

ENTRAPMENT DEFENCE IN MALAYSIA

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Abstract

The fundamental principle underlying the criminal justice system in Malaysia is that an accused person is innocent until proven guilty by a competent court of law. In line with this principle, the criminal justice system of Malaysia provides various safeguards to protect accused persons. However, covert policing methods, normally the use of informers and / or undercover police officers, raise profound issues as regards the fairness of trials. In Malaysia there is no rule that evidence obtained by the use of trickery and deception, even by provocation and entrapment be automatically excluded. It is necessary to appreciate that courts have a responsibility to protect the overall integrity of the criminal justice system. This must, therefore, inevitably mean that in setting standards of fairness, a court in a particular case must consider whether to condemn them by resort to its common law power to stay the proceedings or exclude the evidence. But, in cases which involved informer or agent provocateur, a distinction must be made to divide the line between a mere informer and a *particeps criminis*, that is the degree of the persons participation or a person who enticed another to commit crime. The focus at trial is on the conduct of the police irrespective of the culpability or predisposition of the accused. Potential benefits of this approach include the protection of the purity and integrity of the criminal justice system and the deterrence of police misconduct.

Prinsip perundangan keadilan jenayah di Malaysia ialah dimana seorang yang dituduh itu tidak bersalah sehingga disabitkan kesalahannya oleh mahkamah. Selaras dengan prinsip ini, perundangan keadilan jenayah Malaysia telah memperuntukkan berbagai penetapan undang-undang bagi menjamin keadilan atas tertuduh. Walaubagaimana pun tugas polis yang dijalankan secara sulit, umpamanya penggunaan informan dan penyamaran anggota polis telah membangkitkan pelbagai isu ke atas keadilan perbicaraan. Di Malaysia tidak ada penetapan undang-undang dimana bahan bukti yang diperolehi secara penipuan dan penyamaran atau pun diperolehi secara provokasi atau pemerangkapan boleh disangkal secara automatik. Mahkamah mempunyai tanggungjawab untuk memelihara keseluruhan integriti system keadilan jenayah. Ini bermaksud dalam menetapkan tahap keadilan, mahkamah didalam sesuatu kes perlu mengambil kira sama ada menyangkal dengan merujuk kepada kuasa Common Law membatalkan prosiding atau mengenyahkan bukti keterangan. Tetapi dalam kes-kes yang melibatkan informan atau agen provokatur, satu penilaian perlu dibuat bagi membezakan di antara informan dan *particeps criminis* iaitu tahap penglibatan seseorang dalam memujuk individu melakukan kesalahan jenayah. Fokus perbicaraan adalah ke atas tingkah laku polis selain penglibatan atau niat tertuduh. Kelembaan aspek ini termasuk memelihara integriti system keadilan jenayah dan menghalang salahkuasa polis.

1. INTRODUCTION

Undercover police investigation methods, normally the use of informers and / or undercover police officers, raise profound issues as regards the fairness of trials. In Malaysia there is no rule that evidence obtained by the use of trickery and deception, even by provocation and entrapment be automatically excluded. Nonetheless abuse of process is based on the principle of fairness and the protection of the rights of the defendant. It is necessary to appreciate that courts have a responsibility to protect the overall integrity of the criminal justice system. This must, therefore, inevitably mean that in setting standards of fairness, a court in a particular case must consider whether to condemn them by resort to its common law power to stay the proceedings or exclude the evidence.

However, the common law rule is settled that as long as the evidence is relevant to the matters in issue it is admissible, the court is not concerned with how it was obtained. But, in cases which involved informer or agent provocateur, a distinction must be made to divide the line between a mere informer and a *particeps criminis*, that is the degree of the persons participation or a person who enticed another to commit crime. The focus at trial is on the conduct of the police irrespective of the culpability or predisposition of the accused. Potential benefits of this approach include the protection of the purity and integrity of the criminal justice system and the deterrence of police misconduct.

The fundamental principle underlying the criminal justice system in Malaysia is that an accused person is innocent until proven guilty by a competent court of law. In line with this principle, the criminal justice system of Malaysia provides various safeguards to protect accused persons.

Some legislation, however, like the Dangerous Drugs Act 1952 and the Anti-Corruption Act 1997, reverses the application of this principle. Under these laws, certain statutory presumptions are made against the accused. Thus, when a person is charged under these laws the burden is placed on the accused to rebut the presumptions made against him.

The use of informants to procure criminal convictions is of ancient origin. The use of members of the public to provide evidence of crime was not limited to those who were upstanding citizens. The maxim '*set a thief to catch a thief*' was applied with great frequency and, indeed, was formally endorsed through a system of rewards which automatically carried the promise of pardon to accomplices. The potential for corruption in such a system was enormous and despite the cause, no action was taken to prohibit the practice.

However, such methods of crime control are effectively still with us, ungoverned by statute and giving rise to informal deals with known criminals and to discretionary payments from public funds. Information useful to the police is bought from informers either with money or with promises of preferential or lenient treatment. These exchange relationships between police and informants are of low visibility and subject to minimal supervisory control. Further, reported cases continue to arise in which the allegation is made that the police have not simply relied upon information or surveillance

to obtain evidence, but have incited or participated in the offence either directly or through the use of agents.

While evidence unlawfully obtained is admissible if relevant, there is a judicial discretion to disallow such evidence if its reception would operate unfairly against an accused. From a standpoint of principle two important interests come into conflict when considering the question of admissibility of evidence so obtained. On one hand there is the interest of the individual to be protected from illegal invasions of his liberties by the authorities and on the other hand the interest of the state to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts on any merely technical ground. Purely on principle it is not clear that the harm to the public is substantially in contestable if evidence unlawfully obtained is admitted.

Entrapment occurs when an individual has been incited or persuaded by agents of the state to commit an offence which he had no previous intent or design of his own to commit. A trap exists where an agent of the state merely affords a person an opportunity to put his existing criminal purpose into effect. A frame refers to a situation where a person performs an act which he in no way believes to be criminal, such as delivering a package containing drugs while believing it contains powdered milk. Due to absence of *mens rea*, frames would never attract criminal responsibility. The concern arises when an innocent-minded person is enticed to violate the law by perverse tactics.

With respect to entrapment, it may be argued that police activities constituted a false arrest as no arrest would have been possible without the police instigation. Entrapment practices may amount to criminal behavior by

the police, for example, when they aid, abet, counsel, procure or incite another person to commit an offence.

Defence by police were based on public duty, Crown immunity, necessity and absence of *mens rea*, however their application is limited. In *R v Ormerod*¹, the accused, who claimed he was a spy or agent acting on behalf of the police, was charged and convicted of drug offences as a result of activities of an undercover police officer. In this case, Laskin J.A. rejected any notion of immunity based on a proper motive or public duty. His reasoning as follows ;

‘...a general want of intent to break the law is not a defence where a person carries out forbidden acts intending to do them or knowing what he is in fact doing. That he does them for a purpose or from a high motive is beside the point. The assertion of want of intent to break the law must be related to the very ingredients of the offence; otherwise, it is simply an assertion that notwithstanding that an offence has been committed, the offender was motivated or actuated by some benevolent design. It may be enough, in a particular case, to save him from prosecution or to result in mitigation of sentence if a prosecution is lodged but he cannot be rescued from guilt if prosecution is undertaken.’

In an American case, *Reigan v People*², where two game wardens, in order to enforce the game laws, told two youths they were fur buyers who could dispose of ‘hot’ beaver hides. In this manner, they induced the youths to agree to trap beaver illegally. The wardens were convicted of unlawful conspiracy to trap beaver and possess hides and of becoming accessories

¹ [1969] 4 c.c.c.3(Ont.CA)

² [1949] 210 p. 2nd 991 (Cal.S.C.)

before the fact to such crimes, having intended to induce persons, who would not otherwise have done so, to commit the same offences.

It has been argued that the most effective way to enforce the procedures is to provide that evidence improperly taken, that is, taken in violation of the rights of the accused, will be excluded from court. However, there are also complaints that, accused may go free because of the exclusionary rule, especially with regard to confessions made before the accused had counsel or was told of the right to counsel. The accused had given a confession. But that evidence, under the exclusionary rule, cannot be admitted as evidence in the trial. In many cases this often means that the prosecution does not have enough admissible evidence to convict the defendant.

So, why does this rule exist if it hinders law enforcement? That question should be considered as some of the specific rights of the defendants are analysed. It should also be remembered that not all people who commit crimes will be convicted. The system of justice does not wish to sentence people who are innocent. The cards are stacked in favour of the prosecution unless the defendant is given certain safeguards. The system is based on the concept that it would be better to allow ten guilty people to go free than have one innocent person convicted.

The whole thrust of criminal jurisprudence is a matter of balancing of right between an accused person as one party and state as the other party. And it is common knowledge that the state bears the burden of proving the case beyond reasonable doubt the offence complained of. This gives concessions to the accused person such as the benefit of doubt, the right to remain silent. At the same time the law also caters for the needs of the state. In *Chandrasekaran*

*v PP*³, it was stated that, section 27 Evidence Act 1950 is a concession to the prosecution. It is an express intention of the legislature that the statement, any portion thereof is nevertheless admissible if it leads to the discovery of relevant fact.

There has been much discussion as to the extent to which officers may be permitted not to give evidence that would or might disclose the identity of informers or the whereabouts of observation posts or matters relating to surveillance. The general rule, in relation to informers, is clear, a witness may not be asked, and he will not be allowed to disclose, the channels through which information has been obtained by the law enforcement. However, there is an exception to the general rule, namely, where disclosure is necessary to avoid miscarriage of justice, or where the evidence is necessary to show the innocence of the accused.

In *Johnson*⁴, the Court of Appeal gave guidance on the evidence to be given during a *voir dire* to determine whether the information should be withheld or disclosed. The judge must then balance the interests of the defence and the interests of the prosecution as well as the interests of informers, owner, or occupiers who may be affected by disclosure.

In *PP v Chong Chee Kin & Anor*⁵, an argument raised by the defence counsel that the informer could not claim protection under section 40(1) Evidence Act 1950 as he was in fact an agent provocateur and the prosecution's failure to call him as witness attracts the presumption of adverse inference under section 114(g) of the said Act. The learned trial judge Kang Hwee Gee JC is of the view that, the term 'informer' is not defined anywhere

³ [1971] 1 MLJ 53

⁴ [1998] 1 WLR 1377

⁵ [1995] 2 MLJ 679

in the Act, a police informer is a person who provides information to the police with regard to the commission of a crime. But it is stated that if a person does more than merely providing information to the police by going a step further by introducing the offender to the police with a view to induce its commission it would be inappropriate and a contradiction in terms to call him an informer. In *Namasiyam & Ors v PP*⁶, Supreme Court held that, a person who not only introduced the accused but was present on more than one occasion including at the time of the accused's arrest in the subsequent delivery of the drug, was a *particeps criminis* and not an informer whose failure to appear in court may well attract the provision of section 114(g) of the Evidence Act 1950. Therefore the dividing line between a mere informer and a *particeps criminis* is the degree of the persons participation in the controlled sale and delivery of the drug.

But what about evidence obtained by way of a trick ? In *Cadette*⁷, *X* arrived at Heathrow Airport and was found with cocaine concealed in her clothing. *X* was ultimately acquitted of being knowingly concerned in the fraudulent evasion or the prohibition on the importation of a controlled drug. However, *C*'s telephone number was found on *X* who agreed with officers to contact *C* and their conversation was tape recorded. In dismissing *C*'s appeal against conviction for the unlawful importation of the drug, the Court of Appeal held that the mere fact that evidence was obtained by subterfuge did not automatically lead to its exclusion. There is indeed ample authority that some tricks are permissible particularly if the defendant is merely detected

⁶[1987] 2 MLJ 336

⁷[1995] Crim. LR.229

doing what he would do any way despite the trick. In *Latif and Shahzad*⁸, an importation of drugs from Pakistan to London was carefully managed by Customs officers using undercover personnel. The prosecution accepted that in the course of the undercover operation there was resort to the tactics of trickery and deception. The facts in *Latif* were briefly as follows; in Pakistan a paid informant of the Drug Enforcement Administration of the United States (DEA) was tasked to make contact with local suppliers for heroin. The informant duly made contact with the defendants who expressed a willingness to export heroin to the United Kingdom(UK). The informant offered to facilitate this. Subsequently, a plan for the export of heroin to the UK was agreed, the arrangement being that the defendants would deliver the heroin to the informant who would then arrange for it to be brought to the UK. Once here the defendants would subsequently travel to the UK for the purpose of collecting the heroin and arranging for its distribution. This arrangement went according to plan, along with the acquiescence of the Pakistani authorities. The defendants came to England and after meeting the informant in London were promptly arrested. At *Latif's* trial the defendant submitted that the use of such tactics was oppressive and accordingly the trial should be stayed as an abuse. The trial judge however, rejected the abuse of process application holding that the defendants were not incited or entrapped by the informant.

In *Somchai Liangsiriprasert v Government of the United States of America*⁹, an operation was taken by the Drug Enforcement Administration of the United States (DEA) to lure the defendant, a suspected major exporter of heroin based in Thailand, from Thailand to Hong Kong in order that his

⁸ [1996] 1 ALL ER 353

⁹ [1990] 2 ALL ER 866

extradition could then be sought to stand trial in the United States. At that time drug offences were not extraditable crimes in the extradition treaty between the USA and Thailand. An undercover US official, acting as a willing buyer of heroin, agreed to purchase heroin from the defendant for sale in New York. The deception continued and ultimately as planned by the DEA, the defendant agreed to travel to Hong Kong to collect his share of the proceeds. On his arrival in Hong Kong, the defendant was arrested and his extradition to the USA then sought. Ultimately the defendant while detained in Hong Kong appealed to the Privy Counsel. He contended that his detention was unlawful because it was an abuse for a government agency to entice a person to a jurisdiction from which extradition was then available. Furthermore such official conduct was oppressive. Lord Griffiths however, rejected this submission and thus expressly approved, not just condoned, the use of such undercover techniques for the purpose of bringing major criminals to justice. Deception and trickery alone could never constitute in the court's eyes, an affront to public conscience, oppression or an abuse of process. But one situation, not considered was when a defendant is lured by investigators into this country for the purposes of arrest and charge, the consequence of this being that he is thereby denied legal rights and privileges which would have been available to him in the foreign jurisdiction had the investigators instead sought his extradition. The legal rights and privileges denied to the defendant may be significant. For example, if the authorities had instead decided to follow the extradition route the defendant might having strong community ties in his country of residence, have been granted bail pending an application for extradition.

