

CITATION: R. v. Bayat, 2011 ONCA 778

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COURT OF APPEAL FOR ONTARIO

Doherty, Rosenberg and Juriansz JJ.A.

BETWEEN:

Her Majesty The Queen

Appellant

and

Shakib Bayat

Respondent

Allison Dellandrea, for the appellant

Robert Sheppard, for the respondent

Heard: November 25, 2011

On appeal from the order of Justice Bruce G. Thomas of the Superior Court of Justice dated November 3, 2010, staying the proceedings on the basis of entrapment.

Rosenberg J.A.:

[1] This Crown appeal concerns the use of techniques by the police to investigate crimes that originate in contact between an accused and children through the internet. Thomas J. found the respondent guilty of child luring contrary to s. 172.1 of the *Criminal Code*, but stayed the charge on the basis of entrapment. The Crown now appeals from

that decision. For the following reasons, I would allow the appeal, quash the stay of proceedings and remit the matter to the trial judge for sentencing.

[2] The trial judge gave lengthy and thorough reasons that clearly set out the facts and the path taken by the judge to the finding of entrapment. However, in my view, the trial judge failed to consider one element of entrapment, the necessity of showing that the police gave the accused an opportunity to commit the offence. The line between proper investigation and providing an opportunity to commit an offence can be a fine one. But, having regard to the controlling authorities, particularly the decision of this court in *R. v. Imoro*, 2010 ONCA 122, 251 C.C.C. (3d) 131, in my view that line was not crossed in this case.

THE FACTS

[3] Following a trial by judge alone, the trial judge found the respondent guilty of child luring. That finding is not in issue in this appeal. The facts giving rise to the entrapment issue are accurately set out in the reasons of the trial judge, which can be found at 2010 ONSC 5606. I have liberally borrowed from those reasons in summarizing the facts.

[4] In September 2007, London police were contacted by the vice-principal of a high school. Detective Howe, from the cyber crime unit, became involved in the investigation. It came to his attention that a sixteen year old female student named B. had entered a

sexual relationship with a twenty-two year old male from Brampton, whom she had met on the internet.

[5] Police interviewed B. and two of her friends. According to B. and her friends, B. and the respondent had consensual sex. The respondent videotaped the sexual acts and showed the video to one of B.'s friends, and perhaps others. It was clear that B. and her friends were unwilling to assist in a prosecution.

[6] Detective Howe was able to obtain the respondent's hotmail address for MSN Messenger. On November 8, 2007, he sent the respondent a message asking to be added as a "friend" to his account. Detective Howe chose to adopt an identity he had used before on the internet; that of a thirteen year old London girl named Natasha.

[7] The following day Detective Howe found he had been accepted as a friend by the respondent, and that the respondent was online. The respondent initiated an exchange with Natasha by asking her who she was, and how she had obtained his address. The respondent asked Natasha to let him see her via webcam. Natasha replied that her mom would not let her have a webcam, but that she had a picture of herself that she could send. Detective Howe transmitted a picture that he used for undercover purposes to establish his identity to the respondent. The image transmitted was a colour photograph of a female member of the London Police Service, taken when she was approximately 13 years old. The image is of a young girl in a swimming pool. There is nothing sexual about the photograph. The child in the photograph is obviously young.

[8] Once the respondent had received Natasha's picture, the following exchanges took place. I have highlighted some of the important parts of the exchange:

natasha	did u see my pic
respondent	ya
natasha	wat u think
respondent	ur cute but too young
natasha	im 13 now but i was 12 in the pic
respondent	oh ok but still young lol
natasha	for wat lol
respondent	to talk to me
Natasha	oh how old r u
respondent	22
natasha	oh thats kewl but if y don wanna whatever
respondent	i dont care
natasha	k its kewl wit me

[9] Natasha was then directed to a second MSN address for the respondent's friends.

