rx DO DOWLAND, M.C. Entrapment.

LL.M. CRIMINAL LAW & COMMERCIAL FRAUD – 1975.

File No.	Name	Address	Date
			From 19
			to 19
			Reference

VICTORIA UNIVERSITY OF WELLINGTON

CRIMINAL LAW AND COMMERCIAL FRAUD (1975).

E N T R A P M E N T

Submitted for the Degree of LL.M.

by Mark Dowland.

I N D E X

INTRODUCTION

The entrapment situation has not received much interest in New Zealand law until the last ten years. This is no doubt due to the apparent increase in the consensual type of crime since the 1960's especially crimes of immorality and involving narcotics and other prohibited substances. The Court of Appeal has been called upon to pronounce on the topic twice in the last two years [1] and on both occasions clearly stated that there was no doctrine of entrapment in this country. The doctrine was held to be foreign to English law [2].

A distinction must be drawn between entrapment and permissible police activity. An entrapper or an agent provocateur was defined in the Report of the Royal Commission on Police Powers and Procedure, HMSO 1929 as;

> "a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds or informs against him in respect of such offence [3]. "

The essential distinction is drawn between persons who are predisposed to the commission of the offence and persons who would not have committed the offence but for the instigation of the agent provocateur or entrapper. The distinction was confirmed in O'Shannessy's case

1. R v. O'Shannessy, Unrep.N.Z. Ct. of Appeal 8 October 1973
   R v. Capner [1975] 1 N.Z.L.R. 411
2. R v. O'Shannessy op. cit., 2, note1.
3. at Cmd. 14

where the President said;

> "There can be little doubt that most jurisdictions descending from the Law of England recognise the broad distinction between the use of Police agents to present opportunity to commit offences to those disposed to such activity, on the one hand, and the encouragement or stimulation of offences which would not otherwise have been committed, on the other [4]."

It may not always be possible to draw a distinction between whether an accused was predisposed to the offence or not. In fact it is doubtful whether such a distinction is ever possible. The danger of the distinction is that any enquiry into the disposition of the offender may call for a consideration of his past activities to determine whether or not these shed any light on his disposition. To consider past offences before guilt has been established is contrary to English law and should be avoided. The solution to the problem is apparent where there is a jury trial and an investigation into the police agent's conduct and, necessarily, the offender's disposition is conducted on a voir dire. The evidence on the voir dire would not go before the jury in establishing guilt so there would be no prejudice to the accused. Once an investigation is attempted into the disposition of the accused difficulties will always be

4. R v O'Shannessy op. cit., note 1, at page 1

encountered. The American defence of entrapment requires an investigation of disposition and the difficulties of the defence will be considered later.

When a case involving police participation is reported in the newapapers the emphasis nearly always seems to be on the part of the police in the offence with the implied criticism that this is a breach of the "fair play" that the community can expect from the police. Particular emphasis is given to policemen involved, as part of their duties, in sexual and drug offences. It is the duty of the police to enforce the law so far as their resources allow. It is not for the police to decide which laws should be enforced and which should not. This is especially true when a law does not enjoy wide-spread support amongst the community. Many persons consider that the prohibitions against cannabis and certain abortions have no place in our criminal law. This may well be so but it is not the perogative of the police to make the decision. It is the police perogative to decide the methods that they use for the investigation of crime. In cases of consensual crime the methods used will obviously be different from cases where there is a victim or a complainant. So long as the police remain on the correct side of the line no Court could interfere with the collection of the evidence. This paper is concerned with what happens when the police overstep the line.

The entrapment situation calls for protection both

for the accused and the machinery of justice. Where there is no objectionable behaviour on the part of the police the accused can hardly complain that he was "hard done by" simply because he sold his narcotic, or whatever, to a person who happened to be a policeman. Certain crimes call for extraordinary measures and it may be that the Courts are more reluctant to make a finding of entrapment in crimes of terrorism or violence than other types of offence [5]. Clearly, where state security or danger to life is involved the policy of ensuring fairness to the accused will be subordinated to a higher policy of protection of the state and of the physical well-being of its subjects. This is not to say that a finding of entrapment will always fail in this type of crime but that it will be more difficult for the accused to convince the Court that he has been unfairly treated. The approach taken to the entrapped terrorists in Mealey's case will later be questionned. As a general comment it appears to the writer that a true entrapment situation should excuse the accused, either by inadmissibility of evidence or otherwise, no matter how horendous the purported crime was.

Entrapment is the encouragement of crime which would not otherwise have been committed. It is in the interests of the state that persons who are prepared to commit horendous crimes be apprehended but these persons could never be "entrapped" as, by definition, their predisposition excludes them from entrapment. Police conduct which

5. e.g. R v Mealey (1974) 60 Cr. App. R. 59 The Court failed to find objectionable police agent behaviour arising from the infiltration of the Irish Republican Army (I.R.A.).

actively encourages the commission of a crime which would not otherwise have been committed is to be deplored no matter what the type of crime. It would be a mistake to assume that since persons belong to the I.R.A. or other terrorist organisations they are necessarily predisposed to the commission of crime. This seemend to be the error the English Court fell into in Mealey's case.

The entrapment situation is still developing in New Zealand law and, as such, is not without problems. This paper will focus on how the various approaches to entrapment differ and decide whether any change is desirable in the New Zealand approach.

ENTRAPMENT IN FRAUD CASES

Commercial fraud cases rarely have an aspect of entrapment, the activities of the entrapping officers being largely confined to the more orthodox criminal activities. The reason for this must surely be that sophisticated commercial swindles involve sophisticated methods of detection which are often outside of the resources of police departments.

Countries which have bodies policing the Stock Exchange and Securities Markets are more likely to be able to have an officer infiltrate a ring of suspected persons and entrap them. It would be expected that infiltration of such a group would be a difficult task as men of commercial affairs dealing in large sums may be expected to know each other and, naturally, be suspicous of an outsider.

Entrapment often finds its way into a commercial area where there are illegal sales, usually of drugs. However, it is rare that there is fraud involved in the sale. There was, however, in Wellington in the late 1960's a notable case of persons selling swamp-weed as cannabis. Unfortunately for the enterprising sellers they attempted to sell to an under cover policeman and were subsequently arrested on fraud charges. The policeman was not, of course, investigating fraud as such but was concerned with the sale of drugs in a certain hotel.

The obtaining of licences either by fraud or by bribery also has brought entrapment into the commercial area.

