COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Karigar, 2017 ONCA 576
DATE: 20170706
DOCKET: C59321

Feldman, Pardu and Benotto JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Nazir Karigar

Appellant

Israel Gencher, Norman Keith and Tala Khoury, for the appellant

Jeanette Gevikoglu and Moray Welch, for the respondent

Heard: May 29, 2017

On appeal from the conviction entered on August 15, 2013 by Justice Charles T. Hackland of the Superior Court of Justice, with reasons reported at 2013 ONSC 5199.

Feldman J.A.:

[1] The appellant was convicted by Hackland J. of agreeing to offer a bribe to a foreign public official, contrary to s. 3(1)(b) of the *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34 (the "Act"). As an agent or employee of Cryptometrics Canada, a Canadian subsidiary of an American company, the appellant agreed with other employees and agents of the company to bribe

Indian officials in order to secure a multi-million dollar contract with Air India for the Canadian company. The evidence of what occurred was overwhelming; it came in large part from two sources: the testimony of an unindicted co-conspirator who explained the documentation and described what occurred, as well as from the appellant himself in emails and in a statement to the RCMP.

[2] There are three key grounds of appeal. The main basis of the appeal is the appellant's claim that there was no sufficient connection to Canada to give the court territorial jurisdiction over what occurred. The appellant also challenges the meaning of the word "agree" within s. 3 of the Act: he submits that the Crown must prove an agreement between the accused and the foreign public official and that it is not sufficient to prove a conspiracy to offer a bribe to a foreign public official. Third, the appellant says the trial judge erred in his application of the co-conspirators' exception to the hearsay rule and misapprehended some of the evidence.

[3] For the reasons that follow, I would not give effect to any of the grounds of appeal.

Facts and findings of the trial judge

[4] As mentioned, the Crown's case relied on the testimony of an unindicted co-conspirator, Robert Bell; email communications seized from computer drives at Cryptometrics's offices in Kanata, Ontario (many of those emails authored by

the appellant himself); as well as admissions made by the appellant to the RCMP, the Canadian Assistant Trade Commissioner in Mumbai and to the US Department of Justice. The appellant did not call any evidence.

[5] At the relevant times, Robert Bell was Vice-President, Business Development, for Cryptometrics Canada. He handled the technical and some financial components of the Cryptometrics Canada bid on the Air India project. The appellant handled strategy to win the contract, including communications with Air India officials and the proposed offering of bribes. Two US-based Cryptometrics executives – Mario Berini, the Chief Operating Officer of Cryptometrics Canada and its parent company Cryptometrics Corporation and Robert Barra, Chief Executive Officer of the two related companies – were responsible for making the ultimate strategic decisions.

[6] In June 2005, the appellant approached BeII with a business proposal. The appellant said he was president of IPCON, a firm that had business dealings in India. The appellant explained he had good connections with certain Air India officials and advised that the airline was seeking technology to deal with security issues. The two discussed whether Cryptometrics's biometric facial recognition technology might provide a solution.

[7] In September 2005, the appellant and his colleague, Mehul Shah, met with Bell in Ottawa to discuss a passenger identification solution for Air India using

Cryptometrics's technology. The proposal was that the appellant and Shah would help Cryptometrics Canada obtain this work from Air India in exchange for 30 percent of the expected revenue.

[8] Also in September 2005, Bell travelled to Mumbai, India, as Cryptometrics Canada's representative. The appellant and Bell met with the Canadian Assistant Trade Commissioner in Mumbai, to discuss doing business in India.[1] The appellant arranged for Bell to meet senior Air India officials, in particular, Hasan Gafoor, Air India's Director of Security and his Deputy, Captain Mascarenhas. The appellant also arranged for Bell to give a presentation to some 30-40 people on Cryptometrics Canada's facial recognition technology in the Air India offices.

[9] When Bell returned from India, he reported what he had learned to Berini and Barra, who decided to pursue the contract. In the months that followed, Cryptometrics Canada, with the appellant's help, prepared for the project.

[10] On January 19, 2006, the appellant, with Gafoor and Captain Mascarenhas, travelled to Canada to visit Cryptometrics's offices in Kanata. A company named Cryptometrics India was subsequently established with the appellant as its executive director.

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[1] There is no suggestion that bribery was discussed at this meeting. It was only at a later meeting in May 2007, discussed below, that the appellant told the Commissioner that they had paid bribes in their attempts to obtain the contract. The Commissioner responded by expressing shock and telling them they could be prosecuted or sued.

