

CANADA / JUDGMENT

R. v. Perri

2024 BCCA 18

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 18 R. v. Perri

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Perri,

2024 BCCA 18

Date: 20240123

Docket: CA48741

Between:

Rex

Respondent

And

Nicholas Benjamin Michael Perri

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Justice Griffin

The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated
August 25, 2022 (R. v. Perri, 2022 BCSC 1665, Victoria Docket 179819-2).

Counsel for the Appellant:

M. Iyengar

Counsel for the Respondent:

C. Greenwood

Place and Date of Hearing:

Vancouver, British Columbia

December 13, 2023

Place and Date of Judgment:

Vancouver, British Columbia

January 23, 2024

Written Reasons by:

The Honourable Madam Justice Horsman

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Justice Griffin

Summary:

The appellant appeals his conviction for possession for the purpose of trafficking on the ground that the judge erred in failing to stay the conviction on the basis of entrapment. An undercover officer arranged to buy cocaine from the appellant over the phone. The entrapment issue turned on the meaning to be given the officer's opening statement "Hey, can you help me out, I'm looking for 80". The judge held that this statement did not offer an opportunity to the appellant to commit an offence, and he was not entrapped. Held: Appeal dismissed. The impugned findings of the judge are factual findings that were open to her on the record. The judge made no error in her application of the law to the facts of this case.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Overview

- [1] The appellant was found guilty of the possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. Following his conviction, the appellant applied for a stay of proceedings on the basis that he was entrapped by the police. The trial judge found there was no entrapment, and she dismissed the stay application. The appellant now appeals from his conviction on the ground that the judge erred in not granting a stay.

- [2] The appellant alleges that the trial judge committed legal errors in her application of the framework for opportunity-based entrapment in "dial-a-dope" cases that is set out by the Supreme Court of Canada in *R. v. Ahmad*, 2020 SCC 11. The majority in *Ahmad* held that police officers cannot offer a person who answers a phone the opportunity to commit an offence without first having formed reasonable suspicion that the person using the phone, or phone number, is engaged in criminal activity. A court reviewing a claim of entrapment must review all circumstances, including the language of the telephone conversation, to determine whether the police had formed reasonable suspicion by the time the opportunity to commit an offence was provided.
- [3] The narrow focus of the present appeal is whether the judge made a reversible error in finding that an undercover officer did not offer the appellant an opportunity to commit an offence when she stated "I'm looking for 80" during a telephone conversation with him. It was common ground at trial that an opportunity to commit a crime in drug cases is provided only when the terms of the deal have narrowed to the point that the police make a request for a specific quantity of a specific drug. The judge found that the evidence in this case did not support the appellant's contention that the words "I'm looking for 80" were intended or understood to mean a specific request for cocaine, as opposed to a generic request for drugs.
- [4] The appellant says that the judge's conclusion reflects legal error in that she failed to undertake the objective and context-specific assessment of the evidence required by *Ahmad*. He further alleges that the judge committed errors in her treatment of the evidence as to what occurred after the request for "80" was made. The appellant says that this case is factually indistinguishable from *R. v. Williams*, one of the two companion appeals that were before the Court in *Ahmad*, and demands the same result: a stay of proceedings.
- [5] The Crown responds that the trial judge's findings regarding the meaning of the words used during the telephone conversation between the undercover officer and the appellant are factual findings that are entitled to deference on appeal. The Crown says the findings are amply supported by the uncontradicted evidence at trial. The Crown acknowledges the parallels between this case and *R. v. Williams*, but says the different outcomes can be explained by the different evidentiary record that was before the court in each case.
- [6] For the reasons that follow, I would dismiss the appeal.

Background

- [7] The factual background is set out in the judge's reasons on the stay application. For the most part, it is not contentious and can be briefly summarized.

