

After the Serpent Beguiled Me: Entrapment and Sentencing in Australia and Canada

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Undercover investigations frequently result in allegations of entrapment by the accused. These allegations can give rise to judicial remedies designed to censure the misconduct of law enforcement, to acknowledge the accused's diminished culpability, or to do both. The authors survey the Australian and Canadian jurisprudence, revealing an important divergence that has emerged in the use of sentencing as a judicial response to entrapment. In both Canada and Australia, a judge may order the exclusion of evidence or a stay of proceedings where the accused was induced to commit a crime that he or she would not have contemplated but for the inducement by investigators. In Australia, however, courts also have the discretion to mitigate an offender's sentence in instances where police conduct may have fallen short of entrapment but nevertheless contributed to or escalated the offender's illegal conduct. Canadian judges do not enjoy this discretion, even where the conduct of investigators raises questions about the offender's culpability.

The authors offer a set of principles to guide entrapment sentencing, beginning with the principle that an offender who is ready, willing and able to commit the offence should not ordinarily be entitled to a reduction in sentence, even where there may have been improper conduct by investigators. Where investigators have used entrapment-type practices that escalated an offender's criminal behaviour, courts should only impose lighter sentences where those practices raise questions about the extent of the offender's culpability. If the courts are not seeking to recognize reduced culpability, but to censure the particular law enforcement practices, they should exclude the evidence obtained from those practices.

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Introduction

In undercover investigation, a variety of proactive techniques are routinely used that involve covert communication with the suspect. These may involve discussing, observing or sometimes facilitating the commission of a criminal offence, and they frequently result in allegations of entrapment by the accused. In the anglophone legal traditions, entrapment gives rise to a range of procedural and substantive remedies, with the emergence of distinctive and divergent principles for dealing with entrapment issues in different jurisdictions.

In this article, we discuss and evaluate sentence mitigation as a judicial remedy for entrapment, focusing on a distinction present in both Australian and Canadian jurisprudence between entrapment in the strict sense and “entrapment-type” practices that fall short of unlawful entrapment but often play a significant role in the sentencing process.

The Australian approach to entrapment relies on procedural and evidentiary remedies, typically through the exclusion of evidence, but has given only limited consideration to the effect of entrapment-type practices on sentencing. The recent case of *R v Lipton* highlights the legal issues generated by these practices and their role in sentence mitigation.¹ When such practices do occur, two rationales are typically used to justify sentence mitigation: the misconduct of law enforcement officials and the diminished culpability of the accused. As we will argue, the choice of rationale for sentence mitigation in entrapment cases affects whether the fundamental purposes of sentencing are advanced and whether the sentence is proportionate and fair.

1. [2012] NSWDC 201.

In contrast to the Australian approach, Canadian courts appear to pay little attention to offender culpability in entrapment cases, focusing solely on police misconduct. In Canada, the remedy for strict entrapment effectively amounts to the judicial censure of law enforcement. However, some Canadian courts have found entrapment-type practices to be relevant to the extent of an offender's culpability at the sentencing stage.

Academic commentary generally tends to focus on entrapment in the strict sense, and on the nexus between law and deceptive policing. This article contributes to an emerging discussion of the effect of entrapment-type practices on sentencing by analyzing significant Australian cases in an attempt to distill principles for entrapment sentencing and to evaluate whether these principles promote or detract from proportionality and the fundamental purposes of sentencing. The Australian position will be compared to and contrasted with the Canadian approach. The two countries provide a logical and interesting springboard for comparison because they share a common law heritage and have been leaders in regulating and constraining law enforcement investigative methods,² while at the same time taking somewhat diverse jurisprudential paths in response to entrapment and entrapment-type practices.

Part I outlines the differing conceptions of entrapment in Canada and Australia. While the judicial analysis of entrapment in Canada is primarily concerned with an objective assessment of law enforcement conduct, the Australian approach also looks to the actions of the accused as well as to broader questions of public policy. Part II briefly describes the range of legal interventions available in entrapment cases. Part III analyzes entrapment sentencing jurisprudence in Australia and Canada, and shows that mitigation of sentence has become a primary remedy for entrapment practices in Australia. Part IV offers a set of principles to guide entrapment sentencing, beginning with the principle that an offender who is ready, willing and able to commit the offence should not ordinarily be entitled to a reduction in sentence, even when there are questions of improper state conduct. Instead, expressing judicial disapproval of law enforcement conduct by excluding tainted evidence, and then addressing the degree

2. See Simon Bronitt, "The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe" (2004) 33:1 C L World Rev 35 at 36 [Bronitt, "Undercover Policing"].

of offender culpability at sentencing, better reflects the purposes of sentencing and promotes proportionality and equal treatment.

We conclude by highlighting the key shortcoming of the Canadian position: While it seeks to promote clarity in its focus on misconduct of law enforcement, it may unfairly deprive suspects of a reduction in sentence by failing to consistently consider the degree of culpability of the offender. This approach may expose a suspect unfairly to conviction by allowing evidence that an Australian court might reject as inadmissible.

I. Comparative Approaches to Entrapment

Entrapment raises complex questions of law and fact, and has a long legal history. It is further complicated by the diversity of approaches across common law jurisdictions and has given rise to an extensive body of literature.³ Because our focus is on the remedy of mitigation of

3. For seminal works on entrapment, see Arthur H Kent, "The Nature of the Defense of Entrapment" (1933) 1:1 U Chicago L Rev 115; Richard C Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs" (1951) 60:7 Yale LJ 1091; JD Heydon, "The Problems of Entrapment" (1973) 32:2 Cambridge LJ 268; JD Heydon, "Entrapment and Unfairly Obtained Evidence in the House of Lords" [1980] Crim L Rev 129; Gerald Dworkin, "The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime" (1985) 4:1 Law & Phil 17; Gerald Dworkin, "Ethics and Entrapment" (1987) 43:3 Journal of Social Issues 57; Andrew Ashworth, "Entrapment" [1978] Crim L Rev 137; Andrew Ashworth, "What is Wrong with Entrapment?" [1999] Sing JLS 293; Andrew Ashworth, "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" (2000) 63:5 Mod L Rev 633; Andrew Ashworth, "Re-Drawing the Boundaries of Entrapment" [2002] Crim L Rev 161 [Ashworth, "Re-Drawing the Boundaries"]; Andrew Ashworth, "Entrapment and Criminal Justice (*R v Looseley and Attorney-General's Reference* (No 3 of 2000))" (2002) 2:1 OUCLJ 125; Simon Bronitt, "Entrapment, Human Rights and Criminal Justice: A Licence to Deviate?" (1999) 29:2 Hong Kong LJ 216 [Bronitt, "Licence to Deviate"]; Simon Bronitt & Declan Roche, "Between Rhetoric and Reality: Sociolegal and Republican Perspectives on Entrapment" (2000) 4:2 International Journal of Evidence and Proof 77; Simon Bronitt, "Sang is Dead, Loosely Speaking" [2002] Sing JLS 374 [Bronitt, "Sang is Dead"]; Bronitt, "Undercover Policing," *supra* note 2; Hock Lai Ho, "State Entrapment" (2011) 31:1 LS 71. See also Edward Sagarin & Donal EJ MacNamara, "The Problem of Entrapment" (1970) 16:4 Crime and Delinquency 363; Joel Shafer & William J Sheridan, "The Defence of Entrapment" (1970) 8:2 Osgoode Hall LJ 277; John David Watt, "The Defence of Entrapment" (1971) 13:3 Crim LQ 313; Barnett M Sneiderman, "A Judicial Test For Entrapment: The Glimmerings of A Canadian Policy On Police-Instigated Crime" (1973) 16:1 Crim LQ 81; Roger Park, "The Entrapment Controversy" (1976) 60:2 Minn L Rev 163; NLA Barlow, "Entrapment and the Common Law: Is There a Place for the American Doctrine

sentence in cases involving entrapment-type practices, we will not review the general entrapment literature.

Nomenclature is a concern in approaching a comparative analysis of the mitigatory effects of entrapment-type practices and their relationship to the purposes and principles of sentencing in Australia and Canada. At its simplest, entrapment involves inducing people to commit crimes they would not have otherwise committed and then prosecuting them for it. The undercover sting operation is the classic example.⁴ Difficulties emerge, however, when we recognize that there is a distinction between someone who would not have committed the offence *at all* had it not been for the entrapment activity, and someone for whom that activity merely *presented the opportunity* to commit the offence. The first case is entrapment; the second is not.

