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attempts to rationalise the decision in a reasonably broad manner, but it remains to be seen whether subsequent case law will interpret *Glasgow City Council* narrowly or in the spirit of the Commissioner's advice.²⁶ Arguably a narrower interpretation is technically correct, though functionally unpalatable. It seems likely that this issue will be revisited in the Supreme Court at some point in the not too distant future.

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How Do You Solve a Problem Like Entrapment? *Jones and Doyle v HM Advocate*

The issue of how a claim of entrapment should be dealt with by the criminal courts has divided the international legal community, with different jurisdictions regarding it as a substantive defence,¹ a matter that should lead to a stay in proceedings² or a matter that should lead to the exclusion of the evidence obtained.³ Traditionally, Scots law has dealt with the issue as one of exclusion of evidence⁴ but in *Brown v HM Advocate*, decided in 2002,⁵ it was suggested that the correct approach was to stay proceedings to preserve the moral integrity of the court system.⁶ The comments made in that case were *obiter*, as there was no evidence from which entrapment could properly have been inferred.⁷ In *Jones and Doyle v HM Advocate*,⁸ however, the issue arose squarely for decision and a majority of the appeal court held that a stay in proceedings is the preferable approach, notwithstanding a strongly argued dissent from Lord Carloway, who considered that precedent prevented any approach other than the exclusion of evidence.

²⁶ There is evidence that the Scottish Government considered the decision a justification to resist multiple disclosures: Scottish Information Commissioner, *Freedom of Information Annual Report 2009* (2010) 2.

¹ As in the federal jurisdiction of the US (*Sorrells v United States* 287 US 435 (1932)).

² As in England and Wales (*R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060) and Canada (*R v Mack* [1988] 2 SCR 903).

³ As in Australia (*Ridgeway v The Queen* (1995) 184 CLR 19), New Zealand (*Police v Lavalle* [1979] 1 NZLR 45) and Singapore (*Law Society of Singapore v Tan Guat Neo Phyllis* [2007] SGHC 207).

⁴ *Marsh v Johnston* 1959 SLT (Notes) 28; *Cook v Skinner*, *MacDonald v Skinner* 1977 JC 9; *Weir v Jessop* 1991 JC 146.

⁵ 2002 SLT 809.

⁶ This rationale is most clearly visible in *Brown* at para 2 per Lord Clarke.

⁷ *Brown* at para 8 per Lord Marnoch.

⁸ [2009] HCJAC 86, 2010 GWD 20-391.

A. FACTS AND OUTCOME

Jones and Doyle arose out of the theft of Da Vinci's *Madonna of the Yarnwinder*. Various people (including the appellants) were alleged to have entered into a conspiracy in 2007 to extort money for the safe return of the painting. After the conspirators had aroused suspicion, undercover police officers became involved and – so the appellants claimed – “actively encouraged”⁹ them to partake in a subsequent offence of reset. The appellants cited entrapment in relation to the reset charges and asked for proceedings to be stayed on the ground of oppression. The trial judge refused this motion. On appeal, it was held unanimously that entrapment had not been established and the appellants’ motion for a stay of proceedings was thus denied. In the event, when the case went to trial, none of the accused was convicted. The case is of considerable importance, however, because the court took the opportunity to discuss various elements of the plea of entrapment, most importantly the procedure by which claims of entrapment should be determined.

B. THE MAJORITY'S APPROACH: STAYING PROCEEDINGS

Lords Reed and Menzies agreed that the appropriate response to entrapment is a stay of proceedings. There remained the question of the means by which this ought to be accomplished. In *Brown*, Lord Marnoch thought that entrapment should stay proceedings because it was a form of oppression (but admitted that it could also be seen as an abuse of process),¹⁰ whilst Lords Philip¹¹ and Clarke¹² viewed it as an abuse of process. As Lord Reed pointed out in *Jones and Doyle*, this distinction matters little in practice¹³ because the result is the same – i.e. the ending of the proceedings. Nevertheless, his Lordship and Lord Menzies sought to resolve the uncertainty.

