

TOP FIVE 2020

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2020 cases were selected and discussed by Mr. Justice Lorne Sossin, then of the Ontario Superior Court of Justice and currently of the Court of Appeal for Ontario. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

***R v AHMAD*, 2020 SCC 11**

Date released: May 29, 2020

<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18383/index.do>

Companion Case: *R v Williams*

Facts

This decision of the Supreme Court of Canada (SCC) considered two similar cases – *R v Ahmad* and *R v Williams* – together because of their similar issues. In order to enforce the law, police must use investigative techniques to seek out crime while respecting the rights and freedoms of the communities they serve. At issue in this case is the balance police must strike in the context of dial-a-dope operations, in which drug deals are conducted through phone calls or texts. Both Ahmad and Williams argued the police did not have reasonable suspicion when they were offered the opportunity to sell drugs and both submitted the police illegally entrapped them in a situation where they sold drugs.

In the case of Ahmad, an officer received information that a person named "Romeo" was selling drugs through a specific phone number. Without investigating the reliability of the information, the officer called the phone number. Romeo answered the phone and they had a brief conversation.

The officer asked for "2 soft," referring to two grams of powder cocaine. On the phone, the pair set a meeting place for the exchange of two small bags of cocaine for \$140. The exchange was completed and Romeo (Ahmad) was later arrested.

In the case of Williams, an officer was given information about another person in Toronto selling cocaine named "Jay." The detective did not seek to confirm the tip before calling "Jay" directly. The officer told Jay he needed "80 hard," referring to \$80 of crack cocaine. Jay suggested that they meet in person at a particular location. The two met and completed the first transaction. They later met again and completed a second transaction. The next month, the police arrested Jay (Williams).

Background on Entrapment

This case deals with the criminal law doctrine of entrapment as set out by the Court in *R v Mack*, [1988] 2 SCR 903.

*R v AHMAD*

TOP FIVE 2020

Mack established that the police have the power to go beyond their normal investigative role and tempt people into committing criminal offences but outlined limitations to this power. When police offer an opportunity to commit a crime without a reasonable suspicion or they induce the commission of an offence, police commit entrapment. Entrapment can be claimed as a defence to the elements of the crime and, when established, can lead to a stay of proceedings, an order by the court to stop the proceeding.

The Court in *Mack* established two ways for an accused person to succeed in arguing entrapment. At issue in this appeal is the first part of the doctrine which says there can be entrapment when there is evidence the authorities provided an opportunity to commit an offence without a reasonable suspicion of criminal activity. Police can form a reasonable suspicion over either 1) a specific person who is engaged in criminal activity or 2) a specific person or people engaging in criminal activity at a specific location, referred to as a *bona fide* inquiry.

In *Ahmad* the Court states that the doctrine of entrapment protects a fundamental value in our society: that the ends do not justify the means. The requirement that there is a reasonable suspicion of criminal activity before police provide an opportunity to commit an offence ensures that, if challenged, police must disclose their

decision-making processes, which allows courts to conduct a meaningful review of police conduct.

Procedural History

Following a contested trial, Ahmad was found guilty of one count of possession for the purpose of trafficking and two counts of possession of the proceeds of crime. He then applied for a stay of proceedings on the basis of entrapment. The trial judge concluded that Ahmad was not entrapped, as the police had formed a reasonable suspicion and corroborated their tip through the course of conversation before providing Ahmad the chance to sell drugs.

At trial, Williams admitted that the evidence established that he was guilty of trafficking and possessing the proceeds of crime but argued that the charges should be stayed on the basis of entrapment. The trial judge agreed and found that the police did not have reasonable suspicion that Williams was dealing drugs. He was, however, found guilty of firearm, ammunition, and breach of recognizance charges, as the police did nothing to encourage or facilitate those crimes.

Ahmad and *Williams* were then heard together at the Court of Appeal for Ontario. The Court looked to *R v Barnes* [1991] 1 SCR 449 to establish that a police officer was allowed to provide an

*R v AHMAD*

TOP FIVE 2020

opportunity to commit a crime when they had a reasonable suspicion that criminal activity was taking place at a specific location. Further, the Court found that a specific location is not always geographic but can also include digital locations such as phone lines.

The Court of Appeal for Ontario dismissed Ahmad's appeal and upheld his convictions. For Williams, the Court of Appeal overturned the trial judge's finding that there was no reasonable suspicion based on the phone number and entered convictions on the trafficking and possession of the proceeds of crime charges for Williams.

Both Williams and Ahmed appealed these convictions to the Supreme Court of Canada.

Issue

1. Is there evidence of entrapment such that the convictions entered should be dismissed?
 - a. When and how is reasonable suspicion established in the dial-a-dope context?
 - i. For the purposes of the entrapment doctrine, can a phone number qualify as a place over which police may form a reasonable suspicion?
 - ii. How does reasonable suspicion apply to dial-a-dope investigations?
 - iii. How should courts review the words spoken during a police officer's call to a target?
 - iv. What constitutes provision of an opportunity to traffic drugs during a phone call?

Decision

The Court found that in the case of Ahmad, there was no entrapment. Therefore, the Court dismissed the appeal and upheld the convictions. However, in the case of Williams, the Court found that there was entrapment, allowed the appeal, set aside the convictions entered by the Court of Appeal, and reinstated the stay of proceedings entered by the trial judge.