A further complication arises when a suspect is consciously manipulated to commit more serious crimes that attract heavier sentences. In these cases, a suspect who might ordinarily commit crime *X* without entrapment will commit crime *X* + (an aggravated form of *X*) or crime *Y* (a different but more serious type of offence) as a result of the conduct of the

of Entrapment?" (1978) 41:3 Mod L Rev 266; Bennett L. Gershman, "Abscam, the Judiciary, and the Ethics of Entrapment" (1982) 91:8 Yale LJ 1565; Andrew Altman & Steven Lee, "Legal Entrapment" (1983) 12:1 Philosophy & Public Affairs 51; Michael J. Allen, "Entrapment: Time for Reconsideration" (1984) 13:4 Anglo-Am L Rev 57; John Braithwaite, Brent Fisse & Gilbert Geis, "Covert Facilitation and Crime: Restoring Balance to the Entrapment Debate" (1987) 43:3 Journal of Social Issues 5; Brent Fisse, "Entrapment as a Defence" (1988) 12 Crim LJ 367; Andrew Choo, "A Defence of Entrapment" (1990) 53:4 Mod L Rev 453; Diane Birch, "Excluding Evidence of Entrapment: What is a Fair Cop?" (1994) 42:2 Curr Legal Probs 73; Geoffrey Robertson, "Entrapment Evidence: Manna from Heaven, or Fruit of the Poisoned Tree?" [1994] Crim L Rev 805; Ronald J. Allen, Melissa Luttrell & Anne Kreeger, "Clarifying Entrapment" (1999) 89:2 J Crim L & Criminology 407; Rebecca Roiphe, "The Serpent Beguiled Me: A History of the Entrapment Defense" (2003) 33:2 Seton Hall L Rev 257; Anthony M. Dillof, "Unraveling Unlawful Entrapment" (2004) 94:4 J Crim L & Criminology 827; Dru Stevenson, "Entrapment and the Problem of Detering Police Misconduct" (2004) 37:1 Conn L Rev 67; Jess D. Mekeel, "Misnamed, Misapplied, and Misguided: Clarifying the State of Sentencing Entrapment and Proposing a New Conception of the Doctrine" (2006) 14:4 Wm & Mary Bill Rts J 1583; Dan Squires, "The Problem with Entrapment" (2006) 26:2 Oxford J Legal Stud 351; Brendon Murphy & John Anderson, "Mates, Mr Big and the Unwary: Ongoing Supply and its Relationship to Entrapment" (2007) 19:1 Current Issues in Criminal Justice 5; Adam V. Chernok, "Entrapment Under Controlled Operations Legislation: A Victorian Perspective" (2011) 35:6 Crim LJ 361.

4. See Ashworth, "Re-Drawing the Boundaries", *supra* note 3; Bronitt, "License to Deviate", *supra* note 3; Robertson, *supra* note 3.

investigators. This practice of “conduct escalation” has been referred to as “sentencing entrapment” by American commentators.⁵ The dilemma, from the perspective of law enforcement, is that certain crimes are almost impossible to detect without presenting the suspect with opportunities to offend. In some cases, determining the severity of the conduct in which the offender was ready and willing to engage requires law enforcement to escalate the scope of their investigative practices.

Accordingly, labelling such conduct escalation as entrapment in the strict sense is difficult. It cannot always be clearly ascertained whether the suspect would not have committed the aggravated or different offence at all without such conduct, or whether they were simply taking the different opportunity presented. That is, their willingness to commit crime *X* means they may have had a similar willingness to commit crimes *X+* or *Y* given the right conditions and even if law enforcement conduct escalation had not been involved.

Not every undercover investigation involving encouragement to offend will constitute entrapment in the strict legal sense, but in some jurisdictions investigations that involve a certain level of impropriety or misconduct may attract judicial intervention. Judicial attention may focus on the interests of the accused or those of the investigator, or on those of both parties, to ensure there is a fair trial. Judges may also raise larger questions of public policy. These complexities are reflected in entrapment jurisprudence.

Entrapment jurisprudence essentially involves two issues: First, what constitutes entrapment? Second, what should be done about it? From a comparative point of view, there are a variety of answers to both questions, and it is clear that attitudes toward entrapment are jurisdictionally specific. Bronitt has argued that the answer to the question of what entrapment is involves two parts, one *subjective* and the other *objective*.⁶

5. See Daniel Abelson, “Sentencing Entrapment: An Overview and Analysis” (2003) 86:4 Marq L Rev 773; Andrew Carlon, “Entrapment, Punishment, and the Sadistic State” (2007) 93:4 Va L Rev 1081; Derrick Augustus Carter, “To Catch the Lion, Tether the Goat: Entrapment, Conspiracy, and Sentencing Manipulation” (2009) 42:1 Akron L Rev 135. For a critical view of the term, see Mekeel, *supra* note 3. This phenomenon has not been significantly explored in Australian legal literature, although it has been considered in the context of drug investigation in New South Wales and Victoria. See Murphy & Anderson, *supra* note 3; Chernok, *supra* note 3.

6. Bronitt, “Undercover Policing”, *supra* note 2; Bronitt, “Sang is Dead”, *supra* note 3.

These considerations have been reflected in different singular tests that originate in the American jurisprudence, particularly in the 1932 decision of *Sorrells v United States*.⁷ The subjective part is concerned with the effect of police conduct on the suspect, and with the suspect's predisposition to commit the offence. The objective part is concerned with the propriety of the law enforcement activity.

As Bronitt has rightly observed, there are problems with conceptualizing the entrapment doctrine as a single test. Entrapment is an assemblage of interlocking questions of fact and degree. It is more properly conceived as a hybrid model rather than a single test. This model requires that the conduct of both the offender and the police be analyzed, but it does not offer any clear guidance on the relative weight to be given to any one factor. Moreover, there remain jurisdictional variations as to what constitutes entrapment and how entrapment-type practices are addressed by the courts.

A. Canadian Approaches

Following the landmark decisions in *R v Amato*⁸ and *R v Mack*,⁹ Canadian courts have held that entrapment arises in two situations. The first is where there is no reasonable suspicion that the suspect is actually committing offences of the kind being investigated, or where the investigators act in "bad faith".¹⁰ The second is where, despite both reasonable suspicion and a bona fide investigation, the conduct of the investigators goes beyond providing an opportunity to commit the offence and actually induces its commission.¹¹

When assessing entrapment claims, Canadian courts use a hybrid test involving both objective and subjective considerations. The objective assessment concerns the conduct of the investigators. This has nothing

7. 287 US 435 (1932). See also *Sherman v United States*, 356 US 369 (1958); *United States v Russell*, 411 US 423 (1973); *Hampton, aka Byers v United States*, 425 US 484 (1976); *Jacobson v United States*, 503 US 540 (1992).

8. [1982] 2 SCR 418, 140 DLR (3d) 405 [cited to SCR].

9. [1988] 2 SCR 903, 90 NR 173 [cited to SCR].

10. This includes being in an area under investigation. See *R v Barnes*, [1991] 1 SCR 449, 121 NR 267.

11. *R v Mack*, *supra* note 9 at 964–65. See also *R v Amato*, *supra* note 8 at 445–46; *R v Barnes*, *supra* note 10 at 460.

to do with the guilt of the accused, which has already been determined at trial. In *R v Pearson*, Lamer CJC and Major J held that entrapment is “completely separate from the issue of guilt or innocence” and “[t]he question is not whether the accused is guilty, but whether his [or her] guilt was uncovered in a manner that shocks the conscience and offends the principle of decency and fair play”.¹² This is in stark contrast to the general trend in American jurisprudence, which favours a subjective assessment of the accused’s predisposition to commit the offence.¹³ In Canada, subjective predisposition is, however, relevant to the question of the existence of “reasonable suspicion”. This separation of liability from the entrapment assessment becomes particularly apparent when it is contrasted with the situation in Australia, where there is an increasing focus on an individual’s culpability.

B. Australian Approaches

In Australia, there is no single “test” for entrapment. It is a question of fact that is determined by a fuzzy analysis that focuses largely on the unlawful or improper conduct of law enforcement officers. In this sense, the Australian position is loosely characterized as an objective test: the illegality of the investigator’s conduct, rather than the effect of that conduct on the accused, is what matters. But the conduct of the accused and the complete factual matrix are also relevant factors. They merge with broad considerations of public policy concerning the balancing of competing interests in a way that ensures that evidence is legally and fairly obtained, so that a conviction is not “bought at a price which is unacceptable, having regard to contemporary community standards”.¹⁴ When faced with entrapment claims, the Australian courts are not only concerned with the actions of the police; they are also concerned with much larger questions of confidence in the administration of justice.¹⁵

12. [1998] 3 SCR 620 at 625–26, 130 CCC (3d).

13. There are, however, variations between the states. It is erroneous to assume a single approach to entrapment in the United States. See Roiphe, *supra* note 3; Joseph A Colquitt, “Rethinking Entrapment” (2004) 41:4 Am Crim L Rev 1389.

14. *R v Swaffield*, [1998] HCA 1 at para 69.

15. See *Ridgeway v R*, [1995] HCA 66; *R v Karam*, (1995), 83 A Crim R 416 at 419 (NSWCCA).

Thus, entrapment claims usually merge into questions of admissibility of evidence rather than focusing on an accused's liability or culpability.