In R v. Timar [6] the facts were - a person complained to the police that Timar could obtain a master heating licence by bribing public officials. The police laid a trap whereby money was given to Timar to arrange the bribe. Timar never had any connections with the public official and it appeared that his ability to obtain licences was a fabrication. He was accordingly charged with fraud but ultimately convicted of attempted fraud as there was no evidence of deceit but only an attempt to deceive.

On the periphery of the fraud area is the counterfeiting case of United States v. Chiarella [7] in the United States Court of Appeal where the facts showed that two Treasury agents "set up" the sale of counterfeited money to themselves. In Shaw v. United States [8] a defence of entrapment failed when the evidence showed the government agents had purchased petrol from the defendants in breach of rationing regulations. From the evidence it seems clear that the agents merely provided opportunity.

In Kott v. United States [9] a conspiracy to sell liquor at an illegal price was infiltrated by a person acting in concert with government agents. An illegal sale was made to the agent and, when charged the defendants raised entrapment as a defence. The defence was rejected as the defendants were shown to be experienced in black market transactions of this nature.

While the commercial fraud area opens many possibilities

6. [1969] 2 O.R. 90
7. 184 F. 2d 903 (1950)
8. 151 F. 2d 967 (1945)
9. 163 F. 2d 984 (1947)

for entrapment it appears that few cases will reach the Courts because of the difficulty in obtaining evidence. Those cases which do reach the Courts will almost certainly be the more simple ones involving sales or "con men".

VARIOUS APPROACHES TO ENTRAPMENT

There is no general agreement in common law jurisdiction as to the juristic basis of the Courts' approaches to entrapment. In the U.S.A. entrapment has been elevated to the status of a doctrine which, if successfully invoked, results in acquittal but there is differing opinion as to its basis. By way of contrast to the approach followed by the New Zealand Courts the current state of entrapment in the United Kingdom and Canada will be examined.

It would be a mistake in considering any of these jurisdictions to assume that entrapment has found a clearly defined place in the law. Although the U.S.A. has a doctrine of entrapment there are insufficient clear authorities in the other jurisdictions to be able to adequately describe the place of entrapment in the law. The New Zealand Court of Appeal seems determined to resist the development of a doctrine, as does the English Court of Appeal. But there is the faint glimmering in Canada of the emergence of a consistent judicial approach.

Where an entrapment situation is raised by the evidence four possible situations apply;

(a) there may be a warning to the jury that the entrapper is an accomplice and that it would be unsafe to convict on his uncorroborated evidence,

(b) the Judge may, in his discretion, refuse to admit

evidence from the entrapper on the grounds that the evidence has been obtained unfairly, which will lead to an acquittal if no other evidence is available.

(c) the Court may stay the prosecution on the grounds that it is oppressive and an abuse of the Court's duty to ensure fairness and justice towards those who come before it.

(d) there may be a complete acquittal on the basis that a finding of entrapment constitutes a defence to the charge.

The Corroboration Requirement

New Zealand:

A fundamental principle of law is that the Judge must warn any jury of the danger of coming to a decision on uncorroborated evidence. Where there is no jury the tribunal must warn itself. Subject to the warning the jury or the tribunal are entitled to act on uncorroborated evidence. [10] Corroboration will be looked for in five instances. [11] We are concerned solely with whether corroboration is required where there is an entrapment situation. There are three possibilities;

(a) the entrapping agent is not an accomplice and therefore no warning need be given,

(b) although the agent is an accomplice in law his evidence does not require a warning,

(c) the agent is an accomplice and a warning is required.

Generally speaking where a person is found to be an accomplice of another the evidence of that person may not be used to convict his co-offender without a warning. There have been many attempts to show that the entrapper commits no crime [12] but these usually confuse motive with mens rea or offer special defences to entrappers. If no crime is committed by the entrapper then he is not an accomplice and the warning need not be given. The warning need only be given in the situation where the entrapper forms part of the crime.

10. Cross R.C. Evidence 3 ed. 169
11. Where there are accomplices evidence, sworn evidence by children, sexual offences, claims against deceased's estate and matrimonial offences.
12. See Carroll v Moore (1907) 9 WAR 34, Adams v People 285 P. 1102 (1930) and Heydon J.D. The Problems of Entrapment [1973] C.L.J. 268, 274

The early New Zealand cases turned more on whether a police agent's evidence should be corroborated as an accomplice than on a consideration of entrapment.

In McGrath v. Vine [13] Edwards J. held that he was not called upon to decide whether a police agent's evidence requires corroboration as had previously been decided in Smith v. O'Donovan [14] and in other overseas jurisdictions. The Magistrate had found no offence of fortune-telling made out and the Judge was not disposed to upset the finding. He said;

> "The case is from any point of view a very trivial one ... Moreover I think the constable in pressing this old woman to tell his fortune, after she had declined to do so, went beyond the bounds of his duty. The practice of entrapping people into the commission of these minor offences by means of police spies has been condemned by more than one Judge ... " [15]

The case of Smith v. O'Donovan related to the purchase of liquor by two probationary constables acting under the instructions of their superior. The issue before the Court was whether the evidence of the constables should be corroborated as being accomplices. The Learned Judge followed the opinion of Mr Justice Maul in R v. Mullins [16]

13. (1909) 12 G.L.R. 480
14. 28 N.Z.L.R. S.C. 94 (1908)
15. McGrath v Vine op.cit., 481 note 13
16. (1843) 3 Cox C.C. 526

that the evidence of a police agent does not require corroboration. The rational behind this is that an accomplice confesses himself a criminal while a police agent may be an essentially honest man taking a course he considers essential "for the protection of his own interests and those of society" [17].

Cooper J. was not, however, blind to the dangers inherent in the entrapment situation;

> "No doubt a Magistrate in considering the evidence of probationary police officers who are, as it were, earning their promotion by, to some extent, their success in detecting offences against the law, will scrutinise such evidence closely and weigh it carefully before acting upon it". [18]

The Judge - made rule that police agents require no corroboration was affirmed in the New Zealand Court of Appeal in R v Phillips [19]. The case was an appeal from a jury trial where the appellant had been convicted for illegally selling liquor. The chief prosecution witness was a police officer who purchased beer off the defendant. The Judge had directed the jury that the officer's evidence did not reuire corroboration and this was affirmed in the appeal.

