

# SUPREME COURT OF YUKON

Citation: *R. v. Johns*, 2020 YKSC 14

Date: 20200507  
S.C. No. 17-01506  
Registry: Whitehorse

**BETWEEN**

**HER MAJESTY THE QUEEN**

**AND**

**DIANA JOHNS**

**Restriction on publication: Publication of information that could identify a witness is prohibited pursuant to s. 486.31 of the *Criminal Code*.**

Before Madam Justice E.M. Campbell

Appearances:  
Ludovic Gouaillier  
Vincent Larochelle

Counsel for the Crown  
Counsel for the accused

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] On June 10, 2019, I found Ms. Johns guilty, after trial, of one count of trafficking cocaine pursuant to s. 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, in relation to two drug transactions that occurred on January 5, 2017. The matter was adjourned for a number of months to allow the defence to file an application for a stay of proceedings based on entrapment. The application proceeded on November 21, 2019. On February 7, 2020, I denied Ms. Johns' application with written reasons to follow. These are my reasons.

## **ISSUE**

[2] Was Ms. Johns entrapped by the police into trafficking crack cocaine?

## **FACTS**

[3] The facts in this case, as they relate to the issue of entrapment, are very much in dispute. As a result, I find it necessary to lay out the Crown's and Ms. Johns' versions of events in detail.

[4] The Crown called one witness at trial, a Royal Canadian Mounted Police ("RCMP") officer who worked undercover in this case. The police officer's identity is protected by a publication ban I ordered pursuant to s. 486.31 of the *Criminal Code of Canada*. The defence did not call evidence at trial. Time, nature of the substance (cocaine), quantity and continuity were not at issue at trial.

[5] Ms. Johns filed an affidavit and testified in support of her application for a stay of proceedings based on entrapment. A number of documents related to the undercover operation that led to Ms. Johns' arrest were also filed by consent on the application.

## **EVIDENCE AT TRIAL**

[6] The RCMP officer testified that, in January 2017, he was tasked with assisting the Yukon RCMP in a street-level drug trafficking undercover operation called Project Multitool. The officer had experience as an undercover operator. At the time, he had worked on approximately 80 undercover scenarios. During Project Multitool, his tasks, as an undercover operator, were to attempt to purchase small quantities of drugs from targets identified by the local RCMP. Each day, his cover person, a police officer from the Yukon RCMP, provided him with either phone numbers, locations or people to target. He would either have to attend a certain location or make a call to attempt to make a purchase. He was directed, by his cover person, on a case-by-case scenario.

He was not briefed on who the principal targets of Project Multitool were. He effected 19 drug purchases as part of the operation.

[7] On January 5, 2017, the officer was tasked to attend Unit 39 of the Barracks, an apartment building in Whitehorse, to attempt to purchase crack cocaine from “black males”. He was not given names, nor was he given a further description of those individuals. He did not know how many males would be at the apartment nor was he given a phone number for that location or the males. However, he was told that Unit 39 was the first unit on the right upon entry from the back set of stairs at the back entrance of the Barracks.

[8] The officer, working undercover, went to the Barracks shortly after 6:00 p.m. on January 5, 2017. When he arrived, he realized that the doors to the building were locked. At some point, a maroon minivan pulled up and an unknown black male got out of the vehicle. The male came up the outside back stairs where the officer was located. As the male was coming up the stairs, the officer, who was in a position to see down the hallway of the building through the doors, saw a second black male come out of the first unit on the right. The first male opened the doors with a key and proceeded into the building. The officer followed him into the hallway. The first and second males went back to the apartment door of the first unit on the right. The second male let the first male into the unit. The officer walked to the door and showed the second male, who was still at the door, that he had a \$100 in his hand. The male gestured for the officer to come inside the unit. The officer noted that he was at Unit 38 not Unit 39. However, he also noted that the location of the unit matched the physical location he had been given. As the second male gestured for the officer to enter the apartment, after seeing the money in his hand, he felt he was at the right location.

[9] Once inside, the officer saw two more black males sitting on a couch. One of them (the third male) said to the officer that he did not know him. The officer told him he had been given the location by someone he had met at the 98, a bar in downtown Whitehorse. The officer also mentioned the name of another person. It appeared that the males did not know any of the people the officer mentioned. Around that time, a woman, later identified as Ms. Johns, came into the living room through the bedroom doorway. In cross-examination, the officer conceded that it is possible that Ms. Johns came into the apartment behind him but denied he was outside the apartment when he first saw her. He maintained that the first time he saw her, he was in the apartment and she was in the bedroom doorway. The third male asked her if she knew the officer. The officer said he had seen her around the 98. The woman indicated with hesitation that she might know him. The third male then said that he did not know the officer and could not help him.

[10] The officer testified that he then left the apartment and walked back down the hallway. He waited in the stairwell and started making phone calls. He stated that he waited there because he did not think the males would sell to him. However, he was delaying his departure in case they changed their mind. While he was on the phone, the second male came out of the apartment and asked the officer if he was calling "Bill". He answered he was calling someone else. The male invited him back into the apartment. Once inside, the officer had another conversation with the third male, who was still sitting on the couch, about who he knew. The officer went through the same list of names. The third male told him that "it would be 20 minutes". The officer then exited the apartment to wait for 20 minutes. As he was exiting the apartment, the woman asked him if she could have "a smoke".

[11] The officer and the woman left the apartment and went outside to have a cigarette. The woman told him her name was Dice. He asked her if it was her apartment. She said yes. The officer testified that he made a comment about her making good money “out of it” and that she then made a comment about “it not being enough”. The officer testified that the woman told him she could do “3 for \$120” and that she “gets a half”. She clarified that she would make a purchase and then meet him on the third floor to finish the deal. The officer testified that he declined her offer. Instead, he offered her twenty dollars to vouch for him, meaning that she would tell the males inside the apartment that she knew him so that he could buy drugs from them. The officer testified that she agreed to vouch for him. He gave her twenty dollars and they went back inside the apartment.