This picture is complicated by the comparatively recent appearance of statutes authorizing otherwise unlawful conduct by law enforcement officers in the course of investigations.¹⁶ These “controlled operations” statutes also contain declarations that shift the presumption of admissibility of evidence. They create a statutory presumption that evidence is not unlawfully obtained merely because it is obtained in the course of an authorized controlled operation. This has shifted the focus of judicial intervention to questions of authorization, offender culpability and police conduct in an attempt to encourage and maintain confidence in the criminal justice and sentencing process.¹⁷

II. Legal Interventions in Entrapment Cases

A finding of entrapment triggers a range of legal interventions. There are five main approaches to entrapment in the anglophone legal tradition:¹⁸

1. It can provide a substantive defence;
2. It can give rise to an administrative law challenge to the validity of warrants authorizing the investigation in question (a form of “collateral attack”);
3. It can lead to a stay of proceedings for abuse of process;
4. It can lead to the exclusion of evidence;
5. It can be a ground for mitigation of sentence.

16. See *Crimes Act 1914* (Cth), Part 1AB; *Crimes (Controlled Operations) Act 2008* (ACT); *Law Enforcement (Controlled Operations) Act 1997* (NSW); *Police Powers and Responsibilities Act 2000* (Qld), ss 221–77; *Criminal Investigation (Covert Operations) Act 2009* (SA); *Police Powers (Controlled Operations) Act 2006* (Tas); *Crimes (Controlled Operations) Act 2004* (Vic); *Criminal Investigation (Covert Powers) Act 2012* (WA).

17. See e.g. *Gedeon v Commissioner of the New South Wales Crime Commission*, [2008] HCA 43.

18. Other remedies have been proposed over the years, including estoppel and statutory defences, but these approaches have not gained any traction. See e.g. ML Friedland, “Controlling Entrapment” (1982) 32:1 UTLJ 1; Jill Hunter, “Abuse of Process Savages Criminal Issue Estoppel” (1995) 18:1 UNSW LJ 151; RA Duff, “I Might Be Guilty, But You Can’t Try Me’: Estoppel and Other Bars to Trial” (2003) 1:1 Ohio State Journal of Criminal Law 245; Murphy & Anderson, *supra* note 3.

The order for a stay of proceedings and the exclusion of evidence represent important points of divergence between the Canadian and Australian approaches to entrapment. In Canada, an application for a stay for entrapment is a separate proceeding that takes place after guilt has been determined at trial.¹⁹ In Australia, as in the United Kingdom, a stay may be sought at any stage of the proceedings.²⁰ A finding of entrapment and an order for a stay will terminate the case on the basis that further proceedings would constitute an abuse of process.

In Australia, entrapment is relevant to the admissibility of evidence, or to limits on its use on public policy grounds.²¹ Consequently, exclusion of evidence is a significant remedy for entrapment. In Canada, by contrast, exclusion of evidence has been rejected as a remedy for entrapment.²² While these exculpatory “remedies” are reasonably well understood in the general literature on entrapment, sentence mitigation is not.

There will be situations arising from police conduct during investigations that require attention to whether the conduct calls the culpability of the suspect into question. Such police conduct can involve a broad range of entrapment-type practices, which may have facilitated an offence in the presence of evidence of predisposition on the part of the suspect, but did so through the use of law enforcement methods that are unfair or “contrary to the shared values of our society”.²³ A major issue is whether the judicial determination of a lesser sentence is because of the diminished culpability of the offender or judicial disapproval of police practices. A related issue is whether such a determination aligns with or undermines the fundamental purposes and principles of sentencing, particularly proportionality. In seeking to understand and evaluate the mitigating effect of entrapment-type practices, we turn to a comparative analysis of the leading Australian and Canadian cases, together with a consideration of these sentencing purposes and principles.

19. See *R v Mack*, *supra* note 9; *R v Meuckon* (1990), 57 CCC (3d) 193, 78 CR (3d) 196, (BC CA); *R v Pearson*, *supra* note 12.

20. See *R v Looseley*, [2001] 4 All ER 897 HL (Eng); *Ridgeway v R*, *supra* note 15. Note that the question of the stay order was the subject of different opinions in *Ridgeway*.

21. See *ibid.* See also *Evidence Act 1995* (NSW) & (Cth), Part 3.11, s 138.

22. See *R v Imoro*, 2010 ONCA 122, 328 DLR (4th) 128, *aff'd* 2010 SCC 50, [2010] 3 SCR 62.

23. *R v Punko*, 2010 BCCA 365 at paras 81–82, 291 BCAC 95.

III. Entrapment and Sentencing

A. English Origins

In the UK, entrapment jurisprudence originated in the early concept of the *agent provocateur*. This concept was grounded in the English abhorrence of the practices of plainclothes policing and internal surveillance that were typified under the French Revolution, and the “thief-taker” model of the Bow Street Runners.²⁴ Entrapment secured through the conduct of an *agent provocateur* gave rise to a variety of remedies, including mitigation of sentence.²⁵ Lord Chief Justice Parker, in *R v Birtles*, held that how an offence had been orchestrated by law enforcement officers was a key factor in entrapment sentencing.²⁶ The test was described in that case as whether there was a “real possibility” or “real likelihood” that the accused would not have committed the offence without the intervention of the officer.²⁷ Where that test was satisfied, a reduction in sentence was required. The test was applied in subsequent cases, such as *R v McCann*²⁸ and *R v Mealey*,²⁹ where it became well-accepted that “activities of someone who can be described as an agent provocateur . . . may be an important matter in regard to sentence”.³⁰

Overall, the UK cases clearly demonstrate the principle that mitigation of penalty is within the purview of the sentencing judge in entrapment cases and that the scope of mitigation may be considerable, although the

24. See Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (London, UK: Stevens & Sons, 1956) vol 2 at 307–46; JM Beattie, “Early Detection: The Bow Street Runners in Late Eighteenth-Century London” in Clive Emsley & Haia Shpayer-Makov, eds, *Police Detectives in History, 1750–1950* (Aldershot, UK: Ashgate, 2006); UK, Secretary of State for the Home Department, *Report of the Royal Commission on Police Powers and Procedure* (London: Her Majesty’s Stationery Office, 1929).

25. *Brannan v Peek*, [1948] 1 KB 68 at 72; *Browning v JWH Watson (Rochester) Ltd*, [1953] 1 WLR 1172 at 1176 (Div Ct) [*Browning*]; *R v Birtles*, [1969] 1 WLR 1047 at 1049–50 (CA).

26. *Ibid.*

27. *Ibid* at 1049.

28. (1971), [1972] 56 Cr App Rep 359 (CA).

29. [1974] 60 Cr App Rep 59 (CA).

30. *Ibid* at 62.

weight to be given to entrapment as a mitigating factor is imprecise.³¹ Further, because police conduct is taken “into account [when] assessing (offender) culpability” for the purposes of sentencing,³² rather than to express judicial disapproval of that conduct, there is a clear possibility of an unconditional discharge if the nature of the entrapment is such that it substantially reduces the level of the offender’s culpability.³³

B. Australian Jurisprudence

The principles in *Birtles* and *McCann* have significantly influenced the Australian jurisprudence on entrapment sentencing and the potential mitigating effect of police conduct. Questions have also been raised about proportionality and equal treatment in the Australian sentencing landscape. The purposes of sentencing are well established: retribution or “just deserts”, general and specific deterrence, community protection or incapacitation, denunciation and rehabilitation.³⁴ These purposes must be considered in setting a proportionate and fair sentence. How the purposes of sentencing are synthesized, however, will depend on the characterization of entrapment-type practices: Do they diminish offender culpability or do they require judicial disapproval of police conduct? Given the range of activities encompassed by entrapment-type practices, the impact on the purposes of sentencing can range from slight to substantial.

31. See also *R v Chapman*, [1989] 11 Cr App R (S) 222 (CA); *R v Perrin*, [1991] 13 Cr App R (S) 518 (CA); *R v Mackey*, [1992] Crim LR 602 (CA); *R v Bigley*, (1992), [1993] 14 Cr App R (S) 201 (CA); *R v Springer*, (1998), [1999] 1 Cr App R (S) 217 (CA); *R v Mayeri*, (1998), [1999] 1 Cr App R (S) 304 (CA); *R v Chalcraft*, (2001), [2002] 2 Cr App R (S) 42 (CA); *R v Barnett*, (2007), [2008] 1 Cr App R (S) 354 (CA).

32. Andrew Ashworth, *Sentencing and Criminal Justice*, 5th ed (Cambridge, UK: Cambridge University Press, 2010) at 149 [Ashworth, *Sentencing*].

33. See *Browning*, *supra* note 25 at 1176; UK, HC, Law Commission, *Criminal Law: Report on Defences of General Application* (London: Her Majesty’s Stationery Office, 1977) at 47.

34. See Ashworth, *Sentencing*, *supra* note 32 at 78–92. See also Andrew von Hirsch, Andrew Ashworth & Julian Roberts, eds, *Principled Sentencing: Readings on Theory and Policy*, 3d ed (Portland: Hart Publishing, 2009); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A; *Sentencing Act 1991* (Vic), s 5(1); *Penalties and Sentences Act 1992* (Qld), s 9(1); *Criminal Law (Sentencing) Act 1988* (SA), s 10; *Sentencing Act 1995* (WA), s 6; *Sentencing Act 1997* (Tas), s 3.