- [8] Constable Jennifer Gilroy, of the Victoria Police Department, first encountered the appellant a week before the offence in the parking lot of a Travel Lodge in Victoria that was being used as a temporary housing shelter. Cst. Gilroy was patrolling the area, which was a high crime area, in her police vehicle. The appellant arrived at the Travel Lodge driving a BMW. Cst. Gilroy spoke with the appellant. He told her that he was not living at the Travel Lodge, and did not want to answer the question of who he was visiting.
- [9] After her encounter with the appellant, Cst. Gilroy made inquiries about him on the police database PRIME. She learned that the appellant was being investigated by the West Shore RCMP for CDSA-related trafficking. Cst. Gilroy made entries in PRIME regarding her encounter with the appellant at the Travel Lodge. She was then contacted by Cst. Ewington, of the West Shore RCMP. Cst. Ewington told Cst. Gilroy that he had reasonable grounds to believe that the appellant was trafficking in crack cocaine. He gave her the cellular telephone number that Cst. Gilroy later used to call the appellant. The parties agreed at trial that the information provided to Cst. Gilroy by Cst. Ewington must be treated as a "bare tip" because there was no evidence about its basis.
- [10] On the evening of April 2, 2020, Cst. Gilroy called the number she had been given by Cst. Ewington and a male voice answered the phone. She recognized the voice as belonging to the appellant. Their conversation was as follows:

Appellant: Hello

Cst. Gilroy: Hey, can you help me out, I'm looking for 80

Appellant: Who's this?

Cst. Gilroy: Kat

Appellant: How do I know you?

Cst. Gilroy: You don't Sara gave me your number.

Appellant: Okay, do you want powder?

Cst. Gilroy: No, hard.

Appellant: I have to load up, I'll call you back in 45 minutes.

[Emphasis added.]

- [11] Cst. Gilroy and the appellant later spoke over the phone one more time, and exchanged text messages, to arrange the details of their meeting. Cst. Gilroy advised the arrest team of the details, including that the appellant would be driving a blue BMW. The appellant was arrested on his arrival at the meeting location. He was found with 0.3 grams of crack cocaine in his pocket.

- [12] The trial judge's reasons for convicting the appellant of possession for the purpose of trafficking are indexed at 2022 BCCA 1664. She found that the appellant's communications with Cst. Gilroy "clearly indicate[d] a purpose of trafficking": at para. 19. At the same time, she recognized that, in the absence of these communications, "standing alone, and on the evidence in the trial, the quantity of cocaine [the appellant] had on his person would not establish a trafficking purpose beyond a reasonable doubt": at para. 6.
- [13] On appeal, the appellant does not challenge the guilty verdict. The only issue is whether the judge erred in dismissing the appellant's post-conviction application for a stay on the basis of entrapment.
- [14] There was evidence on the stay application from two of the Crown's police witnesses about the meaning of Cst. Gilroy's statement "I'm looking for 80" in her initial conversation with the appellant. Cst. Gilroy testified that her intended meaning was that she was looking for \$80 worth of drugs. She testified that she did not intend to refer to a specific drug because she wanted the person answering the call to engage first in using actual drug terms. When she stated that she was "looking for 80", that was just Cst. Gilroy's personal style of asking a question about drugs generally rather than using drug terminology that she had been taught was specific to a certain type of drug.
- [15] Constable Scot Hourston was qualified to provide expert evidence on the price, packaging, methods of consumption, methods of trafficking, and jargon associated with the sale of cocaine. Cst. Hourston's experience included using jargon to discuss cocaine transactions while posing as a buyer, and he was familiar with cocaine jargon from his transactions with both users and traffickers. The conversations that took place between Cst. Gilroy and the appellant were put to Cst. Hourston in the form of a hypothetical. He testified that the phrase "hey, can you help me out" in the context of drug trafficking would be a request by someone asking for someone to help them out by selling them drugs. He testified that the phrase "I'm looking for 80" would indicate that the buyer was looking for \$80 worth of drugs, but that "80" does not refer to any specific drug.
- [16] The evidence of Cst. Gilroy and Cst. Hourston on this point was not challenged or contradicted. The defence led no evidence on the stay application.

The entrapment ruling

- [17] The trial judge began her ruling by reviewing the applicable law, as set out in Ahmad. She explained that in Ahmad, the Supreme Court of Canada confirmed that the legal standard for entrapment set out in R. v. Mack, [1988] 2 S.C.R. 903, 1988 CanLII 24, applied in the context of suspected dial-a-dope operations. The judge quoted the Mack framework, which sets out the two alternative branches of the entrapment doctrine:

There is, therefore, entrapment when: (a) the authorities provide an opportunity to persons to commit an offence without reasonable suspicion or acting mala fides or, (b) having a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.

