



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Brown*, 2021 NLCA 27

Date: May 10, 2021

Docket Number: 202001H0059

BETWEEN:

KYLE BROWN

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, Hoegg and O'Brien JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador

Appeal Heard: April 16, 2021

Judgment Rendered: May 10, 2021

Reasons for Judgment by: Welsh J.A.

Concurred in by: Hoegg and O'Brien JJ.A.

Counsel for the Appellant: Derek Hogan

Counsel for the Respondent: Shawn I. Patten

Authorities Cited:

CASES CONSIDERED: *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Ahmad*, 2020 SCC 11; *R. v. Ghotra*, 2021 SCC 12; *R. v. Ghotra*, 2020 ONCA 373; *R. v. Barnes*, [1991] 1 S.C.R. 449 (S.C.C.).

STATUTES CONSIDERED: *Criminal Code*, sections 172.1(1), 163.1, 152, and 271.

Welsh J.A.:

[1] Kyle Brown was convicted of three counts of child luring contrary to section 172.1(1) of the *Criminal Code*. At trial, his application for a stay of the charges based on the doctrine of entrapment was dismissed. Mr. Brown appeals that decision.

BACKGROUND

[2] Mr. Brown’s telecommunications with a fictional girl created by an undercover police officer resulted in convictions for child luring for the purpose of facilitating the commission of possession of child pornography (section 163.1 of the *Criminal Code*), invitation to sexual touching (section 152) and sexual assault (section 271). The trial judge summarized the relevant facts in an oral decision of January 28, 2020 in which he dismissed Mr. Brown’s application for a stay of the charges:

[3] Constable Follett testified that as an investigator with respect to child pornography, he created a fictional profile of a young female and placed an ad on the website NLAdult.com. The ad [was] titled “New to this scene”. The description stated, “Teen girl involved in dance and cheer, long legs lean body can’t host”. It was posted in an area of “I am a woman seeking a man”. The officer testified that the account is set up using a name and an email address. He created the account in the name of Madison Dohey. A fictitious email address was used. The officer stated he used this site 5 to 10 times for the same purpose. He had in the past also used sites called Backpages, Craigslist and other Apps. There was no requirement in this case [using this website] to put in an age. He testified he also used a photo that he found on the internet. The photo depicts a girl in bra and panties with the head cut out. He posted the ad April 26, 2017. He accessed the email account shortly after and he had 10 responses. He told the 10 the age of the person and said she was 15. Five either did not respond or responded saying too young. The other five were not deterred by the age. One of the group sent emails back, and the emails were presented in

evidence. There were email exchanges with this person who later provided his cell phone number. Once the officer had the cell phone number he was able to find the person who he was communicating with. The email exchanges continue for about five days. He reiterates in the email exchanges that the person is 15. In addition there were a number of text messages that were exchanged between the two during the same time frame.

[4] ... [The emails] commence with Mr. Brown responding to the advert and picture stating “You are the best thing I’ve seen on here in a long time and I would love to meet you ...”. The immediate response from the fictitious Madison is that “im 15 dunno if that’s too young for wat ur into”. His immediate response is “if you look like the picture in the ad I’m absolutely into you” and he then writes “To be honest it is a little strange to see a 15 year old on here but I’m all for it”. The chatter continues and he states shortly thereafter “Yeah I am cool with you being 15”. ...

[3] Mr. Brown submits that the manner in which the undercover officer proceeded amounted to entrapment and that the trial judge erred in his application of the law.

ISSUES

[4] The focus of this appeal is whether the trial judge erred in concluding that the undercover police officer had the necessary reasonable suspicion to ground a *bona fide* investigation that led to the charges against Mr. Brown.

ANALYSIS

The Law

[5] Section 172.1(1) of the *Criminal Code* provides:

Every person commits an offence who, by means of telecommunication, communicates with

(a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence with respect to that person under subsection ... 163.1 ...;

(b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section ... 152, ... or section 271 ... with respect to that person; or

...