Between the two accounts the conversation continued:

respondent	do u like to hav fun
natasha	ya of corse lol
respondent	wat kinda fun
natasha	anything i guess is kewl
respondent	how about with a guy:P
natasha	wat u mean
respondent	u know getting naughty n having fun with a guy
natasha	oh lol sure thats kewl
respondent	lol ok u do that alot
natasha	ya a few time
respondent	wat have u done
natasha	everything
respondent	like
natasha	naughty stuff lol what

	u done
respondent	ru a virgin
natasha	i did it once
respondent	with who
natasha	my ex bf
respondent	how was it
natasha	it hurt a bit but it was fun
respondent	ya i know
natasha	what have u done
respondent	so wat hav u done other then that
natasha	u first lol
respondent	i've done everything
natasha	k wat u don
respondent	everything in sex lol
natasha	kewl lol what u like most
respondent	tight girls n sexy n cute ones like u

natasha	relly u like me?
respondent	like to get to know u
natasha	kewl me to
respondent	thats good
natasha	yuppers
respondent	hav u give a head
natasha	no i never done that have u had that done to u
respondent	ya
natasha	lol was it fun
respondent	yes very
natasha	lol guys like that
respondent	lol ya will u do it to me:P
natasha	ummmm k but i dont know wat u look like lol

[10] Later in the conversation Natasha and the respondent arranged to meet when the respondent was going to be in London. On November 13, the respondent was arrested by London police at a payphone near the proposed meeting spot.

[11] Detective Howe testified that he commenced the investigation of the respondent because he believed the respondent was possibly guilty of production and distribution of child pornography. Since the sexual activity with B. was consensual and B. was 16 years old the respondent did not commit any sexual offence. However, the definition of child pornography in s. 163.1(1) of the *Criminal Code* can include images of persons under the age of 18 years.

REASONS OF THE TRIAL JUDGE

[12] The trial judge referred to several leading decisions concerning entrapment including the decisions in *R. v. Mack*, [1988] 2 S.C.R. 903, *R. v. Barnes*, [1991] 1 S.C.R. 449 and *Imoro*. As he correctly held, the respondent's case turned on the first branch of entrapment identified in *Mack*, namely, where the authorities provide a person with an opportunity to commit an offence without acting on: (i) a reasonable suspicion that this person is already engaged in criminal activity; or (ii) pursuant to a *bona fide* inquiry. The trial judge disbelieved Detective Howe. He held that the officer was not engaged in a *bona fide* investigation. The officer claimed to be engaged in a child pornography investigation however, his method of investigation was inconsistent with such a purpose.

[13] The trial judge then turned to whether the officer was nevertheless acting on a reasonable suspicion that the respondent was already engaged in criminal activity. I have set out in full the part of his reasons at the core of the error alleged by the Crown:

The timing of the investigator's possession of the requisite suspicion is important (*R. v. Benedetti*, [1997] 7 W.W.R. 330

(Alta. C.A.)). As it was *Detective Howe* who instituted the first contact with Bayat, as "*Natasha*", I find it necessary that he had the reasonable suspicion at the time of his first message on November 8, 2007 and not at some later point in the investigation. This is not like the investigations considered in *Imoro* and *Benedetti*, *supra*, where tips of drug trafficking lead officers to locations where it was alleged drugs were being regularly sold, and where ultimately drug charges were laid. [Emphasis added.]

[14] In *Barnes* the court clarified that the police may only present an opportunity to commit a particular crime to a person who arouses a suspicion that he or she is already engaged in the particular criminal activity. The trial judge concluded that since the officer in this case did not have a subjective belief that the respondent was engaged in child luring, the offence that he had set out to investigate, the requisite reasonable suspicion was absent. Entrapment was made out because the officer was not involved in a *bona fide* investigation and did not have a reasonable suspicion that the respondent was involved in a particular crime when he first communicated with the respondent. Accordingly, the trial judge entered a judicial stay of proceedings.

ANALYSIS

[15] In *Mack*, Lamer J. explained the basis for entrapment in these terms at p. 956:

I take this statement [from *R. v. Amato*, [1982] 2 S.C.R. 418] to mean that *the police are entitled to provide opportunities for the commission of offences where they have reasonable suspicion to believe that the individuals in question are already engaged in criminal conduct*. The absence of a reasonable suspicion may establish a defence of entrapment for two reasons: firstly, it may indicate the police are engaged in random virtue-testing or, worse, are carrying on in that way for dubious motives unrelated to the investigation and

repression of crimes and are as such "*mala fides*". [Emphasis added.]

[16] And later at p. 959:

To summarize then, the police must not, and it is entrapment to do so, offer people opportunities to commit crime unless they have a reasonable suspicion that such people are already engaged in criminal activity or, unless such an offer is made in the course of a bona fide investigation. In addition, the mere existence of a prior record is not usually sufficient to ground a "reasonable suspicion". These situations will be rare, in my opinion. If the accused is not alleging this form of entrapment the central question in a particular case will be: have the police gone further than providing an opportunity and instead employed tactics designed to induce someone into the commission of an offence? [Emphasis added.]