[11] On February 24, 2006, Air India released its Request for Proposals ("RFP") to supply a biometric passenger identification security system. Under the executive direction of Berini and with guidance and strategic advice from the appellant, Bell and Cryptometrics Canada began to prepare a proposal in response to the RFP.

[12] In April 2006, Bell and Berini met with the appellant, Shah and Mehta (Shah's partner) in a hotel room in Mumbai to discuss submission of the Cryptometrics Canada bid. During this meeting, Shah explained that Indian officials would have to be paid in order for Cryptometrics Canada to obtain the contract. The trial judge explained that this appeared to be the first time the payment of bribes was openly discussed in front of Bell.

[13] After Bell returned to Ottawa, Berini sent him a new version of the financial spreadsheets. These spreadsheets listed Air India officials who would be paid bribes and the amount of money and Cryptometrics's shares these officials would be offered. The appellant would subsequently admit in a statement to the RCMP that he furnished the information reflected in the spreadsheets.

[14] In the weeks that followed, Bell and Berini, with the appellant's help, continued to develop Cryptometrics Canada's proposal in answer to the RFP. The appellant provided Bell with inside information regarding potential competitors for the contract. In June 2006, Bell, the appellant and other

Cryptometrics Canada representatives visited India to advance Cryptometrics Canada's proposal.

[15] Later, under the appellant’s direction and advice, the Cryptometrics team prepared a second proposal for the contract, using the appellant’s company IPCON, creating the appearance of a separate competitive bidder using Cryptometrics Canada technology but at a higher price. This second proposal was designed to create the false impression of a competitive bidding situation, providing Cryptometrics Canada with certain procedural advantages.

[16] On June 19, 2006, the appellant e-mailed Bell and Berini, requesting $200,000 for Captain Mascarenhas. The $200,000 was subsequently transferred from Cryptometrics USA to the appellant's bank account in Mumbai. The trial judge found that this money was intended for the purpose of bribing Captain Mascarenhas.

[17] The trial judge listed a series of evidentiary references that satisfied him beyond a reasonable doubt that the appellant was involved in a conspiracy to offer bribes to Air India officials in order to win the contract for Cryptometrics Canada. Those evidentiary references included:

- In April 2006, Bell, together with the appellant, Berini, Shah and Mehta met in a hotel room in India to discuss the company's proposal. Shah advised that more money was required because officials would have to be paid in order to obtain the contract;

- A spreadsheet budgeting intended bribes to identified officials was circulated between Berini, Bell, Barra and Shah. The appellant admitted in his statement to RCMP Sergeant Bedard that he was the initial author of the list of persons to be offered bribes and the amounts;

- On June 16, 2006, via e-mail, the appellant asked that arrangements be made to pay funds in regards to the selection of two companies (Cryptometrics Canada and IPCON) as the only compliant bidders so that the deal would "not get blown";

- On June 19, 2006, the appellant e-mailed Berini and Bell to get $200,000 for "the Captain". The Captain figures on the spreadsheet as an individual who is to receive shares and "upfront cash". The Captain was the co-chair of the selection committee for the Air India project;

- On June 21, 2006, the appellant e-mailed Berini, stating that the Captain and MMD "need to see the money", and that he needed it the following day. The same day $200,000 was transferred from Cryptometrics USA to the bank account of the appellant in Mumbai;

- On July 18, 2006, the appellant told Berini and Bell that he was ready to push the shortlist but that MMD had problems with the valuation of the shares. The MMD is listed on the bribe spreadsheet as an individual who is to receive shares, as bribes;

- On or around August 3, 2006, IPCON and Cryptometrics were shortlisted as the only two qualified bidders, as planned. The appellant informed Berini that the CMD was to be in New York and wanted $5000 spending money. He further stated that the Captain and the CMD were giving pressure about the "shares";

- On August 7, 2006, the appellant wrote to Barra and Berini to say that the selection had been completed, that Cryptometrics and IPCON were the two companies qualified and that Cryptometrics would win the commercial round because its price was substantially lower than that of IPCON;

- On September 3, 2006, Berini e-mailed Bell a copy of the draft Air India/ Cryptometrics Canada agreement and the latest version of the spreadsheet. Berini and Bell discussed via e-mail how the bribes were to be amortized in order to maintain the profitability of the project;