[Mack at 959, Ahmad at para. 15.]

- [18] The judge noted that it is the first branch of Mack that is most commonly engaged in cases where the police are alleged to have entrapped a person answering the phone in a suspected dial-a-dope operation. The issue is typically whether the police have, without first forming a reasonable suspicion, offered the person an opportunity to commit an offence: at para. 9.
- [19] The judge reviewed the "reasonable suspicion" standard, as discussed in Ahmad. She stated, citing the majority decision in Ahmad, that a reasonable suspicion is "grounded on objectively discernible facts that stand up to independent scrutiny": at para. 11. A bare tip alone will not ground a reasonable suspicion. However, a bare tip may be corroborated by other information so as to ground a reasonable suspicion. As the judge explained:
- [15] The police may acquire sufficient corroborating information either before they phone the telephone number given in the tip, or during their call to the number, so long as the police acquire that additional information before they offer an opportunity to commit an offence. When acquiring sufficient information during the call, the police are, however, "on thin ice" (Ahmad, para. 54), and must take care to confine their remarks to exploratory inquiries and not to offer an opportunity to commit an offence.
- [20] In the context of a police call to a suspected dial-a-dope number, "an opportunity [to commit an offence] will be established when an affirmative response to the question posed by the officer could satisfy the material elements of an offence": at para. 18, quoting Ahmad at para. 63.
- [21] Having reviewed the principles from Ahmad, the judge then turned to their application in this case. She observed that it was common ground that Cst. Gilroy could not have formed reasonable suspicion before calling the appellant for the first time: at paras. 12, 20, 32. The main issue on the stay application was whether Cst. Gilroy's statement to the appellant "Hey, can you help me out, I'm looking for 80" offered him the opportunity to commit an offence: at paras. 4, 36-37.
- [22] The judge noted that Cst. Gilroy's opening request was almost identical to the officer's request in *R. v. Williams* ("I need 80"), which was found to constitute an opportunity to commit the offence in the particular circumstances of that case. However, she held that the present case was factually distinguishable from *R. v. Williams*:
- [42] The difficulty for Mr. Perri is that the evidence in this case does not support his contention that "I'm looking for 80" was intended or understood to mean a request for a specific amount of cocaine. As I discussed, an opportunity is offered where the police request is framed in such a way that an affirmative response would amount to an offence. On the evidence in this

case, "I'm looking for 80" meant a request for \$80/worth of drugs, without specifying the type of drug (except that it meant a drug that is subject to the CDSA). Neither Cst. Gilroy nor Cst. Hourston was challenged or contradicted on the evidence they gave to this effect, as noted, and there was no other evidence in the trial or the entrapment hearing on the point. Counsel appear to agree that for a trafficking offence to be committed, the particular drug must be identified. An opportunity has been provided "only when the terms of the deal have narrowed to the point that the request is for a specific type of drug and, therefore, the target can commit an offence by simply agreeing to provide what the officer has requested" (Ahmad, para. 66). On the evidence in this case, an affirmative response to "I'm looking for 80" would not have amounted to an offence, because it would not have been an offer to sell a particular prohibited drug.

- [43] That this deal had not narrowed to that point is underscored by Mr. Perri's question shortly afterwards, when he asked Cst. Gilroy if she was looking for "powder" - Mr. Perri evidently needed to clarify what type of drug Cst. Gilroy was seeking.

[Emphasis added.]

- [23] The judge acknowledged that it may appear incongruous that the statement "I need 80" in R. v. Williams fell on one side of the line, while "I'm looking for 80" in this case fell on the other. However, she found the different outcomes in the two cases could be explained by the different evidence about what is meant by a request for "80". She interpreted the trial judgment in R. v. Williams to include an implicit finding that "80" in that case was a reference to cocaine: at para. 45.
- [24] The judge rejected the appellant's submission that Cst. Gilroy's request for "80" must be taken to have been coloured by the context of Cst. Ewington's tip, which related specifically to the appellant's suspected trafficking in cocaine: at paras. 47-48.
- [25] In the result, the judge concluded that the evidence did not establish that Cst. Gilroy's statement "Hey, can you help me out, I'm looking for 80", offered an opportunity to the appellant to commit an offence. There was no dispute that the police had formed reasonable suspicion later in the conversation, after the appellant responded to Cst. Gilroy's first statement. Accordingly, the judge found there was no entrapment, and she dismissed the stay application: at paras. 49-50, 52.