Turner J. recognised that an accomplice's evidence must usually be treated with caution as he may try to put

17. (1843)3 Cox C.C. 526
18. Smith v O'Donovan op. cit., 96 note 14
19. [1963] N.Z.L.R. 855 (C.A.)

all or part of the blame on another in order to purchase leniency or immunity. But;

> "This danger is conspicuously absent in the case of police-spies, who are seldom, if ever, exposed to any danger of prosecution and who, in the unlikely event of being prosecuted, would certainly suffer no substantial penalty [20] ".

The Judge, however, did not completely shut the door and recognised there may be cases where a police agent's evidence should be corroborated. This was, with respect, a wise conclusion to his judgment. There would be a danger of limiting the discretion of the Supreme Court Judges if the statement was left out. The case is interesting on another point in that the Judge does not exclude the possibility of a police agent being prosecuted as <u>participes criminis</u>.

20. ibid., 858

Fairness and Entrapment as a Defence in New Zealand

The Court of Appeal's recent decisions in O'Shannessy's and Capner's cases firmly resist any doctrine of entrapment in New Zealand and clearly hold that entrapment offers no defence to a criminal charge. The Court is content to leave the entrapment issue to the good sense of the trial Judge's exercise of discretion, to exclude evidence which would operate unfairly against the accused. The origin and basis of the Court's approach will be discussed later.

The facts of the two cases will, however, be described in some detail to illustrate the difficulties of deciding when an entrapment situation arises and may give an indication of how the Courts will be expected to act in a given situation.

Roger Allan O'Shannessy was charged with the supply of cannabis and was duly convicted after a trial by jury. He appealed to the Court of Appeal on the grounds that the police agent had stepped beyond the "fine line" and an entrapment situation arose. Unfortunately the admissibility of the officer's evidence was not challenged at the trial and there was no voir dire to examine his conduct in detail.

In any event the Court was,

> "far from convinced that this is an instance where the police stepped beyond the bounds of what is permissible into the area of unacceptable encouragement [21] ".

and "it is certainly not a case where an

21. R v O'Shannessy op.cit., 2, note 1.

> appellate Court could say that the trial Judge had exercised his discretion in a wrong manner [22]".

On the latter point the failure to object before the trial Judge was held to be a material point and the appeal failed.

The facts of the case were that a police agent had been introduced into a communal group who accepted him, not knowing him to be a police officer. The officer immediately requested members of the community to supply him with drugs. This failed. The officer then made it known to the members of the commune that he was under pressure to obtain some "grass" for one, 'Tom Pritchard' an illusory but apparently unsavoury character from Wellington.

O'Shannessy's wife heard of the new member's plight and informed O'Shannessy who contacted a friend who was a supplier of cannabis. Liability in terms of Crimes Act 1961 S.66 (1) (d) was attracted. The transaction was directly between the police agent and the supplier, O'Shannessy being at work at the time of the transaction. No drugs were found in either O'Shannessy or his wife's possession.

The case well illustrates the difficulties that a police agent faces when engaged in undercover work. There was no evidence at the trial that O'Shannessy had been

22. ibid., 2

involved in the drug scene previously or that he was predisposed to the commission of an offence. The facts of the case came close to a police-manufactured crime although the Court of Appeal felt the permissible limit was not overstepped. The police officer did not put any pressure directly on the appellant. All he did was express a desire for drugs and when this did not work provided some moderately compelling reason why he needed them. Although O'Shannessy did not exhibit a predisposition the officer did not directly inveigle him to commit a crime. Rather the officer offered an opportunity to several members of the community and it was the unwitting O'Shannessy who availed himself of the opportunity to assist his "guest".

The situation is clearly different from that of R v. Shipley [23] where the Canadian policeman had brought direct pressure to bear on the person who ultimately committed the offence. O'Shannessy was not under any compulsion but was more in the position of a volunteer and accordingly no entrapment arose.

As previously mentioned the admissibility of the agent's evidence was not objected to at the trial before the jury and O'Shannessy was convicted and sentenced to one years imprisonment.

On appeal the Court of Appeal in an oral judgment delivered by McCarthyP. confirmed the recognition in New Zealand of the broad distinction between the use of police agents to present opportunity on the one hand and the

23. [1970] 2 O.R. 411

stimulation or encouragement of offences which would not otherwise have been committed on the other. The Court noted there was a doctrine of entrapment established in America but went on:

> "But in New Zealand we have always approached this application of public policy (for that is what it is, as Mr Maclaren points out) by leaving it to the discretion of the trial Judge to exclude the evidence to be given by the police officer if he thinks that the conduct of that officer falls on the wrong side of the line." [24]

The Court thought;

> "it preferrable to deal with questions touching the acceptance or rejection of such evidence on the basis of discretion rather than to lay down rigid delineations of areas of admission or exclusion." [25]

As there was no objection to the evidence at the trial and as, in any event, the conduct of the officer did not fall on the wrong side of the line the appeal failed. Leave was granted to appeal against sentence which was reduced to six months.

However the Court did not shut the door on a doctrine

24. R v. O'Shannessy op.cit., note2 , at page 2.
25. loc. cit.

of entrapment developing at some future time and mentioned someday it may have to consider the extent to which public policy requires a redefinition of the extent to which the police may permissibly go. An opportunity to reconsider was offered to the Court in Capner but the Court declined it in rather terse terms.

Tierney William Capner [26] was staying in a private hotel in Auckland pending his purchasing a home for his family who were waiting in Blenheim. Capner was a Justice Department employee on transfer. He became acquainted with Bevege, a police constable six months out of training. Bevege did not reveal his occupation saying he was a pig shooter from the South Island. A warm relationship developed and the two became good friends.

Capner was a cannabis user and apparently knew other persons involved in the Auckland "drug scene." Both became involved in this "scene" and attended parties where drugs were taken. They also hosted their own parties. Both purchased drugs from other people either jointly or singularly. Eventually, on three occasions Capner sold Bevege some cannabis. There was no profit motive involved and the sale was clearly a transaction between friends of similar disposition. Unfortunately, while one disposition was genuine, the other was simulated and Capner was later charged with the sale of narcotics to Bevege.

At the trial a voir dire was held which extended over

26. R v. Capner [1975] 1 N.Z.L.R. 411 (C.A.)

two days and in which the conduct of Bevege was examined in detail. Despite Capner's protestations to the contrary McMullin J. accepted Bevege's evidence that he did not pressure Capner to supply him with the narcotic. Corroborative evidence was called for both sides, seven persons from the "drug scene" for Capner and two police officers for Bevege. The Learned Judge did not find the constable's conduct so objectionnable as to render his evidence inadmissible and accordingly the evidence went to the jury and Capner was convicted.