Another question to ask, is police entrapment mitigation? Now, in *R v Sang*¹⁰, the House of Lords held that although a trial judge had no discretion, except in the case of confessions, to refuse to admit evidence merely because it had been improperly obtained, nevertheless, could be a significant factor in mitigation. Lord Fraser of Tullybeeton said, the degree of guilt may be modified by the inducement and that can be reflected in the sentence. The decision was followed by Augustine Paul J in *Mohd Ali Jaafar v PP*¹¹ by quoting that the use of an agent provocateur in the commission of a crime may operate as a mitigating factor in sentencing an accused person. However, in *Ti Chuee Hiang v PP*¹², the conviction was quashed and the accused acquitted on the ground of miscarriage of justice. Edgar Joseph Jr FCJ, held that the informer, having regard to his role, was not a mere informer but had assumed the mantle of an agent provocateur. It is accepted that each case will of course depend on its own facts. It is well known that many drug operations, particularly elaborately planned ventures, come to light and are successfully prosecuted as a result of police or Customs undercover work. This may include an officer posing as an interested purchaser of narcotics in order to ascertain who the suppliers, or importers, are in a distribution network. Such work is sometimes dangerous and without it many serious cases would go undetected. In *Underhill*¹³, the appellant was encouraged to sell a quantity of drug to a police officer who, on one view of the facts, instigated the offence. But the court declined to treat this feature as mitigation on the grounds that the appellant was, in any event, ready to sell the drugs to anybody who was

¹⁰ [1980] AC 402

¹¹ [1998] 4 MLJ 210

¹² [1995] 2MLJ 433

¹³ [1979] 1 Cr App R(S)270

willing to pay the price. The court suggested that one would have to inquire whether the offence would have been committed notwithstanding the involvement of police and, secondly, whether investigating officers crossed the line between legitimate infiltration of criminal activities and conduct which could fairly be condemned as illegitimate instigation. Therefore, it can be said that where a person of good character is entrapped, and there is no reason to believe that the offence would have been committed but for the instigation of the officers, or agents, then the entrapment must be quite substantial mitigation.

In order to secure the necessary evidence for bringing offenders to justice, law enforcement officers are given powers to invade the freedom of individuals in the process of criminal investigations. These powers are not, however, unlimited, in modern democratic states the relationship between the public authorities and individuals is governed not by the arbitrary exercises of power but by power exercised within the constraints of law. The law enforcement officers do not always exercise their powers within the permissible limits. Where law enforcement officers exceed their powers, evidence may be obtained to incriminate the suspect in trial. The question of whether such evidence can be taken as a basis for judgment is the main concern of this study.

A democratic criminal justice system should strive for freedom and security of all persons in the community. In order to accomplish this goal, the public must be protected by the repression of crime and the safeguarding of the individual liberties. In exercising the means to achieve the ultimate result,

the parties to the criminal justice system should ensure that persons guilty of criminal offences are dealt with without endangering innocent persons.

The problem of admissibility of improperly obtained evidence by way of entrapment is not unique to Malaysia. It is a worldwide problem. Different legal systems may offer different solutions. This make it interesting to compare the different solutions and approaches to this issue in different countries. Seeing how different legal system approach the same problem enables one to learn much about the problem itself.

The principal aim of the study is not only to ascertain how far and in what respects, Malaysia and other countries solutions to the issue of admissibility of improperly obtained evidence by entrapment resemble to or differ from each other, but also to seek to explain similarities and diversities. It is hoped that some contribution will be made in this way to the issue of how the issue in question can most appropriately be solved under the different social, economic, and legal circumstances.

The starting point of the law concerned with this subject is the decision of the House of Lords in *R v Sang*¹⁴ where the House made clear that there is no substantive defence of entrapment in English criminal law. Further, that a trial judge has no discretion to exclude otherwise admissible evidence, on the ground that it was obtained by improper or unfair means. However, it was held that, the fact that the evidence has been obtained by entrapment, or by agent provocateur, or by a trick does not of itself require the judge to exclude it. If, however, it is considered that in all the circumstances the obtaining of the

¹⁴ [1979] 69 Cr. App Rep 282

evidence in that way would have an adverse effect on the fairness of the trial then it will be excluded.

It is concluded that one of the factors that a Judge may take into account when deciding to whether omit or exclude the evidence of an undercover officer was whether that officer was acting as an agent provocateur, in the sense that he was enticing the defendant to commit an offence he would not otherwise have committed. In effect, its therefore provided a basis for courts to decide whether the evidence should be excluded or proceeding stayed.

It is submitted that while the rule enunciated by the House of Lords in *Sang* concerning entrapment not being a substantive defence, it is nevertheless increasingly being undermined in an abuse context by courts who, in the exercise of their discretion, are deciding to exclude evidence based on such a method. The use of entrapment is increasingly regarded by courts as an example of oppressive behavior or investigative impropriety that should not be tolerated.

Undoubtedly the recent judgment of the European Court in *R v Loosely*¹⁵ will have a decisive effect on English jurisprudence concerning entrapment. In *R v Loosely* the court held that the officers had incited and procured this defendant to commit an offence he would not otherwise have committed. The point of law to the House of Lords is that every court had an inherent power and duty to prevent abuse of its process.. Entrapment is an instance where such abuse may occur. The overall consideration was whether

¹⁵ Attorney-General's Reference (N0.3 of 2000)[2001] UKHL 53

the conduct of the police was so seriously improper as to bring the administration of justice into disrepute.

In seeking to identify the limits that should be placed on police conduct, it was a useful guide to consider as one of the relevant factors the police did no more than present the defendant with an unexceptional opportunity to commit a crime. The yardstick for this test was whether the conduct of the police was no more than might have been expected from others in the circumstances. If no more than this had been done, the police had not incited or instigated the offence. Other relevant factors could be the nature of the offence, the reason for any police operation, reasonable suspicion and the nature and extent of any police participation. It was also relevant to consider the defendant's circumstances, including any vulnerability.

In *Teixeira de Castro v Portugal*¹⁶, the court held that the applicant had been incited by undercover police officers to commit an offence of drug trafficking for which he was later convicted. The applicant complained that as a result of this incitement he had not received a fair trial in breach of Article 6 of the Convention. The government of Portugal disagreed contending that all the officers had done was to expose a latent predisposition on the part of the applicant to commit the offences. The court conclude that the two police officers actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed. That intervention and its use in the impugned criminal proceedings meant that, right from the out set, the applicant was definitely deprived of a fair trial.

¹⁶ [1999] 28 EHRR 101

A general view as to the tactic of entrapment is the use of undercover agents must be restricted and safeguards put in place even in cases concerning the fights against drug trafficking. While the rise in organized crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience. The public interest cannot justify the use of evidence obtained as a result of police incitement.

In *How Poh Sun v PP*¹⁷, the Singapore Court of Criminal Appeal, refused to recognize a defence of entrapment. While, in certain cases, the use of an agent provocateur by law enforcement agencies might be a matter to be taken into account in sentencing, the court ruled against making it a ground for the acquittal of an accused. The Court of Criminal Appeal held that, save for admissions and confessions, a trial judge had no discretion to refuse to admit relevant evidence on the ground that it had been obtained by illegal or unfair means.

It is incorrect to hold that a person is criminally liable for an offence upon the *actus reus* and *mens rea* of the crime being made out. Criminal liability is established not merely on proof of the offence elements but also on the absence of any defence which might be available to the accused. The judicial error appears to have been due to the misconception that defences always operate either to negative the *mens rea* or the *actus reus* of an offence. But there are certain well-recognised defences which do not operate in this way, for example, the plea of self-defence, duress and provocation. These defences work very much by way of an admission and an avoidance, with the

¹⁷ [1991] 3 MLJ 216

accused saying, 'I admit to performing the conduct with the necessary mental state but I have an explanation for so doing which exculpates me from criminal liability'.

A defence of entrapment operates in the same way. The accused admits to satisfying the mental and physical elements of the offence charged but explains that he or she would never have committed such a crime had the agent provocateur not induced her or him into doing it. However, the accused will not be able to rely successfully on the defence if it were shown that he had a predisposition to committing the offence charged and would have done so had an opportunity in normal life presented itself. Under this approach, entrapment practices which single out persons who are known or reasonably suspected to be predisposed to the type of crime complained of are acceptable and should lead to the conviction of persons so entrapped. On the other hand, an entrapment scheme which is used to test the virtue of people on a random basis should not be permitted to lead to a conviction.

1.1 DEFINING ENTRAPMENT

It is noted that there are two different approaches to the meaning of entrapment. The subjective approach focuses upon the predisposition or mental state of the accused, whereas the objective approach focuses upon the conduct of the law enforcement authorities. The Australian Law Reform Commission proposed a subjective definition of entrapment in its draft Criminal Investigation Bill 1981. Clause 67 prohibits entrapment, defining it as inducing a person to commit an offence that but for the inducement, he would not have committed on the occasion on which he committed the offence. The

subjective approach would be that suggested in *Romeo*¹⁸..per White J., that is, the likelihood that the offender would have committed an offence of that kind in any event.

Entrapment takes place when a public law enforcement official, for the purpose of obtaining evidence of the commission of an offence, induces or encourages another person to commit an offence by either making false representations designed to induce the belief that the criminal conduct is not prohibited, or by employing methods of persuasion or inducement which create a substantial risk that such an offence will be committed by persons other than those who are ready to commit it.¹⁹ Whereas admissibility refers to whether a piece of evidence is permitted to be given, or to be taken into account and must be distinguished from the weigh or the credibility of evidence.

In *R v Sang*²⁰, the issue before the House of Lords was what a trial judge should do when he is satisfied that an accused has been deliberately procured, incited or tricked by an official of the government into the commission of a crime which he would not otherwise have committed. This practice of facilitation or incitement, by an official of the government, of the commission of a crime which the defendant would not otherwise have committed will be referred to as entrapment.

Therefore entrapment occurs when an individual has been incited or persuaded by agents of the state to commit an offence which he had no previous intent or design of his own to commit. A trap exists where an agent of the state merely affords a person an opportunity to put his existing criminal

¹⁸ [1987] 45 SASR 212 at 218

¹⁹ American Law Institute. S.2.13 Model Penal Code [1962]

²⁰ [1980] AC 402

purpose into effect. The concern arises when an innocent-minded person is enticed to violate the law by perverse tactics.

In *R v Loosely*²¹, Roch L.J stated, the law is consistent with the European Convention of Human Rights and the judgment of the European Court of Human Rights, namely that if an offence is due to that person being incited by a law enforcement officer to commit the offence, or by that person being trapped into committing the offence by a law enforcement officer, then the evidence of that law enforcement officer should be excluded by the trial judge. On the other hand, if the law enforcement officer has done no more than give an accused the opportunity to break the law, of which the accused has freely taken advantage in circumstances where it appears that the accused would have behaved in the same way if the opportunity had been offered by anyone else, then there is no reason why the officer's evidence should be excluded and the accused's trial should proceed with that evidence being admitted.

In the Model Penal Code, the American Law Institute is of the opinion that entrapment takes place when a public law enforcement official or a person acting in co-operation with such an official, for the purpose of obtaining evidence of the commission of an offence, induces or encourages another person to commit an offence by either making false representations designed to induce the belief that the criminal is not prohibited, or by employing methods of persuasion or inducement which create a substantial risk that such an offence will be committed by persons other than those ready to commit it.²²

²¹ [2001] UKHL 53, [2002] 1 Cr. App R. 29

²² *American Law Institute*, s 2. 13 Model Penal Code (1962)

1.2 DEFINING ILLEGALLY OBTAINED EVIDENCE

It is settled law that as long as the evidence is relevant to the matters in issue it is admissible; the court is not concerned with how it was obtained. In *Saminathan v PP*²³ it was held that the Magistrate was only concerned with the relevancy of the document and not with the manner in which the police obtained possession of them. In this case, the accused was charged with keeping a common betting house, and the charge arose out of information given to the police. Eventually the accused was brought to trial and was convicted on the said charge. The issue that was raised on appeal was that the accused was illegally arrested as the inspector who entered the accused house, searched it, and arrested the accused was not a senior police officer within the meaning of that term as defined in section 2 of the Betting Enactment (Cap.48) and thus the proceedings were *void ab initio* and the conviction cannot stand. It was held that the legality or illegality of a man's arrest does not concern the court which is trying him. The court is only concerned with the charge brought against him.

In *Saw Kim Hai & Anor v Regina*²⁴ the appellants were jointly charged first with assisting in the carrying on of 100 number lottery and secondly with assisting in the carrying on of 1,000 number lottery at the same time and place, both charges being laid under s.4(1)(c) of the Common Gaming Houses Ordinance No 26 of 1953. It was argued that as in the present case the Police had not strictly proved that their entry into the premises had been carried out in accordance with the provision of the Ordinance, the presumption under s.11 did not arise as it is necessary to prove strictly that the entry by the police was

²³ [1937] MLJ 39

²⁴ [1956] MLJ 21

lawful. ACRJ (Spencer Wilkinson) J, it is settled law that when an accused person is before a court, the court had jurisdiction to try him notwithstanding the fact that his arrest may have been illegal, and it has been held by the Privy Council that the fact that evidence has been illegally obtained does not affect the question of its admissibility²⁵. Even therefore, if the evidence of possession by these appellants of the documents in question in this case was illegally obtained that would not affect its admissibility.

The learned Wee Chong Jin CJ, Chua J., Ambrose J. in *Cheng Swee Tiang v PP*²⁶, held that, while evidence unlawfully obtained is admissible if relevant, there is a judicial discretion to disallow such evidence if its reception would operate unfairly against an accused.