On appeal

- [26] The appellant alleges that in dismissing his stay application, the judge committed three errors:
- (1) In distinguishing R. v. Williams, she failed to consider the objective, context-specific meaning of the term "80";
 - (2) She did not restrict her analysis to information available to the police before the request for "80" was made, and instead wrongly considered information that came after the request; and

- (3) Her assessment of the post-request evidence, assuming such evidence is relevant, was based on a mistaken premise and a misapprehension of the evidence.

Standard of review

- [27] Although the parties disagree on the proper characterization of the errors alleged by the appellant, the general principles of standard of review that govern the appeal are not contentious. Questions of law attract a standard of review of correctness, while questions of fact attract a palpable and overriding standard. The application of the relevant legal standards to the facts as found in a case--that is, whether a legal standard is met--amounts to a question of law that is reviewable on the correctness standard: *R. v. Le*, 2019 SCC 34 at para. 23; *R. v. Griffin*, 2021 ABCA 405 at para. 17.
- [28] The Crown says the judge's finding that the words "I'm looking for 80" was not intended or understood to constitute a request for cocaine is a factual finding entitled to deference on appeal. The appellant says the finding reflects legal error in the judge's application of the law of entrapment, which is reviewable on a standard of correctness. I will address this dispute in the course of my analysis.

Analysis

The legal framework: Mack and Ahmad

- [29] This appeal concerns the application of the principles established by the Supreme Court of Canada in *Ahmad and Mack* to the judge's assessment of the evidence on the stay application and her factual findings. In *Mack*, the Court held that the doctrine of entrapment was an aspect of the court's inherent jurisdiction to enter a stay of proceedings to prevent an abuse of process and preserve the integrity of the administration of justice. In granting a remedy for entrapment, "[t]he court is, in effect, saying it cannot condone or be seen to lend a stamp of approval to behaviour which transcends what our society perceives to be acceptable on the part of the state": *Mack* at 942. As quoted by the judge in the present case at para. 7, the Court in *Mack* set out two alternative branches of entrapment, either of which is sufficient to justify the remedy of a stay.
- [30] *Ahmad* concerns the application of the first branch of the entrapment doctrine--police provide an opportunity to persons to commit an offence without reasonable suspicion or acting mala fides--in dial-a-dope cases where the police place a call to an alleged drug dealer based on minimal information. There were two companion appeals before the Court in *Ahmad*. In *R. v. Williams*, an undercover officer, following up on a tip, phoned the accused and stated "I need 80". The trial judge found that in using these words, the officer had provided the accused with an opportunity to traffic drugs without reasonable suspicion, and he entered a stay on the basis that the accused was entrapped. In *R. v. Ahmad*, the undercover officer, also following a tip, asked the accused if "you can help me out?", to which the accused replied "What do you need?". The officer then asked for "2 soft", which the

evidence established meant two grams of cocaine. The trial judge found the police officer had reasonable suspicion by the time of the request to purchase a specific quantity of a specific drug. Accordingly, the stay application was dismissed.