[12] The woman vouched for him as agreed to. The third man said that he had already made a call and it would take 20 minutes. The officer testified that he then exited the apartment again. While he was waiting in the stairwell, the woman came out. The officer testified that she had what appeared to be one piece of crack cocaine wrapped in plastic in her right hand. She offered it to him for \$50. He looked at it and said that it looked light. The woman responded that it had been weighed. He told her that he only had twenty dollar bills. She replied she had a five but not a ten. The officer agreed to make the deal. He gave her sixty dollars for the piece of crack cocaine. He then asked her for a phone number that he could call later. She replied that she would have to ask the males inside as she needed their permission to give their phone number.

[13] The woman went back inside the apartment. When she came back, she told the officer that he would have to come back later. He asked if he could come back later that

evening. She said yes. The officer then departed the Barracks. He went downtown Whitehorse and turned over the drug to another police officer.

[14] The officer further testified that, later that night, he was tasked to go back to the Barracks to make another purchase of cocaine. He was not given anymore information than he had the first time. He attended the Barracks shortly after 9 p.m. Both the front and the back doors of the building were locked. He walked outside the building to where Unit 38 is located and threw a snowball at the window. The same woman he had seen earlier that day asked him who he was. He replied that it was “Rob from earlier”. The officer went back to the door. The woman came out of Unit 38 and opened the door for him. She told him that the “black guys” had left. She continued on to say that she was not supposed to but that she knew someone else who could help him out. The officer stated in cross-examination that she offered to “hook him up” with someone by phone before he even asked for crack cocaine. The officer went into Unit 38. The woman then asked to use his phone. She went to the back bedroom where she appeared to be reading phone numbers from a list inside the closet. She then dialed some phone numbers. While he was waiting for her, the officer noticed a photocopy of a newspaper article with a photo of two females. The article identified the woman who looked like “Dice” as Diana Johns. The woman confirmed that it was her in the photo and that Diana Johns was her name. The officer testified that she spoke to someone on the phone. He stated that it sounded like she was asking someone “to do 3 rocks of cocaine for \$120” but that the individual was not agreeable. It also sounded like the individual would be there in five minutes. According to the officer, they then talked about the woman’s tattoos. He also agreed to give her two dollars to buy pop from the building’s vending machine. After that, they went down to wait for the individual to arrive. Shortly

after, he received a text on his phone to the effect that the individual was there in a cab. The woman told him to reply KK.

[15] They then proceeded out the rear entrance door where he observed an unknown black male driving a blue minivan taxi parked outside. There was also a second unknown man wearing a hoodie over his head in the passenger seat of the minivan. The second man appeared to be caucasian. The woman and the officer got in the back seat of the taxi. The woman told the man in the passenger seat “a hundred”. The man looked at the officer who gave him a hundred dollars. The man gave the woman two pieces of what appeared to be crack cocaine. She took them. The officer and the woman then exited the taxi, which drove away. After the transaction, the officer and the woman went back to Unit 38. He asked her if he could get the phone number of her friend. The woman indicated that she wanted a piece of the crack cocaine he had bought in exchange for the phone number. The officer agreed and gave her a small piece of crack cocaine from one of the pieces he had bought. She then gave him a phone number. The officer asked her if the individual would be fine if he phoned him and she replied to tell them that he knows Dice. The officer then left. He met up with another police officer and gave him the pieces of crack cocaine he had bought. He never dealt with the woman after that. He went back to the Barracks on three occasions after that evening, but no one was there. The officer identified the accused, Diana Johns, as being the woman he dealt with on January 5, 2017.

[16] The officer confirmed that the black males, not Ms. Johns, were his targets when he went to the Barracks. He stated that he had no reason to believe that Ms. Johns would be at the apartment when he first went there and that Ms. Johns was not identified to him as a target of Project Multitool.

[17] In cross-examination, the officer stated that, typically, he does not pretend to be or look like a crack user when working undercover because he does not want to find himself in a situation where he would have to consume crack cocaine. He usually suggests that the drug is for someone else. His cover story varies from scenario to scenario but, usually, his story is that he buys for a friend, a woman. He stated that he did not recall any specific instance in Project Multitool where he would have said that he was using drugs himself as he usually tries to stay away from that. Also, he did not think his cover story included that he was buying for himself when he went to the Barracks. The officer added that he did not believe he told Ms. Johns or the black males who he was buying crack cocaine for at the time.

[18] The officer also stated that his cover person is the one who directed him to contact specific targets, phone numbers, and attend certain locations. He also stated that, generally, as an undercover operator, he follows the instructions he receives from his cover person and the investigating team. However, he added that if, while at the targeted places or with the targeted people, other opportunities to make a transaction arises he takes them.

[19] The officer also stated that he did not want to deal with Ms. Johns at first because he did not want her to insulate the male targets from him. He wanted to buy drugs directly from the male targets who had told him to wait for twenty minutes.

[20] In cross-examination, the officer agreed that, after January 5, 2017, he texted the same phone number Ms. Johns had given him. He also agreed that he texted the expression "I'm hard up", which, he had to concede, could be construed as he needed crack cocaine for himself. He conceded that, while at the 98, he stated that he was looking to party. He also acknowledged that during Project Multitool, he followed



someone, whom he had just met at the 98, to another location to buy drugs from an unknown individual. He also agreed that, in the course of Project Multitool, he did solicit individuals to sell drugs to him after they had refused to do so.

[21] Defence counsel put to the officer the names of the principal targets of Project Multitool. The officer did not recognize any of them, including the name of the target associated with the apartment at the Barracks. However, the officer also indicated that often, in these types of operations, he is not given names. In his experience, it is not looked upon positively to use someone's name during a drug transaction. The officer reiterated that he was directed by the Yukon RCMP on a scenario-by-scenario basis.

[22] With respect to other specific drug transactions he made during Project Multitool, the officer testified that unless any new information or lead he gathered during a scenario was part of what he was tasked to do, he went back to his cover person to get directions prior to acting on that information. He testified that the cover person is ultimately the manager of the undercover operation. That person acts as a liaison with the investigating team and is in possession of the totality of the information. As an undercover officer, he follows the directions he is given.

### **EVIDENCE ON THE APPLICATION**

[23] Diana Johns filed an affidavit and testified in support of her application for a stay of proceedings. She was the only defence witness to testify on the application. The Crown did not call any witnesses on the application. A number of documents related to Project Multitool were filed by consent.