Ratio

The Court defined the entrapment doctrine in the context of dial-a-dope operations and established that a phone number can be a precise enough "location" over which to form a reasonable suspicion. In reaffirming that a reasonable suspicion must be obtained before offering the opportunity to commit an offence, the Court found that police cannot call any suspicious phone number and invite the commission of an offence without first substantiating their information through further investigation or conversation.



This decision was released amidst the protests against police brutality and racial injustice in both Canada and the U.S. and as such, has an increased importance in 2020. The Court stated that cases of entrapment have a disproportionate impact on poor and racialized communities and as such, the Court's standard of review should be rigorous to assess the extent to which police relied upon discriminatory, stereotypical, or racially charged assumptions in forming a reasonable suspicion.

The key takeaways are as follows:

- a. "Whether the police are targeting a person, place or phone number, the legal standard for entrapment is a uniform one, requiring reasonable suspicion in *all* cases where police provide an opportunity to commit a criminal offence." (para. 4)
- b. the reasonable suspicion standard is uniquely 'designed to avoid indiscriminate and discriminatory' police conduct... This is particularly critical in cases of entrapment, since entrapment is a 'breeding ground for racial profiling' ... and has 'a disproportionate impact on poor and racialized communities'... Courts must be able to assess the extent to which the police, in seeking to form reasonable suspicion over a person or a place, rely upon overtly discriminatory or stereotypical thinking, or upon 'intuition' or 'hunches' that

easily disguise unconscious racism and stereotyping..." (para. 25, citations omitted)

Reasons

In a divided decision, the majority of the Court discussed the doctrine of entrapment and reaffirmed the framework set out in *Mack and Barnes*.

For the majority, Justices Karakatsanis, Brown, and Martin first determined whether or not a phone number was sufficiently precise to qualify as a "place" over which the police can form a reasonable suspicion, per the first branch of the entrapment doctrine as outlined in *Mack*. To ensure that innocent people can maintain privacy without the risk of being subject to investigation by the police, "places" in the entrapment doctrine should be precisely defined. The Court found that phone numbers can be precisely defined this way.

Next, the Court asked and answered the question of how a police officer can form a reasonable suspicion in the context of a dial-a-dope investigation. The Court found that a single tip received by police officers is insufficient to raise a reasonable suspicion. Additional information from conversations with the target, for example, can corroborate the tip to give the police a reasonable suspicion. Police should be careful in the course of a conversation, as a reasonable suspicion must be established *before* providing an opportunity to commit the crime.



R v AHMAD



TOP FIVE 2020

The third question the Court answered was how courts should review the words spoken during a police officer's call to the target. The Crown argued it was wrong for the trial judge to review transcripts of the exchange between the targets and the police officers. The Court here rejected this argument finding that, because the officers had not formed a reasonable suspicion prior to the phone call, reviewing the words exchanged on the call was necessary.

Finally, the Court asked what constituted a provision of an opportunity to traffic drugs. The opportunity to commit an offence is offered when an officer says something to which the offence can be committed by answering "yes." The Court looked to the police conduct to determine if it closely resembled the commission of an offence, which, in this case, it did.

Applying these principles to the facts of the case, ultimately the Court found that the appeals resulted in different conclusions. In answering each appeal, the Court only answered one question: **whether the police had formed a reasonable suspicion at the time the officer provided the opportunity to commit a crime.** Based on conversation transcripts with Ahmad, the Court found that the police had formed a reasonable suspicion before providing the opportunity for Ahmad to commit the offence. Therefore, there was no entrapment.

The outcome in Williams was different. There was nothing in Williams' responses, like there was in Ahmad's, to suggest the phone number was being used to sell drugs *before* the police provided the opportunity to traffic. The majority of the Court found that the police had proceeded on an unsubstantiated assumption.

Justice Moldaver, writing the dissenting opinion on behalf of himself, Chief Justice Wagner, and Justices Côté and Rowe, held that the both appeals should be dismissed and convictions for both Ahmad and Williams upheld. In analyzing the approach taken by the majority, Justice Moldaver explained that the adopted approach to the doctrine of entrapment is inappropriate in the context of dial-a-dope operations.

While the majority makes a distinction between "investigative steps" and providing an "opportunity," the dissent held that the distinction between taking investigative steps and offering opportunities is often artificial. Instead, Justice Moldaver suggested courts should focus on whether society would view the officer's conduct as intolerable or abusive.

The dissenting justices proposed a solution for the doctrine of entrapment in this context. They suggest that police should be found to be acting pursuant to a *bona fide* inquiry where 1) their investigation was motivated by genuine law enforcement purposes;

*R v AHMAD***TOP FIVE 2020**

2) they had a factually grounded basis for their investigation; and 3) their investigation was directed at investigating a specific type of crime within a tightly circumscribed location (whether physical or virtual). Applying this revised test to the case at hand, the dissent concludes that the police met each requirement. As such, the dissenting judges held that neither Williams nor Ahmad were entrapped.

DISCUSSION

1. In your own words, explain the meaning of “police entrapment”.
2. In what way is a phone number similar to a location?
3. Why is it important for police to ensure they have a reasonable suspicion before they provide the opportunity to commit a crime?
4. Why did the majority reasons result in two different conclusions in Ahmad and Williams?
5. Should police be allowed to invite someone to commit an offence if they have a reasonable suspicion that that person had already committed that offence?