- [31] The Court in Ahmad split 5-4 on the question of whether the first branch of the entrapment doctrine should be modified in this context. As reflected in the debate between the majority and minority judgments in Ahmad, concern had been expressed with the application of the reasonable suspicion standard in dial-a-dope cases. While the investigating officer in such cases may not possess reasonable suspicion at the time they offer an opportunity to an accused to commit an offence, it was questioned whether police conduct in dial-a-dope cases rises to a level of abuse of process that would warrant a stay. Further, in the dial-a-dope context, the reasonable suspicion standard had been interpreted prior to Ahmad as requiring a "minute parsing" of the language used by the undercover officer. In the view of the minority, this has led to "artificial distinctions" between cases where a stay is granted and when it is refused: at para. 118 per Moldaver J., dissenting in part.
- [32] The majority in Ahmad was not persuaded that such concerns warranted a departure from the reasonable suspicion standard. The reasonable suspicion standard is, in the view of the majority, necessary to the balance between society's interest in the detection and punishment of crime and its interest in maintaining individual freedoms: at para. 25. This standard ensures that courts can conduct meaningful judicial review of police conduct by requiring the police to demonstrate they had a legitimate basis for targeting an individual or people associated with a location: at para. 24. The first branch of Mack establishes that police cannot subject anyone to random virtue testing without reasonable suspicion: at para. 27.
- [33] Reasonable suspicion, as described by the majority in Ahmad, must be "focused, precise, reasonable, and based in 'objective facts that stand up to independent scrutiny'": at para. 46. A "bald tip" that is devoid of predictive information cannot meet the reasonable suspicion standard: at paras. 50, 53. However, it is possible for the police to corroborate the tip, or to form reasonable suspicion in the course of a conversation with the target prior to providing the opportunity to commit a crime: paras. 50, 54. If the police have not formed reasonable suspicion before a phone call is made, then scrutiny of the precise words spoken during the conversation is unavoidable: at paras. 59, 62. As explained by the majority in Ahmad:
- [61] We acknowledge that there has been criticism of an approach sometimes described as narrowly "parsing" conversations between police officers and the individuals they are investigating. The term "parsing" however, captures neither the purpose of the exercise nor the way it is carried out. A court must examine all of the circumstances, and not merely the language used during the call, in order to determine whether police had formed reasonable suspicion by the time the opportunity was provided. In dial-a-dope cases, conversations are a means of forming a reasonable suspicion and the means of committing the offence itself. Given that police cannot verify the identities of their interlocutors when operating in a virtual world, determining when a target is provided with an opportunity to make an offer to

traffic unavoidably requires that courts scrutinize the language used. This is a common basis upon which police make professional judgment calls about what actions are legally permitted. It is also the basis upon which courts review the legality of those actions. Examining the language used may reveal, as it does in the cases at bar, the difference between an officer who is investigating whether there is reasonable suspicion of criminal activity through careful attention to the answers received, and an officer who makes no serious attempt to verify a tip of unknown reliability and immediately asks for drugs.

[Emphasis added.]

- [34] An opportunity to commit an offence will be established when an affirmative response to the question posed by the officer could satisfy the material elements of the offence. Thus, a key question is whether the officer says something to which an accused can commit an offence by simply answering "yes": at paras. 63-64. Where the offence is trafficking in a controlled substance:
- [66] police can make exploratory requests of the target, including asking whether they sell drugs, without providing an opportunity to traffic in illegal drugs (see, e.g., *R. v. Ralph*, 2014 ONCA 3, 313 O.A.C. 384, at para. 32). An opportunity has been provided only when the terms of the deal have narrowed to the point that the request is for a specific type of drug and, therefore, the target can commit an offence by simply agreeing to provide what the officer has requested. In some cases, a request to purchase a specific quantity of drugs will suffice. For example, in *Williams'* case, where the police were working from a tip that the individual was a cocaine dealer, a request for a particular quantity of that drug (i.e., "I need 80") constituted an opportunity (stay decision, at para. 9).

[Italic emphasis in the original; underline emphasis added.]

- [35] In applying this framework to the facts of the appeal in *R. v. Ahmad*, the majority found the trial judge was correct to dismiss the stay application. The undercover officer had formed reasonable suspicion by the time the opportunity to commit drug trafficking was provided with the officer's request for "2 soft". The constellation of circumstances, including the accused's response "[w]hat do you need?" in response to the request that he "help out" the caller, supported the officer's reasonable suspicion at the time the opportunity was provided: at para. 76.
- [36] By contrast, the majority in *Ahmad* held that the trial judge was correct on the facts of the *R. v. Williams* appeal to grant a stay on the basis of entrapment. In this case, the undercover officer placed the call after receiving a tip that "Jay" was selling drugs using a phone number. As explained by the majority in *Ahmad*:
- [79] As soon as the person who answered confirmed that he was Jay, D.C. Canepa provided an opportunity to traffic drugs when he presented Williams with the specific request to sell him "80", slang for a dollar amount of cocaine. Once Williams responded "Okay", the offence of trafficking by offer was complete.