[17] In *Imoro*, at para. 13, this court interpreted *Mack* to mean that on the lack of reasonable suspicion branch of entrapment the court must make two findings: "first, a finding that the police provided an opportunity to commit an offence; and second, a finding that the police did so without reasonable suspicion". In that case, the court found that the initial police contact with the accused did not amount to providing an opportunity to commit an offence. An opportunity was given later, but by that time the officer had the requisite reasonable suspicion. Accordingly, entrapment was not made out.

[18] The appellant makes a similar argument here. In her very helpful submissions, Ms. Dellandrea argues that when the interchange with the respondent is examined, the officer never provided the respondent with an opportunity to commit an offence, as that concept is understood in the entrapment context. Alternatively, at the very least such opportunity was not given until well into the communication at a time where the officer

had a reasonable suspicion that the respondent was engaged in child luring by reason of the respondent's own messages to "Natasha".

[19] I agree with the appellant's submissions. The issue is a difficult one and the line between simple investigation and offering an opportunity to commit an offence will sometimes be difficult to draw. In my view, the trial judge erred in failing to consider whether the officer's conduct in simply opening up a dialogue with the respondent constituted an opportunity to commit an offence. As is apparent from the passage in the trial judge's reasons set out above at paragraph 13, the trial judge held that the reasonable suspicion had to exist from the moment the officer contacted the respondent. He failed to consider whether that initial contact was an offer of an opportunity to commit an offence. In my view, it was not. The initial contact was no more than a step in an investigation, the equivalent of a knock on a door.

[20] Detective Howe, in the guise of Natasha, offered to be added as a "friend" to the respondent's MSN account. This act could not be construed as an opportunity to commit the offence of child luring. After the initial contact was made, the respondent took the initiative in opening up communications with Natasha. The respondent asked to view Natasha. The photograph provided by the officer in response to this request was neutral. It could in not be construed as sexually provocative or as offering an opportunity to commit an offence. The respondent took the lead in engaging in ever more explicit sexual discussions even though by then he believed that Natasha was a child. The officer gave

the respondent several opportunities to withdraw from the discussion. However, the respondent chose to carry on.

[21] Counsel for the respondent argues that the officer's conduct in targeting the respondent through his MSN account was materially different from the usual method used by the police of entering a chat room. See for example, *R. v. Alicandro*, 2009 ONCA 133. While I appreciate that there is a difference, in my view, it is not a legally material distinction. In the chat room type of investigation, police officers initially make themselves available to chat with everyone in the chat room, and then may enter a dialogue with particular individual. In this case the police officer made himself available to chat with a particular individual from the outset. In both situations, if it is the accused who takes the lead in directing the conversation, the element of offering an opportunity to commit the offence of child luring is not made out. There is a difference between simply providing an opportunity to chat or talk, and providing an opportunity to commit the offence of child luring.

[22] The respondent further submits that if this court were to find that the trial judge erred in failing to consider whether the officer gave the respondent an opportunity to commit an offence, we should remit the matter back to the trial judge. He submits that this is essentially a factual issue to be determined by the trier of fact. I do not agree. In a judge alone trial, where the trial judge has made all the necessary findings of fact to support a finding of guilt, or those facts are not in dispute, the appellate court may substitute a finding of guilt on a Crown appeal from acquittal: *R. v. Cassidy*, [1989] 2

S.C.R. 345 at 354-55. The same test should apply on a Crown appeal from a stay of proceedings.

[23] In this appeal, the relevant facts are uncontested and undisputed. They are set out in the transcripts of the communications between the respondent and the officer and in the trial judge's reasons. It only remains for this court to apply the legally correct test for entrapment to those undisputed facts. The trial judge's adverse finding of credibility against the officer on whether he was engaged in a *bona fide* investigation, or had a reasonable suspicion, do not affect the preliminary question of whether the facts reveal an opportunity to commit an offence. I am satisfied that there was no opportunity to commit an offence as that requirement was interpreted by this court in *Imoro*.

DISPOSITION

[24] Accordingly, I would allow the appeal, set aside the stay of proceedings and remit the case to the trial judge to impose sentence in accordance with s. 686(4)(b)(ii) of the *Criminal Code*.

Signed: "M. Rosenberg J.A."

"I agree Doherty J.A."

"I agree R. G. Juriansz J.A."

RELEASED: "DD" December 13, 2011