THE DEFENCE OF ENTRAPMENT: ‘THE SERPENT BEGUILED ME’

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INTRODUCTION

Although the entrapment defense is often associated with the biblical story of Eve's admission in the Garden of Eden: "The serpent beguiled me, and I did eat," the entrapment defense itself is a recent, and distinctly American, innovation.

Entrapment has been defined as the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal proceeding against him. Entrapment is a defence when a criminal act is committed at the sole instigation of a police informer, but where the informer merely provides an opportunity to commit a crime which is voluntarily accepted by the defendant, the defence of entrapment is not available.

DEVELOPMENT OF THE DEFENCE OF ENTRAPMENT

The defense emerged in the late nineteenth and early twentieth centuries, largely in response to changes in the criminal law and methods of policing. The defence of entrapment first came to be recognized by the U.S. Supreme Court in the case of Sorrells v. United States. In this case, an undercover agent disguised himself and presented lucrative bait to Sorrells to procure for him illicitly manufactured alcohol. Sorrells’s conviction for illegally selling alcohol was overturned by the Supreme Court as he had been entrapped into selling liquor. In this view, a defense became available when law enforcement used tactics which were "so revolting" they "ought not

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1 Advocate
2 Genesis 3:13
3 21 AM. JUR. 2D, Criminal Law, § 202 (1981)
4 State v. Good, 110 Ohio App. 415, 165 N.E.2d 28 (1960); 22 Ohio St. L.J. 750 1961
5 American Criminal Law Review 48 Am. Crim. L. Rev. 1757
6 287 U.S. 435 (1932)
to be permitted by any self respecting tribunal.” The defense thus emerged as an outgrowth of the court's supervisory powers over judicial proceedings. The crux of the defence lies in government inducement of an otherwise innocent individual to commit a crime. The defence is now put to use in a number of cases involving prostitution, illegal sale of alcohol, cigarettes, firearms, narcotics, public corruption and cyber entrapment.

THE TESTS FOR ENTRAPMENT

From the beginning, modern entrapment law has been an intricate patchwork of two general approaches. The focus on the predisposition of the defendant has come to be known as the ‘subjective test’ of entrapment whereas, under the ‘objective test’, the court would simply determine whether the police methods were so improper that they likely induced or ensnared a person into committing a crime.

THE SUBJECTIVE APPROACH

The subjective test also called as the “origin of intent” test focuses on determining if the defendant was intent on performing the criminal act with the police only furnishing him with an opportunity or if he was an innocent person lured into committing the crime. ‘Innocent’ in the context of entrapment means that the defendant would not have perpetrated the crime, with which he is presently charged, but for the enticement of the official. Thus, the absence of predisposition is to be inferred from the lack of origin of the criminal design and willingness on part of the defendant when the opportunity is furnished.

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7 See United States v. Russell, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting) (“In Sorrells v. United States, and Sherman v. United States, supra, the Court took what might be called a ‘subjective’ approach to the defense of entrapment.”).
9 JOHN M. SCHEB & JOHN M. SCHEB II, CRIMINAL LAW 346 (West/Wadsworth 2d ed.)
10 21 AmJur2d § 204
11 State v. Nelson, 89 S.D. 1, 228 N.W. 2d 143 (1988)
12 Hansford v. United States, 112 App D.C. 359, 303 F. 2d 219 (D.C. Cir.1962)
13 Matthew Lippman, Contemporary Criminal Law-Concept, Cases and Controversies (Sage Publication 2d ed.) at 311
In *Sherman v. United States*14, the purchase of the drugs was initiated by the informant after overcoming Sherman’s initial resistance. There was no indication that Sherman was otherwise involved in the drug trade and a search failed to find drugs in his home. In spite of him being convicted of a drug offence 9 years ago, the Court held that Sherman was not ready and willing to sell narcotics and was entrapped.

**THE OBJECTIVE APPROACH**

This approach focuses on whether the bait put by the police officials is likely to lure an otherwise innocent person into committing a crime.15 Unlawful entrapment is shown where the criminal intent did not originate with the accused but was conceived in the minds of enforcement officers who lured the defendant into commission of the offence by persuasion, deceitful representation or other inducement.16 Examples of prohibited governmental activity may include offers of inordinate sums of money.17

**INGREDIENTS OF THE DEFENCE**

- **No predisposition on part of the accused**

  The defence of entrapment cannot be successfully interposed if it is shown that the accused had already formed the design to commit the crime charged or similar crimes. This can be inferred from his ready complaisance or willingness when an opportunity is provided by the *agent provocateur*.18 For instance in *United States v. Russell*19, even though the officials had provided the accused with ingredients for the production of meth, the fact that they possessed ingredients apart from those provided, was held to be indicative of their having already formed the design to commit the crime.