While drug sales to friends are, like other sales, contrary to law the police agent's conduct is open to criticism in that it does not seem necessary to go to such lengths to secure a conviction. If Capner was predisposed towards the offence he would have surely been found out in time. The motive for the offence was not profit and, unless Capner had a pathological urge to sell drugs without profit, the motive must have arisen as a response to his relationship with Bevege. The trial Judge's finding that Bevege did not instigate the sales must be accepted, however, it was probable that, given the environment and given the relationship between the two, a drug transaction was likely to occur.

Submissions were made to the trial Judge that an entrapment situation had occurred and he was invited to find this as a defence to the charge. Counsel submitted

that public policy did not support a conviction where the foundation for the prosecution was the entrapment of the accused. The Judge held that there was no objectionable entrapment and that, in any event, this was not a defence in New Zealand law. The matter went on appeal supported by 49 pages of written submissions.

The Court expressed its dissatisfaction with the word "entrapment" mainly because of the indiscriminant use to which the word is put. In this the Court was following the, then recent, English decision R v. Mealey [27] which was, then, only reported in the Times.

On appeal Counsel argued that the relationship between Capner and the constable would inevitably lead to a supply of the drug. This was rejected on the facts by the Court after a perusal of the evidence. Counsel's next submission in point was that as a New Zealand Judge does not have the discretion to exclude probative evidence, albeit unfairly obtained the Court should rule that evidence which had been obtained by entrapment should be excluded as a matter of law. He was clearly wrong in this, as a New Zealand Judge does have the discretion and he was persuaded by the Court to amend his submission to one maintaining that the discretionary rule was inadequate. The Court declined to acceed to his request to define the law and preferred to leave the matter as decided in O'Shannessy's case. The Court was further satisfied that no redefinition was

27. op. cit., note 5

required at the time of the decision and the appeal was dismissed.[28]

The case signifies the end of any hope of a judicial recognition of a doctrine of entrapment in New Zealand for some time. It is a pity that Counsel pressed the entrapment situation when clearly the trial Judge had found there was no entrapment. It was obvious that the appeal was doomed to fail on this ground at least and it thereby gave rise to another unsuccessful appeal based on entrapment. It seems pointless to urge a Court to lay down the law on entrapment when the facts do not support a finding of entrapment. Attempts to do so will hinder, rather than assist, the development of the law in this field.

An analysis of the New Zealand decisions leads to the following submissions of the law of entrapment in New Zealand;

1. the entrapper's evidence generally does not require corroboration,
2. there is no defence of entrapment in New Zealand,
3. an objection to the entrapper's evidence is generally essential with a subsequent voir dire,
4. the decision whether or not to exclude evidence is a matter of the trial Judge's discretion,
5. the Courts will draw a line between presenting opportunity (unobjectionable) and encouraging or stimulating offences which would not otherwise

28. This was consistent with Sneddon v. Stevenson [1967] 1 W.L.R. 1051

have been committed,

6. entrapment is something more than merely providing an opportunity, a general appeal to likely suppliers is insufficient as is the cultivation of a relationship.

The Origin of the New Zealand Rule of Fairness

The Courts have moved away from the statement of Crompton J. in R v. Leatham [29] relating to the admissibility of evidence that;

> "it matter not how you get it, if you steal it even, it would be admissible in evidence." [30]

While the statement may be strictly true even today the Courts have over the last century imposed limitations on the general rule so it does not operate unfairly against the defendant. For example where the evidence was obtained in breach of the spirit of the Judge's rules the Judge has a discretion to refuse to admit the evidence - so held the Court of Appeal in R v Phillips. [31] The Chief Justice took a similar approach in Daily v Police [32] a case involving the admissibility of blood samples in the case of driving a vehicle under the influence of drink where the accused had not been warned as to the intended use for the blood. The accused gave evidence that he thought the taking of his blood was to facilitate some treatment. The analysis of the sample was held to be admissible but the Chief Justice warned that this was not to be construed as a warrant to the police; [33]

> "where necessary in the interests of justice the Courts will always use their discretion to exclude evidence which

29. (1861), 8 Cox C.C. 498
30. ibid., 501
31. [1963] N.Z.L.R. 855
32. [1966] N.Z.L.R. 1048
33. ibid., 1052

would operate unfairly against an accused person."

There is high judicial authority for the obiter of the Chief Justice. In Selvey v. Director of Public Prosecutions [34] the House of Lords held that it was too late to say that a Judge had no discretion to exclude evidence which would operate unfairly against the accused. [35] The weight and value of the authority on which the House of Lords based their decision was questionned by Bernard Livesey in an article in the Cambridge Law Journal entitled "Judicial Discretion to Exclude Prejudicial Evidence." [36] The writer concluded that the decision of the House of Lords was based on obiter drawn from a number of cases. An examination of the authorities indicates that this is the case but this does not affect the weight of the House of Lords decision.

As the House of Lords said in Selvey's case it is too late now to suggest that a Judge does not have the discretion.

The New Zealand Courts recognised in 1945 that they could exclude evidence where the prejudicial tendency outweighed the probative value [37] and had earlier held that a Judge should specially caution a jury where evidence was admissible but of low evidentary and high prejudicial value. [38] Later the Court of Appeal's finding in Phillips was affirmed in R v Convery [39].

34. [1968] 2 W.L.R. 1494
35. ibid., at 1524 per Lord Guest
36. [1968] C.L.J. 291
37. R v. Rogan [1916] N.Z.L.R. 265
38. R v. Adams and Blatt [1945] N.Z.L.R. 725
39. [1968] N.Z.L.R. 426

In 1971 the general rule in Kuruma v The Queen [40] was affirmed in New Zealand subject to the discretion of the Court to exclude evidence on the grounds of unfairness.

In McFarlane v Sharp [41] White J. said;

> "The principle to be applied as to the admissibility of evidence is whether it is relevant to the matters in issue, not how the evidence was obtained. ... There is ample authority that such evidence will be admitted subject to the discretion of a Court hearing a charge to exclude, on grounds of unfairness. [42] "

The Court of Appeal in Capner were quite firm that a New Zealand Judge did have the discretion to exclude evidence on the grounds of unfairness. This was consistent with obiter in O'Shannessy and it can be seen that the proposition rests on an authorative body of cases in New Zealand. While the pedigree of the rule may be suspect it is clear that it is here to stay and no good purpose would be served by arguing against the existence of the discretion.