[24] At the beginning of her testimony, Ms. Johns endorsed the content of her affidavit. Ms. Johns is 49 years old, and is a member of the Carcross Tagish First Nation. Ms. Johns stated that her mother, grandmother and great grandmother went to

residential school. She stated that, growing up, her parents and most of her extended family consumed drugs and alcohol. She also witnessed a lot of physical and sexual abuse in her family and entourage. Ms. Johns reported that she, herself, suffered from sexual abuse growing up. Ms. Johns testified that she was only a teenager when she started drinking alcohol. Her drinking became excessive through her 20s and 30s. She was approximately 28 years old when she started smoking crack cocaine and she quickly became addicted to that drug. However, she managed to remain clean and sober for a period of nine years, from the early 2000s to the early 2010s, prior to entering into what she referred to as a very dark period of her life, when she started abusing alcohol and crack cocaine again and was unable to stop. She stated that she drank and smoked crack cocaine to forget about her trauma and pain. During that time, Ms. Johns found herself unemployed. She relied on social assistance and disability payments to get by. She lost her house in Carcross and was homeless for an extended period prior to moving into an apartment at the Barracks in Whitehorse in October of 2016.

[25] Ms. Johns' version of what happened on January 5, 2017, differs substantially from what the Court heard at trial. Ms. Johns indicated that back in January of 2017, she was living at Unit 38 of the Barracks. Her apartment was the first one to the right of the stairwell. Ms. Johns testified that, at the time, she was back and forth between her apartment and her boyfriend's apartment, which was located in the same building. She does not believe that there is a Unit 39 at the Barracks. Ms. Johns acknowledged that a number of male individuals, whom she referred to as the "black guys", had been selling drugs out of her apartment for about 30 days prior to January 5, 2017. She did not know the men's real names nor did she remember the names they went by. They had come

to use her apartment through a woman who had befriended Ms. Johns and had stayed at her apartment for a period of time. When the woman left, the black men stayed and continued to use her apartment as a base to eat, watch television and sell drugs.

[26] Ms. Johns testified that a number of black men, all part of the same group, would come and go from her apartment. They were not always there. The men had a key to the building but not to her apartment. She or her boyfriend had to let them into her apartment. Ms. Johns acknowledged that she was supposed to receive “a cut” and/or drugs for letting them use her apartment to sell drugs. However, she stated that the men would regularly “cheat her out of her cut”.

[27] Ms. Johns testified that, at the end of 2016 - beginning of 2017, she decided to turn her life around. She stated that a week or so prior to January 5<sup>th</sup>, she had told the black men they could no longer use her apartment and had to leave. She made that decision partly because she wanted to turn her life around, but also because they were “cheating her out”. Ms. Johns reported that, while the men had been giving her all sorts of excuses for staying, on January 5<sup>th</sup> (the day the events before the Court took place) they were finally ready to leave. At some point during the day, Ms. Johns’ boyfriend received a call from the men asking Ms. Johns to come to Unit 38. She assumed they were ready to go so she went to her apartment to ensure the door was lock upon their departure. When she arrived, she noticed a man standing outside her unit. She did not know him, but stated that she now realizes he was an undercover police officer. However, at the time, she thought he was a “junkie” because of the way he looked. He was fidgety and asked her if she had drugs for him. She did not answer. As she was trying to unlock her door, he asked her if she lived there. She replied something along the lines of “Yah, who are you?” At that point, the door of her apartment opened from

the inside and the black men let her in. The unknown man tried to follow her into the apartment while asking for drugs. However, they were able to close the door on him to prevent him from entering the apartment.

[28] Once inside, Ms. Johns asked the men if they were ready to go. They told her they were ready to go but that the man outside her unit was bothering them by repeatedly asking for drugs and not wanting to leave. That is why they had phoned her. Ms. Johns asked them if they had ten dollars for cigarettes. They replied they did not have money, but one of them gave her a cigarette. She went outside to smoke it. As she was exiting her apartment, she noticed that the man was still there standing at the stairwell and exit door. He asked her to help him get crack cocaine, from the black men, or from anywhere. He followed her outside and, while she was smoking her cigarette, he told her that he really wanted drugs and asked her to get crack cocaine for him. Ms. Johns stated that she was annoyed and exasperated. She asked him why he was still there. She told him that the black men were leaving and were not selling that day. She testified that she was hoping the man would just leave. She stated that she was not certain whether the man asked her to vouch for him.

[29] After she finished her cigarette, she went back to her apartment. She reminded the black men that they had to leave and told them to call her when they were ready to do so. She asked them again for ten dollars to buy cigarettes. At that point, they gave her a small piece of crack cocaine in a plastic bag. The piece was worth approximately fifty dollars. They told her that if she sold it to the man, she could keep ten dollars. She stated that she did not know where that piece of crack cocaine came from, as she had understood that they were leaving and did not have drugs to sell that day. She took the piece of crack cocaine and sold it to the man, who was still in the hallway. She told him

that the black men had said it was all they had. The man gave her three twenty dollar bills. She went back inside to give the money to the black men. They told her they did not have change and could not give her the promised ten dollars. However, they had their bags and were ready to leave. Prior to leaving, they told her they would send her money and cigarettes, but they never did. The man was still out in the hallway when they left and asked for crack cocaine again. They yelled a phone number at him as they were leaving. The man left after that. Ms. Johns stated that she does not remember the phone number they yelled at him. She then locked her apartment and went back to her boyfriend's apartment.

[30] Later that day, at around 9:30 p.m., the same man knocked on the door of her apartment. She opened the door and he came in. He asked for drugs again or a phone number. She stated that she was uncomfortable being in her apartment alone with him. She told him she was leaving. As she was locking her door, she told him to try the phone number the black men had given him. The man made the phone call. Ms. Johns stated that he offered her money and crack cocaine to stay with him for "the meet". She stated that she agreed to stay with him because she had not had any drugs that day. Ms. Johns testified that a taxi came to the Barracks and the man bought crack cocaine from the driver. Afterward, the man gave her twenty dollars and a piece of the crack cocaine he had just bought. She then went back inside the building. The man left in another taxi. She smoked the piece of crack cocaine that evening. She never saw that man again, until he testified at trial. Ms. Johns acknowledged that she consumed alcohol, "a jug of cider", the day after the events (January 6, 2017), and that, as a result, she was somewhat intoxicated that day. She also acknowledged that she consumed alcohol and drugs on and off after January 6, 2017. While she did not remember exactly

what she consumed, she stated that she was in the process of weaning herself off of alcohol and drugs. Ms. Johns confirmed that she was not arrested in relation to this matter until approximately two months after the events.