After *Birtles* and *McCann*, the Australian jurisprudence was shaped by a series of decisions emanating from South Australia in the 1980s. These cases arose from increased use of undercover controlled purchase operations. The development of entrapment sentencing principles was apparent from *R v Mandica*, where undercover police and informants met the appellants to purchase thirty-two kilograms of Indian hemp.³⁵ The appellants were arrested, convicted and sentenced to eighteen months' imprisonment. On appeal, in arguing for more lenient sentence, they raised the principle in *Birtles*—where there was a “real possibility” that the offender would not have committed the offence without official encouragement, the sentence should be reduced.³⁶

This principle was tempered by the then recent English decision in *R v Sang*, which distinguished between encouraging individuals to commit offences they would not have otherwise committed and using investigatory techniques suitable for detecting offences that they were ready to commit.³⁷ Chief Justice King held that leniency in sentence should not apply “against an offender who is only too ready to commit the offence”,³⁸ and went on to distinguish the different forms of entrapment based on their mitigatory effect on sentence:

It would be totally wrong, of course, for police officers to incite or encourage susceptible persons to commit crime in order to arrest and prosecute them for offences which they might not have otherwise committed. Indeed, in such a case the police officer would himself be guilty of a crime. The situation is entirely different where police have reliable information that a person is engaged in criminal activity. In such circumstances a police trap is a legitimate device for obtaining the evidence necessary for a prosecution. Sometimes it is the only way in which those carrying on criminal businesses and activities can be brought to justice . . . In deciding whether to extend leniency by reason of entrapment, the sentencing judge should take a common sense view of the evidence for the purpose of deciding whether there is a reasonable possibility that the convicted person would not have committed the offence but for the encouragement involved in the setting of the trap.³⁹

35. (1980), 24 SASR 394 (SC).

36. *R v Birtles*, *supra* note 25 at 1049.

37. (1979), [1980] AC 402 at 432 HL (Eng), Lord Diplock (declaring that while mitigation of sentence was available to a court as a sentencing remedy, the fact that a person otherwise performed the prohibited act with the relevant state of mind meant that the technical elements of liability were present notwithstanding these acts may have been influenced by the conduct of another).

38. *Ibid* at 403.

39. *Ibid* at 404.

Therefore, the decision in *Mandica* established that mitigation of penalty is within the court's sentencing discretion in entrapment cases, but whether and how it is applied depends on the circumstances surrounding the setting of the "trap" by the police.⁴⁰ Where mitigation is appropriate, it may be because the police conduct reduces the offender's culpability or it may be because the court wishes to mark disapproval of the police conduct. No reference was made in *Mandica* to the alignment of or potential tension between mitigation of sentence, the principle of proportionality, and the other purposes of sentencing. Such questions do not expressly emerge until the later jurisprudence.

The *Mandica* principle was echoed by the Federal Court in *R v Jurkovic*.⁴¹ In determining the extent of any sentence mitigation, the Court distinguished effective collaboration between the offender and the police in executing the crime from a response by the offender to a request made by police. In this case, the offender was part of a supply chain mobilized by an informer acting in concert with the police. The offender was a heroin addict who was arrested when he and a co-offender met with the informer to hand over eleven grams of heavily diluted heroin. The following circumstances were held to warrant a reduction in sentence:

[I]t is also a matter of mitigation that the particular crime charged occurred only because the police asked that the order be placed. The situation is different from one in which the police, by agents provocateurs or otherwise, break into an ongoing supply system. The police and other authorities are not in my view to be discouraged in the least from following either course, *but when it comes to sentencing the mitigating effects can be different*.⁴²

The offender in *Jurkovic* was not the immediate target, but was drawn into the operation as part of the supply chain. In determining the mitigatory effects on sentence, the Court emphasized the police conduct and its impact on the offender. There was no hint of judicial disapproval of the police conduct—simply a statement that the particular course of such conduct will have ramifications for offender culpability. The reasoning in *Jurkovic* was later considered in *R v Scott*,⁴³ where Lee J affirmed that the conduct of an *agent provocateur* may constitute grounds for mitigation,

40. *R v Mandica*, *supra* note 35.

41. (1981), 6 A Crim R 215 (FCA).

42. *Ibid* at 224 [emphasis added].

43. (30 June 1983), (NSWCCA) at 7.

but emphasized that the resolution of every case hinges on the specific factual matrix. This reflects the myriad of entrapment-type practices and offender circumstances.

By the mid-1980s, Australian courts began to seriously consider the appropriate remedies for entrapment-type practices.⁴⁴ Mitigation of sentence became enmeshed with questions of stay orders and the exclusion of evidence. In *R v Romeo*, White J suggested that mitigation of sentence was available as a remedy in cases where the offender's conduct was affected by official incitement to offend but was not so serious as to trigger a stay or the exclusion of evidence:

Even though we do have a discretion in Australia, the conduct of the police or the position of the offender may be such that it is inappropriate to exercise the discretion to stay or to exclude evidence but nevertheless appropriate to discount the length of the sentence so as to take into account factors concerning the police and the offender respectively.⁴⁵

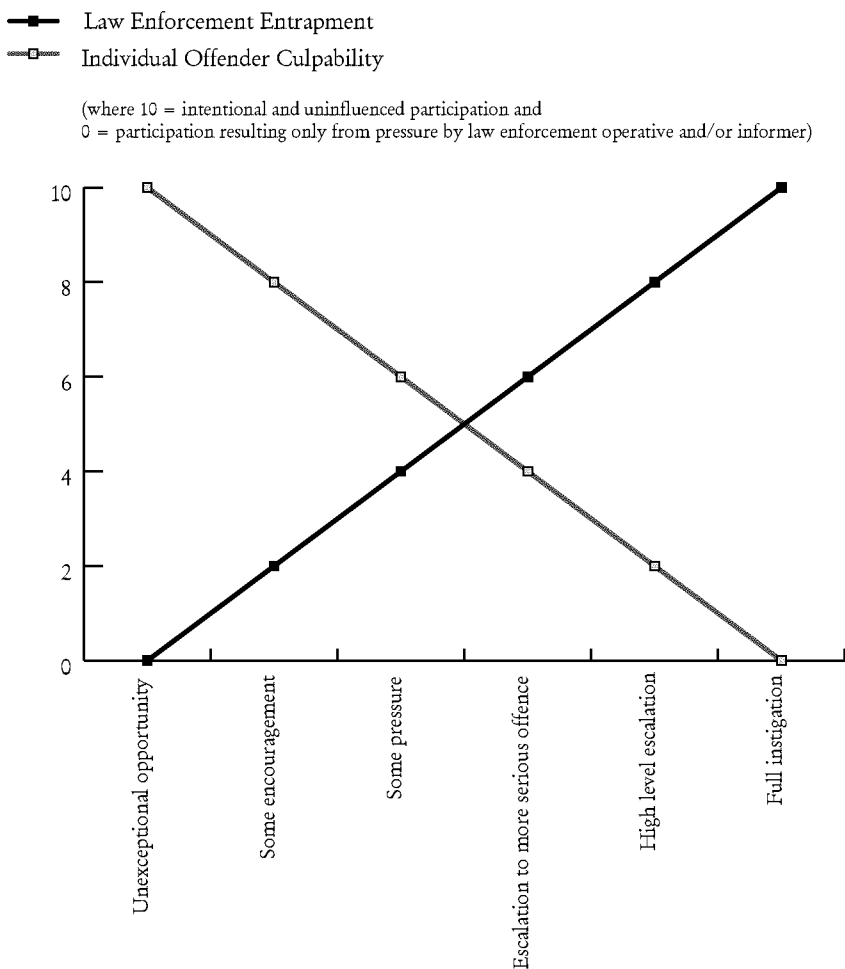
This reasoning seems to require judges to conceptualize the conduct of the offender and the police on an intersecting continuum, as illustrated below in Figure 1:⁴⁶

44. See e.g. *R v Vuckov*, (1986), 40 SASR 498 (SC); *Hunt v Wark*, (1985), 40 SASR 489 (SC); *R v Dugan*, [1984] 2 NSWLR 554 (SC).

45. (1987), 45 SASR 212 (CCA) at 224.

46. However, such a linear representation cannot accurately reflect every circumstance involving some form of police entrapment.

Figure 1—The Remedial Spectrum for Offending Conduct and Investigative Conduct



Mitigation of sentence may be available in cases where it would not be appropriate to order a stay or exclude evidence because the investigative methods used have not reached the area of the continuum where they clearly outweigh the offender's culpability. Even where exclusion of evidence and stay orders are being considered, mitigation appears to

remain possible, although it obviously may become redundant in cases where the exclusion of evidence is fatal to the prosecution's case or where a stay order results in the discontinuation of proceedings.