There may be some doubt in England as to the extent of a Judge's discretion but this point was specifically mentioned in Capner. The Learned President mentioned the, then recent, case of Mealey in support of his proposition that some English Judges have doubts as to whether they can exclude evidence which has been obtained in an entrapment

40. [1945] A.C. 197
41. [1972] N.Z.L.R. 64
42. ibid., 69

situation. However he went on to say;

> " ... in this country we have not hesitated to develop the use of this discretion, and we think that this is a desirable attitude. " [43]

The New Zealand Courts have developed the discretion in a short time. The discretion is available to be used in an entrapment situation but there is no absolute requirement that it is used. It is a matter of discretion and not a matter of law. Nor will the exercise of the discretion towards the defendant's favour automatically follow from a finding of entrapment. A Judge will then decide whether or not the admission of the evidence would be unfair but if the New Zealand Courts continue to take the approach to entrapment suggested in O'Shannessy it is difficult to think of an entrapment situation which would not be unfair.

With respect, the New Zealand Courts have taken the correct approach to the problem. Clearly a Judge should be able to exclude unfair evidence in a criminal prosecution. He should not be fettered in the exercise of discretion as no two cases are the same. The balance of the interests of justice and fairness to the accused is best served by leaving the matter to the good sense of the trial Judge.

Hasn't analysed "unfairness" an all important issue??

43. R v. Capner [1975] N.Z.L.R. 411, 414

Entrapment as Abuse of Process

Canada

The Canadian approach is interesting as, like New Zealand, the Canadian Courts have relied on English authority as the basis of their approach to entrapment. However, possibly because of the close proximity to the United States the Canadian Courts have moved towards an abuse of process concept rather than taking the more conservative line of the New Zealand Courts.

The Canadian approach rests on the English decision of Connelly v. Director of Public Prosecutions [44] and the famous words of Devlin L.J. in that case;

> "Are the Courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them." [44a]

The case did not surface in Canada until the decision in R v. Osborn [45] in which the accused was indicted in November 1965 on a charge of having in his possession certain articles that were intended to be adapted for the commission of forgery. The charge failed on a technical ground but in May 1967 the accused again faced an indictment arising from the same fact situation that he conspired with certain persons unknown to commit forgery. The case is notable for the recognition that;

44. [1964] 2 All E.R. 401
44a. ibid., 442
45. [1969] 1. O.R. 152

"The foundation of the principle is the duty of a Court to prevent the abuse of its process." [46]

The Court was not prepared to confine its duty to secure fair treatment solely to its civil jurisdiction and did not see why the duty;

"cannot be invoked to abate oppression caused by a multiplicity of charges successively made on the same facts." [47]

The Court was of the opinion that an abuse of process doctrine could be successfully invoked in the case to the accused's advantage but warned that each future case would depend on its own facts. The discretion should be exercised only where it is clear that an injustice would otherwise result. In the instant case the Court was satisfied that there was an injustice arising from the long delay in the presenting of the indictment by the Crown and the Crown's intervening appeal.

The previous Canadian case of R v.Lemieux [48] was referred to in the New Zealand Supreme Court decision R v. Capner [49] where McMullin J. cited it as an example of an attempt to put forward a doctrine of entrapment in a Commonwealth jurisdiction. The Canadian Court was able to step the issue in the Lemieux case and did not have to determine the entrapment issue. The police agent had solicited the defendant and actively encouraged him

46. ibid., 156
47. loc. cit.,
48. (1967)63 D.L.R. (2d) 75
49. Unreported, Auckland sentenced August 16, 1974, T 120/74

Supreme Ct,

in the commission of an offence of breaking and entering. The defendant at first had no intention of attempting the crime and it would seem that a classic entrapment situation had been created. However, the police co-offender had been given the key to the property "broken into" by the owner thereof and, accordingly the Court found an essential ingredient of the crime missing. The accused was acquitted. The Canadian Supreme Court took a similar stand in another case [50] where it was held that there was no actus reus in a charge of keeping a bawdy house as the prosecution had failed to establish a "frequent or habitual use." It was found by the Court that a police officer had asked a woman to arrange three friends for entertainment but again the Court avoided the entrapment issue.

R v. Timar [51] was a case which involved the passing of a bribe by the police agent to Timar who then was to bribe a government official to produce a false licence. In fact Timar never had an intention to bribe the officer and was therefore charged with fraudulently obtaining the bribe monies from the agent. Counsel for Timar argued that the Court should dismiss the indictment to express its displeasure at the type of police conduct, a submission which was grounded on public policy and not directed towards an abuse of process. But the Court did not consider the police's action unjustified because;

(a) they had good reason to suspect that the accused was engaged in some sort of illegal

50. R v. Patterson (1968) 67 D.L.R. (2d) 83
51. [1969] 2 O.R. 90

activity,

(b) they entered into offence for the sole purpose of detecting the designs of the accused, and,

(c) the accused was a ready and willing party and was not lured into the offence but merely given the opportunity to commit the offence.

The Court is in accord with the New Zealand Court of Appeal in the recognition of the broad distinction between providing opportunity and instigation. While the matter is not specifically referred to in the judgment it is a recognition of the issues which would be before the Court in an entrapment case. The Osborn decision closely followed Timar and it is not unreasonable to assume that the Osborn Court was made more confident in its approach by the Timar decision.

Entrapment as an abuse of process was squarely faced by the Ontario Judge, McAndrew Co. Ct.J. in R v. Shipley.[52] Shipley was a rather naive young man who formed a friendship with a person he met at the local Y.M.C.A. . Shipley attempted to impress his new found friend by assuring him that he could supply him with anything the friend wanted in narcotics. He could not have picked a worse thing to say since the friend was a police officer. The officer eventually borrowed some money from Shipley and then refused to repay the loan

52. [1970] 2 O.R. 411

until Shipley supplied him with some cannabis. Shipley effected the supply and was duly charged. The Judge found as a fact that without the inducement held out by the officer Shipley would not have committed the offence. The decision on the point by the Judge cannot be seriously objected to as he had the advantage of hearing the evidence. However, it is worthy of comment that the officer must have only just come down on the wrong side of the line for the purposes of entrapment. The initial discussions were instigated by the accused and the officer had to do little to get Shipley to supply him with the drug. It seems that Shipley in his naivety was "breaking his neck" to supply the drug to his friend. The loan involved was only $10.00 so the pressure on Shipley to supply the drug was not excessive.