Both judges thought that entrapment should afford a plea in bar of trial based on oppression. This was because the term “abuse of process” tends to connote that the courts are being utilised by a litigant in a way for which they were not designed.¹⁴ An entrapped accused is brought to trial in order for the Crown to prove that she (voluntarily) committed the *actus reus* with the requisite *mens rea* and this is – according to Lord Reed¹⁵ – the proper purpose for the courts. It would therefore be a misnomer to refer to the prosecution of an entrapped accused as an “abuse of process”.¹⁶ Their Lordships preferred to rely on the plea in bar of trial based on oppression as it is “sufficiently wide and flexible”¹⁷ so as to encompass entrapment.

⁹ *Jones and Doyle* at para 51.

¹⁰ *Brown* at para 12.

¹¹ Para 14.

¹² Paras 2-3.

¹³ *Jones and Doyle* at para 34.

¹⁴ Para 35 per Lord Reed. For discussion of abuse of process in Scots law, see J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) ch 19.

¹⁵ Para 36.

¹⁶ Para 86.

¹⁷ Para 37 per Lord Reed.

There are two main problems with this approach, one legal and one concerned with the understanding of oppression in everyday speech. The legal difficulty is that oppression has usually relied on the concept of prejudice *at trial*, and yet entrapment cases might, procedurally, be adjudicated in an impeccably fair way. Indeed, the leading case on oppression, *Stuurman v HM Advocate*¹⁸ (which involved pre-trial publicity), might be thought to limit oppression to cases of prejudice, given the headnote in the *Justiciary Cases* report of the case.¹⁹ This, however, is inaccurate:²⁰ the operative part of the *Stuurman* test is whether “having regard to the principles of substantial justice and of fair trial, to require an accused to face trial would be oppressive”.²¹ In *Jones and Doyle*, Lord Reed interpreted this as requiring prosecutions to conform to “accepted standards of justice” and held that “[a] trial based on entrapment would not conform to those standards”.²²

The second difficulty follows from Lord Reed’s argument that the trial of an entrapped accused is “plainly oppressive as a matter of ordinary language”.²³ Consider the definitions given in the Oxford English Dictionary: abuse “is the improper use of something”; to oppress is to “keep in subjection or hardship” or to “cause to feel distressed or anxious”. Neither term seems to capture the vice of entrapment exactly, namely that the state has manufactured a case for the purposes of (mis)using the court’s powers to convict a citizen who would not otherwise have committed an offence. This seems to be both oppressive *and* an abuse of the court system. It is oppressive because the accused is essentially being used by the state as a means to an end (conviction). It is an abuse because the purpose of the criminal trial can be seen as more than simply determining whether the accused committed an *actus reus* with the appropriate *mens rea*. That is merely its instrumental role. It also fulfils a more normative, communicative role,²⁴ through establishing whether the accused acted in such a way that her conduct deserves to be authoritatively disavowed by society.²⁵ This communicative element can only be present in regard to those who have not been induced into committing an offence in order for the state to prosecute them. It is, therefore, misusing the court process to try an entrapped accused.

C. LORD CARLOWAY’S DISSENT: EXCLUDING EVIDENCE

Lord Carloway shared the other judges’ concerns about the abuse of executive power, but disagreed about how to deal with it. In the authorities prior to *Brown*,

¹⁸ 1980 JC 111.

¹⁹ Which states (at 112) that the court held that “oppression occurs only when the risk of prejudice to the accused is so grave that no direction of the trial Judge could reasonably be expected to remove it”.

²⁰ Chalmers & Leverick, *Criminal Defences* (n 14) para 19.02.

²¹ *Stuurman* at 122 per the Lord Justice-General (Emslie). Cf *Mitchell v HM Advocate* 2003 JC 89.

²² Para 37. See also para 96 per Lord Menzies.

²³ Para 37.

²⁴ This thesis has been developed most fully by Antony Duff (see, for instance, R A Duff, *Punishment, Crime and Community* (2000)) and forms the backbone of R A Duff et al, *The Trial on Trial: Volume 3 – Towards a Normative Theory of the Criminal Trial* (2007).