[Emphasis added.]

[37] Thus, unlike the facts of *R. v. Ahmad*, in *R. v. Williams* the undercover officer did not wait to see how Williams would respond to an investigative question that might have corroborated his involvement in criminal activity before providing the opportunity to commit the crime: at para. 80. As the police had nothing but a bare tip prior to making the call, the reasonable suspicion standard was not met.

The alleged errors

Issue (1): Did the judge err in distinguishing *R. v. Williams*?

[38] The first, and primary, issue raised on appeal is the judge's alleged error in concluding that the facts of *R. v. Williams* distinguished it from the present case. The appellant emphasizes that the standard of reasonable suspicion is assessed contextually and objectively. The state of knowledge of the police must be assessed at the time they provide the accused with an opportunity to commit an offence. The appellant says that, as in *R. v. Williams*, the judge had to assess the contextualized meaning of the term "80" by reference to the objective facts of the case, specifically the tip that the accused was trafficking in cocaine. Instead, the appellant says, the judge erred by considering a combination of what Cst. Gilroy subjectively intended "80" to mean, what inferences could be drawn from the evidence about the understanding of the accused, and what "80" generally means in the drug culture. None of this, the appellant says, is relevant to the contextualized inquiry. Instead, the request for "80" should have been viewed in the context of the tip received by Cst. Gilroy that the appellant trafficked in cocaine.

[39] I do not accept the appellant's submission, which appears to me to be an overly-restrictive approach to the contextualized inquiry mandated by *Ahmad*. The nature of the tip received by the police is clearly a relevant contextual factor in the assessment of reasonable suspicion, and the judge treated it as such. However, the analysis must encompass the full "constellation of objectively discernable facts" (*Ahmad* at paras. 46, 48), which includes the precise language used by the police during the call and the meaning of the words used. On the appellant's theory, the fact that the tip in this case related to the accused's suspected cocaine trafficking is of overriding importance, regardless of what language was used by the police during the call. If Cst. Gilroy had said "I need 80 of product", or even "I need 80 of something", that would have still amounted to an opportunity because, on the appellant's theory, the meaning of the request is necessarily narrowed by the nature of the tip.

[40] The appellant's argument is, in my view, inconsistent with the framework set out in *Ahmad*. The parties agree that in the context of drug trafficking, an agreement to sell must relate to a specific drug included in the schedules to the CDSA. A general agreement to sell "drugs" or "product" will not be sufficient unless there are contextual markers that narrow what is intended to a particular drug listed in the schedules: *Ahmad* at para. 65. This necessarily invites an inquiry not only into the words used by police during a telephone call, but also the meaning and context of the words: *R. v. Zakos*, 2022 ONCA 121 at para. 50.

- [41] I do not agree with the appellant that the relevant facts in this case are "undisputed" simply because the conversation between him and Cst. Gilroy is captured in a transcript. The words used are not in dispute. However, it was for the judge to interpret the meaning of the words, viewed in the context of the evidentiary record as a whole. The judge had to undertake the "contextualized, individualized, and fact-driven inquiry" required by the stay application, and to make "concrete factual findings about what has constituted an opportunity and what has not": *R. v. Henry-Osbourne*, 2021 ONCA 561 at para. 24; *R. v. Ghotra*, 2020 ONCA 373 at para. 22, *aff'd* 2021 SCC 12.
- [42] Given the contextualized, individualized, and fact-driven nature of the inquiry under the opportunity-based branch of entrapment, comparisons between the outcomes of different cases must be undertaken with caution. The appellant's argument that the outcome of the present case is mandated by the outcome in *R. v. Williams*, overlooks the fact that the two cases were based on different evidentiary records. In *Ahmad*, the majority held that an opportunity was provided in *R. v. Williams* when the officer presented the accused with "the specific request to sell him '80', slang for a dollar amount of cocaine": *Ahmad* at para. 79 (emphasis added). That factual characterization of the term "80" was presumably open to the Court on the record in *R. v. Williams*. However, the record is different in the present case. The judge in this case was not bound by the Court's conclusion in *Ahmad* that "80" was slang for a dollar amount of cocaine. Subject to judicial notice, a factual conclusion rests wholly on the evidence in a particular case, and cannot be presumed to be true in any other case: *R. v. Daley*, 2007 SCC 53 at para. 86.
- [43] As the trial judge observed, it may appear incongruous that the same words used by the police leads to a different outcome in different cases. However, the approach endorsed by the majority in *Ahmad* expressly requires not only precise scrutiny of the words used by police officers in investigating a dial-a-dope line, but also an assessment of their meaning within a case-specific context. Words will not necessarily have the same meaning in different contexts. The approach in *Ahmad* also presumably allows a court to account for jurisdictional differences in terms of the jargon of the drug trade. The minority in *Ahmad* expressed concern that the application of the individualized reasonable suspicion standard from *Mack* in the dial-a-dope context would lead to arbitrary outcomes that could not easily be rationalized. However, despite such concerns, the majority in *Ahmad* affirmed the application of the settled law of entrapment in this context so as to ensure a robust protection of the rule of law, individual privacy, and personal freedom from state overreach.
- [44] On the evidence before her in this case, the judge found that an affirmative response to "I'm looking for 80" would not have amounted to an offence because it would not have been an offer to sell a particular prohibited drug. In reaching this conclusion, the judge undertook an objective and context-specific approach. She did not limit her analysis to Cst. Gilroy's evidence about what she intended by the request for "80". In addition to Cst. Gilroy's evidence, the judge also considered expert evidence about the meaning of the term "80" generally in the drug culture, and she considered the inferences that could be drawn from

