counts of trafficking in cocaine. The arrest and subsequent charges were the result of over two months of solicitation by a police informer and an undercover agent to obtain cocaine from Amto. The purpose of the operation was to get to Amato's supplier. It took nearly two months of daily contact to induce Amato to sell two small amounts of cocaine.

At his trial, Amato raised the defence of entrapment, however, it was rejected as there was not enough evidence to show that the scheme had been instigated by the police..[2] The British Columbia Court of Appeal dismissed the appeal,[3] holding that entrapment was not available as a defence to a criminal charge. Taggart J. held that the court's jearlier decision in *R.* v. *Chernicki*[4] should be followed. In that decision entrapment was rejected as a defence until "such time as the matter is definitively settled by the Supreme Court of Canada or by a division of this Court composed of five members . . ."[5] Seaton J. also rejected the proposition that entrapment afforded a defence but noted, that the police-informer, and not the police, had importuned the accused.[6] In Mr. Justice Seaton's view, this method of apprehending criminals did not constitute entrapment.

On appeal to the Supreme Court of Canada, the issues in the *Amato* case divided the Court. A majority of five to four held that the accused had not been entrapped and hence the defence was not available. However, a second majority of five to four held that entrapment was a proper defence available to an accused on a criminal charge. After years of having left the question open, the court appeared ready to respond to the issue.

Canadian courts have discussed the defence of entrapment but always in the absence of a "proper case" in which to apply it. In *Regina* v. *Ormerod*[7] Laskin J. as he then was, briefly discussed entrapment. Although he found the defence was not available to the accused in that case, he defined entrapment as ". . . such calculated inveigling and persistent importuning of the accused . . . as to go beyond ordinary solicitation . . ."[8] The use of police

[1] *Amato* v. *The Queen* (1982), 69 C.C.C. (2d) 31.

[2] *Ibid.*, at 40, Dickson J. quoting from the trial judge's reasons.

[3] (1980), 57 C.C.C. (2d) 401.

[4] (1971), 4 C.C.C. (2d) 556.

[5] *Supra*, footnote 2, at 404.

[6] *Ibid.*, at 405.

[7] [1969] 2 O.R. 230.

[8] *Ibid.*, at 238.

decoys or *agent provocateurs* to ensnare a thief was not enough. For the defence to operate, something more was needed, and this something more was "persistent importuning."

Despite the lack of direction on this defence, one Ontario County Court judge did accept the defence of entrapment. *Regina* v. *Shipley*[9] records the first instance in which the defence of entrapment was successfully raised. There the police officer, working undercover, admitted that the evidence he wished to build was against some suppliers, and that he had taken advantage of a naive youth who would not have obtained the narcotic for him had it not been for the officer's inducements. The court stayed the prosecution as an abuse of process.

Such a small step toward recognition of the defence was set back by the decision of the British Columbia Court of Appeal in *R.* v. *Chernicki*[10] where the Court rejected the accused's defence of entrapment, holding that such a defence was not available. However, the Nova Scotia Court of Appeal took the opposite view.[11] While the court held that it was not an available defence in that particular case, MacDonald J. in *obiter* said:

> . . . that proceedings should be stayed or the accused discharged if it is clear that the accused did not have a prior intention or predisposition to commit the offence with which he is charged but committed it only because the conduct of the *agent provocateur* was (as Laskin J.A. said in *Regina* v. *Ormerod*): Such calculating inveigling and and persistent importuning as went beyond ordinary solicitation.[12]

Like the County Court Judge in *Shipley*, MacDonald J. took the view that such police conduct constituted an abuse of process and was contrary to public policy, in that courts should not be open to cases which arise out of police instigated crime.[13]

The public policy concerns and the very nature of entrapment received more attention and greater elaboration in 1978 when *Kirzner*[14] went before the Supreme Court of Canada, on appeal from the Ontario court of Appeal. The latter held that not only was the defence of entrapment not available to the accused, but that it did not constitute a defence recognized at law.[15] The Supreme Court of Canada affirmed the Appeal Court's decision with respect to Kirzner's particular case but felt that the question of whether

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[9][1970] 2 O.R. 411.

