

Legal Method

Entrapment

An analysis of the law of Entrapment and Relevant Cases

Entrapment Definition

The Police does not allow undercover officers to catch offenders committing offences. This is common in drug operations to put undercover officers to uncover the roots of drug circles.

Entrapment is where police use undercover officers which push or encourage a defendant in committing an offence they would have otherwise NOT committed.

To put it simply: undercover officers roles are to catch offenders that would do a crime regardless, not catch people by encouraging someone to commit an offence they had no intention to commit.

Principles of the law of Entrapment

McKee v R case states “Entrapment is NOT a defence to the entire offence, however, entrapment can only be used to exclude evidence.

To put it simply: using police entrapment does not act as a defence to the entire offence, there are other things that must be satisfied in order to prove innocent. Evidence under entrapment may be excluded.

Normally, when entrapment evidence is excluded there is no other evidence. This is due to entrapment evidence being the main source of evidence. Once excluded, the person would most likely end up walking away.

Voir Dire

When entrapment is raised in a case, the court hears what is called a ‘voir dire’, which is a french word in saying basically a hearing within a hearing.

The defence lawyer would say to the judge that there has been entrapment in this case and the jury should be removed so that the court can hear evidence as to the entrapment of this particular case.

The jury cannot hear it because it would affect the way they decide the case. This is then where the judge hears the arguments, about the admissibility of the evidence. In these circumstances, the test for admissibility is whether or not the undercover officer acted fairly or unfairly.

Stevenson v R 2011 case

Facts:

In 2008, a 14-year-old girl named BB placed an advertisement which offered a “young girl for sex”. She received at least 100 emails to her advertisement. Mr Stevenson had replied and offered “\$200 for a couple of hours of fun”. BB said she was 16 and Mr Stevenson had inquired about meeting that evening. However, nothing transpired and contact between BB and Mr Stevenson ceased.

A couple of months later, BB disclosed to child youth and family about entering into arrangements with 2 men (none of which are Mr Stevenson) who paid her in exchange for sex. The police interviewed BB and took possession of her computer.

The police used BB’s computer and purported as BB and sent Mr Stevenson a suggestive email. Mr Stevenson advised his willingness to meet the next day or the day after that. His exact reply being: “srry cnt do last wk. can u meet on weds thurs morning? U sure u wnt to meet this yng ish 16 yr old!? What do u wnt to do to me, hw much will I be doing this 4!?”.

The payment was not mentioned, the police brought it up and proposed a figure of \$50 an hour. Mr Stevenson agreed and asked BB if she was “just 16”. The meeting was arranged and upon coming to the agreed location, Mr Stevenson was arrested.

District Court

The case was heard first at the District Court. In section 33 of the prostitution reform act, “no person may enter into a contract with a person under the age of 18 to provide commercial sexual services.”

The district court judge said it was Mr Stevenson’s choice to continue the contact and therefore there was no entrapment as it was his choice to respond to the email despite knowing the girl’s age.

The penalty under this act is severe (maximum punishment of 7 years imprisonment) to protect young women from being alluded to prostitution.

Court of Appeal

The matter was appealed to the court of appeal by Stevenson’s lawyer. The argument at hand was the offender’s predisposition to offend was “not the criterion”. Which means, Mr Stevenson obviously had a desire, a predisposition to want to have sex for money with a young woman, the court said that this does not negate the misuse of state power or render acceptable what would otherwise be acceptable.

The court also said conduct which brings about state-created crime is unacceptable and improper because it is an affront to the public conscience and a prosecution where it occurs would not be fair. This means, that if the police go too far and create the crime, it is just unacceptable and improper and is an affront to the public conscience as is unfair.

The court looked at it and set out the following yardstick, in determining whether or not the police have acted unfairly.

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- Did the police do more than present the defendant with an unexceptional opportunity to create a crime?
 - Is the police conduct no more than might have been expected by others in the circumstances?
 - Would the crime have been committed without the nature and extent of the police's involvement?
 - Would Mr Stevenson had done what he had done if the police hadn't sent him the email?

The court of appeal start analysing the facts of the case to see if the police had gone further than they should've, did they create this crime and if they did then obviously the court says it's unfair.

