

UNITED STATES)
) Brief of the Government
v) on
) Motion to Suppress
HAYWOOD BARNES)

It is a well-recognized exception to the hearsay rule that the acts and declarations of a co-conspirator or co-actor, pursuant to, and in furtherance of, an unlawful combination or crime, are admissible against all co-conspirators or co-actors during the existence of the conspiracy.

US v Salisbury, 14 USCMA 171, 33 CMR 383 (1963)
US v Miasel, 8 USCMA 374, 24 CMR 184 (1957)

Statements made during the conspiracy and in pursuance of it are, admissible in evidence for the purpose of proving the truth of the matters stated against those co-conspirators who were parties to the conspiracy at the time the statement was made or who became parties to the conspiracy thereafter.

Paragraph 140b, MCM, 1969 (Rev.)
US v Mesarosh, 223 F2d 449 (3d Cir 1955)

As stated by the court in Mesarosh, supra,

"Where one joins an existing conspiracy knowing of the illegal objectives, he takes the conspiracy as it is, including prior acts and declarations by co-conspirators which are competent evidence against him."

In other words, when an accused joins in criminal activities with other persons he is deemed to have created a type of agency relationship with them sufficient to authorize them to speak and act on his behalf in furtherance of the joint enterprise. Therefore, statements made by such other persons during the existence of the common purpose and in furtherance of it are treated, for the purpose of the hearsay rule, as though they had been made by the accused himself. A sufficient foundation for the application of the exception is laid by showing the existence of the unlawful joint enterprise and that the proffered statement was made during its existence and in furtherance of it.

DA Pamphlet 27-172, Evidence, June 1962.

Further, although acts, conduct, or statements made after a conspiracy has ended may not be admissible against a co-conspirator for the purpose of proving the truth of the matters stated, such evidence, including statements offered for another purpose, is admissible for the purpose of showing the existence of the conspiracy.

} also not
} had nothing to do with conspiracy

Para 140b, MCM 1969 (Rev.)
US v Salisbury, supra.
Lutwak v US, 344 US 604 (1953)

Participation in a criminal conspiracy may be shown by circumstantial, as well as direct evidence.

US v Miasel, supra.
Delli Paoli v US, 352 US 232

When, however, once the conspiracy or combination is established, the act or declaration of one conspirator or accomplice in the prosecution of the enterprise is considered, the act or declaration of all, and therefore, imputable to all.

Wharton, Criminal Evidence, 11th ed, § 699, p. 1183.

And in order to withdraw from a conspiracy, affirmative action is required.

Poliafico v US, 237 F2d 97 (6th Cir, 1956)
US v Miasel, supra.

When evidence of acts or statements of a co-conspirator is offered, the question as to whether the conspiracy existed, and whether the statement was made in pursuance of it is, for the purpose of determining the admissibility of the statement, of course, one to be decided by the Military Judge. At the latter's discretion, the statement may be admitted upon the condition that the statement must ultimately be excluded and disregarded if it is not afterwards shown to be admissible under the exception above discussed, or to be otherwise admissible.

It is submitted that this is the appropriate course of action. To rule otherwise would result in a situation where the government would be prevented from introducing competent evidence to establish the basis, i.e., the conspiracy, on which the exception to the rule is founded.

ROBERT B. SULLIVAN
CPT, JAGC