[10]*Supra*, footnote 3, at 556.

[11]*R.* v. *Bonnar* (1976), 14 N.S.R. 365.

[12]*Ibid.*, at 376.

[13]*Ibid.*

[14][1978] 2 S.C.R. 487.

[15](1977), 14 O.R. (2d) 665.

entrapment was generally available as a defence should be left open, to be decided when a proper case came before the court.

The *Kirzner* decision provided the Court with an opportunity to restate some basic principles with respect to entrapment. Laskin C.J. defined entrapment as police conduct which went beyond mere solicitation or decoy work, but which set out to actively "organize a scheme of ensnarement . . . in order to prosecute the person so caught."[16] The key element in the defence is held to be the role played by the police, and whether that role is one of instigating the crime, rather than merely providing an environ for a criminally predisposed individual.[17]

The policy reasons underlying the defence are set out at length in *Kirzner*. The Court does not object to the use of police decoys or *agent provocateurs*, but rather; to police conceiving a crime, and then through trickery, persuasion or fraud procuring its commission from an innocent citizen. Such police tactics can only serve to bring the administration to justice into disrepute.[18]

The third issue, discussed in *Kirzner* but not settled, was whose conduct the court was going to scrutinize in determining the applicability of the entrapment defence, *i.e.*, whether courts would look to the conduct of the accused or to that of the police. Courts in the United States opted for looking to the conduct of the accused. This approach has been referred to as the subjective approach, and is derived from the majority decision of the United States Supreme Court in *Sorrells* v. *The United States*.[19] The test applied in that case was the accused's predisposition toward committing the crime. If he was so predisposed, then the defence of entrapment would not arise. The minority view in *Sorrells*, on the other hand, held that only the conduct of the police was relevant. In the latter view, the record of the accused and his predisposition played no role in the determination:

> The applicable principle is that Courts must be closed to the trial of a crime instigaged by the government's own agents. *No other issue*, comparison or equities as between the guilty official and the guilty defendant *has any place in the enforcement of this over-ruling principle of public policy*.[20] (emphasis added)

This approach has been referred to as the objective approach. Of these two views, those Canadian Courts which have recognized the defence of entrapment have opted for the subjective approach.[21] A discussion of why the objective approach is clearly preferable will follow shortly.

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[16]*Supra*, footnote 13, at 494.

[17]*Ibid.*, at 493.

[18]*Ibid.*, at 496.

[19](1932), 287 U.S. 210.

[20]*Ibid.*, at 219.

[21]*Bonnar, supra*, footnote 10, at 365.

The *Amato* case provided the Supreme Court of Canada with that "proper case" it sought in order to establish the Canadian position on the defence of entrapment. Of the nine justices, four held[22] that, assuming it was a recognized defence, the facts of the case would not warrant its application in this particular instance. Ritchie J. held that it was a recognized defence but that it had no application in this particular case. Estey J. held that it was a proper defence, *and* was applicable in this case.[23] Although five justices accepted the proposition that entrapment was a recognized defence, they produced two versions as to how the defence should apply.

In a short judgment, Ritchie J. held that one should look to the accused's character or record to determine the accused's criminal predisposition. For example, did the accused take advantage of an opportunity created by the police; or was his involvement with the crime "devised" through the creative activity of an *agent provocateur*? If the accused's record is tarnished, then he cannot rely on the defence of entrapment, but if he can show that his record is blemish free, then it becomes a matter of lack of *mens rea* on the accused's part. In the latter alternative the defence is established and the accused acquitted.[24]

Estey J. adopts the minority view as expressed in *Sorrells* by Mr. Justice Roberts. The only issue on the inquiry here is the conduct of the police and their conduct alone. The test to determine whether the accused was entrapped becomes, not the predisposition of the accused, but whether the police scheme was such as to induce only those persons who would normally commit the crime, rather than those who would avoid it.[25]

Instigating and perpetuating a scheme to ensnare a criminal is not enough to bring the defence of entrapment into operation; "the scheme so perpetrated must in all circumstance be so shocking and outrageous as to bring the administration of justice into disrepute."[26] Consequently, this appears to be the full test of police conduct which gives rise to entrapment, and which the accused must meet in order to escape conviction.