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14 356 U.S. 369 (1958), 2 Led 2d 848, 78 S Ct 819
15 Hay Bruce, *supra* note 29, at 18
16 Lewis v. United States, 119 App DC 145, 337 F2d 541, cert den 381 U.S. 920
17 21 AM. JUR. 2d, *supra* note 18, § 206
19 411 U.S. 423 (1973)
**Agent Provocateur must be a law enforcement official**

The classic definition of an *agent provocateur* was given by the Royal Commission on the Police in 1929 as “a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds or informs against him in respect of such offences”.  

The rationale and remedies for entrapment are dependent on the involvement of the state and its officials in instigating crime. No such rationale would apply if it were a private individual who on his or her own initiative incited the defendant to commit the offence: the fact that one person incites another does not relieve the other of criminal liability since the law regards each of them as autonomous individuals who are able to choose what to do. The defence of entrapment is not available to a defendant who has been entrapped by a person not associated with the government or police. A person hired to commit a crime cannot defend himself on the ground that the hirer offered him so much money that it broke down his resistance. For example, in *R. v. Hardwicke & Thwaites*, the investigations’ editor of the *News of the World* newspaper along with a freelance investigative journalist posed as Arab Sheikhs and approached the defendants for the purchase of motor scooters. In the course of the conversation, while in their room at Savoy Hotel they expressed a desire for cocaine to which the defendants readily agreed and supplied them with the same. Here, the Court held that as the deception had been practiced by journalists and not law enforcement officials, it could not fall under entrapment. Similarly, in *R. v. Shannon*, a journalist from the *News of the World* proceeded to expose the defendant when he received information about his alleged drug peddling activities. He approached the defendant as an Arab Sheikh who owned a nightclub in Dubai and was desirous of having the defendant as a celebrity guest there. The journalist raised the topic of drugs and extensive conversation ensued about cocaine use.

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20 *REPORT OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE* (Cmd. 3297, London, 1929)
21 ASHWORTH, *supra* note 2, at 225; 1A WIGMORE, *supra* note 5 § 70.3 at 1539
22 Henderson v. United States, 237 F.2d 169 (5th Cir. 1956)
23 United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994)(en banc)
Ultimately, Shannon supplied cocaine and cannabis for the Sheikh’s party. Here again, the Court rejected the defence of entrapment as the State or its agents were not involved.

However, there is contrasting opinion on this point prevailing in different legal systems and in some, the definition of an ‘agent provocateur’ is subjected to broad interpretations. Thus, entrapment may, in some jurisdictions at least, consist of the action of a person other than an officer, as, for example, a private detective, or even a private person.

Such is the case of *People v. Moran* where the court held that if the crime had been suggested by another person, whether or not a law enforcement officer, for the purpose of entrapment, the defendant was not criminally liable. Also, in *Beasley v. State*, the defence of entrapment was available to the defendant where although the entrapping person, the bootlegger, was not acting as a decoy for law enforcement officers at the inception of the transaction, the officers were fully informed of the criminal act before it was committed.

1. Reprehensible conduct on part of the law enforcement authorities

Situations or circumstances in which the Court has held the conduct of an agent provocateur to fulfill the required standard of outrageousness are illustrated in the case of *Jacobson v. United States*. Here the defendant was subjected to a constant barrage of emails containing advertisements of pornographic literature over a period of 26 months. It was held that the design of the crime was implanted by such conduct and did not originate in the mind of the accused. Thus, the conduct of the enforcement officials was held to be outrageous and Jacobson was convicted. But the Supreme Court stressed in *United States v. Russell* that the investigation of drug related offences often requires infiltration and co-operation with narcotics rings and that the law enforcement tactics employed in *Russell* were neither in violation of “fundamental fairness” nor “shocking to the universal sense of justice”.

