

## TRAFFICKING

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### Strategy & Tactics in Defending in Trafficking Cases - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

A few years ago the word trafficking conjured up images of drugs smugglers and boot-leggers. Now you are more likely to think first of gun-runners and people traffickers. The latter of these is attracting particular concern. This modern day slave trade across the E.U. involving women and children has reached epidemic proportions.

Whether the 'commodity' is drugs, contraband, guns or people, trafficking offences share some similar characteristics. Police operations are invariably intelligence led with the usual concerns for defenders that association alone, e.g. telephone links and so on can make an innocent associate look guilty, without there being any smoking-gun. Here we outline some of the practical issues we have come across in tackling trafficking allegations.

#### OVERSEAS ELEMENT

Of course trafficking necessarily means that the alleged offence has an overseas element. This will not usually raise any particular challenges of itself although it is worth considering where the actual offence (if any) was committed. The starting point in English law is that the Court's jurisdiction is territorial, however, certain acts committed abroad will be triable here, including a conspiracy abroad to commit an offence here.

Modern British policing recognises the trans-national nature of certain serious crime. The Serious and Organised Crime Agency (SOCA) is now up and running and its remit is to target those at the top of criminal conspiracies; it is not limited to just those suspects within the U.K. The Agency has some 4,300 staff and 120 officers in 40 countries. Furthermore, E.U. states are now fast moving together in the field of international cross co-operation in criminal investigations, see for example the European Arrest Warrant. There is also undoubtedly increasing co-operation between worldwide law-enforcement agencies such as the American D.E.A., Interpol, and European police forces. As explained in last November's article this reliance on overseas forces will sometimes provide some leverage for defenders to enquire into whether any foreign agency has conducted surveillance on a suspect and, if so, how far that surveillance is compatible with what we would recognise as proper human rights protection.

#### CONSPIRACY

Invariably a trafficking offence will be charged as a conspiracy to commit a certain offence. Conspiracies are technically difficult to defend because the Crown do not have to prove a particular act – it does not need to be actually proven that X was an organiser or a courier; the evidence will be presented by the Crown and if enough mud sticks the jury will convict – even if it's just on the basis that 'he was defiantly involved.' But conspiracies raise as many problems for the Crown as solutions. It is always worthwhile going back to basics and understanding that conspiracy allegations necessarily mean the Crown proving that a suspect was a party to an agreement and he knew that if the agreement were carried out a course of conduct would be pursued which would result in the commission of an offence.

But what if, for example, A, B and C agree to import cannabis (now a Category C drug) where C provides a car but in fact A and B import cocaine (still a Category A drug)? In that situation C would in fact be acquitted (see *R v Taylor* [2002] Crim LR 205). The point is that it is always worth going back to basics in trafficking conspiracy cases and considering whether the Crown have created problems for themselves. Again, what if, for example, A and B agree with C to commit an offence but C, in reality, had no intention to go through with it, or if B later changed his mind? What if A, B and C agreed with D to commit a trafficking offence and D turned out to be an undercover officer? What if A agreed with B but did not meet C or even know D? It would take a book to explain all the many variables of the law on conspiracy. The essential thing to remember is that conspiracy really means 'agreement' – the Crown must always prove a suspect's agreement to be involved in a trafficking offence.

#### POLICE INTELLIGENCE

Trafficking charges often follow from long and complex investigations. Often there clearly has been an offence committed; what the concern is, is what the case is against a particular Defendant. The evidence might show that a particular suspect has no more than a few suspicious meetings and lots of telephone calls between others who have much more evidence against them – yet this same suspect is portrayed as 'Mr. Big'. Why is this? Very often it is down to police intelligence where the Crown's 'theory of the case' is presented without any firm evi-

dence of the number one status given to the Defendant. For prosecutor's that is the beauty of a conspiracy charge. Defenders on the other hand will often try to pressurise the Crown in disclosure arguments, hoping that the Judge will make a disclosure order that the prosecution will be unwilling to obey thus ending the case altogether. The Courts are well used to these arguments – infact they require very careful thought and precise drafting. All too often such arguments fail as there is a lack of detail about why police intelligence must be disclosed in order to assist the defence case. Prosecutor's will simply say to the Judge in a private hearing that the identity of the informant – or whatever is the disclosure sought - should not be revealed as the defence are only asserting that they are not involved in the conspiracy and have done nothing to show how such disclosure might assist their defence.

### **INFORMANTS, SUPERGRASSES AND AGENTS PROVOCATEURS**

Traffickers move in treacherous circles, the police and the Courts recognise the vital importance of keeping the informant system going by using material gathered straight from the front-line. In trafficking cases, this can cause an over confident informant with an agenda (officer or civilian) to over step the mark and start creating crime; the classic case of entrapment. Such dangers are bound to increase with the importance attached to trafficking investigations and the new provisions allowing 'immunity notices' to be issued to a suspect prepared to turn Queen's Evidence; s71, Serious Organised Crime and Police Act2005.

### **DISCLOSURE AND PUBLIC INTEREST IMMUNITY**

In a drugs trafficking conspiracy allegation that the authors are currently involved in our Defence Statement actually went as far as naming an individual as an informant and provided some reasoning for his informing; the defence – set-up. Crucially the Crown have now just served a very lengthy statement from the named informant who is now a prosecution witness and who has confirmed that he was paid (a lot of money) to provide police with intelligence. It can be imagined how this opens up other lines of disclosure and helps focus the trial on the credibility of the informant as opposed to the Defendant. Such tactics will not be appropriate in all cases and careful judgements have to be made about what is pleaded in the Defence Statement but it can be seen that in trafficking cases it is important to properly prepare for disclosure arguments and not just make bald assertions on a piece of paper headed 'Defence Statement' – see comments of the House of Lords in R v H & C [2004] 2 AC 134.

We have already mentioned entrapment which is often the issue in participating informant cases. In trafficking cases this issue arises again and again. An undercover police officer, or a criminal used by the police to get close to suspects, can provide very valuable material to

the police. But the Court's recognise that the temptation for those involved to cross the line and 'create an offence' is very real, see test in R v Loosely; A.G.'s ref (No. 2 of 2000) [2002] 1 Cr. App. R 29. The argument's on entrapment may also include not just the informant's actions but the lawfulness of the police operation and whether it was properly authorised under Regulation of Investigatory Procedures Act 2000 (RIPA). An informant feeding material back to his handler for reward in undoubtedly a 'covert human intelligence source' under RIPA and thus proper authorisations must be provided otherwise the Crown could face a submission that about the suspect's right to privacy being violated under Article 8 of the European Convention.

### **CONCLUSION**

Criminal cases centering on trafficking will take up more and more court time. The cases will become increasingly complex as the facilities of the State to battle trafficking increase, e.g. the use of immunity notices and so on. However, we predict that the central issues will not change namely; entrapment, innocent association and disclosure and PII arguments. Also, as ever, we predict that as the court's get more and more used to the same arguments so early and proper preparation, particularly of the new style Defence Statements, will be the key in defending trafficking allegations.

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