Once accepted as a defence, and found to exist on the facts, the question which remains to be answered is what will the remedy be? The proper remedy should be different than that proposed by Ritchie J. for two reasons. First of all, the question of intention or *mens rea* does not arise since it is the conduct of the police which is being scrutinized rather than the accused's predisposition for committing the offence. Secondly, the defence of en-

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[22]Dickson J., Martland, Beetz, and Chouinard, JJ., concurring.

[23]Concurred in by Laskin C.J., McIntyre and Lamer, JJ.

[24]*Supra*, footnote 1, at 138.

[25]*Ibid.*, at 52.

[26]*Ibid.*, at 62.

trapment is not, in Mr. Justice Estey's view, a defence in the traditional sense of the word:

> A successful defence leads to an acquittal on the charge, *a determination that the offence has not been committed.* Here, axiomatically, the crime from a physical point of view at least has been committed. *Indeed it may be that the necessary intent and act have combined to form a complete crime.*[27] (emphasis added)

The crime has been technically committed, but since the entire transaction has been "tainted" by police conduct, "the remedy in such a case, therefore, is a stay of prosecution, a denial of the courts to their improper use by the law enforcement agencies of the community."[28]

The court's power to enter a stay of prosecution is derived from its inherent jurisdiction to control its own process. Such a jurisdiction is required for several reasons, one of which is to ensure that the Court's sense of justice is not violated.[29] In his lengthy judgment, Estey J. canvasses the bulk of case law which deals with this point, in order to amply illustrate that courts are clothed with the power to enter a stay.

Finally, an inquiry must be made as to where this power to create new defences and to apply appropriate remedies stems from. In *Kirzner,* Laskin J. as he then was, in opposition to the Ontario Court of Appeal, held that section 7(3) of the *Criminal Code of Canada* did more than merely preserve common law defences.[30] In *Amato* Estey J. accepts the proposition put forth by the Chief Justice in *Kirzner,* and found the court's power to adopt new defences, "if appropriate," on the basis of section 7(3).[31]

In *Amato,* the Supreme Court of Canada has finally recognized entrapment as a defence. What remains to be decided is the nature of the test which must be met for the defence to apply. As noted, there are two views on this point. There is the subjective approach adopted by Ritchie J. who proposes as the applicable test the predisposition of the accused, which, if lacking, ought to result in an acquittal. On the other hand, there is the objective approach adopted by Estey J. which focuses on the conduct of the police and whether such conduct was such as to offend the community standard, thereby bringing the administration of justice into disrepute. If these two conditions are met, the proper remedy would be a stay of prosecution.

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[27]*Ibid.*, at 61.

[28]*Ibid.*, at 63.

[29]*Ibid.*, at 68.

[30]*Chernicki, supra,* footnote 3, at 496.

[31]*Amato, supra,* footnote 1, at 60.

Of the two views, the latter is more acceptable. One reasons why Mr. Justice Estey's view is preferable is that it would hardly be just to deny one an available defence on the basis of his having a prior record. An otherwise innocent person could be convicted regardless of the scheme!

Furthermore, the approach of Mr. Justice Ritchie conflicts with the policy reasons for giving effect to the defence of entrapment. The defence operates when the police have induced an innocent person into the commission of an offence, through trickery or fraud. The court intervenes because such conduct is reprehensible and the stay of prosecution is a comment on that conduct. A test then, which "looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reasons for the defense of entrapment."[32]

Amato illustrates one step in the acceptance of the defence of entrapment. Other important issues related to the defence must be determined in subsequent judgments. The major hurdle of recognizing the defence has, however been overcome with *Amato*.

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[32]*Sherman* v. *United States* (1958), 356 U.S. 359, at 382: Frankfurter J. commenting on the majority view in *Sorrels*.

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