It should be noted that even though evidence is obtained illegally by way of wrongful arrest, the court is only concerned with the charge brought against the accused. But it is a different scenario with entrapment, it is where the officers had incited and procured the accused to commit an offence which he would not otherwise have committed.

1.3 DEFINING AGENT PROVOCATEUR AND INFORMER

The general rule, in relation to informers, is clear; a witness may not be asked, and he will not be allowed to disclose, the channels through which information has been obtained by the law enforcement agencies. Furthermore, officers may be permitted not to give evidence that would or might disclose the identity of informers or matters relating to surveillance. However, in some

²⁵ Kuruma v Queen [1955] A.C. 197

²⁶ [1964] MLJ 291

circumstances court may quashed a conviction for an offence because disclosure as to whether a particular person was an informer, or not, was vital. The disclosure is necessary to protect individual and to avoid miscarriage of justice.

An agent provocateur²⁷ is a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such an offence. While evidence unlawfully obtained is admissible if relevant, there is a judicial discretion to disallow such evidence if its reception would operate unfairly against an accused. From a standpoint of principle two important interests come into conflict when considering the question of admissibility of evidence so obtained. On the one hand there is the interest of the individual to be protected from illegal invasions of his liberties by the authorities and on the other hand the interest of the state to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts on any merely technical ground. Purely on principle it is not clear that the harm to the public is substantially incontestable if evidence unlawfully obtained is admitted.

In *PP v Chong Chee Kin & Anor*²⁸, both accused were charged with the offence of jointly and in furtherance of a common intention trafficking in 644 g of cannabis under s.39B of the Dangerous Drugs Act 1952. They were arrested in an operation staged by the police which involved the use of an informer and three agent provocateurs to buy the drug from the accused. The court held that, a police informer is a person who provides information to the

²⁷ Archbold Criminal Pleading Evidence and Practice

²⁸ [1995] 2 MLJ 679

police with regard to the commission of a crime. But it is stated that if a person does more than merely providing information to the police by giving a step further by introducing the offender to the police with a view to induce its commission it would be inappropriate and contradiction in terms to call him an informer. In *Namasiyam & Ors v PP*²⁹, Supreme court held that, a person who not only introduced the accused but was present on more than one occasion including at the time of the accused's arrest in the subsequent delivery of the drug, was a *particeps criminis* and not an informer whose failure to appear in court may well attract the provision of section 114(g) of the Evidence Act 1950. Therefore the dividing line between a mere informer and a *particeps criminis* is the degree of the person's participation in the controlled sale and delivery of the drug.

1.4 ADMISSIBILITY OF EVIDENCE

In contrast the principle and scope of s.27 Evidence Act 1950, is an exception to the law of confession as contained in s.24,25 and 26 of the Act. Under this section a statement made by a person while in the custody of the police, whether it amounts to a confession or not, is admissible provided that the conditions prescribed in the section are strictly complied with. The rationale of the section is that it renders a self-incriminatory statement admissible if such statement can properly be regarded as information relating distinctly to a fact thereby discovered. The proper use of this section is the celebrated case of *Pulukurri Kottaya & Ors v Emperor*³⁰

²⁹ [1987] 2 MLJ 336

³⁰ [1947] AIR PC 67

Section 27 of the Evidence Act 1950, enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to and thereupon so much of the information as relates distinctly to the act thereby discovered may be proved.

This section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence, but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally, the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused.

However, section 27 appears to be discriminatory in nature, on the grounds that the law is different for a person in police custody and the person outside the police custody. Thus it may be argued that section 27 is unconstitutional. For example A and B committed the murder of C and they concealed their knives at a specified place. One is arrested and gives information to the police of the whereabouts of the murder weapon. The other is not arrested but he also gives information by telephone to the police of the whereabouts of the murder weapon. As a result of both information, the police recovered the murder weapon. Later the second accused is also arrested. Assume the case totally rests on circumstantial evidence. The legal position

will be that the information leading to the discovery can be proved against one accused, but the same cannot be proved against the other accused, because he was not in police custody at the time the information was given. Thus there will seem to be a discrimination, which will appear to violate article 8(1) of the Federal Constitution.

Section 136 of the Evidence Act 1950, emphasizes the rule that the question of admissibility of evidence is a question of law and it is to be determined by the judge. It is a cardinal principal under our Act that party to a case is only entitled to give evidence of only those facts which are declared to be relevant under the Act. It is the duty of the judge to admit all relevant evidence and reject all irrelevant evidence.

Section 5 of the Evidence Act 1950, declares that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as declared to be relevant and of no others. It follows from this that a party to a suit or proceeding is entitled to give evidence of only facts which are declared relevant under the provisions of the Evidence Act 1950. The judge is empowered to allow only such evidence to be given as is, in his opinion relevant and admissible and in order to ascertain the relevancy of the evidence which a party proposes to give, the judge may ask the party proposing to give evidence, in what manner the alleged fact, if proved, would be relevant, and he may then decide as to its admissibility.

A matter of critical importance is whether this power can be exercised by the court before a proposed witness starts to give evidence. In my opinion, the language employed in the subsection clearly contemplates the exercise of the power at that stage as it empowers the court to inquire from a party, in

what manner the alleged fact, if proved, would be relevant. When a party proposes to give evidence of any fact and to admit the evidence only if it finds it to be relevant. The word proposes means the court can exercise the power given by the subsection when a party wishes to call a witness, that is to say, before a proposed witness begins to give evidence.

In *Goi Ching Ang v PP*³¹, Federal Court re-instated section 27 of the Evidence Act 1950 as an independent provision. Chong Siew Fai CJ (Sabah and Sarawak), said; 'It will thus be seen from the judicial pronouncements that the independence and distinctiveness of section 27 of the Evidence Act 1950 and its being regarded as an exception to section 24 of the said Act. Having made the ruling the Federal Court excluded the section 27 statement in that case in the exercise of its discretion by reason of it having involuntarily obtained. The rationale for the exclusion, as explained by Chong Siew Fai CJ is that, there is a vested discretion in a trial judge to exclude evidence which is prejudicial to an accused even though the said evidence may be 'technically admissible'. Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. The court should ensure that the standards of propriety in obtaining section 27 information are scrupulously followed in the police station. Whereas Shankar J (as he then was) in *PP v Jamali bin Adnan*³² is in full agreement with the authority that section 27 must be strictly construed. That is to say that all concerned must be on guard to ensure that only so much of the information

³¹ [1999] 1 MLJ 507

³² [1985] 2 MLJ 392, 401 (HC)

supplied by the accused as distinctly relates to the discovery of the fact should be admitted. An intolerable burden is put upon defence counsel who cannot cross-examine to elicit other statements made in the course of investigation which may or may not help to cast doubt on what might actually have been said. It is therefore all the imperative that in fairness to the accused, the greatest care is exercised in excluding doubtful material under section 27 and only admitting such material as is very clearly shown to fall within the purview of the section.

However, the principal issue, then, is whether a defence of entrapment ought to be provided in the criminal code. We have noted that a defence would not be ineffective in preventing entrapment, but general defences are usually justified in terms of the defendant's culpability or responsibility. The real issue is whether someone who was entrapped into committing an offence deserves the stigma of a criminal conviction. Of course the resolution of this question will depend on the balancing of many considerations, such as defendants are sometimes induced by fellow- criminals to commit crimes requires careful examination. Does it make any difference if the defendant was persuaded to commit the crime by a police officer or agent provocateur, rather than by someone else? It could be said to make little difference to his culpability, for in either case he shows himself to be open to suggestions of lawbreaking. But it may make a crucial difference to whether the offence occurs at all.

In *PP v Dato' Seri Anwar bin Ibrahim*³³, Augustine Paul J. was of the view that a judge is empowered to allow only such evidence to be given as is, in his opinion, relevant and admissible. A party therefore does not have an

³³ (N0 3) [1999] 2 MLJ 1

automatic right to call a person as a witness. The court has the power and is duty bound to inquire into the relevancy of a proposed witness before he gives evidence. The object is to ensure that evidence is confined to relevant facts and does not stray beyond the proper limits of the issues at trial. The exclusion of witnesses on these principles is not an infringement of the right of an accused person to defend himself because such rights can be limited by the provisions of any written law. The Act limits the type of evidence that is admissible in a trial including the presentation of a defence. Section 136(1) of the Act is a vehicle for excluding evidence rendered irrelevant by the Act. In the present case the proposed evidence of the defence related to collateral facts and such evidence is generally not admissible.

Section 5 of the Evidence Act 1950, lays down the rule that evidence may be given only of facts in issue and other facts declared by this Act to relevant, and of no others. The section must be read with section 136 (c) of the Evidence Act, 1950

The primary function of the Evidence Act 1950 is to define relevancy and state what relevant facts of which evidence may be given. Secondly, it states what kind of proof is to be given of those relevant facts. Thirdly, it states by whom and in what manner evidence is to be given. At common law it was a cardinal rule that ; (a) evidence must be confined to matters in issue ;(b) hearsay evidence is not admissible ; (c) in all cases only the best evidence must be given ;(d) the burden of proof generally rests on the person who positively asserts the facts. Per Taylor J.. in *Muthusamy v PP*³⁴, it is the duty of the advocate to prepare his case with due regard to the real issues and with

³⁴ [1948] MLJ 57,58 (H.C)

special care for the law of evidence. If he cannot show tersely that a proposed question is relevant he cannot complain if the magistrate promptly excludes it under section 5 which provides that evidence may be given of legally relevant facts and of no others. These words are mandatory.

In English law relevant evidence is in principle admissible irrespective of the fact that it was illegally or improperly obtained and this is emphasized by early cases. In *Jones v Owens*³⁵, a constable unlawfully searched the suspect and found a quantity of young salmon in his pocket. By accepting this evidence as a basis of judgment the suspect was convicted of unlawful fishing. This approach has been employed in subsequent cases. In *Kuruma*³⁶ the judicial committee of the Privy Council held that in order to decide whether evidence is admissible the test to be applied is whether it is relevant to the matter in issue. If the answer is affirmative, it is admissible and the court is not concerned with how it was obtained.

The law traditionally did not see the problem of the admissibility of improperly obtained evidence in terms of principles such as legitimacy, deterrent, or protective, but was instead concerned with the relevance of the evidence. Although all cases mentioned above are concerned with illegal searches, the approach which has been adopted in these cases is applicable to all sort of evidence, subject to certain exemption.

It is advisable that the court ascertain in advance what the prosecution case is and how the defence propose to meet it. From a judicial perspective this statement is pragmatic but it does give rise to issues, beyond the scope of this project paper, as to how a trial should be managed and conducted.

³⁵ [1870] 34 J.P 759

³⁶ [1955] AC 197

However, there are disputes as to the admissibility of evidence are being resolved by *voir dire*s and it may be that the admissibility of improperly obtained evidence by entrapment could be dealt with in this manner. Whether such development is desirable is another matter.

1.5 RATIONALE FOR JUDICIAL INTERVENTION IN ENTRAPMENT CASES.

There are a number of possible rationales in prosecutions precipitated by entrapment. Firstly, it may be said to reduce culpability. The fact that the state has instigated or created the offence bears directly upon an accused's culpability in that the accused did not have the necessary intention or the criminal conduct is able to be excused or justified.

Secondly, it may be argued that the court should intervene because it is unjust or unfair to the individual accused in a broad sense that the state be allowed to prosecute for an offence which, although admittedly committed by the accused, was done so at the state's incitement.

Thirdly, by intervening in individual cases, the court is in effect protecting the rights of all citizens by emphasising that infringement of a citizen's rights will not be ignored. The court acts to protect and vindicate a citizen's right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life.³⁷

Fourthly, as part of the criminal justice system the courts should act to discipline law enforcement officers who act improperly and to set standards for acceptable police conduct. The court's intervention may incidentally deter future illegality or impropriety.

³⁷ *Bunning v Cross* [1978] 141 CLR 54 at 75 per Stephen and Aickin JJ

Fifthly, the courts are seen as guardian of the justice system. For the court to disregard police or government impropriety may be seen by the public as condoning such conduct. The effect may be the loss of respect of the public. If the court is unable to preserve its own dignity by upholding values that society views as essential, there will not be a system which can pride itself on its commitment in justice and truth and which commands the respect of the community it serves.³⁸

1.6 OBJECTIVES OF THE RESEARCH

- 1.6.1 To have a basic idea and understanding on the doctrine of entrapment in a neighboring country that has a different legal system and how far this system helps to provide for the legal protection of the people.
- 1.6.2 To make a comparative study on the application of the doctrine of entrapment applicable in the common countries of England, America, Canada and Australia.
- 1.6.3 To explore the possibility of recognizing a limited defence of entrapment in Malaysia

1.7 METHODOLOGY

1.7.1 Library Research

The research will be carried out in the Law Libraries in Malaysia i.e. at the University of Malaya, University Kebangsaan Malaysia, International Islamic University. These

³⁸ Mack [1988] 44 CCC (3d) 513 at 539 per Lamer J.

law libraries may provide the information and materials on both the common law and civil law countries. Thus data collections are generally based on documents, books and any other written materials.

2. RELEVANCY OF ENTRAPMENT DEFENCE FROM OTHER JURISDICTION.

On the question of entrapment we find considerable variation of approach among legal system. Common law countries differ in the nature of the remedy provided in entrapment cases. In the United States, entrapment is a substantive defence in the federal courts. This is based on a presumption of legislative intent. The judiciary in all common law countries have generally recognized the need for undercover techniques in the investigation and detection of certain criminal activities. The use of spies, informers and infiltrators is seen as an inevitable requirement, and a recognized and legitimate means of detecting crimes. However, the courts approval of such practices is not without qualification. Covert operations cease to be proper and justifiable when the conduct of law enforcement officers actually causes an offence to be committed which otherwise would not be committed at all. Entrapment has been described by one American judge as the conception and planning of an offence by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer.³⁹

There are a number of possible rationales for judicial intervention in prosecutions precipitated by entrapment in its strict sense. The fact that the state has instigated or created the offence bears directly upon an accused's culpability in that the accused did not have the necessary intention or the

³⁹ Sorrel v U.S. 287 US 435 at 454 [1932] per Robert J.

criminal conduct is able to be excused or justified. It is unjust or unfair to the individual accused in a broad sense that the state be allowed to prosecute for an offence which, although admittedly committed by the accused, was done so at the state's incitement. By intervening in individual cases, the court is in effect protecting the rights of all citizens by emphasizing that infringement of a citizens rights will not be ignored. The court should act to discipline law enforcement officers who act improperly and to set standards for acceptable police conduct. In carrying out this role, the court's intervention may incidentally deter future illegality or impropriety. For the court to disregard police or government impropriety may be seen by the public as condoning such conduct. If the court is unable to preserve its own dignity by upholding values that society views as essential.

