

TRAFFICKING

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

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. 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 serious crime. According to the UK Threat Assessment of Organised Crime 2009/10 much of the most serious trafficking is undertaken by organised criminal gangs, thus trafficking receives the attention of the Serious and Organised Crime Agency (SOCA) - which has been up and running since 2006 and whose stated aim is to target those at the top of criminal conspiracies.

The world is becoming a smaller place in terms of law enforcement. E.U. states are now well used to the European Arrest Warrant for example - this was implemented here in 2004 and essentially does away with the old and lengthy extradition procedures, at least in between E.U. States. There is also undoubtedly increasing co-operation between worldwide law-enforcement agencies such as the American D.E.A., Interpol, and European police forces and now especially financial watchdogs such as the Financial Services Authority, the Serious Fraud Office and the American Securities & Exchange Commission.

This reliance on overseas law-enforcement 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. It will also present an opportunity for the prosecution to use as evidence phone calls intercepted overseas - this is still not possible in domestic

cases under s17 of the Regulation of Investigatory Powers Act 2000 ("RIPA").

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 definitely involved.' But conspiracy charges also present problems for the Crown as well 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 (a Category B drug - again) 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 may well follow from long and complex investigations. Often it is undeniable that an offence has been committed; what the concern is, is what the case is against a particular defendant. The evidence might show that a 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 evidence 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 don't want. The Courts are well used to these arguments - in fact 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 ("Public Interest Immunity" or PII hearings) 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 or undermine the prosecution case.

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 fairly new provisions allowing 'immunity notices' to be issued to a suspect prepared to turn Queen's Evidence; s71, Serious Organised Crime and Police Act 2005. The same legislation also introduces incentives for informants to come forward from prison and receive often substantial discounts in their sentences after entering written agreements with the prosecution - see e.g. R v P; R v Blackburn [2008] 2 Cr. App. R (S). The problems with these sorts of witnesses are obvious - they may be telling the truth but are equally highly motivated to lie. The authors have been involved in several cases involving examination of the police handling of these sorts of witnesses which can be crucial to preserve, or undermine, the credibility of these inherently flawed witnesses.

DISCLOSURE AND PUBLIC INTEREST IMMUNITY

In a drugs trafficking conspiracy allegation that the authors were involved in some years ago the Defence Statement actually went as far as naming an individual as an informant and provided some reasoning for making this allegation. The Crown were then forced into serving a very lengthy statement from the named informant who then had to come out of the shadows and become a prosecution witness. The advantage for defenders of this sort of tactic is that the issue may be about the credibility of

the outed informant, rather than of the Defendant. But 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, perhaps more strikingly than in other cases, it is important to properly prepare for disclosure arguments and not just make bald assertions on a piece of papers 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 arguments 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 RIPA. An informant feeding material back to his handler for reward is undoubtedly a 'covert human intelligence source' or 'CHIS' in police speak under RIPA, and thus proper authorisations must be provided otherwise the Crown could face a submission that the suspect's right to privacy under Article 8 of the European Convention has been breached demanding the exclusion of that unlawfully obtained evidence.

CONCLUSION

Criminal cases centering on trafficking are bound to 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, early and proper preparation, particularly of Defence Statements, will be the key in defending trafficking allegations.

AUTHORS

Jonathan Lennon is a Barrister specialising in serious and complex criminal cases at 23 Essex Street Chambers in London. He was junior Counsel in R v H (C.A.) and is contributing author to 'Covert Human Intelligence Sources' 2009 Waterside Press.

Aziz Rahman is a Solicitor - Advocate and Partner at the leading Criminal Defence firm Rahman Ravelli Solicitors, specialising in Human Rights, Financial Crime and Large Scale Conspiracies/Serious crime. Rahman Ravelli are members of the Specialist Fraud Panel.