²⁵ Cf *Jones and Doyle* at para 36 per Lord Reed, para 86 per Lord Carloway.

entrapment was dealt with by excluding evidence.²⁶ It is these cases on which Lord Carloway premised his argument against a plea in bar of trial. His Lordship contended that:²⁷

[N]either the speeches in *R v Looseley* ... however persuasive or illuminating, nor the *obiter dicta* in *Brown v HM Advocate* ... can overturn established Scottish precedent. The Court ought to have firmly in mind its own principle of *stare decisis*. In deciding a particular case, the Court ought not to introduce new laws or procedures, where these are in conflict with existing law and procedure, even if it considers that, from a theoretical perspective, they constitute an improvement on the established situation.

Thus the appropriate procedure, in Lord Carloway's view, was to raise an objection to the relevant evidence.²⁸

This is a remarkable *volte face* from the position adopted by the court in *Brown* and, with respect, Lord Carloway's own opinion in the case of *HM Advocate v Bowie*.²⁹ Furthermore, the other judges in *Jones and Doyle* were correct in their observations that nothing in the earlier decisions to which Lord Carloway referred *precludes* a stay of proceedings being the appropriate remedy for entrapment.³⁰ As Lord Menzies pointed out, the focus on irregularly obtained evidence arose largely because of the way that those cases were argued before the court.³¹

Furthermore, Lord Carloway seems to accept, in the quote above, that a stay of proceedings *is* the more theoretically viable approach to entrapment. The reason for this is that an exclusionary rule misses the point of why entrapment is troubling. In irregularly-obtained evidence cases, the objection is to the means by which some or all of the evidence was obtained. To admit this evidence would offend the community's sense of fairness and damage the reputation of the criminal justice system.³² But *other* evidence of the accused's wrongdoing, which the state has obtained in a procedurally correct manner, is not liable to endanger public confidence in the moral legitimacy of the courts' decision-making. Ending the proceedings altogether in such circumstances would be wholly inappropriate and just as likely to damage confidence in the administration of criminal justice as convicting the accused on the basis of, for example, evidence from a warrantless search conducted in the absence of urgency. By contrast, in entrapment cases, it is not the *way* in which the state seeks to call the accused to answer to the courts which is of concern.³³ Rather it is the very fact of the

²⁶ See the cases cited at n 4 above.

²⁷ Para 75.

²⁸ Para 84.

²⁹ 2004 SCCR 105 at 110.

³⁰ Para 33 per Lord Reed, para 95 per Lord Menzies.

³¹ Para 95.

³² For an argument to this effect, see P Duff, "Admissibility of improperly obtained physical evidence in the Scottish criminal trial: the search for principle" (2004) 8 EdinLR 152 at 171-176.

³³ For a view that criminal responsibility is a form of answerability, see R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007) 15.

accused being called to account at all.³⁴ In order to avoid lending the court's "stamp of approval", a stay of proceedings is thus necessitated.³⁵

Furthermore, there is a danger that – if other evidence is available – the accused might ultimately be convicted of an offence that (but for the state's involvement) she would never have committed. A stay of proceedings avoids the possibility that she is convicted in circumstances which would offend the sensibilities of the community in whose name criminal convictions are imposed.

D. THE TEST TO BE APPLIED

Despite the differences of opinion in relation to procedure, the court was in agreement on the appropriate test to be applied in determining whether or not entrapment has taken place. As Lord Carloway put it, "[w]hat the Court is looking to see . . . is simply whether or not an unfair trick was played upon the particular accused whereby he was deceived, pressured, encouraged or induced into committing an offence which he would never otherwise have committed".³⁶ In applying this test, the court should look to the guidance given by the House of Lords in *R v Looseley* and by the Canadian Supreme Court in *R v Mack*.³⁷ As such, two factors must be considered. First, consideration should be given to whether the police caused or induced the offence or merely provided an "unexceptional opportunity".³⁸ Second, it is relevant whether or not the police operation was conducted "in good faith".³⁹ This can be established either by a reasonable suspicion that the particular accused was likely to commit the offence in question (or one similar in nature)⁴⁰ or by a finding that the police were "acting in the course of a bona fide investigation of offences similar to that with which the accused has been charged".⁴¹