Importantly, in *Romeo* the Full Court affirmed the conclusion drawn from *Mandica* and *Sang* that the use of informers, undercover police and traps based on credible information are legitimate devices and could not ground the exercise of discretion to order a stay or exclude evidence. Therefore, even where there is full instigation through law enforcement entrapment and individual culpability is very low, the appropriate remedy may still be mitigation of sentence, albeit a more significant mitigation than at other points on the continuum where there is a different balance between entrapment and culpability. In other words, the weight given to each of the specific purposes of sentencing will likely vary with changes in that balance. Courts may also use mitigation of sentence to express disapproval of the police methods used in the particular case. Notably, this will be where the culpability of the offender is detached from the enhanced law enforcement activity—possibly because of the offender's motivations even in the face of police pressure or escalation of the stakes in the criminal conduct. Essentially, such expression of disapproval is the only means left available to the court to mitigate a sentence where the accused's level of culpability is too high to warrant the more drastic remedies of a stay or exclusion of evidence.

In New South Wales (NSW), remedies for entrapment have evolved alongside those in the South Australian cases. In *R v Sloane*, following a successful Crown appeal against an order for a stay of proceedings based on a finding of entrapment, the offender pleaded guilty to supplying a kilogram of cocaine to undercover police operatives.⁴⁷ She had no history of supplying prohibited drugs and was sentenced to eighteen months' imprisonment to be served by way of periodic detention. Arguably, this was a disproportionately lenient sentence given the large commercial quantity of cocaine involved. It was well established at the time that anything less than full-time custodial sentences would be exceptional in large-scale drug trafficking cases, to reflect the need for retribution,

47. (1990), 49 A Crim R 270 (NSWCCA).

community protection, general deterrence and denunciation.⁴⁸ Yet a Crown appeal against the sentence ultimately failed.⁴⁹ The role of the police officers in inducing the offence was considered at some length. There were strong defence submissions that the entrapment-type practices—including the talking up “from small amounts . . . previously provided to the promise of a much more substantial amount”—constituted mitigating circumstances.⁵⁰ But the Court found that this was actually a case where “the police were endeavouring to determine if the [offender was] engaged in a large commercial operation, and to that end . . . were entitled to act as they did”.⁵¹ Further, because the offender suggested to police that she was able to supply large quantities of the drug, and provided a sample, the police “were entitled to believe they had possibly tapped into a commercial operation”.⁵² The reality, however, was that the accused and her accomplice were intending to “rip off” the undercover officer by representing a kilogram of sugar as cocaine, and that neither of them was actually able to supply that amount of the drug. Although a smaller amount of cocaine was supplied initially, the failure to supply a full kilogram, and the inability to supply it, were held to be key mitigating factors.⁵³

The upshot of *Sloane* in terms of entrapment sentencing principles was that although mitigation of sentence was warranted in the circumstances, the Court held that “by pleading guilty the [offender] could not rely on

48. See e.g. *Drug Misuse and Trafficking Act 1985* (NSW), Schedule 1, ss 25, 33; *R v Clark* (15 March 1990), (NSWCCA); *R v Pilley*, (1991), 56 A Crim R 202 (NSWCCA). At the time, a maximum sentence of fifteen years’ imprisonment was proscribed for this offence. The maximum sentence is now life imprisonment for the same offence, coupled with a standard fifteen-year non-parole period in *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 54(a)–(d), Table Standard Non-Parole Periods, and the judicial policy of imposing full-time custodial sentences unless there are exceptional circumstances has continued. See e.g. *R v Carrion*, [2000] NSWCCA 191 at paras 25–26; *R v Gu*, [2006] NSWCCA 104 at para 27; *Mitchell v R*, [2008] NSWCCA 192 at paras 18–19.

49. See *R v Rice*, *R v Sloane* (15 July 1992), (NSWCCA). Although the Court of Criminal Appeal determined that the sentence was inadequate, the exposure of the offender to “double jeopardy” in standing twice for sentence on the same offence resulted in the court exercising its discretion not to increase the sentence. *Ibid* at 13.

50. *Ibid*.

51. *Ibid* at 10.

52. *Ibid* at 11.

53. *Ibid* at 10 (following *R v Rahme*, (1991), 53 A Crim R 8 (NSWCCA)).

the proposition that [she] had been induced to commit a crime [she] would otherwise not have committed and would have been unlikely to commit”.⁵⁴ Interestingly, the Court balanced the propriety of the investigation, on the one hand, and the offender’s guilty plea, on the other, in order to determine the actual diminution in the offender’s culpability and thus the appropriate degree of sentence mitigation. Overall, it is important to emphasize that the leniency in sentence was not based on any real reduction due to entrapment practices, but an intersection of other matters, particularly the fact that this case was primarily concerned with misrepresentation and not with actual supply. However, in cases where representations of access to substantial quantities of drugs or to materials of significant public harm are made, police are entitled to assume those representations are valid and to act accordingly.

At around the same time, the role of mitigation in entrapment cases was affirmed in the Western Australian case of *Jackson v R*.⁵⁵ Chief Justice Malcolm held that entrapment is a relevant factor in mitigation of sentence, notably where there was encouragement or incitement by law enforcement authorities to commit an offence that the offender would not have otherwise committed.⁵⁶ The judgment also importantly observed that such factors will not usually be given much weight because of the need for general deterrence of drug trafficking.⁵⁷

The fundamental tension between sentence mitigation for entrapment-type practices and the objective of general deterrence emerges most clearly here. Deterrence and denunciation are generally regarded as important purposes of sentencing in drug trafficking cases, particularly where the offenders can be characterized as “rational and calculating agents who deliberately engage in criminal behaviour for significant illicit benefits”.⁵⁸ The tension in entrapment sentencing results from the fact that the crime is brought about, or contributed to, in varying degrees by officers representing the state, while at the same time the state is seeking to deter

54. *Ibid* at 11.

55. (8 March 1991), (WASCA).

56. *Ibid* at para 16.

57. *Ibid* at para 19.

58. Richard Edney & Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge, UK: Cambridge University Press, 2007) at 126–27. See also Ashworth, *Sentencing*, *supra* note 32 at 82, 130. See also *R v Cottrell*, (1989), 42 A Crim R 31 (WASCA); *R v Nguyen*, [2005] SASC 329 at paras 23–24.

serious criminal behaviour of this sort. The diminution of the offender's culpability can undermine the deterrence rationale of punishment in the overall sentencing synthesis. Conversely, if the mitigation results from judicial disapproval of police conduct, deterrence is presented in another guise and directed at the investigators rather than the offender.

It is also clear, however, that a "just" punishment will only be arrived at through a proper assessment of the offender's actual culpability. The need for community protection and deterrence will arguably not be as significant where entrapment-type practices have been used, particularly if those practices cannot be regarded as necessary in properly policing the illicit drug trade or go beyond internationally accepted human rights norms. This will ultimately depend on the nature and extent of the particular practices and the nature of the criminal operation being investigated.

As Figure 1 demonstrates, there will be degrees of mitigation based on the judicial weighing of the offender's culpability as against the particular entrapment-type practices and the perceived need for judicial disapproval of such practices. There is no clear guidance for this weighing; outcomes will largely depend on the judge's factual characterization of individual culpability and entrapment conduct. This risks disproportionate and unfair sentencing outcomes, as "like cases [will not always] . . . be treated alike and different cases [will not always be treated] differently".⁵⁹ The many vagaries associated with the meaning of entrapment and the characterization of offender culpability will increase the margin of error, particularly in cases where the courts are marking disapproval of police misconduct rather than recognizing reduced offender culpability. The Canadian position, focused as it is on a post-trial stay proceeding, appears to avoid this unfortunate dynamic.

Mitigation of penalty for entrapment-type practices appeared in its clearest and most detailed form in the leading judgment of the NSW Court of Criminal Appeal in *R v Taouk*.⁶⁰ Accepting that sentence mitigation is an option once the entrapment evidence has been used as part of the basis

59. Ashworth, *Sentencing*, *supra* note 32 at 255. See also *Lowe v R*, (1984), 154 CLR 606 at 610–11 (HCA); *Tarry v Pryce*, (1987), 24 A Crim R 394 at 402 (NTSC); *R v Siganto*, (1998), 159 ALR 94 at 105 (HCA); *R v Jurisic*, (1998), 45 NSWLR 209 at 216 (CCA).

60. (1992), 65 A Crim R 387 (NSWCCA).

for conviction, Badgery-Parker J carefully considered the rationale for mitigation based on three connected questions:

1. Is mitigation concerned with judicial disapproval of the conduct of law enforcement?
2. Is mitigation enlivened only where the conduct of the police is of such magnitude that it would enliven a defence in another jurisdiction?
3. Is mitigation concerned with the conceptual reduction of the criminal culpability of the offender?⁶¹

In concluding that judicial disapproval of police conduct was an *outcome* of the exclusion of evidence rather than its purpose and that mitigation should be based on the level of culpability of the offender,⁶² Badgery-Parker J emphasized that judges should not express such disapproval of police entrapment through the sentencing process. Judicial disapproval of police conduct ought to be a by-product of the exclusion of evidence, not a factor in sentencing.