## LEGAL PRINCIPLES

[31] The doctrine of entrapment is concerned with unacceptable police conduct in investigating and uncovering criminal activity (*R. v. Imoro*, 2010 ONCA 122, at para.8 (“*Imoro*”), and *R. v. Barnes*, [1991] 1 S.C.R. 449, at para. 14 (“*Barnes*”).

[32] As stated by the Supreme Court of Canada in *R. v. Pearson*, [1998] 3 S.C.R. 620, at para. 11:

... The question to be answered is not whether the accused is guilty, but whether his guilt was uncovered in a manner that shocks the conscience and offends the principle of decency and fair play.

[33] The circumstances giving rise to entrapment were set out by Lamer J. (as he then was) in *R. v. Mack*, [1988] 2 S.C.R. 903, at pp. 964-965 (“*Mack*”):

... [T]here is entrapment when,

- (a) 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;
- (b) 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 the offence.

...

The absence of a reasonable suspicion or a *bona fide* inquiry is significant in assessing the police conduct because of the risk that the police will attract people who would not otherwise have any involvement in a crime and because it is

not a proper use of police power to simply go out and test the virtue of people on a random basis. ...

[34] Once the court has made a finding of guilt, the burden is on the accused to prove, on a balance of probabilities, that they were entrapped into committing the offence.

[35] A finding of entrapment will automatically lead to a stay of proceedings because allowing a conviction to stand when the accused has been entrapped into committing the offence would constitute an abuse of process and bring the administration of justice into disrepute (*Imoro*, at para. 11).

### **POSITIONS OF THE PARTIES**

[36] Defence counsel submitted at the hearing of the application that Ms. Johns testified in a forthright and convincing manner and that her version of events should be preferred to that of the officer. Defence counsel submitted that the officer was not forthcoming, that he was evasive and even disingenuous when confronted with text messages he sent during the undercover operation showing that he was going around town portraying himself as a drug addict, instead of someone buying for a girlfriend, as he testified he usually does. Defence counsel added that the officer was playing the part of a “desperate junkie” and that his text messages confirm Ms. Johns’ version of events.

[37] Defence counsel also submitted that the evidence reveals that Project Multitool was not a *bona fide* police operation, instead, it constituted “random virtue testing” as the police went around the city of Whitehorse randomly providing people with the opportunity to traffic in drugs. According to the defence, the fact that the officer frequented the 98, a bar in downtown Whitehorse he was tasked to attend to purchase

drugs, while portraying himself as a drug addict desperate for drugs and pursuing any lead he could get, illustrates the true random nature of the police operation.

[38] Defence counsel also pointed out that, as part of Project Multitool, the officer was specifically tasked to attend the residence of an individual, who had not been identified in the police's Investigational and Planning Report, as one of the principal targets of Project Multitool, and to purchase drugs from him. The officer followed this direction. Furthermore, the fact that the officer was not familiar with the names of the project's principal targets, and that only one out of twelve people arrested and charged as a result of the operation was a principal target, support the conclusion that Project Multitool was not a *bona fide* investigation. Also, defence counsel submitted that it was the entire city of Whitehorse that was targeted by the police, which encompasses too broad of an area to qualify as a *bona fide* investigation. Defence counsel also submitted that the evidence before the Court is such that the Crown was faced with an evidentiary burden to establish that the RCMP was engaged in a *bona fide* investigation. By choosing not to call the police officers responsible for Project Multitool to testify, the Crown failed to establish that the operation was a *bona fide* investigation. Entrapment is therefore made out.

[39] With respect to the undercover scenario involving Ms. Johns, defence counsel submitted that the police did not have reasonable suspicion to attend her apartment. The officer received very little information before he went to the Barracks to attempt to buy crack cocaine. He did not know the names of the targets or what they looked like. The only description he had was that they were black males. Accordingly, the police was simply acting on a tip that black males were operating out of an apartment, which, defence counsel submitted, constitutes racial profiling. Defence counsel further



submitted that when the officer arrived at the Barracks, he simply followed two unknown black males into an unknown apartment based on a dubious and unspecific tip. This, according to defence counsel, clearly demonstrates that the undercover officer was not acting on reasonable suspicion nor pursuant to a *bona fide* investigation.

[40] In the alternative, defence counsel submitted that, even if the police had a reasonable suspicion to be there, the officer had no reason to solicit Ms. Johns for drugs at first, as he had no reason to believe that she lived there and she did not meet the description of the targets.

[41] In the further alternative, defence counsel submitted that by pretending to be a drug addict desperate for drugs, by repeatedly asking for drugs while he was at the Barracks, and by refusing to leave when asked to do so, the officer went beyond providing an opportunity to traffic in drugs, he induced the commission of the offence, which also constitutes entrapment.

[42] Defence counsel added that it is concerning that the police targeted vulnerable drug addicts, like Ms. Johns, as part of their investigation. In addition, Defence counsel contended that it is egregious that the undercover officer offered and gave a piece of crack cocaine to an addict to entice her into helping him make a drug transaction, and that in doing so, the police exploited her vulnerability.

[43] Conversely, Crown counsel submitted that the officer testified in a forthright manner and was unshaken in cross-examination as opposed to Ms. Johns, who admitted to using drugs at the time of the events, and who would have had no particular reason to remember the day of the undercover operation, as she was only arrested approximately two months later.

[44] Crown counsel also submitted that the officer was engaged in a *bona fide* investigation, which targeted individuals suspected of trafficking cocaine, when he incidentally encountered Ms. Johns at the Barracks. The information the officer was acting on had been obtained by the Yukon RCMP from a confidential source.

Furthermore, the RCMP did not target the males because they were black. The RCMP had confirmed that at least one of the male targets had been arrested in previous drug files and was suspected of being involved in the drug trade prior to initiating the undercover scenario that led the officer to Ms. Johns' apartment.