[6] The analytical approach to the doctrine of entrapment was established in *R. v. Mack*, [1988] 2 S.C.R. 903 (*R. v. Ahmad*, 2020 SCC 11, at paragraph 23). The analysis was recently applied in the context of child luring in *R. v. Ghotra*, 2021 SCC 12, in which the Supreme Court dismissed Mr. Ghotra’s appeal “for the reasons of Justice Miller of the Ontario Court of Appeal” (paragraph 1). In the Court of Appeal decision, 2020 ONCA 373, Miller J.A. provides a helpful summary of the law:

[16] The defence of entrapment flows from the doctrine of abuse of process. It is not a substantive defence to allegations of criminal wrongdoing, but instead allows for a conviction to be stayed where the investigative conduct of the police was exploitative or corrupting. ...

[17] ...

In *Mack*, at pp. 964-65, the Supreme Court set out the two principal categories of entrapment. The defence is available when either:

1) “the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry”;
or

2) “although having such 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.”

[7] The onus is on the accused to establish entrapment on a balance of probabilities (paragraph 18). Miller J.A. continued:

[19] In *R. v. Barnes*, [1991] 1 S.C.R. 449 (S.C.C.), the Supreme Court affirmed the “basic rule” articulated in *Mack*, that “the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity”: at p. 463. It also affirmed an exception to this rule where police are undertaking “a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring”: at p. 463. Where police neither have reasonable suspicion of an individual already engaged in crime, nor are investigating a location that is reasonably suspected of being a hub of criminal activity, presenting an opportunity to commit a particular crime amounts to random virtue testing, and is not permitted. The Supreme Court most recently affirmed these principles in *Ahmad* [2020 SCC 11], in which a majority of the Court held that the entrapment framework from *Mack* has “stood the test of time” and applies with full force to contexts such as child luring: at para. 23.

(Emphasis added.)

[8] In *R. v. Ahmad*, the majority emphasized the requirement for “reasonable suspicion”:

[24] ... This standard requires the police to disclose the basis for their belief and to show that they had legitimate reasons related to criminality for targeting ... the people associated with a location [citation omitted]. An objective standard like reasonable suspicion ... requires objectively discernable facts. ...

[9] The majority in *Ahmad* acknowledged the valid use of technology by the police conducting an investigation:

[35] The difficulty, of course, is that technology aids in the commission of crime. And in order to investigate and detect those crimes, police must also make use of technology. ...

[10] However, as cautioned in *Ahmad*, care must be taken in defining the scope of the investigation:

[37] ... Technology and remote communication significantly increase the number of people to whom police investigators can provide opportunities, thereby heightening the risk that innocent people will be targeted. ...

...

[39] Relatedly, the entrapment doctrine ensures Canadians can “go about their daily lives without courting the risk that they will be subjected to the clandestine investigatory techniques of agents of the state” It is therefore important to carefully delineate and tightly circumscribe virtual locations in which police can provide the opportunity to commit a crime. As Lamer C.J. noted in *Barnes* [[1991] 1 S.C.R. 449], at pp. 462-63, a reasonable suspicion can attach to a place only if it is defined with sufficient precision

[11] An inquiry to ensure that the police have sufficiently narrowed the scope of their clandestine operation may involve consideration of factors such as: “the seriousness of the crime in question; the time of day and the number of activities and persons who might be affected; ... the level of privacy expected in the area or space; the importance of the virtual space to freedom of expression; and the availability of other, less intrusive investigative techniques” (*Ahmad*, at paragraph 41).

Application of the Law

[12] There is no allegation in this case that the undercover officer acted so as to induce Mr. Brown to commit the offences. The question is whether this was a

bona fide investigation at a location where the police reasonably suspected child luring activity is taking place.

[13] It is clear from the decision in *Ghotra*, which dealt with child luring, that a website on the internet may constitute a location for purposes of an undercover police investigation. However, the police must have a reasonable suspicion, based on objectively discernable facts, that child luring is occurring on the targeted website. As discussed in *Ghotra* and *Ahmad*, the virtual location must be carefully delineated and tightly circumscribed to avoid “random virtue testing”; that is, providing individuals with the opportunity to commit offences that they likely would not otherwise have committed (*Ahmad*, at paragraph 28; *R. v. Barnes*, [1991] 1 S.C.R. 449 (S.C.C.), at page 463, paragraph 24).