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26 *In re Application of Moore*, 70 Cal App 483,233 P 805
28 1 Cal. 3d 755, 83 Cal. Rptr. 411, 463 P2d 763 (1970)
29 Beasley v. State, (Okla Crim) 282 P. 2d 249 (1955)
30 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2D 174 (1992)
31 411 U.S. 423 (1973)
Therefore, it is only when the official conduct is so egregious as to undermine the process of the Court or outweigh public interest that this ingredient shall stand satisfied. Moreover, how and when that happens shall depend upon the facts and circumstances of each case.

**BURDEN OF PROOF IN CASES OF ENTRAPMENT**

As per the Model Penal Code § 2.13(2) the defendant generally has the burden of production of evidence in support of his defence of entrapment and having done so, he has the burden of persuading the trier-of-fact, mostly the jury, of the existence of facts constituting the defence of a preponderance of the evidence. In *Moody v. State*[^32^], the federal view with respect to the burden of proof was described as –

(i) The defendant has the burden of adducing any evidence of entrapment;
(ii) The trial court determines the sufficiency of the evidence of entrapment;
(iii) If the evidence of entrapment is sufficient the jury must be instructed that the state has the burden of disproving entrapment beyond a reasonable doubt; and
(iv) The jury should never be instructed on the defendant’s burden of adducing evidence.

The standards applicable to burden of proof in an entrapment case were also discussed in *Martinez v. United States*.[^33^] It was said that the fact that the accused asserts affirmative defence of entrapment does not operate to shift the burden of proof to him, but when the defence is raised the burden is on the government to prove beyond a reasonable doubt the defendant’s guilt including the fact that entrapment did not occur. Cases of entrapment prima-facie put the person apprehended, in the dock unless he is able to give a possible explanation for his acts. It has been upheld in the recent judgment of the Patna High Court in *Akhilesh Kumar Singh v. The State of Bihar*[^34^] that the presumption in cases of entrapment would thus lie against the person apprehended. Certainly the presumption is rebuttable but it needs a definite explanation. Cases of

[^32^]: 359 So. 2d 557, 560 (Fla. App. 1978)
[^33^]: 373 F.2d 810 (10th Cir.1967)
[^34^]: Criminal Miscellaneous No.13700 of 2012
entrapment form a different class altogether and the issue of sanction or any irregularity therein has to be considered against such classification.

**RECOGNITION OF THE DEFENCE**

As already seen, the defence of entrapment had its origination in the US. Gradually it came to be acknowledged in other countries also to ensure an equitable treatment to an accused who was lured into crime by bait. A successful claim of the defence may entitle the accused to stay of proceedings or alternatively, exclusion of the evidence obtained by entrapment.\(^{35}\)

The defence of entrapment is today recognized in a number of common law jurisdictions. In the United States, entrapment operates as a substantive defence.\(^{36}\) In the *Amato* case\(^{37}\), the Supreme Court of Canada also recognized entrapment as a defence.\(^{38}\) Though England did not adopt the defence for long, in *R. v. Loosely and Attorney General's Reference (No. 3 of 2000)*,\(^{39}\) the House of Lords held that where a person is entrapped into committing an offence, it is appropriate to stay the proceedings in order to prevent an abuse of the process of the Court. However, the Court refused to recognize it as a substantive defence. The New Zealand approach is similar.\(^{40}\) In *R. v. Pethig*,\(^{41}\) the Supreme Court of New Zealand held that evidence by a police agent, where he encourages and stimulates the accused to commit an offence that would not otherwise be committed, is inadmissible.

On the other hand, in some nations the defence has not received the same approval as others. The entrapment defence has been affirmed by the High Court of Australia in *Ridgeway v. The Queen*.\(^{42}\) However, all seven judges opined that the common law of Australia did not recognize entrapment as a substantive defence to a criminal charge. The majority also held that exclusion