[45] Crown counsel further argued that the officer did not offer Ms. Johns an opportunity to commit a crime. Ms. Johns is the one who offered to sell crack cocaine to him while he was attempting to buy from the male targets. According to Crown counsel, it would have been illogical, suspicious and potentially dangerous for the officer to refuse to buy crack cocaine from Ms. Johns at the time. In the alternative, the officer did have reasonable suspicion to believe Ms. John was engaged in drug trafficking when he provided her with the opportunity to commit the offence. In the further alternative, even if the Court came to the conclusion that the officer had given her an opportunity to commit a crime without reasonable suspicion, it was in the course of a *bona fide* investigation. Finally, the *Controlled Drugs and Substances Act (Police Enforcement) Regulations*, SOR/97-234, authorized the officer, in the context of the investigation, to give a piece of crack cocaine to Ms. Johns, as she requested.

## **ANALYSIS**

[46] Ms. Johns bears the burden of establishing, on a balance of probabilities, that the police entrapped her into trafficking crack cocaine.

## **FINDING OF FACTS**

[47] As previously stated, the Crown and the defence put forward completely diverging versions of what happened at the Barracks on January 5, 2017. I must therefore make a finding of facts prior to determining whether entrapment is made out on a balance of probabilities.

[48] Ms. Johns testified that while she could not remember exactly the content of all the conversations that took place on January 5, 2017, she remembered the events of that day really well. She said it was like a movie in her head. She then went on to provide a detailed version of how the events unfolded.

[49] However, there are two notable inconsistencies between what she testified to at the hearing of the application and the content of her affidavit, which I find affect her credibility and reliability with respect to how the events unfolded on January 5, 2017.

[50] First, Ms. Johns testified that the officer never entered her apartment, while she was there with the black males, prior to and during the first drug transaction. She testified that, when she arrived at the door of her unit, the undercover officer tried to follow her inside her apartment but was unable to do so because she and the “black guys” were able to close the door on him. She then had a discussion with the men about their upcoming departure and asked them for money to buy cigarettes. They told her that they did not have any money and gave her a cigarette instead. She then exited her apartment to smoke the cigarette. According to Ms. John’s testimony, it is only at that point that she saw the officer again, as he was waiting outside her apartment by the stairwell.

[51] That version of events is materially inconsistent with the version in her affidavit. In her affidavit, Ms. Johns deposed that after preventing the officer from entering her

apartment, she and the “black guys” let him in and had a conversation with him before she went outside to smoke a cigarette. Paragraphs 30 to 32 of Ms. Johns’ affidavit read as follow:

30. At that point, [the officer] knocked on the door and we let him in. He asked the guys if they have drugs. They said “no”. Then he asked me if I have any drugs or know where to get any. I said I have nothing. We tell him to leave and close the door behind him. He left.

31. At that point, one of the guys gives me a cigarette. The guys were getting ready to leave my apartment at that time. I told them I wanted them out of my place.

32. I walked out to go smoke a cigarette. When I came out in the hallway, [the officer] was still waiting there, near the stairway and exit door. ... (my emphasis)

[52] Ms. Johns’ testimony is also materially inconsistent with the version of events she deposed to in her affidavit with respect to how the second drug transaction unfolded. At the hearing, Ms. Johns testified that it was the officer himself who called the number the black men had yelled at him while leaving earlier that day. She also testified that it was the officer, who, on his own, made the second drug transaction on the phone. She testified that he gave her money and a piece of crack cocaine simply to stay with him for the “meet”. However, in her affidavit, she stated that the officer was the one who dialed the phone number, but that he then gave her the phone to make the transaction for him. She also stated that she “took the phone on the understanding that he would give her a “little something”” (Ms. Johns’ affidavit, para. 41).

[53] These two material inconsistencies are difficult to reconcile with Ms. Johns’ affirmation that she recalls the events of that day really well and that it is like a movie in her head.

[54] I also find it quite inconceivable that a group of male drug dealers would have called Ms. Johns and asked her to come to her apartment simply to let her know that they were ready to leave, but had not done so because a single man outside her apartment was bothering them by repeatedly asking them for drugs, and was refusing to leave.

[55] In addition, I find it unlikely that an undercover officer used to working on his own would have asked Ms. Johns to stay with him until the second drug transaction was completed, as Ms. Johns testified, unless he needed her to complete that transaction. Ms. Johns did not state in her testimony that her presence was required to complete the transaction.

[56] Finally, I note that even though Ms. Johns was trying to wean herself off of drugs, back in January 2017, she was still consuming drugs and drinking alcohol off and on, which, I find, would have had an impact on her ability to remember the events of January 5, 2017, in a detailed manner. I also note that Ms. Johns was only arrested two months after the day the two transactions took place, and that she would not have had any particular reason to remember in great detail those transactions prior to her arrest.

[57] On the other hand, I tend to agree with defence counsel that the officer was evasive when he was confronted with text messages showing that, in some other undercover scenarios, which were part of Project Multitool, he portrayed himself as a drug user. This tends to confirm what Ms. Johns said he was doing when he attended the Barracks, and not the scenario that the officer stated he ordinarily uses of someone who buys for his girlfriend. However, the officer also testified that he did not think he mentioned who he was buying for when he attended the Barracks. Other than that, I find

that the officer's testimony was consistent and his recollection of events did not waver in cross-examination.

[58] For these reasons, on balance, I reject Ms. Johns' evidence with respect to the events of January 5, 2017, as I do not find it to be reliable and credible. Additionally, I find portions of her evidence, regarding the events of that day, to be incredible and/or implausible. Having examined closely the officer's evidence, I accept his version of events.

[59] Based on this finding of facts, I now have to determine whether entrapment occurred.

### **ENTRAPMENT**

[60] As stated in *Mack*, entrapment may occur in two different sets of circumstances.

- a) **Did the police provide the accused with an opportunity to commit the offence without acting on a reasonable suspicion that she was already engaged in criminal activity or pursuant to a *bona fide* inquiry?**

[61] Under the first situation, entrapment will be made out if I find, on balance of probabilities, that (i) the officer provided Ms. Johns with an opportunity to sell him crack cocaine; and (ii) he did so without reasonable suspicion or in the context of a *bona fide* inquiry. Both parts of the test must be met to find that entrapment occurred.