In our view, the correct approach is to express judicial censure of law enforcement behaviour through the exclusion of evidence, and to recognize the degree of offender culpability through sentencing. This reasoning promotes proportionality in sentencing and places a strong emphasis on culpability as the measure for mitigation of sentence. In Badgery-Parker J's words:

[W]hen it comes to sentence, the question is not whether the accused can show that but for the involvement, encouragement or incitement by police he would not have committed the crime, but rather, whether there is a *real possibility* that but for the assistance, encouragement or incitement offered by police officers he would not have done so, and whether in all the circumstances of the case the involvement of the police in the commission of the crime was such as diminished his culpability.⁶³

61. See *ibid* at 396.

62. See *ibid* at 403.

63. *Ibid* at 404 [emphasis added].

This “real possibility”⁶⁴ standard highlights the importance of the particular factual matrix in entrapment cases and it has crystallized as a general principle in a string of cases since *Taouk*.⁶⁵ The conduct of the suspect in response to an approach by an undercover officer is critical to the practical implementation of that standard. In *R v C* the South Australian Court of Criminal Appeal held as follows:

A sentence is not to be discounted merely because it was committed as a result of police entrapment. An offender is, however, entitled to a discount where it appears, as a reasonable possibility, that the offender would not have committed the offence had he not been talked into it by the undercover police officer.

That gives no support to the general proposition that entrapment will always result in a sentencing discount . . . Nor is it correct, in my view, to say, as was put to us, that it is enough that the police officer made the first move—that it was the police officer who asked the appellant to sell him heroin. That, of course, is an almost inevitable feature of any retail sale, whether legitimate or illegitimate. I suppose there are cases where wholesale heroin dealers expressly offer their wares to potential buyers, but there can be no doubt that the typical case is of someone approaching the vendor and by words or actions making a request.⁶⁶

The appeal against the sentence was dismissed in this case because there was ample evidence that the offender was ready, willing and able to sell heroin when asked by the undercover operative. There was no scope for mitigation where individual culpability was high and the entrapment-type practice was merely facilitative.

In contrast, the entrapment in *R v N* was of a very different nature, and mitigation of sentence figured prominently in the outcome of the appeal.⁶⁷ The accused, who was serving a term of imprisonment by periodic detention, was the subject of an undercover operation that the trial judge

64. See *R v Birtles*, *supra* note 25; *R v Sang*, *supra* note 37; *R v Mandica*, *supra* note 35. The real possibility standard was used in those cases. The expression “reasonable possibility” is used by King CJ in *Mandica* but arguably there is no practical difference in the implementation of the test.

65. *R v Doyle*, (1994), 71 A Crim R 360 (WASCA); *R v Reppucci*, (1994), 74 A Crim R 353 (WASCA); *R v Martelli*, (1995), 83 A Crim R 550 (SASC); *R v N*, (1999), 106 A Crim R 493 (NSWCCA); *R v Richards*, [2001] NSWCCA 160; *R v Stockdale*, [2004] NSWCCA 1; *R v Sama*, [2005] NSWCCA 191; and *R v Day*, [2009] SASC 84.

66. (1998), 72 SASR 391 at 396.

67. *Supra* note 65.

found to constitute duress and which was therefore technically unlawful, but the judge nonetheless admitted the resulting evidence. The accused pleaded guilty and, on appeal, the sentence was reduced from forty-two to twenty months' imprisonment. Part of the sentence reduction was because the culpability of the offender was significantly diminished by the conduct of the investigators. They had maintained pressure on her, even though she had made attempts to avoid communication and was clearly reluctant to participate in the transactions. Accordingly, in these circumstances, retribution, specific deterrence and denunciation were trumped by significantly diminished culpability. What might otherwise be described as an objectively disproportionate sentence, having regard to the serious nature of the drug trafficking offence, was justified by the significant diminution in offender culpability because of the unrelenting inducement by law enforcement officers—behaviour that seemingly went well beyond what was necessary to detect drug traffickers and obtain evidence against them.⁶⁸ The judicial synthesis of sentencing purposes was heavily modified to account for that factor.

On this basis, the mitigation of sentence in *R v N*, or at least part of it, could be characterized as judicial disapproval of state sanctioned entrapment-type practices which clearly enter the areas of high-level escalation and instigation illustrated in Figure 1, but are not severe enough to require the exclusion of the resulting evidence.⁶⁹ However, this manner of judicial disapproval of police conduct arguably creates a disproportionately low sentence, which no longer reflects the gravity of the offence and blameworthiness of the offender but incorporates denunciation of the entrapment method used to obtain evidence.

Most recently in *R v Lipton*, there was important judicial consideration of sentence mitigation in entrapment cases.⁷⁰ Although this case was decided at the intermediate judicial level of the NSW District Court, it had a significant history through the Court of Criminal Appeal.⁷¹ Defence counsel had tried to gain access to police records of communication with an informer, for which the NSW Police Force claimed public interest

68. See *Jackson v R*, *supra* note 55.

69. See *R v Swaffield*, *supra* note 14.

70. *R v Lipton*, *supra* note 1.

71. See *Lipton v R*, [2010] NSWCCA 175; *R v Lipton*, [2011] NSWCCA 247; *Attorney General (NSW) v Lipton*, [2012] NSWCCA 156. For a succinct summary of the history of the interlocutory proceedings, see *Lipton v R*, *supra* note 1 at paras 6–31, Finnane J.

immunity. After the accused pleaded guilty to supplying large quantities of cocaine and MDMA,⁷² the defence sought access to various documents to support an argument for sentence mitigation based on the claim that the offender had been pressured into dealing those quantities of drugs by an undercover operative. Further, the offender claimed that he had never trafficked in prohibited drugs other than cocaine, and had only obtained the MDMA because of the pressure from police operatives.⁷³ Ultimately, the defence abandoned attempts to access the documents because the offender's financial resources were exhausted, but they persisted in the argument for sentence mitigation.

The sentencing judge accepted the arguments that the request from the undercover operative led to the offender's involvement. However, the judge held he did not act under duress but as a "highly intelligent and well-educated man" who treated drug supplying as a business for substantial rewards.⁷⁴ Therefore, his culpability was not diminished by the methods used by the police, and he was not entitled to mitigation of sentence for being encouraged to sell more drugs than he would normally. The sentence imposed was eight years' imprisonment and a non-parole period of four-and-a-half years, a dramatically low sentence for an offence that normally carries a maximum penalty of life imprisonment and a standard non-parole period of fifteen years. Although there was no explicit sentencing discount for entrapment, it is clear that the judge took account of the fact that the offender would not have become involved in the offences but for the encouragement of the police informer and her introduction of the offender to the undercover officer. The sentencing judge described the circumstances as "very unusual"⁷⁵—the records sought from the police were not provided, and the prosecution did not contradict the offender's evidence.⁷⁶ Although this was not expressly stated, some of the mitigation of sentence may have been attributable to judicial disapproval of law enforcement and prosecutorial conduct. The sentencing judge did refer to the sentencing purposes of "general deterrence, specific deterrence,

72. 3,4-methylenedioxy-N-methylamphetamine.

73. *R v Lipton*, *supra* note 1 at para 52.

74. *Ibid* at paras 59–63.

75. *Ibid* at para 74.

76. See *ibid* at paras 49–56.

rehabilitation and retribution”,⁷⁷ but it is apparent that the nature and extent of the entrapment methods had a significant mitigatory effect.

The outcome in *Lipton* raises questions about the proportionality between sentence and objective criminality, particularly the significant reduction of a sentence for entrapment-type practices even where the culpability of the offender is not proportionately diminished. Arguably, Lipton’s sentence was discounted too heavily in light of the findings of the sentencing judge as to the level of offender culpability, and denunciation in another guise was an evident objective of the very lenient sentence. That is, the Court marked its disapproval of the entrapment-type practices and of the efforts of prosecutors to hide the real nature and extent of those practices through the heavily discounted sentence. Further, deterrence in another guise is evident through the Court seeking to discourage entrapment-type practices and obstructive behaviour in the future. The need for such practices could not be assessed on the basis of the continuum in Figure 1, as important information was not available in all the circumstances. Thus, significant mitigation as a result of judicial disapproval and discouragement of those entrapment-type practices seems likely to result in disproportionately lenient sentences and inequitable treatment of offenders. The more appropriate way of expressing such disapproval and discouragement relates back to the statements of Badgery-Parker J in *Taouk*—that it is an outcome of exclusion of evidence where that particular remedy is clearly warranted.⁷⁸ The focus in sentencing must remain on offender culpability, which may be reduced when entrapment-type practices have been used.

C. Canadian Jurisprudence

Canadian cases on entrapment have included references to the mitigation of sentence, although these have been limited. They were largely decided before the significant procedural change arising from *Mack*—that allegations of entrapment are a separate proceeding after the guilt of an accused has been determined.⁷⁹ Like entrapment itself, the

77. *Ibid* at paras 70–71.

78. *Supra* note 60.

79. *Supra* note 9.

sentence mitigation cases emerged in the context of drug prosecutions in the late 1960s.