The judgment of the Court commenced by citing with approval the United States decisions of Sherman v. United States [53] and Sorrells v. United States [54] which provided a guideline for what the Court felt was objectionable behaviour on the part of the police. The Court then went on to consider the distinction which was raised in Timar's case and the abuse of process doctrine from Osborn's case. The Court held that it had a duty to secure fair treatment of those who came before it. In all the circumstances of the case it would have been unfair to the accused and an abuse of the Court to allow the

53. 356 U.S. 369 (1958)
54. 287 U.S. 435 (1932)

prosecution to continue. The Court therefore "stayed" the prosecution.

Connelly turned on what is sometimes called "issue estoppel" [55] whereby once an issue has been raised and determined between the parties, as a general rule, they are estopped from raising it again. The form of estoppel has been recognised in civil proceedings in New Zealand [56] but not, to date, in criminal proceedings.

Connelly's case introduced the possibility of issue estoppel to criminal law. The Canadian Courts have taken up the obiter in that case and applied it to criminal proceedings. There is no New Zealand authority on issue estoppel or the obiter in criminal proceedings but both are open to Counsel to argue. It is only a small step from approving of Connelly in civil proceedings to applying the obiter therein in criminal proceedings. But while the New Zealand Courts may well develop their approach in this way the law on entrapment situations at the moment seems to be firmly grounded on a discretion to exclude unfairly obtained evidence.

55. See for example Fidelitas Shipping Co. Ltd. v. v/o Exportchleb, [1965] 2 All E.R. 4.

56. Craddocks Transport Ltd. v. Stuart [1970] N.Z.L.R. 499

Entrapment as a defence.

The United States:

Since 1915 the United States Courts have been acquitting people on the grounds that they were entrapped. The doctrine had been suggested much earlier [57] but it was not until Woo Wai v. United States [58] that a defendant was acquitted on this ground. The doctrine became established by two Supreme Court decisions, Sorrells v. United States [59] and Sherman v. United States [60]. While the doctrine offered some relief for entrapped persons there is, as yet, unresolved argument about the basis of the doctrine and how it should operate.

Sorrells was visited (during the period of prohibition) by a fellow army veteran who asked him to get him some liquor. A friendly conversation developed and after two more requests Sorrells complied and sold the friend one half gallon of whiskey. The friend was a prohibition agent and Sorrells was duly charged with the possession and sale of liquor. There was no evidence of a prior disposition to the offence on his part, although it was rumoured in the area that he was a rum runner. The trial Judge refused to allow the issue of entrapment to go to the jury but after appeals the matter reached the Supreme Court. The Court granted certiorari on the issue that there was sufficient evidence for the defence to go to the jury.

57. See, generally, Donelly R.C. Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocateur 60 Yale Law Journal 1091
58. 233 Fed 412 (1916)
59. 287 U.S. 435 (1932)
60. 356 U.S. 369 (1958)

There was a conflict between the judgments of the Court. The majority held that the agent had lured an otherwise innocent to the offence by "persistent solicitation" which was accepted by the minority. The judgments differed on three points. Firstly the majority argued that an offence of this kind was not contemplated by the section. The argument proceeded that while the words of the statute were sufficiently broad to catch the offence Congress would only be taken to intend an unjust result if the words were unequivocal. As the words were not unequivocal Congress is taken to mean by the statute that it was not intended to catch entrapped persons. The doctrine was therefore one of statutory interpretation resulting in a substantative defence which must go to the jury.

The minority took a view somewhat similar to the Canadian Courts and held that the doctrine was rooted in the Courts duty to ensure a fair trial. Accordingly it is a matter for the Judge to direct the jury on. It follows from this that entrapment is unrelated to any question of guilt or innocence and no investigation of the accused's past conduct is called for. The minorities enquiry begins and ends with establishing whether the means employed by the police were objectionable.

On the other hand, the majority requires that the accused be completely innocent and not predisposed to the type of offending. In determining predisposition an

enquiry into the accused's past conduct is called for.

The next case of Sherman failed to resolve the areas of difference as has the 1973 case, Russell v. United States [61] . Sherman however indicates that previous convictions are not fatal to the defence. The facts were that a government informer met Sherman at a doctor's clinic where they were both being treated for drug addiction. After several meetings the informer asked Sherman to get him some narcotics, an issue which Sherman tried to avoid. Finally to relieve the agent's apparent suffering Sherman agreed to get some narcotics and was duly charged with the sale. On the issue of whether there was a predisposition the Supreme Court found that there were several requests and that Sherman was not in the business of the sale of narcotics. He had a previous nine year old conviction for sale of narcotics and a five year old conviction for possession. The Court held that this did not prove that he had a readiness to sell at the time that he was approached. Accordingly the conviction in the lower Court was set aside.

The decision is a sensible one but illustrates the difficulties that a jury may have in deciding whether or not there is a predisposition. An enquiry into past conduct should not be encouraged as the accused's guilt should be determined on the offence with which he is charged and not on his past offending. The onus is on the prosecutor to prove predisposition although it is up to

61. 93 S.Ct 1637 (1973)

the accused to show that on the balance of probabilities he was induced to commit the crime by a police officer. The defence does not appear to be available for crimes against the State or for very serious crimes as these should be resisted whatever the temptation.

The minority view is preferred. Firstly this avoids tortured logic as to the origin of the doctrine grounding it on the exercise of judicial discretion and showing that the Courts have a dominion over police investigation. Secondly the minority avoids enquiry into past offending. An airing of past offences could be highly prejudicial to the accused if the entrapment defence fails after having been put to the jury and the jury then goes on to decide the substantive question of guilt or innocence. Thirdly entrapment going to the jury as a defence may inhibit the defendant from putting up other defences on the grounds that the defences are inconsistent. Heydon [62] shows that denial of actus reus is generally inconsistent with entrapment and accordingly each defence may prejudice the other. He goes on to say that the Courts tend to allow defences which might be inconsistent so as to ensure that the crime is proved beyond a reasonable doubt. [63] However, this does not overcome possible prejudice in the minds of the jurors.

It can be seen that the minority approach is not far removed from that taken in New Zealand although there is a different juristic basis.

62. Heydon J.D. op.cit., 280, note 12.
63. loc. cit.

ENTRAPMENT IN ENGLISH LAW

The most recent case involving possible entrapment to receive judicial consideration in England is R v. Mealey [64]. The facts were that, one, Lennon had managed to infiltrate an organisation known as Sinn Fein which was an arm of the Irish Republican Army (I.R.A.) although, not of itself, an illegal organisation. He was present when plans were discussed for a bank robbery to fund the I.R.A. and displayed a degree of enthusiasm for the raid throughout the preliminary discussions. When it came to a final briefing he managed to absent himself and was also not present for the raid. Just before the raid Mealey and others were stopped by the police and found to have the impedimentia of armed robbery in their possession, including sawn-off shotguns. Lennon subsequently made a statement that he was acting under pressure from the police and had informed on his colleagues. The I.R. A. , on discovering Lennon's identity, indicated their disapproval of his actions by shooting him.