- i) **Did the officer provide Ms. Johns with an opportunity to sell him crack cocaine?**

[62] Based on the finding of facts I made, I conclude that the officer did not provide Ms. Johns with an opportunity to traffic in crack cocaine. He did not ask her to sell him drugs nor did he, through his words or actions, provide her with an opportunity to traffic in crack cocaine. The undercover officer was attempting to buy crack cocaine from black males, who had told him to wait for twenty minutes, when Ms. Johns first offered

to buy crack cocaine from them and sell it to him. The officer rejected her offer. Instead, he offered her twenty dollars to tell them that she knew or was familiar with him, which she did. The men told the officer that they had already made a phone call and that he had to wait.

[63] It is shortly after that interaction that Ms. Johns went back to the officer, who was waiting in the hallway, with a small piece of crack cocaine, which she offered to sell to him for fifty dollars. At no point, during that period of time, did the officer ask her to sell crack cocaine to him or to obtain crack cocaine for him, nor did his words or actions amount to giving her an opportunity to sell crack cocaine to him or crack obtain cocaine for him. To the contrary, his words and actions, during that period of time, were focused on attempting to purchase crack cocaine directly from the males in her apartment by showing them money; by engaging in a discussion with the males about individuals they may also know to show them they could safely sell to him; and to wait outside the apartment when requested to do so. In that context, asking Ms. Johns to tell the males that she knew him or that he was familiar to her, does not amount to giving her the opportunity to sell or obtain crack cocaine for him. The fact that Ms. Johns was aware of the officer's desire to buy drugs from someone else and decided on her own, for a small profit, to sell crack cocaine to him, essentially as an agent of the black men, does not amount to the officer giving her an opportunity to sell crack cocaine to him or obtain cocaine for him.

[64] However, even if I had found that the officer had given Ms. Johns an opportunity to traffic in crack cocaine before the first transaction occurred, I am of the view that he had reasonable suspicion to do so.

**ii) Did the officer act on reasonable suspicion or in the context of a *bona fide* inquiry?**

[65] Reasonable suspicion is a low standard to meet. It has been defined as “something more than mere suspicion and something less than a belief based upon reasonable and probable grounds” (*R. v. Chehill*, 2013 SCC 49, at para. 26, citing *R. v. Kang-Brown*, 2008 SCC 18, at para. 75).

[66] In addition, reasonable suspicion is an objective standard. The question is whether, objectively speaking, the police had a reasonable suspicion that the suspect was engaged in illicit activity when they presented an opportunity to commit an illicit act (*R. v. Olazo*, 2012 BCCA 59, at para. 28 (“*Olazo*”)).

[67] As stated by Manitoba Court of Appeal in *R. v. Seymour*, 2016 MBCA 118 (“*Seymour*”), at para. 18: “The facts [before the court] must support the [reasonable] suspicion and allow for “an independent judicial assessment””.

[68] It is important to note that the police must have acquired their reasonable suspicion prior to providing the opportunity to commit the illicit act.

[69] In that respect, a tip from an informant of unknown reliability will be enough to form a reasonable suspicion if part of the tip is confirmed by some other objective or extrinsic piece of information obtained prior to the police offering the opportunity to commit a crime (*Olazo*, at paras. 17 - 18).

[70] In addition, police officers may obtain information that will allow them to form a reasonable suspicion “by engaging in the preliminaries of a drug transaction without risking entrapment” (*Olazo*, at para. 25). The British Columbia Court of Appeal added in *Olazo*, at para. 19, that: “Steps taken to investigate the reliability of a tip, falling short of providing an opportunity to commit an offence, will not give rise to the defence”.



[71] Courts have also recognized that police officers act as a team. As such, the undercover officer who provides the opportunity to commit a crime is entitled to take action based on the advice/request of another police officer (*R. v. Li*, 2019 BCCA 344, at paras. 17 – 20 (“*Li*”).

[72] Consequently, in this case, it is the information collectively gathered by Project Multitool’s investigating team that should be considered, not simply the information provided to the undercover officer and/or that he obtained.

[73] Police documents filed by consent on this application indicate that at the time, the police had received contemporaneous information from a confidential informant, of unknown reliability, that two or three males, including one of the main targets of Project Multitool, were trafficking drugs out of Unit 39 at the Barracks. The informant specifically mentioned the main target’s full name and nickname. The informant also indicated that one of the other males’ nickname was Frank and that he was tall with dreads. As for the third male, the informant indicated that he appeared to be the same age as Frank but “was more mulatto” than Frank. The informant also told police that Unit 39 was the first door on the left hand side in the middle of the building. I note that the information provided to the Court about that tip does not specify whether the informant was referring to the front or the back door of the building. The officer testified that he was told that Unit 39 was the first unit on the right from the back entrance of the Barracks.

[74] The police then conducted checks on the named individual. It revealed that, back in November 2016, the RCMP had received source information of unknown reliability that this specific individual was using a certain phone number to sell cocaine. It also revealed that there were a number of police entries dating back to 2013 and 2015 indicating that this individual had been suspected of being involved in the drug trade

and had been arrested on RCMP drug files. The checks also revealed that this specific individual had been observed during a surveillance in the fall of 2016 taking part in acts consistent with drug trafficking.

[75] The confidential information was also corroborated by the observations the officer made as part of the investigation stage of the undercover operation. Upon his arrival at the Barracks, the building identified by the informant, the officer observed two individuals, of the same gender and skin colour as the ones described by the informant, entering an apartment located in the same area as the one described by the informant, even though the unit number did not match the information received – it was 38 instead of 39. The undercover officer was then invited to come inside the apartment without having to say anything, even though he did not know those men, once he showed one of them that he had money in his hand. He then entered the apartment where he saw two more black males.

[76] I find that, by that point, the initial tip had been sufficiently corroborated by extrinsic or objective information, obtained prior to any opportunity of committing an illicit act had been given, to objectively ground reasonable suspicion that the black males were engaged in drug trafficking in that apartment. I am also of the view that the discussion that ensued between the undercover officer and one of the black male occupants, about the officer's connections to individuals potentially known by the male, was also part of the investigative steps and took place prior to giving the males an opportunity to traffic in drugs.