In *R v Ormerod* the Ontario Court of Appeal suggested in *obiter* that the mitigation principle was very simple: The role of law enforcement in procuring the offence had to be taken into account in assessing the degree of culpability of the offender.⁸⁰ Based on the principle set out by the Queen's Bench Division in *Browning v JWH Watson (Rochester) Ltd*, judicial disapproval of the method of investigation could be expressed through a reduction in sentence.⁸¹ Thus, both reasons for mitigation of sentence because of entrapment were recognized, without specific reference to how they interact with proportionality and the various purposes of sentencing.

After an oblique mention in *R v Chernecki*,⁸² the mitigation principle was given more significant consideration by the Ontario Court of Appeal in *R v Kirzner*,⁸³ where the offender's sentence was reduced because insufficient weight had been given to the role of police in encouraging the offender's involvement in the drug market. On appeal, the Supreme Court of Canada recognized that questions of sentencing and substantive law were intertwined.⁸⁴ The sentencing problem was one of conflicting culpabilities. On the one hand, the offender had no real basis for claiming any reduction of culpability when caught "red-handed" during an undercover operation. On the other hand, established principles in English and New Zealand common law allowed sentence mitigation for entrapment-type practices. Ultimately, the Court held that the test for entrapment had not been met, but the actions of the police "were sufficiently implicated in the offender's actions to warrant a reduction in his sentence".⁸⁵ This indicates that the sentence was mitigated because of judicial disapproval of entrapment-type practices, rather than because of any diminution in offender culpability.

Shortly after *Kirzner*, Seaton JA of the British Columbia Court of Appeal considered the question of sentencing entrapment in *R v Amato*.⁸⁶

80. [1969] 2 OR 230, 4 CCC 3.

81. *Supra* note 25.

82. (1971), 4 CCC (2d) 556 at para 9, 5 WWR 469 (CA).

83. (1976), [1977] 14 OR (2d) 665, 32 CCC (2d) 76.

84. *R v Kirzner*, [1978] 2 SCR 487, 81 DLR (3d) 229 [cited SCR].

85. *Ibid* at para 54.

86. (1979), 51 CCC (2d) 401, 12 CR (3d) 386 [cited SCR].

The culpability of the offender was determined by reference to the role and influence of third parties, and it was held that conduct which did not amount to entrapment at law could still factor into the sentence.⁸⁷ When *Amato* came before the Supreme Court in 1982, the minority, led by Estey J, was highly critical of responding to entrapment cases by merely mitigating sentence.⁸⁸ Because the *Criminal Code* imposed statutory minimums for many offences, Estey J thought it was “repugnant” to justice that someone who could establish entrapment at law would still face a minimum term of imprisonment.⁸⁹ In his view, if the abuse of process necessary for entrapment had been established, it was inappropriate to impose any type of sentence.

When entrapment was confirmed as a separate legal doctrine six years later in *R v Mack*, the Supreme Court did not address the question of sentence.⁹⁰ The governing principles were said to concern the “culpability” of law enforcement rather than the culpability of the accused.⁹¹ This effectively turned the focus away from questions of sentence mitigation. Because the doctrine was objective and considered only *after* the Crown had proven its case against the accused, questions of offender culpability were no longer important. If the accused was able to satisfy the narrow test of entrapment after guilt had been otherwise established, the proper remedy was a stay of proceedings, so sentencing became redundant. Thus, the weighing of offending conduct and investigative conduct set out in Figure 1 appears to have no application in Canada.

However, sentence mitigation is not rendered redundant in the overall scheme of improper police conduct, which may well include entrapment-type practices. Sentencing was a prominent consideration in the 2010 case of *R v Nasogaluak*, which concerned an intoxicated man who was assaulted by police officers while being arrested after a high-speed pursuit.⁹² The assault was held to constitute excessive force in contravention of section 7 of the *Canadian Charter of Rights and Freedoms*, so the trial judge reduced the penalty as a remedy for the breach pursuant to section 24(1) of the

87. *Ibid* at para 13.

88. *Supra* note 8.

89. *Ibid* at 462–63.

90. *Supra* note 9. See also *R v Pearson*, *supra* note 12.

91. *R v Mack*, *supra* note 9 at paras 114–125.

92. 2010 SCC 6, [2010] 1 SCR 206.

Charter.⁹³ This reduction of sentence formed the basis of the Crown's appeal.

The Supreme Court confirmed that sentences *may* be reduced in cases where law enforcement conduct amounts to a breach of a *Charter* right. In ordinary cases, sentences *may not* fall below the relevant statutory minimum; however, in "exceptional cases" there may be a departure.⁹⁴ In addition, it was held that "a sentencing judge may take into account police violence *or other state misconduct* while crafting a fit and proportionate sentence, without requiring the offender to prove . . . a *Charter* breach".⁹⁵ This general reference to "violence" and "other state misconduct" created a vague standard for sentence mitigation in the context of the conduct of law enforcement authorities.

Following *Nasogaluak*, several cases involving undercover investigations have ruled out entrapment but allowed for mitigation of sentence because, in the words of the BC Court of Appeal in *R v Punko*, the (lawful) police conduct "nevertheless violates society's shared common values".⁹⁶ These cases, however, seemed to turn on their particular facts.

Interestingly, the usual sources of mitigation—reduction in offender culpability and judicial disapproval of police conduct—have been raised in these cases and have resulted in some highly questionable distinctions and arguably disproportionate sentencing outcomes. For example, the supply of a controlled painkilling drug, Percocet, by police to the offender was held to be "contrary to the shared values of our society" in *R v Punko*,⁹⁷ and thus to reduce the offender's culpability for serious drug trafficking offences, whereas in *R v Potts*,⁹⁸ which involved Punko's co-accused, the same police conduct did not diminish the co-accused's culpability. The essential difference was that Punko was attempting to break his addiction to the drug while Potts was not, so the police conduct only caused harm

93. Part I of the *Constitution Act, 1982*, ss 7, 24(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (section 24(1) is an enforcement provision which provides for anyone whose rights or freedoms have been infringed or denied to apply to a court for an appropriate and just remedy).

94. *R v Nasogaluak*, *supra* note 92 at para 6.

95. *Ibid* at para 55 [emphasis added].

96. *Supra* note 23 at para 34. See also *R v Potts*, 2011 BCCA 9, 298 BCAC 185; *R v Bacon*, 2012 BCSC 1446 (available on QL).

97. *Supra* note 23.

98. *Supra* note 96.

to Punko.⁹⁹ As there was no evidence of an “adverse effect” on Potts, the conduct had no mitigatory effect on his sentence. In the end, it is arguable that the vague standard for sentence mitigation generated in the Canadian jurisprudence led to disproportionate sentences for these two co-offenders, particularly in regard to the similarities in the seriousness of their crimes and in their individual blameworthiness. This illustrates a strong potential for unfair discrimination in sentencing if adverse effect cannot be proved, even where law enforcement conduct is contrary to shared community values.

IV. Principles of Entrapment Sentencing

The principles identified below¹⁰⁰ may be discerned from Australian cases where entrapment-type practices have been established that are not of such a nature as to trigger the more definitive remedies of a stay of proceedings or the exclusion of evidence. From the outset, however, two points must be emphasized. First, where the entrapment-type conduct is serious enough to warrant a stay or exclusion, the question of mitigation may not arise at all. Second, sentencing is by no means an actuarial exercise. It necessarily involves a discretionary synthesis of a complex array of variables and competing purposes, and is limited by the jurisdiction of the court and the maximum penalties for the offence. Scenarios will arise that require the balancing of the affront to public conscience caused by improper law enforcement practices with the need to find an appropriate sentence for a “wary criminal”.

The first principle is that where the accused is convicted or pleads guilty, mitigation may be considered on the basis of *the nature and extent of inducement involved in the police investigation*, but there will be *no mitigation where the offender is ready, willing and able to commit the offence*. In such circumstances, objective criminality is not reduced by diminished subjective culpability. Remedies will only be available where the conduct of the investigators is unlawful, improper or an affront to public conscience. The primary focus should be on the exclusion of evidence rather than on weighing offender culpability. If the evidence is admitted, however, offender culpability will be at its highest point on

99. *R v Punko*, *supra* note 23 at para 23; *R v Potts*, *supra* note 96 at para 69.

100. The principles are in italics for emphasis.

the spectrum and mitigation will only be available through other relevant objective and subjective factors. Entrapment-type practices will not be a source of mitigation, except where there is judicial disapproval of such practices as indicated by the remarks on sentence.

The second principle is that *mitigation of penalty may be appropriate in cases where the scale of offending has been escalated by the conduct of the investigators, but this depends heavily on the type of offence*. In cases where ordinary methods of investigation are unlikely to succeed without the use of entrapment-type practices to test the nature and extent of a criminal enterprise, any mitigatory effect of those practices will be diminished. In contrast, where a vulnerable or susceptible person is induced to commit an offence that he or she would not otherwise have committed, or where pressure is applied to commit an offence, this will carry significantly more weight in mitigation of sentence. Both the offender's culpability and the objective seriousness of the offence will be diminished to the extent that these considerations might even outweigh such important purposes of sentencing as general deterrence and denunciation.