The English Court of Appeal used the same test for entrapment as did the New Zealand Courts and held that it was not established to their satisfaction that Lennon was a police entrapper. [65] They proceeded for the rest of the judgment however, as if Lennon's conduct had been on the wrong side of the line. The Court held that there

64. [1974] 60 Cr. App. R. 59
65. ibid.,61

was no doctrine of entrapment in English law and that that was the end of the matter. In the present case there was no reason as to why the Court should impose a lighter sentence on Mealey than his co-offenders. The Court did recognise however, that entrapment was a fadtor to consider in imposing sentence.

The case is important as the Court found that as the facts were concerned solely with the activities of an agent provocateur cases cited which dealt with the exclusion of unfairly obtained evidence were irrelevant. This is quite the opposite approach to that taken in New Zealand and in the writer's opinion incorrect. The result of the Court's decision is a dangerously limiting precedent. The decision is that firstly there can be no unfairly obtained evidence in an entrapment situation, therefore this evidence can not be excluded on the exercise of the Judge's discretion, although corroboration of an accomplice's evidence may be required. Secondly the decision affirms that there is no general defence of entrapment in English law. As a result of the decision a Judge is obliged to admit evidence even though it may have been obtained in what is truly an entrapment. By the decision the Court has abdicated its supervisory role over the police and appears to be content to their defining their own rules of conduct.

The Court should have followed the approach taken in R v. Foulder, Foulkes and Johns [66] . In that case

66. [1973] Crim. L. R. 45

the accused were charged with the unlawful possession of LSD. Submissions were made to the jury that the evidence of the police officer should be rejected in the exercise of the Court's discretion as he had incited the defendants, or at least one of them, to commit the crime. The Court found that the officer did in fact actively encourage the sale of the drug to him. The defence relied on obiter in Brannan v. Peek [67]. In reply the prosecutor cited Sneddon v. Stevenson [68]. Counsel for the defendant submitted that if in Sneddon's case the police officer had made the initial approach the case would have been decided differently. As it was, the initial approach was made by the defendant.

The Court agreed with the defendant's Counsel and the evidence of the entrapping police officer was not admitted. As there was no other evidence the defendants were acquitted. The case is a model approach to entrapment in English law. There was no recognition of any doctrine of entrapment but the Judge simply exercised his discretion against the admission of unfairly obtained evidence. In doing this it was made clear that the Court expected certain standards of the police officers and would if necessary enforce these standards.

67. [1948] 1 K.B. 68
68. [1967] 1 WLR 1051

ANCILLIARY MATTERS ARISING FROM THE ENTRAPMENT SITUATION

It has already been shown that in New Zealand an entrapper's evidence does not require corroboration as a matter of law although it is always open for a Judge to require corroboration. It has been suggested that where a witness has a self interest in the outcome of proceedings and he is the entrapper the jury should be warned of the fact. [69] If a Judge has reservations about allowing uncorroborated evidence to go to a jury he should either require corroboration or warn the jury. It is pointless to require a warning about entrapper's evidence as a matter of law. It should always be open to the Judge to warn the jury if he thinks fit but to require this would, in many cases, throw needless suspicion onto the evidence of completely honest witnesses.

Other questions which are raised by the entrapment situation are whether the entrapper himself is criminally liable and whether the sentence should be reduced on the grounds of entrapment alone.

The Entrapper's Liability

In Brannan v. Peek [70] Goddard C.J. said; [71]

> "The Court observes with concern and strong disapproval that the police authority at Derby apparently thought it right in this case to send a police

69. Heydon J.D. The Problems of Entrapment [1973] C. L. J. 268 relying on obiter in R v. Prater [1960] 2 Q.B. 465
70. [1948] 1 K.B. 68
71. ibid., 72

> officer into a public house for the purpose of committing an offence in that house. It cannot be too strongly emphasised that unless an Act of Parliament provides that for the purpose of detecting offences police officers or others may be sent into premises to commit offences therein - and I do not think any Act does so provide - it is wholly wrong to allow a practice of that sort to take place."

The facts of the case were that a police officer had laid a bet in a public house after exerting some pressure on the bookmaker. An information was laid under the Street Betting Act and dismissed as it had no application to a public house which was not a public place by the terms of that Act.

The New Zealand Court of Appeal contemplated the possibility of a charge being laid against a police agent in R v Phillips [73] although Turner J. thought that this was unlikely. In Sneddon v. Stevenson [74] the Queen's Bench also indirectly considered the criminal liability of the police officers and decided on the facts that the case came nowhere near one of the officers aiding and abetting.

The facts of that case were that two police officers had a prostitute under observation. One slowly drove his car past her and then returned stopping by her. It was

73. [1963] N.Z.L.R 855
74. [1967] 1 W.L.R. 1051

obvious that this was to draw the prostitute's attention to the officer who, needless to say, was not in uniform. The lady came up to the car and a deal was negotiated with the lady making the initial offer. Under these circumstances Parker C.J. held that;

> " all the officer did was to place his car in such a position that the appellant could solicit if she had wanted to." [75]

These cases indicate that the Courts are alive to the possibility of offences being committed by police officers. While there appears to be no legal justification for allowing officers to commit offences in an entrapping situation there does appear to be a strong practical reasons if there is no other way of apprehending the offender. Legal justification has been attempted by saying that motive excuses [76] or that superior orders justify [77] or that the entrapper only simulates mens rea [78] or necessity. [79] The attempts either confuse motive with intent or allow police agents defences which are not available to the general public.

It must be conceeded,however, that the possibility of a police officer being charged with an offence is extremely remote in this country. [80] Mandamus will not lie to compel a prosecution and while an entrapping officer may commit a technical offence it is unlikely that he would be prosecuted.