[77] The officer first saw Ms. Johns while he was inside the apartment having the initial discussion with one of the male targets. She was standing by the bedroom doorway. Ms. Johns did not question the undercover officer's presence in the

apartment. When one of the male targets asked her if she knew the officer, the officer responded that he had seen her around the 98. She then indicated, with hesitation, that she might know him. At that point, considering the nature of the discussion that was taking place in the living room and the question posed to Ms. Johns by one of the male occupants, there was, objectively, sufficient information to form a reasonable suspicion that Ms. Johns was connected to the apartment and was aware of the illicit activities that the male targets were conducting in the apartment. Furthermore, even prior to the officer asking Ms. Johns to vouch for him, Ms. Johns essentially told the officer that the apartment was hers and that she was getting money for letting the men use it to sell drugs, thus indicating that she was facilitating and, to some extent, profiting from the men's criminal activities. As such, objectively, the undercover officer had reasonable suspicion that Ms. Johns was engaged in the drug trade prior to, theoretically, giving her any opportunity to traffic in cocaine. Finally, by the time the second drug transaction with Ms. Johns occurred, later that day, the undercover officer had already bought crack cocaine from her once and clearly had reasonable suspicion that she was involved in the drug trade.

[78] I note that in *Olozo*, at paras. 35 - 38, the Court of Appeal found that a phone call made by an undercover officer at 2:00 a.m. and answered by an individual who appeared familiar with street terms for drugs was found to be sufficient confirmation of a tip provided by an informant of unknown reliability that drug dealers were doing business 24/7 at that number.

[79] I also note that in *Li*, the Court of Appeal found that a Crime Stoppers tip about a dial-a-dope line monitored by an Asian male was sufficient to raise reasonable suspicion of criminal activity. In that case, the evidence was to the effect that the tip had

been confirmed by police checks unspecified in scope and by the fact that the line had been answered by a male with an Asian sounding accent.

### **BONA FIDE INVESTIGATION**

[80] As previously stated, defence counsel submitted that the officer's acknowledgement that, while engaged in Project Multitool, he attended the 98 where he asked around for drugs, phone numbers and drug dealers, and followed all the leads he could obtain, is evidence that Project Multitool was not a *bona fide* investigation but random virtue testing. Defence counsel also submitted that, in light of the officer's evidence, the Crown was faced with an evidentiary burden to establish that Project Multitool, as a whole, was a *bona fide* investigation, which the Crown failed to meet. Furthermore, defence counsel submitted that the whole city of Whitehorse was the target of Project Multitool, and that an entire city does not constitute a specific enough location to be the subject of a *bona fide* investigation.

[81] Defence counsel relied, amongst other cases, on the decision of the British Columbia Court of Appeal in *R. v. Swan*, 2009 BCCA 142 ("*Swan*"), the decision of the Manitoba Court of Appeal in *Seymour*, and the decision of the Supreme Court of Yukon in *R. v. Unterschute*, 2004 YKSC 7 ("*Unterschute*"), in support of his position.

[82] Defence counsel also argued that the police were not engaged in a *bona fide* inquiry with respect to the undercover scenario that led the undercover officer to follow two black males to Ms. Johns' apartment but, instead, in racial profiling.

[83] Firstly, I will turn to the defence's argument regarding racial profiling. I find that there is simply no evidence before me which demonstrates that the police acted on the confidential information they received and targeted the male occupants of Ms. Johns' apartment because they were black. Instead, the evidence is to the effect that the police

conducted checks on one of the individuals identified by the informant, which revealed, amongst other things, that he was suspected of being involved in the drug trade and arrested in previous RCMP drug files. Secondly, the evidence does not reveal that the undercover officer randomly followed the first two black males he saw at the Barracks. The evidence is that once he arrived at the Barracks, the undercover officer followed two males who not only met the physical description provided by the informant, but who were also heading toward and subsequently entering an apartment located in the same area of the building as the information he had received. Thirdly, the decision of the British Columbia Court of Appeal in *Li* confirms that police observations with respect to someone's physical appearance or traits, such as their gender, ethnicity and accent, may legitimately be used by police officers to corroborate a tip they received regarding criminal activity containing such information.

[84] There is no evidence that Ms. Johns or the initial male targets were approached for a "questionable motive unrelated to the investigation and repression of crime" (*Barnes*, at para. 17). As a result, I find that the police conduct in this case "was motivated by the genuine purpose of investigating and repressing criminal activity" (*Barnes*, at para.17).

[85] I now turn to the issue of random virtue testing raised by the defence.

[86] The concept of random virtue testing in the context of the defence of entrapment was explained by Lamer C.J. (as he then was) in *Barnes*, at paras. 23 - 24:

[23] ... The basic rule articulated in *Mack* is 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. An exception to this rule arises when the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring.

When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a *bona fide* inquiry.

[24 ] Random virtue-testing, conversely, only arises when a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that:

- (a) the person is already engaged in the particular activity, or
- (b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.

[87] In *Swan*, the British Columbia Court of Appeal found that the dial-a-dope operation that led to Mr. Swan's being charged with drug trafficking and possession for the purpose of trafficking constituted random virtue testing. In that case, the call made by the police and answered by Mr. Swan was part of a dial-a-dope operation involving hundreds of random calls. The police acknowledged that 95% of the phone numbers they had gathered and contacted during the operation were not connected to any name or other specific information. With respect to the accused, the police officer called a number provided anonymously, without further checks, and offered Mr. Swan, who answered the phone, the opportunity to traffic in cocaine. The Court of Appeal determined that the conduct of the police amounted to entrapment. It found that the officer had not formed a reasonable suspicion that the person who answered the phone, Mr. Swan, was engaged in trafficking prior to offering him the opportunity to commit the offence. Furthermore, the Court of Appeal found that the methodology used by the police could not ground a *bona fide* investigation.