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35 Wigmore, supra note 14 § 2512, at 546 (Chadbourn rev., 1981); Martinez v. U.S., 373 F.2d 810 (10th Cir. 1967).
37 Amato v. The Queen, 69 C.C.C. (2d) 31 (1982).
41 [1977] 1 N.Z.L.R. 448
of evidence is the appropriate judicial response to entrapment.\textsuperscript{43} The reasons for rejecting it were similar to those cited in other Common law jurisdictions, that the \textit{actus reus} and \textit{mens rea} of the offence remained unaffected.\textsuperscript{44} Further, since the beginning of 1990, the Singapore Court of Appeal has had, to date, five occasions to deal with the issue of entrapment, all being drug-trafficking cases and involving undercover Central Narcotics Bureau operations.\textsuperscript{45} These cases include \textit{How Poh Sun v. P.P.} (trafficking of diamorphine)\textsuperscript{46}, \textit{Goh Lai Wak v. P.P.} (held difficulty in detection of drug offences necessitates use of undercover agents)\textsuperscript{47}, \textit{Chi Tin Hui v. P.P.}\textsuperscript{48} and \textit{Lai Kam Loy v. P.P.} (held entrapment defence is a stumbling block in investigation by law enforcement agencies),\textsuperscript{49} and the most recent \textit{P.P. v. Rozmanin Jusoh} (accused charged of selling cannabis to a police official acting as an \textit{agent provocateur}),\textsuperscript{50} where the issue of entrapment was dismissed. In Hong Kong the status of \textit{R. v. Sang}\textsuperscript{51} remains unassailed where the defence of entrapment was rejected by the House of Lords.\textsuperscript{52} Indeed, its ascendance has been repeatedly affirmed most recently in \textit{HKSAR v. Lau Yuk Wan}.\textsuperscript{53} In \textit{R. v. Lam Ka Fai},\textsuperscript{54} it was held that evidence is not automatically excluded because it has been obtained by some perceived unfairness. This group of cases shows that the courts are unwilling to exclude evidence obtained by deception that does not infringe any statutory rights of the accused. In such case they will not give the privilege against self-incrimination derivative applications in the absence of manipulation of the accused to do something that he would not otherwise have done.\textsuperscript{55} It is not unfair to admit relevant and reliable evidence of guilt where the accused has voluntarily chosen to incriminate himself.

\begin{itemize}
\item \textsuperscript{43} Gary Leonard Low, \textit{Entrapment and the Singapore Criminal Law}, 17 SING.L. REV. 185 (1996)
\item \textsuperscript{44} Katharine Grevling, \textit{Illegality, Entrapment and a New Discretion}, 112 L.Q.R. 41 (January 1996)
\item \textit{Supra} note 15
\item \textsuperscript{46} [1991] 3 M.L.J. 216
\item \textsuperscript{47} [1994] 1 S.L.R. 748
\item \textsuperscript{48} [1994] 1 S.L.R. 778
\item \textsuperscript{49} [1994] 1 S.L.R. 787
\item \textsuperscript{50} [1995] 3 S.L.R. 317
\item \textsuperscript{51} [1979] 2 All E.R. 1222
\item \textsuperscript{52} Simon Bronitt, \textit{Entrapment, Human Rights And Criminal Justice: A Licence To Deviate}, 29 HONG KONG L.J. 216 (1999)
\item \textsuperscript{54} [1995] 1 H.K.C.L.R. 155
\item \textsuperscript{55} I.H Dennis, \textit{THE LAW OF EVIDENCE}, p.256 (Sweet & Maxwell)
\end{itemize}
ENTRAPMENT AND THE INDIA LAW

Entrapment is often colloquially associated with the concept of “sting operations” in India. Interestingly, the expression “sting operation” evolved from the American movie “The Sting” released in 1973. The Indian criminal jurisprudence is not explicit with regard to its position on the defence of entrapment. However, the Indian Supreme Court has consistently upheld candidly collected evidence to be admissible in law. Following the case of R. v. Maqsud Ali, the court held in Y. E. Nagree v. State of Maharashtra that if candid photograph could be admitted, same shall be the case for conversation recorded without the entrapped person knowing it. This adequately reflects that entrapment is not recognized as a substantive defence in India. Similarly in R. M. Malkani v. State of Maharashtra the coroner of Mumbai (accused-appellant) had planned to implicate an honest doctor in a negligent death case and had asked him for money. The doctor reported the matter to the Anti-Corruption Bureau of Police who, instead of implicating the official, asked the doctor to speak to the accused regarding amount and method of payment etc. over phone and recorded the conversation. The Supreme Court held it to be a mechanical device and that it did not present compulsion or coercion which would have mitigated the criminality of the action of the accused and though supported it, observed that it should be used in controlled conditions. In a very recent judgment of the Constitution Bench of Supreme Court in Rajat Prasad v. Central Bureau of Investigation (Criminal Appeal No. 747 of 2010), the Court however, enlarged the scope of criminality by attributing mens rea even to the sting operator. The Court questioned thus:

“Can the commission of the initial offence by the sting operator be understood to be without any criminal intent and only to facilitate the commission of the other offence by the “main culprit” and its exposure before the public?”

