The defence of entrapment law general essay

Law

Introduction

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.[1]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.[2]

Development of the Defence of Entrapment

The defence first came to be recognized by the U. S. Supreme Court in the case of Sorrells v. United States.[3]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. 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 .

Recognition of the Defence

The defence of entrapment is recognized in common law jurisdictions. In the United States, entrapment operates as a substantive defence.[4]In the Amato case[5], the Supreme Court of Canada also recognized entrapment as a defence.[6]In R. v. Loosely and Attorney General's Reference (No. 3 of 2000),[7]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 entrapment defence has been affirmed by the High Court of Australia in Ridgeway v. The Queen.[8]The majority also held that exclusion of evidence is the appropriate judicial response to entrapment.[9]The New Zealand approach is similar.[10]In R. v. Pethig,[11]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. However, in some nations the defence has not received the same approval as others, In Ridgeway v. The Queen,[12]all seven judges opined that the common law of Australia did not recognize entrapment as a substantive defence to a criminal charge. The reasons for rejecting it were similar to those cited in other Common law jurisdictions, that the actus reus and mens rea of the offence remained unaffected.[13]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.[14]These cases include How Poh Sun v. P. P. (trafficking of diamorphine)[15], Goh Lai Wak v. P. P. (held difficulty in detection of drug offences necessitates use of undercover agents)[16], Chi Tin Hui v. P. P.[17]and Lai Kam Loy v. P. P. (held entrapment defence is a stumbling block in investigation by law enforcement agencies), [18]and the most recent P. P. v. Rozmanbin Jusoh (accused charged of selling cannabis to a police official acting as an agent provocateur),[19]where the issue of entrapment was dismissed. In Hong Kong the status of R. v. Sang[20]remains unassailed.[21]Indeed, its ascendance has been repeatedly

affirmed most recently in HKSAR v. Lau Yuk Wan.[22]In R. v. Lam Ka Fai, [23]it was held that evidence is not automatically excluded because it has been obtained by some perceived unfairness.

The Tests for Entrapment

From the beginning, modern entrapment law has been an intricate patchwork of two general approaches.[24]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.[25]

The Subjective Approach

The subjective test also called as the " origin of intent" test[26]focusses 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.[27]‘ 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.[28]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.[29]In Sherman v. United States[30], 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 focusses on whether the bait put by the police officials is likely to lure an otherwise innocent person into committing a crime.[31]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.[32]Examples of prohibited governmental activity may include offers of inordinate sums of money.[33]

Ingredients of the Defence

No predisposition on part of the accusedReprehensible conduct on art of the law enforcement authoritiesAgent Provocateur must be a law enforcement official

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[34], the federal view with respect to the burden of proof was described as –The defendant has the burden of adducing any evidence of entrapment; The trial court determines the sufficiency of the evidence of entrapment; 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; andThe 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.[35]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 whn 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.

Entrapment and the India Law

The Indian Supreme Court has consistently upheld candidly collected evidence to be admissible in law. Following the case of R. v. Maqsud Ali, [36]the court held in Y. E. Nagree v. State of Maharashtra[37]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 most Common law nations.

Criticism of the Defence