- On March 6, 2007, Robert Barra, CEO of Cryptometrics USA, and the appellant entered into a Letter of Agreement. The agreement provided that US$250,000 in Indian Rupees was to be transferred to the appellant's bank account in Mumbai in order to secure the Air India contract. The agreement was entered into via e-mail correspondence. If the contract was not secured, the money was to be returned. The money was transferred from Cryptometrics to the appellant's bank account on that date;

- On April 17, 2007, Barra asked Berini the following question by e-mail: "Are we finally going to receive the letter today from A.I.? It has been over 6 weeks. I cannot understand these delays on a continuous basis". The six weeks referred to by Barra refers to the amount of time since the $250,000 transfer was made;

- On April 20, 2007, the appellant sent an e-mail saying that he had met with "PP" (which stands for Praful Patel, the Minister of Civil Aviation). The appellant stated that he and Patel discussed the "increments" and that the project would be cleared right away;

- On May 15, 2007, the appellant and Berini met with Annie Dubé at the Consulate General for Canada in Mumbai. During the meeting, the appellant stated that Cryptometrics had paid a bribe to Praful Patel (Minister of Civil Aviation - India) through an agent in order to clear the process and obtain the Air India contract. The appellant also stated that their agent confirmed the bribe money had been received by Patel. The appellant did not disclose the identity of the agent, nor the amount of money that was paid. The appellant also talked about corruption in general in India and specifically how government figures would get up to eight percent of the value of a contract as a bribe payment. The appellant stated "but we know he received the money" and "you didn't hear that from us". He continued that "we went to an agent and he received something. And we got information from the agent that the Minister received it." Dubé testified that she was shocked and expressed that they could be prosecuted (or sued);

- On July 12, 2007, the appellant sent an e-mail to Berini containing the following comments: "After PP took the money, I thought all was done and went ahead". The appellant added: "I guess by now you know why Patel has the Cryptometrics Project on hold!" The appellant made suggestions on how to get "Patel" back on board with Cryptometrics and stated the following: "someone needs to get all the separate

thinking on one track and make it work... will need the backing of Thulasidas and Mehra, if you are in touch with Bankoti, ask him to dig out more about it." The appellant asked Berini: "What have you done about the funds with PP? Have you asked and got them back?";

- On July 28, 2007, the appellant sent an e-mail to Bell asking him to review a draft of an e-mail he was going to send to Berini who seemed to have cut off all contact with him for the past two weeks. He stated the following: "I have no idea what your intentions are. I have been in touch with Wagchaure and Dhoble and they say they are ready and able to recover dues. I don't know if you want to take this route." The appellant explained that there was a lot he could not discuss via e-mail and wanted to meet with Berini;

- On August 13, 2007, one "Buddy" sent an e-mail to the Fraud Section (FCPA) of the US Department of Justice stating he had information about US citizens paying bribes to foreign officers and inquired about reporting the matter. The appellant admitted that he is "Buddy" (the appellant's statement of May 27, 2010 to the RCMP);

- The appellant described the scheme in an e-mail dated January 19, 2008:

> *There was a tender put out by Air India (Government of India enterprise) for a biometric security system, Cryptometrics bid on the system.*
>
> *Cryptometrics Paid USD 200,000 to make sure that only 2 companies were technically qualified.*
>
> *They paid $250,000 for the minister to 'bless' the system. There are documents executed to return the funds if the contract is not awarded. There are recordings asking for the money back.*
>
> *The People involved are Mr. Robert Barra, US citizen, CEO of Cryptometrics and Dario Berini, COO of Cryptometrics, also US Citizen.*
>
> *I am a Canadian Citizen on contract with the Canadian subsidiary of Cryptometrics.*
>
> *What about my immunity?*

- On September 4, 2007, Berini sent an e-mail to the appellant, copying Barra. The e-mail was in regards to the delay in the approval of the Air India tender and stated: “As you know, sizable investments were made to win the contract on top of winning this tender through the formal process. Cryptometrics will not extend itself further without assurances that the contract with AI will be formally awarded to Cryptometrics”;

- On November 2, 2007, Berini and Barra met with Shailesh Govindia, CEO of Emerging Markets Group (EMG) at the Cryptometrics Inc. office in New York, USA. Govindia was hired in another attempt to close the Air India deal. To make this happen, it was agreed that Cryptometrics Inc. (USA) would initially transfer US$650,000 to Govindia: US$500,000 would be given to Praful Patel and US$150,000 was for Govindia's expenses. After the contract was approved/signed, Praful Patel would receive US$1.5 million and Govindia would get US$250,000. They also discussed a “deferred success fee” of US$2 million for Praful Patel and US$1 million for Govindia/EMG. Barra wanted Govindia to hold the funds until the contract was signed. He did not want to see happen what happened last time;

- On November 9, 2007, US$650,000 was transferred from Cryptometrics USA’s bank account to the account of EMG.