[14] In determining whether the police had the necessary reasonable suspicion to proceed with the investigation, the factors set out in *Ahmad* are of assistance. It is self evident that child luring is a serious crime. Young people are adept at accessing technology and must be protected from those who would take advantage of their immaturity, naivety and curiosity. The potential for serious harm to the child cannot be understated.

[15] A website such as NLAdult.com does not engender an expectation of privacy such as would apply, for example, to texting between two friends. The undercover officer posted the fictional information on the portion of the website entitled “I am a woman seeking a man”. The obvious purpose is to facilitate telecommunication between strangers.

[16] In this case, the undercover officer was quick to advise that Madison was 15 years old. Once this was made known to the ten individuals who had responded to the initial posting, several either responded that she was too young, or did not respond. Mr. Brown, on the other hand, indicated his quite keen interest, despite knowing Madison’s age.

[17] The telecommunications between the undercover officer and Mr. Brown did not engage freedom of expression considerations. Further, other less intrusive investigative techniques are not available to the police. This is a crime committed using electronic means. The particular website, NLAdult.com, under the category, “I am a woman seeking a man”, delineates and circumscribes the location targeted by the undercover operation.

[18] The undercover officer explained why he had a legitimate, reasonable suspicion that child luring was occurring on the identified website. The trial

judge accepted that the officer's reasonable suspicion was grounded in objectively discernable facts, and referred to the officer's evidence that he had used that website previously:

[33] ... The evidence from Constable Follett was also that he used the site [NLAdult.com] previously to investigate if there was contact with underage persons for sexual purposes, and noted in cross-examination that charges had been laid as a result of using that site. That is why he posted the ad on that site. That to me provides evidence that this was a *bona fide* investigation that the police were undertaking.

[19] Each investigation must be assessed on its own facts. In this case, the fact that communications on this particular site had led to child luring charges in the past was a valid basis on which the trial judge found the necessary reasonable suspicion to ground the undercover investigation. The Crown is not required to reach back to validate the rationale that led to the first charge on the targeted location, as suggested by Mr. Brown.

[20] As was the case in *Ghotra*, Mr. Brown initiated the communication with Madison who immediately raised the issue of her age, which she reiterated in other communications, giving Mr. Brown the opportunity to cease further communication. Rather than withdrawing, knowing her age, he pursued sexual inquiries and a suggestion that they meet.

[21] Finally, in *Ghotra*, the Court refused to accept the position taken by the accused that:

[26] ... But for the presence of a 14-year-old girl in an adult chat room, he argues, he would not have had an opportunity to commit the offence of luring a 14-year-old girl.

...

[29] Providing an opportunity is not established by but-for causation – that but for the presence of the investigating officer posing as a 14-year-old girl, the appellant would not have had the opportunity to commit the offence. ...

...

[31] ... Where, as here, the police conduct is nothing other than placing a potential victim in an accused's line of vision, and where the accused is given no reason to believe that the victim would be a willing participant in the offence committed, the police have not provided an opportunity to commit an offence. It was the appellant who initiated contact with the undercover officer masquerading as a 14-year-old girl. ... Having learned that she was underage, it was the appellant who ventured into

sexual topics and suggested an in-person meeting. Throughout these interactions, the undercover officer repeatedly raised the issue of the fictional victim's youth, but the appellant persisted.

[22] The same circumstances were at play in this case. The requirement for reasonable suspicion, established by objectively discernable facts, to ground the investigation has been demonstrated.

[23] In the result, I am satisfied that there is no basis on which to conclude that the trial judge erred in dismissing Mr. Brown's application for a stay of the charges based on the doctrine of entrapment.

DISPOSITION

[24] Accordingly, I would dismiss the appeal.

B. G. Welsh J.A.

I concur: _____

L. R. Hoegg J.A.

I concur: _____

F. P. O'Brien J.A.