2.1 ENGLISH POSITION

In current English law the furthest-reaching response to a finding of entrapment is the exclusion of evidence thereby obtained, at the discretion of the court; more broadly, courts have allowed entrapment as a ground for mitigation of sentence. The judicial decisions on the exclusion of evidence and sentence mitigation suggest that a version of the defendant-centred model predominates. When the Human Rights Act 1998 comes into force, English courts will be required to act, in conformity with the European Convention on Human Rights; and to take account of the decisions of the European Court of Human Rights. In *Teixeira de Castro v Portugal*⁴⁰ the European Court held

⁴⁰ [1999] 28 EHRR 101

that there was a breach of the Article 6 right to a fair trial where a person who was not known to the police, and who was approached twice by undercover police officers to supply them with heroin, succumbed to the temptation and obtained heroin to sell to them. The court made it clear that the decision would have been otherwise if there had been evidence to show the defendant was pre-disposed to such conduct. That decision constitute an important marker for the English courts, but it has not yet been fully received into English law and the leading decision is still *Smurthwaite and Gill*⁴¹. This was a conjoined appeal in two cases with similar facts- defendants who let it be known they were looking for someone to kill their respective spouses; undercover officers offered their services; and the officers merely responded so far as was necessary to preserve their cover rather than encouraging or enticing the defendants to go ahead with their plans. In their appeals the defendants argued that, because of the way in which the evidence had been obtained, its admission would have such an adverse effect on the fairness of the proceedings that the court ought to have excluded it. The Court of Appeal articulated six propositions which have sometimes been referred to as 'guidelines', although they hardly warrant that description. In effect, the judgment includes a list of questions which point to relevant distinctions, with little indication of how the distinctions should be drawn in practice. Thus question four asks how active or passive the officer's role was, and question one puts the same point more directly; 'was the officer acting as an agent provocateur in the sense that he was enticing the defendant to commit an

⁴¹ [1994] 1 ALL ER 898

offence he would not otherwise have committed. This formulation, suggests that the English judges adopt a version of the defendant-centred model.

But it is worth reflecting briefly on the question whether the doctrine of entrapment should be applicable only where an official or a person working for an official (as an informant or agent provocateur) is involved in instigating the offence, or whether it should extend to cases of journalists or private citizens who set out to tempt others into lawbreaking. It may be said to be a general principle of criminal law that individuals are treated as autonomous being who are capable of making choices in all but a few extreme situations (eg duress, necessity). If one citizen is approached by another with a plan for a crime, and the two of them agree to commit it and go ahead, the fact that the one was tempted by the other, and would not have committed the crime if the other had not come along, is regarded as irrelevant. The law treats them both as responsible individuals; any one who fails to resist temptation must take the consequences. If there is evidence of exploitation or pressure falling short of duress, mitigation of sentence might be granted. Should it matter, therefore, that those who hold out the temptation are working for a newspaper in order to produce an expose? The answer to this question depends on one's conception of entrapment; an official centred model would not include entrapment by persons not working for law enforcement agencies within its doctrine, whereas a defendant-centred model might extend to such cases if its basis lay purely in the culpability of the defendant. These reflections indicate the importance of examining possible rationales for an entrapment doctrine.

2.1.1 Discretionary exclusion of evidence approach.

Prior to the House of Lords decision in *Sang*⁴², lower courts had excluded evidence obtained as the result of improper conduct by an agent provocateur but had clearly rejected the existence of a defence of entrapment in English law. *Sang*⁴³ is an important and in certain respects very unusual case. There were two extraordinary features of the case from the procedural point of view. The accused was charged with conspiring to utter forged United States banknotes. He pleaded guilty, but before the Crown case was opened, his counsel asked for a trial within the trial to seek to prove that the accused's conduct was the result of action by a police agent provocateur. Counsel then proposed to persuade the judge, in the exercise of his discretion, to prevent the Crown from leading any evidence of the commission of the offence thus incited. The judge ruled that he had no such discretion and refused to hear the evidence of entrapment. The accused then pleaded guilty and unsuccessfully appealed to the Court of Appeal and the House of Lords against the judge's ruling.

The second procedural curiosity was the extraordinary breadth of the question which the Court of Appeal certified as being of general public importance. It was; '*Does a trial judge have a discretion to refuse to allow evidence, being evidence other than evidence of admission, to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?*' This question is much wider than any question arising out of entrapment. To a large extent it makes the speeches of their Lordships purely declaratory and hypothetical in character, though not strictly *obiter dicta*. The

⁴² [1980] AC 402

⁴³ [1980] AC 402

House was enunciating propositions of law on certain assumptions of fact which were never proved, and in answer to a question much wider than any raised by the assumed facts.

It was generally agreed that the foundation of the discretion was the judge's duty to ensure that the accused has a fair trial according to law. However, the fairness in this context meant the trial process itself rather than the method of obtaining evidence. The court adopted a narrow view of the role of the trial judge, asserting that the trial judge is not concerned with how the evidence sought to be adduced by the prosecution has been obtained but with how it is used by the prosecution.

It is submitted that evidence gained by the entrapper would be improperly obtained; other evidence would not be. But whatever may be thought of the reasoning leading to the denial of a discretion to admit evidence obtained by entrapment, there is no doubt the clarity and decisiveness of that unanimous denial. The same cannot be said of those parts of the speeches dealing with the general discretion to exclude improperly obtained evidence.

Two reasons given by Lord Diplock and Viscount Dilhorne in *Sang* for the court's general discretion to exclude evidence. Firstly; a trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. Secondly; save with regard to admission and confessions and generally with regard to evidence obtained from the accused after commission of the offence; he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means.

Since *Sang*, the Police and Criminal Evidence Act 1984 (UK) has been enacted. Section 78(1) of the said Act allows the court to exclude evidence where it appears to the court that its admission would have an adverse effect on the fairness of the proceeding. The court is expressly empowered to consider the circumstances in which the evidence was obtained. Though there were initially some doubts as to whether section 78 can be applied to entrapment evidence, the uncertainty has been cleared up by the case of *R v Smurthwaite and Gill*,⁴⁴ which held that entrapment evidence can be excluded if the method of obtaining evidence would have the adverse effect described in the statute.

In England therefore, the relevance of entrapment is no longer confined to the sentencing stage. In a proper case, entrapment evidence can be excluded. Under section 78, the issue of entrapment is raised prior to the commencement of the trial and decided only after a *voire dire* which will normally involve cross-examination of the undercover agent, the superior who authorized the operation and the defendant who claims to have been pressured into committing an offence which he would otherwise not have committed.

2.1.2 Abuse of process approach.

The English courts have traditionally adopted a very restrictive approach to abuse of process. On this view, judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought.⁴⁵The

⁴⁴ [1994] 1 All ER 898

⁴⁵ DPP v Humphrys [1977] AC 1 at 46 per Salmon LJ

notion of a stay of prosecutions for abuse of process in cases of entrapment was not argued before the House of Lords in *Sang*. Lord Scarman refer to the concept, stating that. 'save in the rare situation, which is not this case, of an abuse of the process of the court, the judge is concerned only with the conduct of the trial. It could be argued that this was not meant to exclude the abuse of process remedy in all cases of entrapment as Lord Scarman was referring to the particular facts of the case where entrapment was not evident. The court was prepared to find the conduct of the police in illegally deporting the accused to bring them within the jurisdiction for prosecution warranted a stay because to allow the prosecutions to continue would be oppressive and an abuse of process. Thus, the path may also be open for intervention in cases of police conduct amounting to entrapment.

However, the submission that the proceedings ought to have been stayed because of entrapment was rejected by the Court of Appeal in the recent case of *Latif and Shahzad*⁴⁶ This decision of the Court of Appeal has since been affirmed by the House of Lords.⁴⁷ In light of the fact that section 78 of PACE has now explicitly recognized to be applicable to entrapment evidence, it is most likely that in all future cases of entrapment, the English courts will rely on the discretion given by section 78 to exclude evidence rather than the inherent power of the court to stay criminal proceedings which amount to an abuse of process.

⁴⁶ [1995] 1 Cr App R 270

⁴⁷ see *R v Latif and Shahzad*

2.2 AMERICAN POSITION

The leading decisions of the Supreme Court of the United States in *Sorrels v US*⁴⁸ is the first in which the US Supreme Court undertook a thorough and sustained consideration of the issue of entrapment. The Supreme Court of the United States indicate three judicial responses to the issue of improper law enforcement conduct; firstly, a subjective defence of entrapment, secondly; a defence of a procedural nature determined by the trial judge that is the objective approach, and thirdly; a due process defence.

2.2.1 Subjective approach

The United States has recognized a defence of entrapment since the decision of *Sorrels v US*. However, that case and subsequent cases⁴⁹ created a division in the court as to the theoretical rationale of the defence and the proper test to be applied. The majority view focuses on the accused's predisposition and is known as the subjective test, whereas the minority view focuses attention on police conduct and is known as the objective test.

To establish entrapment on the majority approach there must be both; government inducement and lack of predisposition. The burden rests with the state to prove that the defendant did in fact have a predisposition to commit the crime charged and the issue of entrapment is one to be decided by the jury.⁵⁰ It could be suggested that, for the defence to succeed the defendant must have had no previous intent to commit the offence charged, doing so only because of official instigation. In *Sharman v US*⁵¹, the defendant had

⁴⁸ US 435 [1932]

⁴⁹ *Sherman v US* 356 US 369 [1958]; *US v Russel* 411 US 423 [1973]

⁵⁰ *US v Russell* US 411 US 423 at 427 [1973]

⁵¹ 356 US 369 [1958]

been convicted of three sales of narcotics. The evidence was that a government informer had asked the defendant to supply him with a source of narcotics, stating that he was not responding to treatment of addiction of narcotics. The defendant was initially reluctant but acquiesced after repeated requests involving appeals to sympathy. It was held that the defence of entrapment was available. There was no evidence that the defendant himself had been in the trade, and when his apartment was searched after his arrest, no narcotics were found.

The subjective approach may, therefore, be summed up as follows. In theory, a defendant is to be found not guilty if he would not have committed the offence in question but for the impugned governmental conduct. But the consequences of applying this test are recognized as being undesirable, and in practice the focus of the inquiry is upon the defendant's general intent to commit crimes of the kind in question.

Critics have pointed out that it is wrong to justify the granting of the entrapment defence to an accused on the ground that he is an otherwise innocent person who only committed the offence because of governmental incitement.⁵² The culpability of the accused is not in issue since the entrapment defence is not available to someone who has been induced into committing an offence by private individuals. If the culpability of the accused is really the issue, the defence of entrapment will be available to the accused irrespective of whether he has been induced into crime by a government agent or a private person.

⁵² *Sorrells v US* 287 at 448

2.2.2 Objective approach

The basis of the entrapment doctrine under the procedural or objective approach is that the need to protect the reputé of the criminal justice system requires that the judiciary should not countenance certain governmental conduct. It follows that the issue of entrapment is one for determination by the trial judge rather than by the jury.⁵³ Additionally it is said that it is only the court which can, through the gradual evolution of explicit standards in precedents, provide significant guidance for official conduct in the future.⁵⁴ Proof of entrapment, at any stage of the proceedings, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty.⁵⁵

According to the minority judges, the relevant question in determining the issue of entrapment is whether the impugned conduct, objectively considered, would have been likely to instigate or create a criminal offence.⁵⁶ *US v Russell*⁵⁷ illustrated the difference between the majority and minority approaches. In this case, the defendant was charged with unlawfully manufacturing and selling methamphetamine. A government undercover agent had made an offer to supply the defendants with phenyl-2-propanone, an essential ingredient in the manufacture of methamphetamine, in return for one-half of the drug produced. The manufacturing process having been completed, the agent was given one-half of the drug. The agent agreed to buy, and the defendant agreed to sell, part of the remainder.

⁵³ *Sorrells v US* 287 US 435,457 [1932] per Roberts J

⁵⁴ *Sherman v US* 356 US 369,385[1958] per Frankfurter J

⁵⁵ *Sorrells v US* 287 US 435,457 [1932] per Roberts J

⁵⁶ *US v Russell* 411 US 425,441 [1973] per Stewart J

⁵⁷ 411 US 423[1973]

The majority of the Supreme Court held, on the basis of the defendant's predisposition, that the defence of entrapment was unavailable to him. The minority, however held that entrapment was established. Douglas J. considered that, the federal agents play a debased role when they become the instigators of the crime, or partners in its commission, or the creative brain behind the illegal scheme. That is what the federal agent did here when he furnished the accused with one of the chemical ingredients needed to manufacture the unlawful drug. It is significant that the government's agent asked that the illegal drug be produced for him, solved his quarry's practical problems with the assurance that he could provide the one essential ingredient that was difficult to obtain, furnished that element as he had promised, and bought the finished product from the respondent, so that the respondent could be prosecuted for producing and selling the very drug for which the agent had asked and for which he had provided the necessary component.

In contrast to the subjective approach, the objective approach to entrapment focuses upon the morality of the impugned governmental action rather than upon the character of the defendant. The defendant will be held to have been entrapped if the governmental involvement in relation to the commission of the offence was such that the need to protect the reputation of the criminal justice system requires that the proceedings should not continue.