[88] In *Unterschute*, the Supreme Court of Yukon upheld the trial judge's finding that the accused had been entrapped into selling alcohol without a licence to an undercover officer. In that case, the undercover RCMP officer attended Pelly Crossing as part of an operation directed at curtailing an alleged bootlegging problem in that community. However, for reasons that need not be discussed in this case, no evidence was led by the Crown with respect to the police having information about a bootlegging problem in Pelly Crossing; or that the police had information that the establishment where Mr. Unterschute worked was a place where bootlegging occurred; or that the police had specific information relating to Mr. Unterschute being involved in bootlegging. It is in that context that Veale J., (as he then was), agreed with the trial judge that "it could be inferred from the lack of evidence, that no *bona fide* inquiry existed" (para. 46). It is also in that context that he stated that it "was not sufficient [for the police] to identify the entire community of Pelly Crossing, a village of some 300 people, where Mr. Unterschute was working, as qualifying for a physical location of such criminal activity, especially when there is no evidence of such criminal activity occurring before Mr. Unterschute was approached" (para. 47).

[89] In *Seymour*, the accused was charged with weapons trafficking for providing a firearm to an undercover police officer who posed as a hunter without a firearm licence. The police acted on confidential information that the owner of a hunting and fishing store was selling firearms illegally. At trial, the Crown did not tender evidence regarding the reliability of the informant. The checks performed by the police, prior to giving the accused an opportunity to commit the offence, were made to confirm the name of the store owner, the address of the business and the fact that it sold firearms. The evidence also revealed that there was a sign outside of the business indicating that it only sold

firearms in compliance with the law. The trial judge concluded there was entrapment as she was unable to find that the police's suspicions were objectively reasonable. The Court of Appeal upheld the finding of entrapment. In doing so, it stated that, the accused bears the burden of proving entrapment on a balance of probabilities and that this burden never shifts to the Crown. However, the Crown still has an evidentiary burden to meet in that it has to adduce evidence establishing that the police had reasonable suspicion that the accused was engaged in illicit activity or acted pursuant to a *bona fide* inquiry. The Manitoba Court of Appeal agreed with Veale J.'s conclusion in *Unterschute* that the absence of a *bona fide* inquiry may be inferred from a lack of evidence.

[90] I now turn to Project Multitool. Project Multitool was an operation targeting street level drug trafficking in Whitehorse. As indicated in an RCMP document entitled "Investigational Planning and Report", filed by consent on the application, the operation was proposed: "to make evidentiary purchases of cocaine from known targets, and from as of yet unknown drug traffickers upon the analysis of information received or surfaced." The document identifies a number of known targets allegedly associated with "dial-a-dope" and conventional cocaine trafficking operations around the Whitehorse area. The document indicates that the targets "have been identified through surveillance and information received through confidential informants". The documents also lists a number of premises located within the city of Whitehorse, which are identified "as places where drug trafficking occurs" according to previous RCMP drug investigations and information provided by confidential informants. The document does not go into the specifics of those drug investigations or of the confidential information the police received. I note that Project Multitool was an operation targeting known individuals and



places not necessarily linked to one another as opposed to an operation targeting the members of a single criminal organization.

[91] The evidence before me does not reveal that the “whole city of Whitehorse” was the location targeted by this operation as argued by defence counsel. Instead, specific locations (within the city of Whitehorse) and individuals were the subject of the undercover operation.

[92] I also note that the Investigational and Planning Report filed by consent shows that the general methodology employed by the police in putting together Project Multitool is not at all comparable to the police operation in *Swan* where 95% of the phone numbers gathered by the police, including Mr. Swan’s, had no name or other specific information associated to them.

[93] In addition, the finding of facts that I made regarding how the undercover scenario unfolded at or near Ms. Johns’ apartment on January 5, 2017, does not support a finding that Project Multitool, as a whole, constituted an operation of random virtue testing.

[94] It is true that the officer’s cross-examination with respect to the undercover scenario(s) he pursued at the 98, which was not listed as a known location in the RCMP Investigational and Planning Report, and the fact that he was also directed to contact another individual whose name did not appear in that report, may well have raised questions about the nature of the information the police possessed prior to engaging in those specific scenarios. However, unanswered questions, and possibly collateral questions, about some undercover scenarios that were completely separate and apart from the undercover scenario that led to Ms. Johns’ charges are not, on balance,

sufficient to demonstrate that the police were engaging in systemic random virtue testing in Project Multitool.

[95] In addition, in light of my finding of facts in this case, the fact that most of the individuals arrested as a result of Project Multitool, including Ms. Johns, were not on the list of Project Multitool's original targets, does not, on balance, demonstrate, even combined with the other undercover scenarios touched upon during the officer's cross-examination, that Project Multitool was an operation of random virtue testing by the police.

[96] Caselaw on entrapment, including *Seymour*, stands for the proposition that the burden to prove entrapment on a balance of probabilities rests on the accused. It does not shift to the Crown. Furthermore, based on the finding of facts that I made in this matter, this is not a case where the lack of evidence leads to the inference that no *bona fide* investigation existed.

[97] I now turn to the issue of inducement included in the second set of circumstances that constitutes entrapment as set out in *Mack*.

**b) Although having reasonable suspicion or acting in the course of a *bona fide* inquiry, did the officer go beyond providing an opportunity and induce the commission of the offence.**

[98] Courts have found that inducement requires a conduct that goes beyond mere solicitation. It has been found that: "the evidence ought to show: "calculated inveigling or persistent importuning," and, in effect, that it was "a police concocted plan to ensnare (the accused) going beyond mere solicitation"" (*R. v. Wurts*, [1990] 11 W.C.B. (2d) 130, at para. 6, citing *R. v. Kirzner*, [1978] 2 S.C.R. 487 and *R. v. Rippey* (1981), 65 C.C.C. (2d) 158)).

[99] Based on my finding of facts, it is Ms. Johns who requested a piece of crack cocaine for helping the undercover officer make a second drug transaction on January 5, 2017. In addition, the *Controlled Drugs and Substances Act (Police Enforcement) Regulations*, SOR/97-234, authorized the officer to provide a piece of crack cocaine to her, in the context of the investigation.

[100] In addition, based on my finding of facts, there is no evidence in this case that, by his words or actions, the undercover officer did anything that goes beyond mere solicitation and induced the commission of the offence. As a result, entrapment is not made out.

### **CONCLUSION**

[101] On balance, I find that Ms. Johns was not entrapped into trafficking crack cocaine on January 5, 2017, and as such, I dismiss her application.

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CAMPBELL J.