The court said: "yes the police initiated the contact. The language that was used did encourage sexual activity. The police stated that she was 16 that made it very clear. The police raised the topic of payment, not Mr Stevenson."

This is saying, that the crime was already created by the police, it wasn't something that he was going to be doing anyway. It was artificially created in this situation, the police did all the work (send the email, use language to encourage sexual activity, state the age, raise payment etc). In other words, the police set out all the elements of the offence to Mr Stevenson to take the bait.

In that sense, the court of appeal said "without the nature and extent of police involvement, Mr Stevenson would not have offended in November 2008. There was active encouragement by the Police over some days to get Mr Stevenson involved. Therefore, even though he had a predisposition, even though there was clear evidence that Mr Stevenson was interested in this sort of activity, the court said that does not disqualify him from being treated in this way". The court held that the evidence they obtained was improperly obtained, we then switch to the evidence act, where this act says that "if evidence has been improperly obtained the court has the discretion to decide whether to exclude it or not".

Looking at section 30(3) of the Evidence act 2006, the real test here is "would exclusion of the evidence be disproportionate to the impropriety". In other words, if the court excluded the evidence here, would it be disproportionate. The court has a whole lot of factors it can weigh up to determine this. This includes: Importance of the right and seriousness of the breach

- Deliberate, reckless, bad faith
- Nature and quality of the evidence
- The seriousness of the offence
- Any other investigating techniques
- Alternative remedies
- Whether necessary to avoid physical damage to the police or others
- Whether there is any urgency in obtaining the improperly obtained evidence

Applying 30(3) in *Stevenson* case

For exclusion: the right breached by the police is significant. In this specific case, Mr Stevenson was minding his own business, he was sitting at home, minding his own business and the message came through on the computer which then got him involved. The intrusion of his privacy and the right to be left alone was serious and breached. There was a deliberate action by the police but it wasn't in bad faith. There was no urgency in obtaining the offence.

Against exclusion: the nature of the evidence is compelling as the evidence shows that Mr Stevenson was prepared to engage in this activity. Additionally, this was a serious crime under the prostitution reform act with a maximum punishment of 7 years imprisonment.

Ultimately, the court of appeal decided that the evidence should be excluded. The court said the exclusion was seen as proportionate to the police impropriety and Mr Stevenson had no alternative remedies to exclusion which could adequately provide redress.

Held: Mr Stevenson was successful in having the evidence excluded. Which means that in this particular case, the conviction cannot stand, the evidence is excluded and without the evidence, there is no case to be convicted.

Summary

Entrapment is about excluding the undercover officers' evidence and the test we saw under Stevenson case of "was the crime created by the state which is an affront to the public conscience and unfair". We do not want the police creating crime, we want them to catch crimes.

Did the police do more than present the defendant with an unexceptional opportunity to commit a crime? In this case, we can see, the police did a lot more than just initiate a crime. An opportunity would be just walking along a drug circle and asking "Are you able to supply any drugs to me" without any further pressure.

Is the conduct no more than might be expected by others? You wouldn't expect others to set up an artificial situation like that in the *Stevenson* case.

Would the crime have been committed without the nature and extent of the police involvement? The court had said that without the initiation, the emails, the contact with Mr Stevenson, he wouldn't have created that crime. He may have created a crime at a later date but that particular crime that court is concerned with and the fact that he had a predisposition from the previous activity is not the criteria, it's whether this particular crime would've happened without the police putting the pressure on and sending the email amidst all other things done.

Once, it has been found to be unfair, is an exclusion proportionate to the impropriety? Was it a serious breach of right, was it deliberate, was there no urgency, what the nature of the offence and the evidence would be, any other investigating techniques, and whether there are any alternative methods? In this case, there was no alternative remedy other than excluding the evidence for breaching the right to privacy and the right to be left alone.

Finally, whether there is any urgency in obtaining the improperly obtained evidence? Yet, in this case Mr Stevenson is able to walk away free.

What the police should've done was keep an eye on Mr Stevenson and ensure he does not commit the predisposition again rather than instigate another offence. Even though it was not in bad faith from the Police.

The exemplar from Wednesdays' lecture