the transcript as a whole about the appellant's understanding of the words. The judge did not overlook the tip received by Cst. Gilroy that the accused trafficked in crack cocaine. The judge asked herself if the "context of the tip" rendered Cst. Gilroy's request for "80" sufficiently specific to constitute an opportunity to commit an offence, and concluded that it did not. No error has been demonstrated in her approach to the evidence in this case. The judge was not compelled to find entrapment because a finding of entrapment was made in *R. v. Williams* on a different evidentiary record.

[45] Therefore, I would not accede to the appellant's first ground of appeal.

Issue (2): Did the judge err in considering information that came after the request for "80"?

[46] The appellant next argues that the judge erred in looking to evidence of what occurred after the request "I'm looking for 80", in deciding whether that request offered an opportunity to commit an offence. The appellant emphasizes that the first branch of the entrapment doctrine is designed to allow police to conduct themselves appropriately based on what is known to them at the time the opportunity is offered. Information known to the police after the offer is made cannot be relied on to buttress the existence of reasonable suspicion.

[47] This ground of appeal relates to the judge's consideration of the appellant's response "do you want powder?", to Cst. Gilroy's request for "80". The appellant focusses on two aspects of the judge's reasoning. First, the judge found that the appellant's response suggested that he required clarification of what Cst. Gilroy was looking for, which in turn supported the conclusion that Cst. Gilroy's request for "80" was not specific to a particular drug. For ease of reference, I repeat the relevant passage of her analysis:

[43] That this deal had not narrowed to that point is underscored by Mr. Perri's question shortly afterwards, when he asked Cst. Gilroy if she was looking for "powder" - Mr. Perri evidently needed to clarify what type of drug Cst. Gilroy was seeking.

[48] Second, the judge addressed the the appellant's argument that the specific nature of the tip received by Cst. Gilroy--that the appellant was trafficking in crack cocaine--should colour the interpretation to be given to her request for "80". The judge reasoned:

[48] In my view, it should not. For the reasons I have given, the evidence in this case, which was clear, was that "80" referred to drugs generally, and not specifically to cocaine. Also, Mr. Perri's response, in asking whether Cst. Gilroy was looking for powdered cocaine, to some extent contradicts the reliability of the tip that he trafficked in crack (hard) cocaine, and Cst. Gilroy's further evidence that Cst. Ewington told her that Mr. Perri did not traffic in powdered cocaine.

[49] The appellant interprets the judge's reasoning in these passages as amounting to a finding that because he did not commit an offence in responding to Constable Gilroy's request, the request cannot have been an opportunity. He says this is inconsistent with the requirement that a court must assess the existence of reasonable suspicion at the time the offer is made.