Although the objective approach is, in many respects, less problematic than the subjective approach, the exclusive focus on governmental conduct has severe drawbacks. The objective approach would allow a defence of entrapment whenever the police have engaged in conduct which, when objectively considered, was liable to attract a hypothetical law-abiding citizen

into crime. This therefore creates the risk that chronic offenders and the criminally minded may be acquitted if it turns out that the inducements that were offered to them would have tempted the hypothetical law-abiding person. Conversely, the danger of convicting persons who do not deserve punishment is also created. This is true especially in the case of law-abiding citizens who have low resistance to temptation or who suffer from a particular vulnerability such as a mental handicap or an addiction.

2.2.3 Due process.

*United States v Russell*⁵⁸ heralded a new approach to entrapment under the Constitution. The argument that due process principles⁵⁹ had been violated was not accepted on the facts of the case but the application of due process principles in an entrapment case was left open by Rehnquist J who acknowledged that the conduct of law enforcement agents may be so outrageous that due process principles would absolutely bar the government from involving judicial process to obtain a conviction. However, the applicability of due process principles in an entrapment case was considered by the Supreme Court in *Hampton v US*⁶⁰. The defendant in this case was charged with selling heroin to undercover agents. The drug had been actually supplied to the defendant by a government informer. It was argued by the defendant that the case involved a violation of his due process rights. Five of the judges⁶¹ did not reject the application of due process principles in

⁵⁸ 411 US 423 [1973]

⁵⁹ Due process clauses are found in the Fifth and Fourteenth Amendments, 'No person... shall... be deprived of life, liberty or property, without due process of law'

⁶⁰ 425 US 484 [1976]

⁶¹ *ibid* at 493 per Powell and Blackmun JJ; at 498 per Brennan, Stewart and Marshall JJ

entrapment cases notwithstanding the accused's predisposition where there has been outrageous police conduct.

It would appear, then, that the procedural and due process approaches share the same rationale – the protection of the repute of the criminal justice system.

2.3 CANADIAN POSITION

The Supreme Court of Canada has given extensive consideration to the problem of entrapment in the case of *R v Mack*⁶². It was said that proof of entrapment should lead to a judicial stay of the proceedings as an abuse of process. The court emphasized that the central issue in entrapment was not the power of the court to discipline police or prosecution conduct but the avoidance of the improper invocation by the state of the judicial process and its powers. The court's primary concern was the maintenance of the public confidence in the legal and judicial process. Thus, the grant of a stay of prosecution is, in effect, the court saying it cannot condone behavior which transcends what society perceives to be acceptance on the parts of the state.

The court also held that the focus should not be on the accused's state of mind but on the permissible limits of police conduct. First, police are only entitled to provide opportunities for the commission of offences where they have a reasonable suspicion that the targeted individuals are already engaged in criminal conduct or in the course of a *bonafide* investigation. Secondly, even where there are proper circumstances for providing opportunity police

⁶² [1988] 67 CR(3d)1

can go no further than providing an opportunity and cannot induce the commission of an offence.

It is apparent that the Canadian rationale and definition of entrapment are in line with the objective approach favoured by the United States minority. The accused's predisposition, particularly past criminal conduct, will only be relevant as a part of the determination whether the provision of an opportunity to the accused was justifiable.

As for procedural issues, it was held that the question of unlawful involvement by the state in the instigation of criminal conduct is one of law and fact, to be decided by the trial judge. The onus is on the accused to prove that the conduct of the state is an abuse of process because of entrapment. Finally, the appropriate remedy is a stay of proceedings, not an acquittal. The accused has done nothing that entitles him to an acquittal.

However it is noted that section 24(2) of the 1982 Charter of Rights and Freedom⁶³ allows a court to exclude evidence obtained in a manner that infringed or denied any rights or freedom guaranteed by the Charter, where, having regard to all the circumstances, its admission would bring the administration of justice into disrepute but entrapment is not expressly recognized as a breach of an individuals rights or freedom under the Charter.

2.4 AUSTRALIAN POSITION.

In Australia, no state or Territory court has recognized a substantive defence of entrapment.⁶⁴ Nor has the High Court had occasion to deal specifically with the issue of improper police conduct associated with the

⁶³ found in Pt 1 of schedule B to the Canada Act 1982

⁶⁴ Venn-Brown [1991] 1 Qd R 458

commission of an offence. Thus the two primary issue of how entrapment is proved and the legal consequences that flow from entrapment have been left to the state courts.

The Australian states courts agree that evidence of entrapment may lead to mitigation of sentence. The choice lies between discretionary exclusion of illegally or unfairly obtained evidence or a stay of proceedings for abuse of process. However, the High Court has recognised a discretion to exclude admissible evidence which was improperly obtained.⁶⁵ The discretion is not based on a restrictive notion of unfairness to the accused or the rule against self-incrimination as in *Sang*⁶⁶ In fact, the High Court has rejected unfairness as the main justification for the discretionary exclusion. As Stephen and Aickin J point out in *Bunning v Cross*⁶⁷ what is involved is ; ‘ No simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law’.

The rationale for judicial intervention would appear to be a combination of the public interest in vindicating individual rights, deterring police misconduct and maintaining the legitimacy of the judicial system. The discretion serves the object that, those who enforce the law themselves respect it, so that a citizen’s precious right to immunity from arbitrary and unlawful

⁶⁵ Ireland [1970] 126 CLR 321

⁶⁶ [1980] AC 402

⁶⁷ [1978] 141 CLR 54 at 74

intrusion into the daily affairs of private life may remain unimpaired.⁶⁸ The discretion applies to evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts on the part of the authorities.⁶⁹

Both *Bunning v Cross*⁷⁰ and *Ireland*⁷¹ were concerned with the application of the public policy discretion to evidence relating to things done after the commission of the offence. The question arises whether the discretion can also apply to exclude evidence of the commission of the offence itself where the offence has been instigated by improper conduct on the part of law enforcement authorities.

In *Dugan v The Queen*⁷², the New South Wales Court of Appeal held that the *Bunning v Cross* discretion to exclude evidence that had been unlawfully or improperly obtained applied to entrapment evidence. Street CJ stated that it was necessary to repudiate conduct that was unfair or unlawful in the sense of bearing so gross a character as to offend relevant concepts of democratic decency. The Queensland position, as stated by Ryan J in *Venn-Brown*⁷³, is that the recognition of a doctrine of entrapment seems to me to go no further than to recognize that entrapment may be a ground for exercise of a judicial discretion. His Honour excluded the evidence of the agent provocateur in relation to the offences and subsequent statements and acts by the accused.

⁶⁸ [1978] 141 CLR 54 at 75

⁶⁹ *Ireland* [1970] 126 CLR 321 at 334 per Barwick CJ

⁷⁰ [1978] 141 CLR 54

⁷¹ [1970] 126 CLR 321

⁷² [1984] 2 NSWLR 554

⁷³ [1991] 1 Qd R 458 at 469

2.4.1 Abuse of process

In *Vuckov and Romeo*⁷⁴, Cox J advocated the remedy of abuse of process for cases of entrapment. In his Honour's view, where the court is satisfied that the prosecution ought to be stopped on policy grounds, it is preferable that it should avoid the artificiality of evidentiary exclusion and simply make an order that the proceedings be stayed as an abuse of process. The court has power to stay proceedings where the evidence shows that it would be unfair to the defendant or an affront to the public conscience to permit the prosecution to proceed.

2.5 NEW ZEALAND POSITION

The courts in New Zealand rejected a substantive defence of entrapment.⁷⁵ However, the New Zealand courts have adopted a broad approach to their general discretion to exclude evidence. In *Capner*⁷⁶, the Court of Appeal rejected counsel's submission that there was no overriding discretion in a trial judge to exclude probative but unfairly obtained evidence. The exercise of the discretion to exclude unlawfully or unfairly obtained evidence was based upon the inherent jurisdiction of the court to prevent an abuse of process by the avoidance of unfairness.

In *Loughlin*⁷⁷, the Court of Appeal confirmed that the evidence of an agent provocateur was to be considered for exclusion under the fairness discretion. A gradual recognition that public policy also underlies the rationale for intervention. In *Mann*⁷⁸, the court excluded evidence illegally obtained

⁷⁴ [1986] 40 SASR 498

⁷⁵ *Capner* [1975] 1 NZLR 411

⁷⁶ [1975] NZLR 411

⁷⁷ [1982] 1 NZLR 236

⁷⁸ [1911] 1 NZLR 458

from the accused despite the recognition that there was no prejudice or unfairness to the accused in its admission. The Court of Appeal in *Salmond*⁷⁹, supports the approach in *Mann* with respect to the issue of illegally obtained evidence.

In determining whether entrapment has occurred, the New Zealand courts have adopted the English distinction between the use of police agents to present opportunity on the one hand and the encouragement or stimulation of offences which would not otherwise be committed on the other. The court looks to the predisposition of the accused and also whether he or she was a person who was in any event ready and willing to commit the offence or one who would otherwise have been a non-offender in a general sense. This approach is consistent with the subjective approach.

The New Zealand Bill of Rights Act 1990 does not secure to any person the right to be secure from entrapment or unlawful police conduct generally. Section 21 of the Bill of Rights Act 1990(NZ) provides every person with the right to be secure against unreasonable search or seizure, whether of the person, property or correspondence or otherwise. In *Capner*⁸⁰, the Court of Appeal chose to leave open the point whether the judge could discharge an accused under section 347 of the Crimes Act 1961⁸¹. Where, notwithstanding exclusion of the evidence of the police agent, other Crown evidence remained which would support a conviction. In *Hartley*⁸², Woodhouse J, suggested in obiter that the s 347 discretion could be used to prevent anything which savours of abuse of process, such as deliberate

⁷⁹ unreported, Court of Appeal, New Zealand, 23 March 1992
⁸⁰ [1975] 1 NZLR 411 at 414

⁸¹ s 347 of the Crimes Act 1961 allows a judge at any stage of the trial to discharge the accused.

⁸² [1978] 2 NZLR 199

breaches of statutory procedures which were established for the protection of the public. Alternatively, his Honour thought that the court could rely on its inherent jurisdiction to direct that the accused be discharged. In so far as that case concerned improper police conduct before prosecution had commenced, the same principles could be applicable to police conduct amounting to entrapment. However, in *Moeyao v Dept. of Labour*⁸³, the court adopted a broad approach to abuse of process, focusing not on procedure but on the abuse of the criminal jurisdiction itself. The issue is whether the continuation of the prosecution is inconsistent with the recognized purposes of the administration of criminal justice and so constitutes an abuse of the process of the court.

These approaches seem to support the proposition that a prosecution for an offence by improper entrapment could be dealt with by a New Zealand court on a discretionary basis under either s 347 of the Crimes Act 1961 or its inherent jurisdiction to prevent an abuse of process.

⁸³ [1980] 1 NZLR 464

3. SUITABLE ENTRAPMENT DEFENCE FOR MALAYSIA

3.1 Rationales

There are many serious crimes that is difficult or almost impossible to detect and solve without the use of some techniques of proactive policing. In many crimes the police may find it easier, or more cost-effective, or even necessary, to adopt a preplanned trap which give an opportunity for someone to commit the offence is provided. Such activities raise important concerns, in terms of both proper respect for citizens and the accountability and transparency of law enforcement agencies. It is in this context that we tend to examine the circumstances in which, and the reasons why, the claim of entrapment should be recognized. The arguments may be considered as possible rationales.

First, it may be argued that the function of the police is to prevent or detect crime and not to cause it. If the evidence shows that the police instigated or provoked or cause a particular crime, then that should be sufficient to show that the defendant was entrapped. Thus some argue that if the idea for the crime originated with the law enforcement officers, their conduct was wrongful. If, on the other hand, it is clear that the idea originated with the defendant and undercover police simply played along with the scheme in order to obtain evidence of the crime, it cannot be said that the police created the crime. In cases where the police were the instigators, the crime creation argument can hardly be used to suggest that the defendant is not responsible or not culpable, since the normal requirements of culpability

would be fulfilled; the key factor is that the idea for the offence originated with the police.

Secondly, it may be argued that the entrapment claim should be recognized where the involvement of law enforcement officers is active rather than passive. It recognizes that undercover police officers may properly play some role in the planning of an offence, and proposes that the limits should be set by reference to the active/passive distinction. However, it is seen that the distinction does not represent the act and omission, or between action and inaction, but simply expresses the outcome of discussions of what should be acceptable or permissible police conduct in given situations. One sphere in which the passive/active distinction appears unhelpful is that of test-purchases. One would need to say that, so long as the officers did no more than any other customer would do, their conduct was acceptable and might therefore be described as passive. This introduces the idea that if the police act as an ordinary person in the situation would act, they do not go beyond what is permissible. A somewhat similar analysis might be applied to the use of decoys, as for example where a policewoman is dressed as a prostitute would normally dress, in the hope that men will solicit her as if she were a prostitute, or is clothed in the manner of an elderly lady, so that other officers can catch anyone minded to attack and rob the elderly. As a matter of principle, is it objectionable for police officers to dress up so as to test the virtue of citizens? In the case of dressing like an elderly lady there can surely be no objection, an old lady walking along a street is a perfectly normal occurrence, and no one other than an intending criminal would treat it as an invitation to crime. It is

the provision of an opportunity for crime, but hardly one that could be described as out of the ordinary or abnormal.

This attempt to elaborate the active/passive distinction has come down to an examination of the appropriate limits of state action in testing the virtue of citizens. It has been argued that test-purchases should fall within the limits of acceptability so long as the test purchaser behaves in the same way as a normal customer. Test-purchases are easier to justify because the seller is licensed by the state or subject to known legal controls applicable to the business. Where the virtue-testing has no such definite target, it is much more difficult to justify. State officials should certainly not create opportunities for crime that are abnormal and tempting to all citizens. Thus a distinction should be drawn between the policewoman dressed as an old lady which holds out no special inducement to crime and leaving valuables unattended which certainly holds out an open inducement to crime.