The Trial Judge’s Decision

[18] Based on the foregoing, the trial judge was satisfied beyond a reasonable doubt that the appellant was involved in a conspiracy to offer bribes to Air India officials in order to win the contract for Cryptometrics Canada. The evidence revealed that Berini and Barra eventually lost trust in the appellant, but proceeded to attempt to have the contract awarded through further monetary bribes facilitated by Govindia.

[19] The trial judge held that the hearsay evidence of Berini, Barra and Shah was admissible against the appellant as evidence from co-conspirators. Applying

the *R. v. Carter*, [1982] 1 S.C.R. 938 test,[2] he was satisfied beyond a reasonable doubt that a conspiracy existed to bribe Air India officials to obtain the contract, and, based on the evidence of Bell and of the appellant himself, the appellant was either a principal of or at the very least a party to the conspiracy. The trial judge also held that Berini's and Barra's attempts to pursue the contract through further bribes using Govindia, following their falling out with the appellant, was admissible against the appellant as further evidence of the existence of an agreement to offer bribes.

[20] The trial judge further held that the offence of "agreeing" to give or offer a benefit to a foreign public official in s. 3 of the Act includes an agreement among two or more people to offer a bribe to a foreign public official, and does not require the Crown to prove an agreement with or payment to a particular foreign official. To do so would make the legislation difficult or impossible to enforce, possibly undermining international comity obligations.

[21] In deciding that Canada has territorial jurisdiction over the offence, the trial judge applied the test from *R. v. Libman*, [1985] 2 S.C.R. 178: whether there is a real and substantial link between the offence and Canada. He rejected the argument that the substantial link test is limited to the essential elements of the offence. He held that the connections could include both the illegitimate and the

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[2] In *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, the Supreme Court held that the traditional co-conspirators exception to the hearsay rule is supported by indicia of necessity and reliability, as required by the principled approach. For the most recent discussion, see *R. v. Bradshaw*, 2017 SCC 35.

legitimate elements of the impugned transaction that was the subject of the bribe or bribery attempt. Those connections included: the appellant was a Canadian businessman who approached a Canadian company in Ottawa, Cryptometrics Canada, and acted as its employee or agent in his efforts to secure the Air India contract; the benefit to be obtained was for the contracting Canadian company, with a great deal of the work to be done by its employees in Ottawa; nearly all of the real evidence – documents and emails – was seized in Canada, and all the witnesses who testified were from Canada.

Issues

[22] This appeal raises four issues:

> (1) Did the trial judge err by misapplying the *Libman* test and finding a substantial link between the offence and Canada?
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> (2) Did the trial judge err by misinterpreting the word “agrees” in s. 3 of the Act?
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> 3) Did the trial judge err by misapplying the *Carter* test for the admission of the evidence of co-conspirators?
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> 4) Did the trial judge err by misapprehending some of the evidence?

Analysis

1) Territorial Jurisdiction

[23] This offence was committed prior to the enactment of Bill S-14, which includes a new provision, s. 5, to establish territorial jurisdiction based on

Canadian nationality or permanent residency of a person who has committed an offence under the Act. Section 5(1) provides:

> 5(1) Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence under section 3 or 4 — or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under that section — is deemed to have committed that act or omission in Canada if the person is
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> (a) a Canadian citizen;
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> (b) a permanent resident as defined in subsection 2(1) of the *Immigration and Refugee Protection Act* who, after the commission of the act or omission, is present in Canada; or
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> (c) a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.

[24] The trial judge observed that this new basis for jurisdiction was not retroactive and did not apply to the present case. He referred instead to the test for territorial jurisdiction stated by the Supreme Court in *Libman* as described by La Forest J., writing for the court, at p. 212-13:

> [A]ll that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law.
>
> […]

> Just what may constitute a real and substantial link in a particular case, I need not explore. There were ample links here. The outer limits of the test may, however, well be coterminous with the requirements of international comity. [Citations omitted.]