E. WHERE NOW?

Jones and Doyle provides answers to a number of important questions, both in relation to entrapment and to pleas in bar of trial more generally. First, it can now be stated with far more certainty than previously that entrapment is a plea in bar of trial and not a matter relating to the exclusion of evidence. In this, the court is surely correct. A claim of entrapment is not merely a claim that evidence has been gathered

34 Para 10 per Lord Reed. See also paras 14 and 31 and similarly, Duff, *Answering for Crime* (n 33) 190.

35 Lord Reed accepted the reasoning of Lamer J in *R v Mack* [1988] 2 SCR 903 at para 81.

36 Para 88. See also Lord Reed at paras 41, 48.

37 Para 38 per Lord Reed, citing *Looseley* (n 2) and *Mack* (n 2).

38 *Looseley* at para 23 per Lord Nicholls. See also para 50 per Lord Hoffmann, and *Mack* at para 130.

39 *Looseley* at para 27 per Lord Nicholls.

40 *Mack* at para 130.

41 *Looseley* at para 100 per Lord Hutton (citing *Ridgeway* (n 3) at 92 per McHugh J). See also *Mack* at para 130. For further discussion of these two factors and the guidance in *Looseley* and *Mack* more generally, see Chalmers & Leverick, *Criminal Defences* (n 14) paras 20.18-20.22.

inappropriately; it is a claim that the moral integrity of the criminal justice process would be compromised if the prosecution went ahead because the state effectively created the crime in order to prosecute it.

Secondly, while it was held that treating entrapment as a plea in bar of trial is the preferable approach, it appears that the exclusionary approach is still competent.⁴² This conclusion is disappointing. As the majority argued, treating entrapment as an issue of exclusion of evidence is “inherently unsatisfactory”⁴³ for the reasons discussed above. Equally, it is unhelpful and potentially inefficient, because it allows the accused to argue the same point in two different ways and, conceivably, at two different points during the same proceedings.

Thirdly, the test to be applied in determining whether or not entrapment has occurred is whether or not the accused was induced to commit an offence he would not otherwise have committed.

Fourthly, pleas of private entrapment – in other words, entrapment by someone, such as an investigative journalist, who is not a police officer or state official – will not be entertained. Given that entrapment was viewed by the majority as a plea in bar of trial based on improper state conduct (“the essential vice of entrapment is the creation of crime by the state for the purpose of prosecuting it”)⁴⁴, it is clear that only state entrapment can act as such.⁴⁵ Here, the court is again surely correct. Absent state involvement, the fact that individuals are persuaded (rather than coerced) to engage in criminal activity by another is not a good reason to absolve them of responsibility.⁴⁶

Finally, as a more general point, it now seems that a plea in bar of trial based on oppression can be successful even if there is no possibility that the accused will suffer prejudice at trial. The plea of oppression is not restricted to matters which would render the trial unfair, such as prejudicial publicity or delay. As such, it serves a similar function in Scots law to the plea of abuse of process in English law, in that it extends to all cases in which it would offend against the legitimacy of the judicial process to hold a trial at all.⁴⁷ This, it would seem, leaves little room for a separate claim of abuse of process.

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42 See *Jones and Doyle* at para 33 per Lord Reed, para 95 per Lord Menzies.

43 Para 31 per Lord Reed.

44 Para 30 per Lord Reed.

45 See para 12 per Lord Reed. For further discussion of private entrapment, see Chalmers & Leverick, *Criminal Defences* (n 14) paras 20.27-20.29; K Hofmeyr, “The problem of private entrapment” [2006] Crim LR 319.

46 On this, see A Ashworth, “Re-drawing the boundaries of entrapment” [2002] Crim LR 161 at 176.

47 With the exception of breach of a promise not to prosecute, which is dealt with as an abuse of process in English law but which is recognised in its own right as a plea in bar of trial in Scotland: see Chalmers & Leverick, *Criminal Defences* (n 14) ch 17.