Thirdly, it can be argued that the active/passive distinction should not be determinative when the defendant may fairly be said to have been pre-disposed to this type of offence. This concept has been invoked by courts in different countries. The European Court of Human Rights held that the conduct of the undercover officers went beyond what was permissible, in that they twice tried to tempt a person whom they had no grounds for suspecting of previous involvement in drug dealing. The court suggested that it might have been otherwise if it had been established that the defendant was pre-disposed to commit such offences.⁸⁴ Two questions arise; *First*, what is pre-disposition and on what kind of evidence is it proper to base a finding? And *secondly*,

⁸⁴ Teixeira de Castro v Portugal [1999] 28 EHRR 101

why should pre-disposition be relevant to entrapment ? The judicial decisions certainly differ in their notions of pre-disposition. The clearest cases are those in which the defendant is already involved in the criminal activity at the time that it is infiltrated by the police.⁸⁵ Then there are cases in which the police have reasonable grounds for suspecting certain individual is involved in a certain type of offending; this is the requirement laid down by the Supreme Court of Canada, and it is one on which the prosecution could be put to proof.⁸⁶ Next come those cases in which the defendant is clearly ready and willing to become involved in the illegal enterprise, as where the individual responded enthusiastically to the suggestion of an offence.⁸⁷

This leads directly into the next question, about the relevance of pre-disposition to entrapment cases. The above argument points to the conclusion that the term pre-disposition, with its connotation of previous convictions, ought to be abandoned in favor of a term with contemporaneous reference such as presently disposed or ready and willing. But this should only make it permissible for the police to go so far as to provide an opportunity for the offence to be committed. A line should still be drawn between providing the opportunity and encouraging or inducing an individual to commit an offence.

Fourthly, there is the question whether the deterrence of improper conduct by law enforcement official is the reason for having an entrapment doctrine. The American Law Institute, states that the rationale of the doctrine is to deter police behavior that would be shocking to the moral standards of the community.⁸⁸ This rationale led the American Law Institute to propose an

⁸⁵ Ludi v Switzerland [1993] 15 EHRR 173

⁸⁶ Mack [1988] 2 SCR 903

⁸⁷ Latif and Shahzad [1996] 1 WLR 104

⁸⁸ American Law Institute model Penal Code, Text and Commentary, vol.ii, 406

official-centred definition that focuses on the conduct of the officer rather than the response of the actual defendant. It is by no means clear that an entrapment doctrine, with either procedural or substantive consequences in the criminal process, does operate as an effective deterrent to law enforcement officers. However, the entrapment doctrine would not be the only mechanism for preventing unacceptable proactive policing, since there would be internal police guidance backed by internal disciplinary proceedings. Since the operation of deterrence requires the persons who are to be deterred to believe that there is a significant risk of being caught and of being punished for the misconduct, it seems unlikely that a doctrine of entrapment adds greatly to the forces of dissuasion.

Fifthly, it can be argued that the principle of judicial integrity supplies the rationale for the entrapment doctrine. The principle is that the legal process should signify its insistence that those who enforce the law should also obey the law.⁸⁹ Criminal justice must carry moral authority and legitimacy, and those qualities would be undermined if the courts were to countenance behavior that threatens the rule of law.⁹⁰ We have seen that there may be arguments for allowing some proactive police conduct towards such persons, whilst insisting that in all other respects the legal system should refuse to act on cases involving the instigation of crime or the virtue-testing of citizens.

If the principle of judicial integrity is to be sustained, persuasive arguments need to be found on two points. The *first* is that the criminal process, or criminal justice system, has such a unity that a court deciding whether or not a defendant should be convicted be said to have its integrity

⁸⁹ *Bunning v Cross* [1978] 141 CLR 54,75

⁹⁰ *R v Horseferry Road Magistrate Court, ex parte Bennett* [1994] 1 AC 42

compromised if it acts upon evidence resulting from an investigative procedure, well before the trial, that deviated from the rulers. One reason in favor of accepting this point is that the court's judgment is a solemn and public pronouncement, representing the culmination of the criminal process and carrying considerable symbolic significance. This leads to the *second* point; critics would argue that this symbolism can act both ways. If the result of the court's ruling is that the prosecution fails, even though it appears plain that the defendant was factually guilty of the offence, this may put the criminal justice system in a disreputable light so far as some sections of the public are concerned.⁹¹

3.2 ENTRAPMENT DEFENCE

It had been demonstrated that entrapment is of a different dimension from other forms of pre-trial executive misconduct in as much as it has actually caused, in a broad sense, the commission of a crime. In other words, the actual commission of the crime can be regarded as having been a fruit of the impropriety. The judicial response to entrapment should accordingly reflect this fact. What is required is a direct recognition by the law that there is, as we have seen earlier, no justification for conviction of an entrapped defendant, in other words, recognition of a defence of entrapment.

It is now timely to consider what form a defence of entrapment in Malaysia might take. *First*, however, it is necessary to consider whether the availability of the defence of entrapment in a particular case should be determined by the court. I would suggest that it is more appropriate for the

⁹¹ Summit Holdings v PP [1997] 3 SLR 922

availability of the defence of entrapment in a particular case to be determined by the court.

From the above discussion, we can see that in other jurisdictions, the relevance of entrapment has not been restricted to the sentencing stage as a mitigating factor. The question now is which of the many approaches just discussed should the local courts adopt to deal with the issue of entrapment?

The US substantive approach made it clear that proof of entrapment can raise complex issues. Thus, to convict or acquit a defendant on the basis of whether it is satisfied that entrapment has been adequately proved will cause considerable practical problems, leading to the danger that the defence will not be taken seriously and will be abandoned eventually if it is discovered that the practical problems generated by it are insurmountable. However, it is accepted that an entrapped defendant must not be convicted, then surely the fact that it may be difficult in particular instances to determine whether entrapment has occurred should not preclude recognition of a defence of entrapment. In England the power of a court to stay proceedings makes it possible for the law to recognize a defence of entrapment while leaving the issue to be determined by the court. Hence the court will hear evidence on the issue of entrapment, and if it concludes that entrapment is established, order that the proceedings be stayed.

The subjective approach does not seem to provide the answer to a suitable entrapment defence. Although the use of the predisposition test ensures that the defence of entrapment is available only to those who are not criminally inclined, the subjective approach suffers from many weaknesses, the most serious of which is the fact that it turns a blind eye to official

misconduct. Allowing a conviction to be secured in circumstances which suggest that the state has in fact engineered the crime may bring the justice system into disrepute. It may be more prudent for the local courts not to adopt the subjective approach to deal with entrapment.

The objective approach is also not suitable. By basing the availability of the entrapment defence solely upon the objective evaluation of the propriety of police conduct without any consideration of the accused's culpability, it creates the risk that criminally minded individuals may be set free. The due process approach may also be ruled out because it is based on the due process clauses in the Fifth and Fourteenth Amendments of the American Constitution. As between the two remaining options of the abuse of process approach and the discretionary exclusion of evidence approach, it is submitted that the abuse of process approach as developed by the Canadian and Australian Courts is to be preferred.

The discretionary exclusion of evidence approach is undesirable in another aspect. When the discretion is exercised and the incriminating evidence excluded, the accused gets an acquittal. This outcome is unattractive because no matter how overwhelming the level of inducement offered, there is no denying that the accused is to be faulted for failing to restrain himself from committing a crime. The granting of an acquittal to the accused may create the wrong impression that under the circumstances he found himself in, he is to be excused for his failure to exercise restraint and that through out the entire affair, not even a single blame is to be attributed to him.

However, it is important to note that section 136 of the Evidence Act 1950, gives the court the power to ask a party tendering evidence of a

particular fact to show how the fact if proved would be relevant, and the evidence can be admitted only if the court is satisfied that it is relevant. Questions of admissibility of evidence are questions of law and are determinable by the judge. If it is the duty of the judge to admit all relevant evidence, it is no less his duty to exclude all irrelevant evidence. Furthermore, section 5 of the Evidence Act 1950, declares that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as declared to be relevant and of no others. It follows from this that a party to a suit or proceeding is entitled to give evidence of only facts which are declared relevant under the provisions of the Evidence Act 1950. The judge is empowered to allow only such evidence to be given as is, in his opinion, relevant and admissible and in order to ascertain the relevancy of the evidence which a party proposes to give, the judge may ask the party proposing to give evidence, in what manner the alleged fact, if proved, would be relevant, and he may then decide as to its admissibility.⁹²

Therefore, I would suggest that the stay of proceedings remedy under the abuse of process approach is preferred because it shows that, while on the merits, the accused may not deserve an acquittal.

The abuse of process approach as developed by the Canadian and Australian courts is also advocated because it seems to have incorporated all the best features offered by the other approaches. Whereas the subjective approach is concerned only with the culpability of the accused when determining the availability of the entrapment defence and the objective approach is concerned only with the propriety of the police conduct, the abuse

⁹² Sarkar on Evidence 15th Ed.p 2152-2153

of process approach is more robust in its attitude towards entrapment. It requires the judge to evaluate and balance out all the relevant factors in the particular case at hand to determine if the authorities have gone beyond their duty of detecting and prosecuting crime and are instead involved in the manufacture of crime. What these factors are, vary from case to case; they may include not only the accused's culpability but also the propriety of police conduct. Since both of these factors are taken into consideration, the abuse of process approach, unlike the subjective and objective approaches cannot be faulted for turning a blind eye to official misconduct or for setting free the criminally minded. In addition, by not limiting itself to a consideration of rigid and predetermined factors, the abuse of process approach introduces into the law a flexibility which is absolutely essential if the law is to deal effectively with the issue of entrapment.

For the above considerations, it is again suggested that the Malaysian courts adopt the abuse of process approach as applied in Canada and Australia to deal with the issue of entrapment. Under this approach, the elements in entrapment is divided into two limbs, that is -

- i. the authorities provide a person with an opportunity to commit a particular offence without acting on a reasonable suspicion that this person is already engaged in the particular criminal activity, or without such opportunity being offered pursuant to a *bona-fide* inquiry or investigation.
- ii. Although having such a reasonable suspicion or acting in the course of a *bona-fide* inquiry or investigation, the authorities go beyond providing an opportunity and induce the commission of an

offence. To determine whether the authorities have employed means which go beyond the provision of an opportunity to commit crime, the court will consider all factors which are relevant in the particular case. These may include the type of crime being investigated and the availability of other investigative techniques; whether an average person with both the strengths and weaknesses in the position of the accused would be induced into the commission of the crime; the persistence and the number of attempts made by the authorities before the accused agreed to commit the offence; the type of inducement used by the authorities including fraud, deceit, trickery or reward; the timing of the covert operation; whether the authorities became involved in ongoing criminal activities; whether the authorities exploited human characteristics such as friendship or human vulnerabilities such as mental handicap or substance addiction; whether the authorities committed any illegal acts themselves or made any threats, express or implied, to the accused.

With respect to the courts decision , I have selected nine cases which involved the used of agent provocateur or the used of informer in applying this test of entrapment in Malaysian Court of Appeal cases, it is likely that none of the cases would have been decided any differently. However, it is important to note that there are instances where courts followed the decision in *R v Sang*⁹³ in coming to a conclusion according to the consequences of the cases. For instance in *Mohd Ali Jaafar v PP*⁹⁴ The

⁹³ [1980] AC 402

⁹⁴ [1998] 4 MLJ 210,

appellant was found guilty by the sessions court judge for soliciting sexual favours from the complainant at the Immigration Office, Melaka under s 3(a)(ii) of the Prevention of Corruption Act 1961— the first charge — and for attempting to obtain sexual favours from her under s 4(a) of the Act — the second charge. He was convicted on both the charges and sentenced to three years' imprisonment in respect of the first charge and 1½ years' imprisonment in respect of the second charge. The appellant appealed against the convictions and sentences imposed. The appeal was confined to the following grounds: (i) the admissibility of several tape recordings and transcripts adduced at the trial; (ii) that the oral evidence adduced was insufficient to support a conviction even if the tape recordings were admissible; and (iii) whether on the facts of the case there was an attempt to obtain sexual favours with regard to the second charge. It was held that the authenticity of the recordings had not been proved beyond reasonable doubt. Therefore, the tape recordings were wrongly admitted in evidence by the judge. As the conviction of the appellant on the first charge was anchored on the recorded evidence, it could not be sustained. Accordingly, the conviction and sentence on the first charge were quashed. Augustine Paul J. referred to the House of Lords decision in *R v Sang* and said that the use of an agent provocateur in the commission of a crime may operate as a mitigating factor in sentencing an accused person. The part played by the complainant in this case ought to operate as a mitigating factor in favour of the appellant. The sentence on the second charge was therefore reduced to one of six months' imprisonment.

In the applying the entrapment test, the Anti Corruption Agency would have to show that the appellant was predisposed to committing the offence. Such predisposition could be evidenced by a likelihood that he would be presented with an opportunity to commit the offence in the near future, and an intention on the accused's part to commit that offence should the opportunity arise.

It is submitted that the decision in *Sang* should also have been read in its English context by the Court of Criminal Appeal. Two matters, in particular, stand-out. *First*, the Law Lords were definitely influenced in their decision making by their knowledge that entrapment could be taken into consideration as a matter of sentencing. *Secondly*, *Sang* should have been read in the light of official efforts in England to deal with what is perceived as the problem of entrapment. A circular issued by the Home Office to the police provides that 'no member of a police force, and no police informant, should counsel, incite or procure the commission of a crime.'⁹⁵ This circular, which has received judicial approval,⁹⁶ is aimed at making breaches the subject of internal disciplinary proceedings.

Another case which the test of entrapment may be applied is in the case of *Ti Chuee Hiang v PP*⁹⁷ In this case, a team of policemen had planned and organized a trap to arrest a drug dealer. A policeman posed as a heroin buyer, and a meeting with the appellant was arranged through the help of a police informer. According to the prosecution's evidence, negotiations between the appellant and the police for the sale of the heroin,

⁹⁵ The circular is reproduced in the English Law Commission's Report No.83, *Criminal Law Report on Defences of General Application* [1977] p.68

⁹⁶ *R v Mealey and Sheridan* [1974] 60 Cr App. R 59 at p.64

⁹⁷ [1995] 2 MLJ 433

which ended as a concluded deal, was carried out. The appellant was arrested when he was delivering the heroin to the police. The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 for drug trafficking. The appellant's defence that he was an innocent carrier of the heroin, was rejected by the trial judge, who convicted and sentenced him to death. The appellant appealed on the ground that there had been a miscarriage of justice, as the prosecution had failed to either call as a witness, or at least make available to the defence for cross-examination, the informer who had assumed the role of an agent provocateur in this case. On appeal, it was held that the informer in this case had lost the protection from disclosure of identity normally accorded to informers under s 40 of the Act, as his identity was no longer a secret when he assumed the mantle of an agent provocateur by putting the appellant in touch with the police, causing the appellant to be arrested. There was also a serious misdirection by way of non-direction which had occasioned a grave miscarriage of justice in the trial court, as although the counsel for the appellant had criticized the prosecution for failing to call the informer, the judge did not direct his attention to this point at all. The result, therefore, was that the court allowed the appeal, quashed the conviction, set aside the sentence of death and acquitted and discharged the appellant. It is suggested that in this case the test of entrapment can be applied as the police used informer and undercover agent to instigate the accused to commit the offence.