The degree of mitigation in the decided cases is broad. It ranges from a significant reduction in the duration of imprisonment to the imposition of non-custodial penalties for offences that would normally carry substantial prison terms. This gives rise to the question of proportionality in sentencing and whether the mitigation for entrapment can result in inequities through disproportionately lenient sentences for some offenders. Arguably, such inequities have occurred in drug trafficking cases, when like cases have not been treated alike because of how a court has characterized an offender's culpability and the nature and extent of the particular entrapment-type practices.¹⁰¹ In some cases, courts have gone so far as to attempt to achieve deterrence and denunciation in another guise by using sentence mitigation to deter and denounce in response to certain state-sanctioned entrapment methods. This form of judicial disapproval of police conduct most clearly risks undermining proportionality in sentencing as it focuses not on reflecting offender culpability but on denouncing police misconduct—an objective that is not relevant in sentencing.

101. See *R v Sloane*, *supra* note 47; *R v Rahme*, *supra* note 53; *Jackson v R*, *supra* note 55; *R v C*, *supra* note 66; *R v N*, *supra* note 65; *R v Lipton*, *supra* note 1.

There are two underlying themes in the relevant cases. The first of these was named by Andrew Ashworth as the “Amin Dichotomy”,¹⁰² after the English Court of Appeal decision in *Nottingham City Council v Amin*.¹⁰³ On the one hand, it is recognized as being “deeply offensive to ordinary notions of fairness” for a person to be tempted into the commission of an offence by those charged with upholding the law, especially in circumstances where that person would not otherwise have committed that offence.¹⁰⁴ On the other hand, it is also recognised that law enforcement does at times require the adoption of methods of investigation that will work for certain kinds of crimes. In such cases, the offender may not have been unfairly trapped, but merely caught by an intelligence greater than their own. It could even be argued that the need to resort to entrapment practices should lead to an increase in sentence, because the secrecy surrounding the criminal activity in question is a strong indicator of consciousness of guilt and of the attempt to evade detection. There will certainly be cases where the secretive and powerful nature of a criminal enterprise demands extraordinary methods of investigation.

The second underlying theme relates to the idea of conduct by law enforcement authorities that is essentially repugnant to the standards reasonably expected of such authorities today.¹⁰⁵ Much of the jurisprudence, particularly on the objective standard for entrapment, is concerned with the conduct of investigators. This is especially evident in the dissenting judgment of McHugh J in *Ridgeway*, which emphasized that the executive arm of government does not have an unfettered right to “test the virtue of its citizens”.¹⁰⁶ Entrapment methods, with their accompanying arsenal of surveillance and intelligence gathering, are easily adapted for oppressive purposes. Entrapment is a very effective method of actually creating crimes.¹⁰⁷ Justice McHugh reminds us that important political questions touching the core of democratic societies—questions

102. Ashworth, “Re-Drawing the Boundaries”, *supra* note 3.

103. (1999), [2000] 1 Cr App R (S) 426 (Div Ct).

104. *Ibid* at 950.

105. See e.g. *Robinson v Woolworths Ltd*, (2005), 64 NSWLR 612 at 618–23 (NSWCCA); *R v Swaffield*, *supra* note 14.

106. *Ridgeway v R*, *supra* note 15 at 96.

107. See *ibid* at 91. It is worth noting that McHugh J was clearly influenced in his reasoning by the opinion of Lamer J in *R v Mack*. *Supra* note 9.

of “high public policy”—are incorporated into the exclusionary rules of evidence.¹⁰⁸

Sentence mitigation raises the further question of whether investigative conduct that does not trigger the exclusion of evidence can be recognized as a mitigating factor. The array of cases considered in this article suggest that it can. Such recognition has particular value in cases of “offence escalation”, where an offender may not readily have committed an offence if an informer or investigator had not facilitated or brought pressure to commit a more serious version of it. The extent of mitigation will vary but, as seen in *Sloane*, it is easy to conceive of a situation where a person is a part of a network of offenders, is involved in low-level drug offences, and is then pressed to become involved in a larger operation.¹⁰⁹ The critical question is whether such offenders are being punished for this actual criminality or for their networks and associations.

A further complication is that situations will arise, as in *Ridgeway*, where both law enforcement and the accused have seriously breached the law. In *Ridgeway*, the Australian High Court found that the interests of the administration of justice were better served by excluding evidence obtained through illegal entrapment methods than by mitigating sentences. Given that many otherwise “unlawful” entrapment-type practices have been legalized in Australia through various controlled operations statutes,¹¹⁰ judges will invariably encounter cases where a controlled operations warrant effectively negates the degree of law enforcement culpability required to trigger the exclusionary remedies. This factor augments the role of mitigation of sentence, to the point where it has become the primary remedy in Australia. The same factor also highlights the extensive factual analysis required to determine the appropriate amount of mitigation in a particular case, and the risk of undermining proportionality in sentencing through judicial disapproval of the particular entrapment-type practices. Mitigation to mark disapproval of police conduct creates fertile ground for undermining the paramount sentencing principle of proportionality.

108. *Ridgeway v R*, *supra* note 15 at 98.

109. *Supra* note 47 at 10.

110. For examples of controlled operations statutes, see *supra* note 16. See also “Model Law”, in Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, *Cross-Border Investigative Powers for Law Enforcement Discussion Paper* (Leaders Summit on Terrorism and Multijurisdictional Crime, 2003).

The Canadian position is very different, and the full remedial spectrum set out in Figure 1 cannot be applied to it. Current Canadian practice requires that guilt must first be established beyond a reasonable doubt. If it is concluded that entrapment, as strictly defined in *Mack*, was the cause of the offence, the remedy is a stay of proceedings for abuse of process. That outcome of course precedes (and precludes) sentencing. Although separating out the issue of entrapment in that way is somewhat artificial, it does provide a definitive remedy for the most unarguable forms of law enforcement entrapment. In those cases, it avoids the need to set an artificial sentence based on the idea of a reduction in the offender's culpability or the court's disapproval of the entrapment practices—which may undermine the principle of proportionality and lead to inequitable sentencing outcomes.

Australia remains in the position that was criticized by Estey J in *Amato*: There are no statutory minimum sentences for drug trafficking offences, but a person is still liable to be convicted (and sentenced) in cases involving entrapment-type practices.¹¹¹ While that criticism has merit, the Australian approach has the distinct advantage of allowing for conviction in cases of serious wrongdoing, notwithstanding the misconduct of law enforcement. It is an approach that permits censure of both parties.

The Canadian approach, with its narrow test for entrapment, creates a situation where police entrapment practices that would likely attract mitigation of penalty in Australia (or even result in the exclusion of evidence) will have no effect unless they are held to breach a *Charter* right or fall afoul of the vague standard of adversely affecting the offender to such a degree that they “[violate] society’s shared common values”.¹¹² Although this narrow approach offers a powerful mechanism to check the serious excesses of law enforcement, it may be encouraging defendants to seek more creative but less principled avenues for remedial action, based on claims of reduced culpability through various “adverse effects”.

Conclusion

With the rise of statutory regimes effectively authorizing controlled purchase operations, sentencing plays a much greater role in Australian

111. *Supra* note 8.

112. *R v Punko*, *supra* note 23 at para 34.

entrapment cases than other remedies and interventions. Entrapment methods are rarely, if ever, characterized as an abuse of process in Australian courts. It is also unusual for evidence obtained through such methods to be excluded. In most cases, that evidence is both probative and compelling. The mitigation principle has, however, become entrenched in Australian jurisprudence. As the recent case of *Lipton* demonstrates, although there are limitations and qualifications on the mitigatory effect of entrapment-type practices, they are often an important factor in the sentencing synthesis. Depending on the nature and extent of the entrapment-type practices, they can trump or restrict the operation of fundamental purposes of sentencing, such as the principle of proportionality, and other factors commonly used in the sentencing process. This can result in significant reductions in sentence, and even in non-custodial options or discharges for certain offences. Proportionality and sentence parity are particularly challenged where mitigation results from judicial disapproval of police conduct rather than from actual diminution in the culpability of the offender.

The rigorous approach to entrapment in Canada effectively distinguishes seriously unacceptable law enforcement conduct from other forms of influence on potential offenders that cannot be legally labelled as entrapment. The Canadian model offers a helpful basis for reconsidering the Australian approach. However, the Canadian approach to sentence mitigation where there is police misconduct that does not amount to entrapment, but which violates the vague standard created in *Nasogaluak*, has the risk of undermining proportionality in sentencing and needs more careful elaboration in order to ensure consistent and principled application. The entrapment sentencing principles we have gleaned from the Australian cases explain to some extent why entrapment has a mitigating effect. However, the sound reasoning by Badgery-Parker J in *Taouk* should be elevated to a prominent jurisprudential position in the form of a guideline judgment in order to ensure that mitigation is consistently linked to diminished offender culpability, not judicial disapproval of the conduct of law enforcement authorities. This will provide a greater prospect of proportionate sentences and equal treatment of offenders.