- [50] I do not agree with the appellant's interpretation of the judge's reasons. The judge did not rely on the evidence of the appellant's response to the request for "80" as a means of justifying the existence of reasonable suspicion at the time the request was made. Rather, she found the appellant's response to be relevant to her interpretation of what the parties to the conversation understood the request to mean. For the reasons I have already stated, it was for the judge to interpret the conversation. The appellant's response to Cst. Gilroy's request for "80" was informative in assessing the parties' understanding of the request, which in turn was relevant to the question of whether Cst. Gilroy's initial inquiry amounted to an opportunity to commit an offence. The judge explained why she did not find that the tip, viewed contextually, narrowed the use of the term "80" to a specific drug. She did not reason that because there was no offence actually committed, there could not have been an opportunity.
- [51] In my view, accordingly, the judge did not err in considering statements made by the appellant after Cst. Gilroy's request for "80". The appellant's response was relevant to the question the judge had to answer: whether the police had provided the appellant with an opportunity to commit an offence before they had formed reasonable suspicion.

Issue (3): Did the judge err in her assessment of the post-request evidence?

- [52] Finally, the appellant argues that even if evidence of what the appellant said after Cst. Gilroy's request for "80" could properly be considered by the judge, she erred in her assessment of the evidence. First, the appellant says that the judge erred in law, at para. 48 of her reasons, in distinguishing between crack cocaine and powder cocaine in finding that no opportunity had been offered, when in fact these are just different forms of the same drug. The appellant says that his question about "powder" in fact supported the opposite inference: that the deal had sufficiently narrowed to cocaine. Second, the appellant says the judge misapprehended the evidence in stating, again at para. 48, that Cst. Ewington told Cst. Gilroy that the appellant did not traffic in powdered cocaine. The evidence was that Cst. Ewington told Cst. Gilroy that the appellant trafficked in crack (hard) cocaine. There was no evidence that Cst. Ewington told Cst. Gilroy that the appellant did not traffic in powder cocaine.
- [53] There is no merit to the argument that the judge mistakenly assumed that crack cocaine and powder cocaine are different drugs. The judge did not find that an opportunity had not been offered because the deal had not yet been narrowed to crack or powder cocaine when Cst. Gilroy requested "80". She expressly found that "80" referred to "drugs generally, and not specifically cocaine": at para. 48 (emphasis added). While the appellant points out alternative inferences that the judge could have drawn from his question about whether the caller wanted "powder", the drawing of inferences is part of the judge's fact-finding role and is entitled to deference on appeal. It was open to the judge on the evidentiary record before her to draw the inference that the appellant's question about "powder" reflected a need to clarify what drug, rather than what form of a particular drug, was being requested. This, in turn, was a further piece of evidence that supported the judge's finding about the meaning

of Cst. Gilroy's request for "80". I see no reversible error in the judge's analysis in this respect.

[54] It is not disputed that the judge made an error in para. 48 of her reasons in her characterization of Cst. Gilroy's evidence. Cst. Gilroy did not testify that Cst. Ewington told her that the appellant did not traffic in powder cocaine; only that he trafficked in crack cocaine.

[55] Where a misapprehension of evidence is alleged, appellate intervention is warranted only if the misapprehension goes to the substance of the case rather than the detail, is material to the judge's reasoning process, and plays an essential role in the reasoning process that resulted in conviction: *R. v. Swales*, 2014 BCCA 350 at para. 48. I agree with the Crown's characterization of the judge's error here as a minor one which had no impact on the judge's analysis. Indeed, I do not understand the appellant to argue otherwise. He acknowledges that this error, standing alone, is unlikely to have affected the result. Rather, the appellant says that this error combined with the judge's other alleged error in assessing his response to Cst. Gilroy's request for "80" is what justifies this Court's intervention. However, I have concluded that the judge did not otherwise err in her treatment of the evidence. The judge's minor misstatement of Cst. Gilroy's evidence went to the detail rather than substance of the case, and it was not material to her reasoning process. Thus, there was no misapprehension of evidence that warrants appellate interference.

Disposition

[56] The appellant had the burden of establishing that the exceptional remedy of a stay was warranted in this case on the basis of entrapment. In dismissing his application for a stay, the judge made factual findings that were open to her on the record and she properly applied the law to those facts.

[57] I would dismiss the appeal.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Justice Griffin"

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