It should be reminded that the focus should not be on the accused's state of mind but on the permissible limits of police conduct. Police are

only entitled to provide opportunities for the commission of offences where they have a reasonable suspicion that the targeted individual are already engaged in criminal conduct or in the course of a *bonafide* investigation. Even where there are proper circumstances for providing opportunity, police can go no further than providing an opportunity and cannot induce the commission of an offence.

In applying the entrapment test the police would have to show that the appellant was predisposed to committing the offence of trafficking in amounts of heroin attracting the death penalty. Such predisposition could be evidenced by a likelihood that he would be presented with an opportunity to commit the offence in the near future, and an intention on the accused's part to commit that offence should the opportunity arise.

In *Namasiyam & Ors v PP*⁹⁸, the Supreme Court held that, a person who not only introduced the accused but was present on more than one occasion including at the time of the accused's arrest was a *particeps criminis* and not an informer whose failure to appear in court may well attract the provision of section 114(g) of the Evidence Act 1950. Therefore the dividing line between a mere informer and a *particeps criminis* is the degree of the person's participation. It is suggested that this distinction can well be done if the entrapment test is applied. In this case, four appellants had been charged under s 39B(1)(c) of the Dangerous Drugs Act 1952 in that in furtherance of the common intention of them all, they did do an act preparatory to trafficking in a dangerous drug, i.e. 1,871.6 grms of heroin and thereby committed an offence punishable under s 39B(2) of the Act

⁹⁸ [1987] 2 MLJ 336

read with s 34 of the Penal Code. The facts showed that the accused were arrested as a result of a trap laid by the police with the assistance of an agent of the Drug Enforcement Administration of the United States and an informer. There were several grounds of appeal raised by each of the appellants. The appeal court judges Salleh Abas LP, Wan Suleiman SCJ, Syed Agil Barakbah SCJ held that, before dealing with the grounds of appeal, we would like to touch on the salient facts of the case as accepted by the trial Judge. This was one of the cases where an officer of the Anti-Dadah Section of the Royal Malaysian Police, Bukit Aman, Kuala Lumpur, Balbir Singh, worked together with an American agent of the Drug Enforcement Administration of the United States, in the person of Raymond James McKinnon. The latter had about twenty-one years experience in anti-narcotic activities and some time in 1981 was posted to Drug Enforcement Administration Kuala Lumpur and had since assisted the Malaysian Police and Customs in this field. He was a professional and claimed to have made four to five hundred arrests in the course of his twenty-one years service. As a result of a meeting between the two who have worked before in *anti-dadah* activities, the agent informed the police of his intended negotiation for the supply of 10 lbs of heroin in Penang. The police requested the agent to keep them informed of future developments on the matter. They met again and at the same time showed the police \$100,000/cash in a briefcase which would be used for the purpose of purchasing the heroin. He also informed the police that the money would be kept in the boot of his car AB 3146 and requested the police to ensure the security of the money during the agent's meeting with

the supplier. According to the agent, prior to that, he met the first appellant through the introduction of an informer. As a result of discussion, the three of them met again and ended with the agent agreeing to buy 10 lbs of heroin at \$16,000 per pound, the supply of which was to be negotiated by the first appellant. It was held that in the case of the agent it was clear from the facts and surrounding circumstances that he was an agent provocateur. As such, he is protected by the provision of s 40A(1) and (2) of the Act in that he is not presumed to be unworthy of credit and his evidence relating to any attempt to abet or abetment of the offence if done for the purpose of securing evidence against an accused person, is admissible. Similarly, any statement made to him by an accused person shall be admissible at the trial. There is therefore no requirement for the evidence of an agent provocateur to be corroborated. That is not the case however with the informer, Francis. Evidence revealed that he took an active part from the beginning till the end of the episode by introducing the agent to the first and second appellants, at times acting as the agent's spokesman, was present in all the meetings between the agent and the appellants and lastly participated in the trap set up by the agent and the police leading to the arrests of the appellants and the seizure of the drugs. It appeared that his involvement in assisting the agent in trapping the appellant was known to the police who throughout the trial called him an informer. In the circumstances of the case, he is not and cannot be termed as an informer within the meaning of s 40 of the Act and cannot claim any protection from disclosure of his name and address or any matter which might lead to his discovery under the Act. On the contrary, no disclosure

was necessary because he was known to the appellants who appeared to trust him. Clearly, Francis was a *particeps criminis*, an accomplice in the true sense of the word. It was submitted that the absence of Francis at the trial would raise the presumption under s 114(g) of the Evidence Act 1950

The police would have to show that the appellant was predisposed to committing the offence of trafficking in amounts of drugs attracting the death penalty. Such predisposition could be evidenced by a likelihood that he would be presented with an opportunity to commit the offence in the near future, and an intention on the accused's part to commit that offence should the opportunity arise.

If the test of entrapment is used in this case, it may probably fall under the second limb of the abuse of process approach, that is although the police having reasonable suspicion, the authorities go beyond providing an opportunity and induce the commission of an offence. It is a general rule, in relation to informers, he will not be asked, and he will not be allowed to disclose, the channels through which information has been obtained by the law enforcement. However, there is an exception to the general rule, namely, where disclosure is necessary to avoid miscarriage of justice, or where the evidence is necessary to show the innocence of the accused.

In *PP v Chong Chee Kin & Anor*⁹⁹, both accused were charged with the offence of jointly and in furtherance of a common intention trafficking in 644g of cannabis under s 39B of the Dangerous Drugs Act 1952. They were arrested in an operation staged by the police which involved the use of an informer and three agent provocateurs to buy the drug from the

⁹⁹ [1995] 2 MLJ 679

accused. The informer introduced Det Sgt Major Saidin to the first accused after two earlier attempts had failed. At that meeting the first accused showed Saidin samples of the drug and a discussion on the terms of the proposed purchase took place. The following day the informer and Saidin again met the first accused where, the first accused made a counter-proposal on the price of the drug. Subsequent meetings took place between Saidin and the first accused without the presence of the informer where at the arrangements for the purchase of the drug were finalized. On the day of the proposed delivery of the drug, Saidin introduced the other two agent provocateurs ('Zorki' and 'Shakri') to the first accused. That night at the place arranged for the delivery, the first accused took a bag from the second accused and from it the first accused brought out a plastic bag and showed its contents to Zorki. Zorki then arrested the first accused while Shakri together with some other policemen arrested the second accused. The plastic bag was found to contain plant materials which were later analysed by the government chemist to be cannabis. At the trial, counsel for the accused submitted that the informer could not claim protection under s 40(1) of the Act as he was in fact an agent provocateur and the prosecution's failure to call him as a witness should attract an adverse inference under s 114(g) of the Evidence Act 1950. The learned Kang Hwee Gee JC states that the term 'informer' is not defined anywhere in the Act. In ordinary meaning, the word is used to describe a person who gives information. A police informer is therefore a person who provides information to the police with regard to the commission of a crime.

While a police informer is not an agent provocateur merely because he

has accompanied a police agent and introduced him to a drug trafficker, if the informer is present on more than one occasion including the occasion of an accused's arrest, he is a *particeps criminis* and not an informer. In the present case, the informer had to be present twice with Saidin before the first accused agreed to supply the drug. It could not be objectively discounted that the sale of the drug would not have been brought about without the informer having been involved in the negotiation. Besides, the informer had to make three appointments before Saidin met the first accused. The informer was thus a *particeps criminis* and an agent provocateur who could not be accorded the protection given to an informer under s 40(1) Dangerous Drugs Act 1952 or under the normal privilege accorded to such a person under the law. As such, an adverse inference under s 114(g) of the Evidence 1950 Act ought to be drawn against the prosecution for its failure to call the informer as a witness. The prosecution's failure to call the informer as a witness rendered the whole of its evidence highly suspicious and at the close of the prosecution case, it fell short of proof beyond reasonable doubt. The presumption of trafficking arising from the possession and knowledge of the drug by the accused was rebutted by the superior probability, which could be legitimately drawn from the adverse inference, that the accused could have been victims of a frame up.

It is necessary for the police to show that the appellant was predisposed to committing the offence of trafficking in amounts of drugs attracting the death penalty. Such predisposition could be evidenced by a likelihood that he would be presented with an opportunity to commit the offence in the

near future, and an intention on the accused's part to commit that offence should the opportunity arise.

In *PP v Ang Soon Huat*¹⁰⁰ The evidence adduced by the prosecution proves beyond any doubt that the accused did traffic in a quantity of diamorphine on the day and time in question. The accused was arrested near his car and a plastic packet was found in the glove compartment thereof as a result of a trap laid for him by the officers of the Central Narcotics Bureau(CNB). The entrapment was made possible when the accused tried to reach one Lim Lye Huat through Lim's pager when Lim was in the custody of the CNB officers after his arrest for trafficking, possession and consumption of a similar drug. Lim was instructed by a CNB officer to arrange for the officer to buy about a 1/4 pound of heroin from the accused. The arrangement was successfully made and it led to the arrest of the accused with a plastic bag containing a pinkish granular substance. In this case the defence counsel did not raise the issue of entrapment. But to my view the test for entrapment can be applied in this case as the enforcement officers used another accused to set the trap in which a presumption can be made that there may exist some sort of negotiation between the CNB officer and the first accused.

The CNB would have to show that the appellant was predisposed to committing the offence of trafficking in amounts of diamorphine attracting the death penalty. Such predisposition could be evidenced by a likelihood that he would be presented with an opportunity to commit the offence in

¹⁰⁰ [1991] 1 MLJ 1

the near future, and an intention on the accused's part to commit that offence.

In *How Poh Sun v PP*¹⁰¹ the appellant was convicted on a charge of unauthorized trafficking in of not less than 33.71g of diamorphine and sentenced to death. The prosecution's evidence, which was largely unchallenged, was that narcotics officers were told by one Goh Yong Siong, whom they had arrested the day before the appellant's arrest, that his boss was the appellant. Goh then arranged for the appellant to bring the drugs to the Ang Mo Kio Industrial Park canteen where Goh would meet the appellant. The appellant was arrested by narcotics officers when he arrived at the canteen. On appeal, the appellant's counsel relied indirectly on a submission of 'agent provocateur', that the role played by Goh as an agent provocateur should be relevant in convicting and sentencing the appellant. However in this case the court held that the defences of agent provocateur and entrapment did not exist in English law would also reflect the position in Singapore. It was not the province of the court to consider whether the Central Narcotics Board (CNB) should have proceeded about its work in one way or the other. The court could only be concerned with the evidence before it. On the evidence before it in the present case, a conviction on any other charge would not have been appropriate.

However had a defence of entrapment been entertained in this case, it might be a different finding. Bearing in mind the difficulty of detection and proof of drug offences, a resort by the CNB to entrapping the appellant was acceptable, provided the particular entrapment arrangement satisfied

¹⁰¹ [1991] 3 MLJ 216

certain conditions. The CNB would have to show that the appellant was predisposed to committing the offence of trafficking in amounts of diamorphine attracting the death penalty. Such predisposition could be evidenced by a likelihood that he would be presented with an opportunity to commit the offence in the near future, and an intention on the accused's part to commit that offence should the opportunity arise. The appellant's predisposition towards committing the crime charged would have been readily made out on the facts. The CNB would show that the appellant had a large and ready supply of diamorphine at his disposal and was able to deliver sizable quantities of the drug at short notice. Indeed, this was exactly what had occurred, with the appellant arriving at the agreed meeting place with 10 packets of diamorphine within two hours of Goh's phone request.

Besides proof of the appellants predisposition, the CNB would have to show that the simulation it employed emulated the type of opportunity or inducement which the appellant could have experienced in normal life. The decision of the Court of Criminal Appeal in *How Poh Sun* was disappointing in its uncritical approval of the English case of *Sang* without any independent analysis of the defence of entrapment. Such an analysis would have revealed that the defence should be judicially recognized for being integrally concerned with the criminal liability of the accused, a subject which goes to the heart of any criminal proceedings.

Perhaps the real reason for the Court of Criminal Appeal's refusal to recognize a defence of entrapment was that no such defence is provided for under the Penal Code. This is, however not evident from the judgment

which mentioned nothing whatsoever about the exhaustive nature of the Code. Should the absence of a provision on entrapment in the Penal Code pose an obstacle to the recognition of such a defence, speedy legislative intervention is advocated to fill the gap.

In *Lee Lee Chong v PP*¹⁰² the appellant was charged with an offence under s 39B of the Dangerous Drugs Act 1952 but was convicted on a lesser charge of possession under s 12(2) read with s 39A(2)(a) of the Act. The accused appealed against his conviction and at the same time, there was a cross-appeal by the respondent against the conviction of the accused on the lesser charge. The court had to decide whether or not the police informer was in fact an agent provocateur, in which if he is, failure on the part of the prosecution to call or make him available as a witness will give rise to an adverse inference against them. It was held that whether a person is an informer or an agent provocateur depends upon the role played by that person in all the circumstances of the particular case. On the facts, the evidence showed that the informer was not merely present at the first meeting but took an active part in the negotiations at that meeting. Therefore the informer was an agent provocateur and had lost the protection afforded by s 40 of the Act.

The prosecution would have to show that the appellant was predisposed to committing the offence of trafficking in amounts of drugs attracting the death penalty. Such predisposition could be evidenced by a likelihood that he would be presented with an opportunity to commit the

¹⁰² [1998] 4 MLJ 697

offence in the near future, and an intention on the accused's part to commit that offence should the opportunity arise.

