



# RESEARCH NOTE

Number 47, 27 June 1995  
ISSN 1323-5664

## Police Entrapment - the High Court's Decision in *Ridgeway v. the Queen*

### Introduction

The decision of the High Court in *Ridgeway* has produced a considerable amount of comment and some criticism. The case involved a 'controlled importation' of heroin arranged by the Australian Federal Police (AFP).

In *Ridgeway's* case, the High Court devoted particular attention to balancing the public interest in the detection and apprehension of drug traffickers with the need to preserve public confidence in the integrity of the criminal justice system.

While the majority and McHugh J came to different conclusions, all expressed concerns about the use of entrapment by law enforcement officials. Those concerns are substantial ones.

The Court was concerned about grave, illegal conduct by those whose duty it is to uphold the law and a resulting undermining of public confidence in the criminal justice system. Brennan J pointed out that even a legislative regime which allowed for controlled importation of drugs was not without potential problems - which he described as 'anomalies, if not corruption, in the absence of adequate supervision.' While McHugh J came to a different conclusion from the majority in *Ridgeway*, his thoughts about entrapment are apposite ones too:

*In a society predicated on respect for the dignity and rights of individuals, noble ends cannot justify ignoble means ... No government in a democratic state has an unlimited right to test the virtue of its citizens. Testing the integrity of citizens can quickly become a tool of political oppression an instrument for creating a police state mentality.*

### The Facts

John Anthony Ridgeway (the appellant) was convicted in the District Court of South Australia of having a prohibited import in his possession without reasonable excuse and in contravention of the *Customs Act 1901* (Cwlth). The import in question was 140.4 grams of heroin (a trafficable quantity). The offence attracts a maximum penalty of imprisonment for 25 years and a fine of \$100,000, or both.

The appellant served time in prison in South Australia with a man called Lee. Lee was deported to Malaysia after serving his sentence and became a police informer. Following his release from prison, Ridgeway contacted Lee to discuss arrangements for the purchase of heroin in Malaysia.

From information passed on by Lee, the AFP and the Royal Malaysian Police Force acted together to arrange a 'controlled' importation and delivery of heroin into Australia. As part of the arrangement, heroin was brought into Australia by Lee and an officer of the Malaysian Police Force. Arrangements were made with the Australian Customs Service for the heroin to clear customs. The heroin was delivered to Ridgeway who was then arrested by the AFP.

It was common ground that in facilitating the importation of the heroin, AFP officials had committed serious offences against the *Customs Act 1901*.

### The Bases for the Appeal

The High Court considered three bases for appeal:

- a defence of entrapment;
- abuse of process; and
- judicial discretion to exclude evidence that has been illegally obtained.

### A Defence of Entrapment?

The High Court agreed unanimously that no substantive defence of entrapment exists in Australia. No such defence exists in England, Canada or New Zealand but it has been recognised by courts in the United States. The defence may operate in the United States where an 'unwary innocent' (as against an 'unwary criminal') is induced or persuaded by a government official to commit an offence.

The High Court held that in common law jurisdictions, such as Australia, it is a central tenet of criminal law that where a person commits all the elements of offence voluntarily and with the necessary intent, then that person is guilty of the offence. Inducement to commit the offence is irrelevant.

### Abuse of Process

Mason CJ, Deane and Dawson JJ delivered a joint judgment. The other Judges delivered individual judgments. Mason CJ, and Deane and Dawson JJ; Brennan J and Toohey J all rejected the argument that the prosecution of *Ridgeway* had been an abuse of process.

Gaudron J, dissenting on this point, distinguished between cases where law enforcement officials provide a person with the 'mere opportunity' to commit a crime and cases where the offence occurs as a result of the illegal actions law enforcement

officials. In the latter case, Her Honour held that if a prosecution were to proceed then the administration of justice would be called into question and public confidence in the courts diminish.

McHugh J also considered abuse of process. He was concerned that the judicial process could be brought into disrepute if it appeared that prosecutions were being instituted against people whose offences were artificially created by the misconduct of law enforcement officials.

His Honour stated that the most effective sanction against such misconduct was to grant a stay of prosecution. McHugh J formulated a test of entrapment which focuses on whether the conduct of the authorities induced the accused to commit an offence, whether the authorities had reasonable ground for suspecting that the accused would commit the offence and whether prior to the inducement, the accused had an intention to commit the offence if the opportunity arose.

McHugh J found that Ridgeway was not entitled to a stay of prosecution. He considered that a stay of prosecution, in this case, would bring the administration of justice into disrepute. He emphasised that Ridgeway had already planned and was willing to commit the offence in question. In McHugh's view, Ridgeway had not been induced into committing the offence.

### **Discretion to Exclude Evidence**

In the leading case of *Bunning v. Cross*, the High Court found that a court could exclude evidence obtained by unlawful means on public policy grounds. This discretion involves weighing the public interest in the apprehension of criminals against the public interest in maintaining the integrity of the criminal justice system.

Mason CJ, Deane and Dawson JJ found that in Australia, the courts have a discretion to exclude evidence of an illegally procured offence which is analogous to the *Bunning v. Cross* discretion. Their Honours distinguished between police conduct which induces a person to commit an offence and police conduct which itself constitutes the offence in question. They agreed that the second category of offence was more serious and more likely to lead to the exclusion of evidence of the offence.

Their Honours took the view that the offence committed by the AFP was a grave one - it involved the importation of a trafficable quantity of heroin, there had been no official disapproval of the operation and the *Customs Act 1901* provided no exemption for the conduct. Their Honours held that if law enforcement officials were to be exempted from the requirements of the law, then this was a matter for the legislative arm of government and not for the courts.

Brennan J found that the *Bunning v. Cross* discretion to exclude illegally obtained evidence could sometimes be used when an entrapped offender is an 'unwary criminal.' In His Honour's view, this was such a case because the illegality of the police conduct had been so grave that Ridgeway's conviction would be 'too high a price to pay.' Like Mason, CJ, Deane and Dawson JJ; Brennan J believed that provision for 'controlled importation' of drugs - including safeguards and penalties - was a matter for Parliament.

Gaudron J rejected the use of the *Bunning v. Cross* discretion in this case.

McHugh J held that the public policy ground for excluding evidence recognised in *Bunning v. Cross* should not be applied when an accused person seeks to exclude evidence on the basis that

he or she was induced to commit a crime because of the unlawful or improper conduct of law enforcement officials.

### **What the High Court Ordered**

By a majority, the High Court ordered that Ridgeway's conviction be quashed and that there should be a permanent stay of proceedings against him under the *Customs Act 1901*.

### **The Consequences of the Decision**

The Government has announced that it intends to introduce legislation to 'ensure the AFP and other law agencies are able to effectively investigate crime and pursue criminals, including drug importers.' Informed and extensive public debate is needed about such legislation and drug policies in general. That debate should also consider the utility of using existing offences - such as conspiracy - to deal with would-be drug traffickers.

In the meantime, planned 'controlled deliveries', pending prosecutions and the sentences of some convicted traffickers may be in doubt.

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