It was thus viewed that a crime does not stand obliterated or extinguished merely because its commission is claimed to be in public interest. Thus, not only was the defence not granted to the

56 [1966] 1 Q.B. 688
58 A.I.R. 1973 SC 157; 1973 Cri. L.J. 228
acquitted, on the contrary it was opined that even the *agent provocateur* must be charged with *mens rea*. Any such principle would be abhorrent to our criminal jurisprudence. In *D Velayutham v. State Represented by Inspector of Police* (Criminal Appeal No. 787 of 2011) decided in 2015, the Supreme Court held conviction on the basis of trap evidence to be perfectly sustainable. These judgements of the Apex Court clearly reflect upon the standpoint of the Indian penal laws in their rejection of the defence. In fact, trap proceedings are habitually resorted to by the law enforcement agencies especially in matter relating to the Prevention of Corruption Act, 1988.

**THE ‘GOODS’ OF ENTRAPPING**

There are certain situations which necessitate the government to use undercover operations. Undeniably, there are several crimes that are extremely difficult to investigate, unearth and prevent without the aid of informants and camouflaged agents. Such crimes include tracking massive drug and forgery rings, human trafficking, prostitution and corruption. Moreover, techniques such as entrapment are smart tactics to get hold of criminals red-handed without putting a strain or spending substantial resources of the state. Further, the threat of law enforcement personnel acting as undercover agents acts as a deterrence for habitual offenders from criminal activity because of government involvement in the crime. This brings us to the question why there should be any special hesitation in admitting such “trap evidence.” It may be of course, be said that such evidence is “not playing the game” and is “unfair,” but that does not mean that it is more untrustworthy than any other evidence.59 For that matter it may be more trustworthy as the accused cannot have been influenced by the hope of receiving any special favor by making the statement as may happen in the case of confession.

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59 LQR July 1970 vol.86 pg 297
THE “BAD” OF ENTRAPPING

A major drawback that follows the strategy of entrapment is the inducement of an innocent person into law breaking. In this way the government may manufacture crime by persons who otherwise may not engage in such activity. Innocent persons are often approached by bootleggers (agent provocateurs) to test their moral virtue by determining whether they will engage in criminal behavior. They likely would not have committed the crime had they not been approached. Thus, such reprehensible and gregarious conduct on the part of law enforcement officials deters faith of the people in their government which may lose their respect for engaging in law breaking. Further, the defence of entrapment can be relied on only if the conduct of the agent provocateur is so outrageous that it violates fundamental fairness and is shocking to the universal sense of justice. This reflects that it is the problem of abuse of process which the defence aims to redress. However, such abuse of process catch hold of offenders must not take place in the first place to so that later a defence of this nature has to be granted to them. Moreover, at times, informers who infiltrate criminal organization may be criminals whose own activity is often overlooked in exchange of their assistance. All these consideration necessitate that when there is not a blanket ban on the abuse of process and authority by the enforcement officials, the defence of entrapment must exist.

CONCLUSION

Though the criminal jurisprudence has come a long way since the origin and development of the defence of entrapment, conflict still prevails as to the character of this defence. While some jurisdictions grant a stay of proceedings in cases of entrapment, others refuse to appreciate it as a substantive defence. Law enforcement agencies justify their use of such tactics, even when they are illegal, as necessary to catch the habitual and hardened criminal who is clever at evading the traditional modes of detection. On the other side the view point that prevails is that, the offence with which the defendant is charged in such cases is an artificial one, created only to entice him

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60 Matthew Lippman, supra note 34
to commit the same crime again which he is suspected of committing in order to catch him. Even the Indian law does not give the required appreciation to the defence though the police system does make use of entrapping strategies. However, situation and circumstances mentioned above show that cases have not been seldom where an innocent person is beguiled into commission of a crime which he would not otherwise even think of. This calls for an urgent need to give recognition to the defence of entrapment to restrain the police from abusing its power and enticing an innocent person to commit crime. The ingredients of the defence clearly and very adequately reflect upon the scenario where the offender is a habitual criminal in which case his predisposition to break the law will prohibit him from a successful claim of the defence. This will sufficiently rule out the possibility of a criminal being let loose. In short, a synthesis of both the subjective and the objective approach shall provide a considerable benefit to both the charged defendant and the investigating officer, while still providing a legal doctrine that is flexible enough to adapt to the future need of law enforce.