

UNITED STATES)

v.)

PFC Haywood S. Barnes)

323th MP Company, USAC)

Fort McPherson, Georgia 30330)

BRIEF IN SUPPORT OF
MOTION TO SUPPRESS

FACTS:

Pvt. Moreno, a witness for the prosecution will testify that on the evening of 14 January 1972, she was at the SCO Club. She will also testify that during that evening she had two conversations with Sp4 Sam Barnwell regarding SPC Johnson (Ret.).

The first of these conversations took place at the bar. During the conversation, Sp4 Barnwell supposedly stated that "the old man (SPC Johnson) has a lot of money." Pvt. Moreno does not recall if PFC Barnes was present at this time.

The second conversation took place at the jukebox. Sp4 Barnwell is supposed to have said, "Leave the old man alone; we'll take care of him", and something to the effect that if Pvt. Moreno would lead the old man outside, he would be taken care of. PFC Barnes was in the general vicinity but Pvt. Moreno does not recall whether or not he was within hearing distance.

Other witnesses will testify that PFC Barnes was in the club that night but cannot relate any conversations that he took part in.

Pvt. Moreno will also testify that after the alleged robbery, Sp4 Barnwell, on the porch of his barracks, gave \$20 to Pvt. Moreno and stated something to the effect that "That's all the old man had." Again, PFC Barnes was in the vicinity of the conversation but she cannot recall whether he was within hearing distance.

LEGAL CITATIONS: Para 140 (b) MCM 1969 (Rev). U.S. v. Labossiere, 18 USCMA 337, 32 CMR 337, (1962), and U.S. v. Beverly and Cartley 14 USCMA 468, 34 CMR 248 (1964)

ARGUMENT:

To allow the evidence of these declarations made by Sp4 Barnwell into evidence against PFC Barnes, the government must admit them as exceptions to the hearsay rule. The government is depending on paragraph 140b of MCM as a statement of a co-conspirator.

In the case of U.S. v. Labossiere, *supra*, statements by accomplice A that accused B was involved in a conspiracy, made out of B's presence and to guards to induce them to join in a conspiracy were excluded because the government failed to show the conspiracy existed prior to the statement.

Therefore, the government must show the existence of the conspiracy both chronologically and logically prior to the statement made. As the court said in *Labossiere*:

... it is equally well settled that, as the Manual, *supra*, notes, such declaration to be admissible - must be made 'during the conspiracy' or, in the words of the Federal judiciary:

'It is elementary that a statement of a conspirator, in order to bind the co-conspirator, must be a statement not made in the formation of the conspiracy. (Emph added) but after the conspiracy is formed and in furtherance of its objects. It is then admissible against all upon the theory that each then speaks and acts for all, if speaking or acting in furtherance of the objects of the conspiracy.' [Collenger v. United States, 33 F2d 345, 348 (CA 7th Cir) (1931)].

The crucial question, therefore, is whether there is any evidence proving the existence of the alleged conspiracy before the statements were made. The testimony of Pvt. Moreno is the only evidence we have on this matter. All other witnesses do not testify to any conversations of the accused. Looking solely to the testimony of Pvt. Moreno, we see that the conspiracy certainly did not exist, as to her prior, to the statements since these are the statements which involved her. So a conspiracy of PFC Barnes, Sp4 Barnwell and Pvt. Moreno could not have existed prior to the statement.

What evidence do we have that PFC Barnes and Sp4 Barnwell entered into a conspiracy before these statements were made? The only evidence is the obscure reference to an undefined 'we' in one of the statements. Is this sufficient to prove the existence of a conspiracy? The answer is in the negative. In the Laboucaine case (*supra*) the court held that a statement naming the accused was insufficient to prove the existence of the conspiracy. The court stated:

"Moreover, we may not, as the Government suggests, rely on the content of Taylor's conversations with the various witnesses to establish the existence of a conspiratorial agreement with the accused, for such would permit the questioned evidence itself to furnish the predicate for its admissibility. We have long held that 'bootstrapping' of this sort is impermissible."

Since the government has failed to show that at the time of the alleged statements that these statements were made during and in furtherance of a conspiracy, they are inadmissible as hearsay.

As to the third statement and non-verbal act of Sp4 Barnwell made on the porch of his barracks, this statement is also hearsay as it relates to PFC Barnes. This statement was made after the alleged incident and was not in furtherance of the alleged incident.

As the Court stated in Beverly Case *supra*:

"We were faced with a similar question in *United States v. Salisbury*, *supra* [14 AF CMA 171, 33 CMR 383]. There, as here, the central object of the conspiracy was the larceny of government property; and we held in *Salisbury* that the conspiracy was completed when the object of the conspiracy was obtained."

Therefore, this testimony should also be suppressed.

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