75. ibid., 1056
76. Carroll v. Moore (1907) 9 W.A.R. 34
77. Valler's case [1844] 1 Cox C.C
78. R v. Salmonson [1960] (4) S.A. 748, 752
79. Adams v. People (1930) 285 P. 1102
80. But see for a Canadian case where a prosecution was brought against a police officer R v. Petheran 1936 2 D.L.R.24

Sentencing

There was no appeal against sentence in Capner but in O'Shannessy the appellant received special leave to appeal against sentence during the course of the appeal against conviction. The Learned Judge said that he did not want to enter into the question of whether an entrapment situation should call for a reduction in sentence as in that case there was no entrapment made out. However he went on to say;

> "But the facts that the appellant was approached, invited to help by a police officer and himself made no advances go materially to the extent of his involvment. We think that is an important element when it comes to sentence." [81]

There is no reported case of the New Zealand Courts which directly faces the question of reduction of sentence on the entrapment situation. The English Courts usually approach police involvment as grounds for reducing sentence [82].

The leading authority is Browning v. J.W.H. Watson (Rochester) Limited [83] where the defendant was charged with unlawfully permitting a motor coach to be used as an express carriage without a licence. The coach had been hired to a private club but two transport inspectors had managed to get aboard without the charter party organisers noticing.

81. R v. O'Shannessy op. cit., 3 note 1.
82. eg. Mealey where the Court decided not to reduce sentence
83, [1953] 2 Q.B.D. 775

Presumptuous.

To his credit the Magistrate dismissed the information on the grounds of lack of knowledge on the part of the accused. On appeal to the Queen's Bench the appellate Court held (rightly in law) that the information could not be dismissed on this ground but said;

> " ... we remind Magistrates that it is possible for them to grant an absolute discharge and it is not necessary for them when they do grant an absolute discharge to order payment of costs." [84]

A similar approach was taken in R v. Birtles [85] where a police officer was involved in encouraging the defendant to commit a crime which may not have otherwise been committed. The sentence was reduced from five years to three years clearly because the Court felt that the police had gone too far.

Heydon [86] says that the purpose for reduction of sentence is to;

> " register the Court's disapproval of the police conduct and perhaps to alleviate any sense of injustice felt by the accused." [87]

However a New Zealand Court should be required to consider a reduction of sentence where despite the entrapment it admits the evidence and convicts the accused. If the entrappers evidence is excluded there would generally be no grounds

84. ibid., 779
85. [1969] 2 All ER 1431
86. Heydon J.D. op. cit., 285, note 12.
87. loc. cit.

for a conviction. If the Court feels that the collection of evidence was performed in an unfair way it should not admit that evidence. If entrapment evidence is admitted it must be because in the circumstances of the case the Judge thought that it was fair to admit it. If the entrapment was fair then there can be no grounds for reduction of sentence.

The Courts should, however, consider reductions in non-entrapment cases such as O'Shannessy's where the accused has no prior disposition and the policeman exerts a gentle pressure not sufficient to entrap. The real reason for this is not to salve the accused's feelings but, where appropriate, to register disapproval of police action.

CONCLUSION

The New Zealand Courts take a correct approach in leaving the entrapment issue to be decided by a Judge. The Judge has the discretion whether or not to admit evidence and if the evidence was obtained by an entrapment process he would, presumably, not admit it. This approach avoids the problems which the American Courts face in applying the majority approach. There is no possible conflict of defences and no prejudice in the minds of the jurors when the decision rests with the Judge. In leaving the matter to judicial discretion the New Zealand Courts come close to the Canadian and American minority approaches. English Courts differ from the others as it is doubtful whether there, a Judge has the discretion to exclude evidence which is obtained by an entrapment process.

The Canadian and American minority both see the discretion to exclude entrapment evidence as being rooted in the Courts role of maintaining its own integrity with evidence obtained by entrapment being a lowering of standards in the Court and demeaning the Court. The Court must keep its own house pure. The New Zealand approach rests on public policy and extends only to the exclusion of unfairly obtained evidence. Accordingly it is not a substantive defence to the charge and if the Judge exercises his discretion against the entrapped that usually would be the end of the matter. Appellate Courts are notably loathe

to review the exercise of judicial discretion. If a situation arose in New Zealand where evidence pointing towards entrapment was discovered after the trial [88] the defendant would have to move for a new trial on the grounds of new evidence becoming available.

The requirement of the New Zealand definition of entrapment that the defendant was encouraged to commit offences that he would not have otherwise committed may involve the Judge going into the defendant's past conduct to decide if he was predisposed to the offence. This is unfortunate as English law maintains that a man's record should not be taken into account in deciding his guilt. Further, if the entrapper's evidence is not objected to then it would go before the jury and any chance of it being later excluded would be lost, and probably pointless. This could be avoided by confining the enquiry to the police officer's conduct. That is, on the evidence did he encourage and instigate the commission of an offence - as opposed to taking advantage of an opportunity to entrap an offender.

Prejudicing the jury is avoided in the New Zealand Courts by holding a voir dire to enquire into the police conduct. The jury are not present during this and the evidence goes to the jury only once the question of admissibility has been decided. The possible prejudice inherent in the American majority approach is thus avoided.

The New Zealand approach requires the accused to object

88. As in Mealey's case

before an enquiry into entrapment can be made. Because of a different doctrinal basis the Canadian approach does not require the accused to do anything as the matter rests entirely with the Court keeping its own house in order. The Canadian and American minority approach is to be preferred because there is no enquiry into past conduct and failure to object to evidence is not fatal. The Courts should maintain their own house without requiring an objection to evidence. Some cases of entrapment have shown monstrous abuses by the police and the Courts should decline to hear evidence obtained by unfair means on its own motion. There is no problem of onus in the preferred approach. All that has to be done is to show an inducement and the Court makes its own enquiry from then on. Further, the voir dire can be a cumbersome and time wasting process. Judicial enquiry would avoid this but to avoid prejudice the jury should not be present during this enquiry.

There is no advantage in having a defence of entrapment able to go to the jury. The defence would raise more problems than it solves. It is proper to leave the matter to judicial discretion but, in New Zealand, the discretion has the wrong juristic basis. The approach is needlessly cumbersome and has problem areas which could be avoided by following the Canadian approach. New Zealand is fortunate in that there does not seem to be a case where the police have actually entrapped a suspect. If there was an

entrapment case proved before the Courts the issue would have to be squarely faced. In these circumstances it is to be hoped that the Courts would reconsider the basis of their approach but the present indications are that this is unlikely.

rx DO DOWLAND, M.C. Entrapment.

The printing this side need only be used if the so-called "Reverse" Filing is practised (this method is to file the letters face downwards so that the earliest date appears on top).

File No. .....

Name .....

Address .....

Date

From ..... 19.....

to ..... 19.....

Reference .....