In *Tee Thian See v PP*¹⁰³, a special agent in the US Secret Service, was investigating into the source in Malaysia in relation to 28 counterfeit credit cards found in the US. He was informed by the New York City Police that a Malaysian residing in New York, had some counterfeit credit cards in his possession. The American agent later became friendly with the informer. According to the informer, the appellant had left the cards in his apartment when he visited him as a guest. The American agent and the informer, and the police in Malaysia then arranged to trap the accused. The informer telephoned the accused in Malaysia and ordered 30 gold cards for the price of US\$1000 each. The informer came to Kuala Lumpur to set the meeting. The accused arrived at the hotel which the informer was staying in a car. The informer got into the car and the accused drove off. According to the informer, the accused handed an envelope containing 28 credit cards and slips of paper with numbers, the types of credit card, and signatures. When the car arrived in front of the hotel, the informer handed the envelope back to the accused, and alighted from the car in order to get the money to pay for the cards. A team of Malaysian police personnel had been monitoring the movements of the accused since he arrived at the hotel until the informer alighted from the car. The police intercepted the accused's car and arrested the accused. The police discovered an envelope containing 28 cards under the seat next to the driver's seat. The accused was charged with possession of counterfeit credit cards under s 467 of the Penal Code

¹⁰³ [1996] 3 MLJ 209

(FMS Cap 45). The sessions court judge convicted the accused and sentenced him to four years' imprisonment and a fine of RM20,000 in default eight months' imprisonment. The accused appealed. Counsel for the accused had attacked the informer and the American agent as being unworthy of credit as their perverse conspiracy to get someone to commit a crime led the accused to do what he did. He referred to them as accomplices who needed corroboration for their evidence. It was also argued that it was necessary for the prosecution to prove that the accused had himself intended to use the counterfeit credit cards for forgery. His argument was that the prosecution had not proved that the accused was going to use them for himself to commit forgery, but in fact had showed that he intended to sell the cards to the informer. It was held that the American agent and the informer were agent provocateur as they had, together with the Malaysian Police, laid a trap for the accused. The court held that the evidence of an agent provocateur is not that of an accomplice and does not require corroboration. The defence counsel in this case did not raise the defence of entrapment. But to my view the test for entrapment can be applied. It may be enough, in a particular case, to save him from prosecution or to result in mitigation of sentence, if a prosecution is lodged he cannot be rescued for guilt if prosecution is undertaken.¹⁰⁴

It can be said that where a person of good character is entrapped, and there is no reason to believe that the offence would have been committed but for the instigation of the officers, or agents, then the entrapment must be quite substantial mitigation. As Augustine Paul J said in *Mohd Ali*

¹⁰⁴ per Laskin JA in *R v Omerod* [1969] 4 ccc 3 (Ont. CA)

*Jaafar v PP*¹⁰⁵, the use of an agent provocateur in the commission of a crime may operate as a mitigating factor in sentencing an accused person.

The police would have to show that the appellant was predisposed to committing the offence of selling counterfeit credit cards. Such predisposition could be evidenced by a likelihood that he would be presented with an opportunity to commit the offence in the near future, and an intention on the accused's part to commit that offence should the opportunity arise.

In *PP v Amir Mahmood & Ors*¹⁰⁶ the first accused was jointly charged with two others for trafficking 1,835.7g of dangerous drugs namely, cannabis, in contravention of s 39B(1) of the Dangerous Drugs Act 1952 and an offence punishable under s 39B(2) of the Act. The following issues arose at the trial namely, the credibility of the prosecution's witness, an agent provocateur who failed on various occasions to give an accurate account of the whole episode, the agent provocateur's uncorroborated evidence. It was held that, it is a rule that if a witness had lied on one or two points, it did not necessarily follow that his whole evidence should be rejected. But it is the duty of the court to sieve the evidence and to ascertain what are the parts of evidence tending to incriminate the accused which could be accepted. The lapses in memory experienced by the prosecution's witness did not affect his credibility as there was sufficient damning and incriminating evidence against all the three accused persons. It was also held that an agent provocateur is entitled to protection under section 40A(1) and (2) of the Dangerous Drugs Act 1952. There was no

¹⁰⁵ [1998] 4 MLJ 210

¹⁰⁶ [1996] 5 MLJ 159

requirement for the evidence of an agent provocateur to be corroborated. The agent provocateur cannot be presumed to be a witness unworthy of credit and his evidence relating to any attempt to abet or abetment of the commission of an offence if done for the purpose of securing evidence against the three accused persons must be regarded as admissible .

It is necessary to show that the appellant was predisposed to committing the offence of trafficking in amounts of drugs attracting the death penalty. Such predisposition could be evidenced by a likelihood that he would be presented with an opportunity to commit the offence in the near future, and an intention on the accused's part to commit that offence should the opportunity arise.

It is submitted that every court had an inherent power and duty to prevent abuse of its process. Entrapment is an instance where such abuse may occur. The overall consideration was whether the conduct of the police by using agent provocateur was so seriously improper as to bring the administration of justice into disrepute.

In seeking to identify the limits that should be placed on police conduct or agent provocateur, it was a useful guide to consider as one of the relevant factors whether the police did present the defendant with an unexceptional opportunity to commit crime. The yardstick for this test was whether the conduct of the police was no more than might have been expected from others in the circumstances. If no more than this had been done, the police had not incited or instigated the offence. Bearing in mind that the number and variety of situations which may fall under the umbrella of entrapment, it may well be impossible to set any rules. None

the less, this an area of law where clarity and certainty are of prime importance, particularly in allowing the police a definite basis upon which to plan and mount operations.

I submitted that since other appeal cases are unlikely to be decided any differently under the test, this conception of entrapment should adequately put to rest the fear of the Malaysian Court of Appeal that the effectiveness of our law enforcement agencies will be sacrificed if a defence of entrapment is recognised. Foremost, when this test of entrapment was developed by the Canadian and Australian Supreme Court, what the courts had in mind was that the law enforcement agencies must not be impeded in their work. This is obvious from the courts many references to the need to give the state sufficient room to develop techniques which assist it in its fight against crime.

Under this test of entrapment, the authorities are still free to provide opportunities for the commission of offences. The only difference is that they must now provide a justification for targeting the accused, either by showing that they had a reasonable suspicion that the accused in question was already engaged in criminal suspicion that the accused in question was already engaged in criminal activity, or, in the case of an accused whose identity was not known beforehand to the authorities, that the opportunity was offered pursuant to a *bonafide* investigation being carried out in an area where they reasonably suspected certain criminal activity to be taking place.

It is suggested that this way of defining entrapment will ensure that the public at large is protected from indiscriminate virtue-testing by the law

enforcement agencies. The insistence on the authorities having a reasonable suspicion before they are justified in providing opportunities for crime will also ensure that reformed convicts are given a chance to start life a fresh in society without being subjected to endless testing of their virtues, since the presence of prior criminal convictions alone are insufficient to amount to reasonable suspicion. Under this approach to entrapment, the burden is on the prosecution to prove beyond reasonable doubt that the accused committed all the essential elements of the offence.

3.3 ELEMENTS OF DEFENCE – A SUGGESTION

3.3.1 Predisposition

It is clear that this point has been appreciated by the US Supreme Court. We have seen that the focus of an inquiry into whether the defence of entrapment is available in a particular case is upon the existence or otherwise of predisposition to commit crimes of the type in question should the opportunity to do so arise. If the prosecution proves that the defendant had been predisposed prior to the governmental intervention, then it cannot be said that he has acted in consequence on the intervention. However, the shortcoming of the defence lies, in its failure to address properly the issue of how predisposition should be proved. General intent should not be confused with mere desire. Possession of a desire to commit crime does not necessarily imply the existence of a general intent to commit it should the opportunity to do so arise.¹⁰⁷ Obviously it is necessary in a given case for all relevant factors

¹⁰⁷ per Lord Hailsham in *R v Hyam* [1975] AC 55

to be considered and weighed up; that is to say, the response of the defendant to the alleged inducement must be weighed against other relevant factors.

3.3.2 Unacceptable conduct.

An important question arises as to whether any official conduct is capable of constituting entrapment so long as it induces the commission of an offence by a member of the public who has no pre-existing general intent to commit offences of the type whenever the occasion arises. It is stated that, the conduct alleged to constitute entrapment must first be shown to be objectively unacceptable. The determination of this issue should be made in isolation of the predisposition issue. Thus, what has to be determined is whether, taking into consideration the crime being investigated, the impugned conduct was objectively reasonable.

3.3.3 Onus of proof

In respect of onus of proof the defence should be similar to the substantive common law defences in English Criminal Law, with the exception of insanity. Thus, the defendant must first adduce sufficient evidence to put the defence of entrapment in issue, that is, he carries the evidential burden, unless such evidence has already emerged in the course of the prosecution case. It should be sufficient for the defendant to discharge this burden by demonstrating, for example, that the government had a meaningful presence, directly or indirectly in the alleged criminal enterprise or affair which could reasonably have influenced defendant's conduct to commit the offences charged against him. The burden then falls on the prosecution to

negate this evidence, which it must do beyond reasonable doubt. In other words, the prosecution bears the legal burden of proof.

3.3.4 Inducer.

It should also be noted that the concept of official or governmental conduct should extend to all conduct which is sufficiently linked to the executive, in particular, the conduct of lay persons who were co-operating with the state, or who were acting either in expectation of or in the hope for a reward or immunity from prosecution. It is stated that if a person does more than merely providing information to the police by going a step further by introducing the offender to the police with a view to induce its commission it would be inappropriate and a contradiction in terms to call him an informer.¹⁰⁸ A person who not only introduced the accused but was present on more than one occasion including at the time of the accused's arrest, was a *particeps criminis* and not an informer whose failure to appear in court may will attract the provision of section 114(g) of the Evidence Act 1950. Therefore the dividing line between a mere informer and a *particeps criminis* is the degree of the person's participation in the offence.¹⁰⁹

3.3.5 Disclosure

Another issue which should not be overlooked in the context of entrapment relates to whether, and to what extent, the prosecution should disclose relevant aspects of state involvement in relation to the offence. Disclosure of state involvement is relevant in a number of other respects. It

¹⁰⁸ PP v Chong Chee Kin & Anor [1995] 2 MLJ 679

¹⁰⁹ Namasiyam & Ors v PP [1987] 2 MLJ 336

may, for example, inform the defendant that he had been in fact entrapped into committing the offence. Since there would not have been an entrapment if the commission had been incited by someone unassociated with the executive, knowledge that the inciter was, for instance, a police is crucial.

The problem of disclosure may also arise where the fact of state involvement is known but the identity of the individual concerned usually a lay informer is not. However, on the grounds of public interest, police and other investigating officers cannot be asked to disclose the sources of their information. This rule of exclusion is, however, subject to a duty to admit in order to avoid a miscarriage of justice. What was known as the informer's privilege was in reality an acknowledgement that by the preservation of their anonymity, members of the public would be encouraged to perform their obligation of communicating any knowledge of the commission of crimes to law enforcement officials. Accordingly there must be limitations on the applicability of the privilege, such as where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defence of an accused, or is essential to a fair determination of a cause, and in these situations the trial court may require disclosure.

4. CONCLUSION

In overseas jurisdictions there has been a gradual recognition by the courts that they have both the power and the duty to address pre-trial executive misconduct, including entrapment. In New Zealand the courts have primarily utilized a broad application of the fairness discretion to exclude evidence of the agent provocateur. In England there have been some inroads into the traditional view that a judge has no concern in matters outside the forensic process, but the strong statements of the members of the House of Lords in *Sang*¹¹⁰ present a hurdle for those arguing that the judiciary will respond to entrapment by granting a stay for abuse of process. Whereas Canadian courts have strongly confirmed that their obligation to maintain public confidence extends to granting a stay for entrapment that amounts to an abuse of process. Meanwhile in the United States the courts have for a substantial time recognised that entrapment warrants judicial intervention and have adopted a substantive defence of a substantive nature to deal with entrapment. The Australian courts, has a recognition that the court has an overriding duty to ensure the due administration of justice and this involves not only ensuring fairness to the accused in the trial process but ensuring fairness to the community and maintenance of the community's respect and confidence.

In this project paper, it is argued that the Malaysian courts treatment of entrapment evidence as a mere mitigating factor is grossly inadequate and that the various reasons given in support of the rejection of the defence of entrapment are highly unconvincing. It is also the suggestion of this project paper that there is a need for the local courts to give recognition to some form

¹¹⁰ [1980] AC 402

of entrapment defence and to this end, the abuse of process approach as applied in the Canadian and Australian courts is suggested as the best form of entrapment defence to adopt in Malaysia. Considering the fact in *Sang*, the House of Lords decision which the courts of appeal relied upon to support its rejection of the entrapment defence, has already been legislatively overruled in England by section 78 of the Police and Criminal Evidence Act 1984(UK), the time is long overdue for the court of appeal to reconsider its stand on entrapment.

The recent judgment of the European Court in *R v Loosely*¹¹¹ will have a decisive effect on English jurisprudence concerning entrapment. In this case, the court held that the officers had incited and procured this defendant to commit an offence he would not otherwise have committed. The point of law to the House of Lords is that every court had an inherent power and duty to prevent abuse of its process.

Furtherance, with the establishment of the Federal Court as the final appellate court in Malaysia, the Federal Court is no longer bound by the doctrine of *stare decisis* and is free to depart not only from its own prior decisions, but also from English decisions. It is therefore sincerely hoped that there should be a defence of entrapment and that it is possible to devise a workable definition to cover cases where individual is subjected to an unjustified crime-resistance test. This way of looking at entrapment is perhaps disturbing because it destroys the fond illusion that our system of criminal justice inflicts punishment for causing harm or danger and not merely for being someone with a criminal propensity. To dispel that illusion, however, is

¹¹¹ Attorney General's Reference (N0.3 of 2000)(2001) UKHL 53

to see an argument for providing defence against the over-zealous manufacture of criminal liability by the state.

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