[25] La Forest J. reviewed the jurisprudential history and rationale for the test. It arose from the concept, then codified in s. 5(2) (and now in s. 6(2)) of the *Criminal Code*, that Canada will not convict a person for an offence committed outside Canada. Nor does it accord with international comity for Canada to assert jurisdiction over crimes committed elsewhere. However, as La Forest J. explained at p. 209 of *Libman*:

> [Canada] has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here…. The protection of the public in this country is widely acknowledged to be a legitimate purpose of criminal law, and one moreover that another nation could not easily say offended the dictates of comity.

[26] A concept that was specifically rejected by the court in *Libman* was that the test required that the gist of the offence or the completion of the offence must have occurred in Canada. Rather than confine the analysis to what acts were strictly part of the offence, La Forest J. looked instead to acts that are “an integral part of the scheme”, stating, at p. 211: “we must, in my view, take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence.” He noted, at p. 209, that historically, Canadian courts “frequently took jurisdiction over transnational offences that

occurred partly in Canada where they felt this country had a legitimate interest in doing so."

[27] On this appeal, the appellant asks this court to resurrect the concept that the *Libman* test requires the court to determine whether the essential elements of the offence took place in Canada. He submits that the trial judge erred by failing to limit his territorial analysis to the essential elements of the offence. He further submits that the trial judge erred by applying the new nationality principle, codified in s. 5(1) of the amended Act, to his analysis.

[28] I would reject both of these submissions.

[29] The trial judge properly stated and applied the *Libman* test. He specifically rejected the appellant's position that because it was Barra and Berini, based in New York, who controlled the finances of Cryptometrics and who made the decision to pay the bribes, and because virtually all dealings occurred in India including the corruption, that therefore Canada did not have the requisite territorial connection to the offence.

[30] He found, correctly, that the substantial link test is not limited to the essential elements of the offence, and that the bribery could not be hived off from the legitimate aspects of the transaction for the purpose of the territorial connection analysis.

[31] One of the factors the trial judge noted was that the appellant was a Canadian businessman who approached a Canadian company with a business proposal that ultimately involved a bribery scheme, then acted as agent or employee of that company in his negotiations with Air India officials. However, he did not apply s. 5 by using the fact that the appellant is Canadian to deem that the appellant committed the offence in Canada. Rather, he included it as one of the factors that linked the offence to Canada.

[32] The other facts were, as noted above, that because a Canadian company was the proposed contracting party, the unfair advantage and fruits of the contract obtained through bribery would benefit that company. A great deal of the contract work was to be done in Canada. In addition, nearly all of the documents and emails that evidenced the transaction were seized in Canada, and all the witnesses were from Canada. I see no error in the trial judge's approach or his analysis.

[33] The appellant also submits that the trial judge's reasons on the issue of territorial jurisdiction were inadequate to explain why "other jurisdictional facts were not taken into consideration". There is no merit in this submission. The trial judge stated the *Libman* test correctly and explained why he found the aspects of the transaction that linked the offence to Canada constituted a real and substantial link between the offence and this country.

2) Interpretation of s. 3 of the Act

[34] Section 3(1) of the Act provides:

> 3(1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official
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> (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
>
> (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

[35] The appellant submits, as he did at trial, that giving the word "agree" its ordinary meaning, the section requires proof of an agreement between the accused and the foreign public official, and does not include an agreement between one or more other persons to offer a bribe to a foreign public official. The appellant also points to a subsequent amendment to the Act to assist in that interpretation. The new s. 6 of the Act provides:

> 6. An information may be laid under section 504 of the *Criminal Code* in respect of an offence under this Act — or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under this Act — only by an officer of the Royal Canadian Mounted Police or any person designated as a peace officer under the *Royal Canadian Mounted Police Act*.

[36] The appellant argues that the effect of this new provision is to add a conspiracy offence to the Act; therefore, he says, there was no conspiracy offence before this amendment.

[37] Finally, the appellant is critical of the trial judge's use of the *Convention on Combating Bribery of Foreign Public Officials* (the "*Convention*"), to which Canada is a signatory, as a guide to the interpretation of the Act.

[38] I would reject each of these submissions.

[39] The Supreme Court of Canada recently commented on the significance of corruption in international business practices in *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207, at para. 1:

> Corruption is a significant obstacle to international development. It undermines confidence in public institutions, diverts funds from those who are in great need of financial support, and violates business integrity. Corruption often transcends borders. In order to tackle this global problem, worldwide cooperation is needed.

[40] The *Convention* provides the legislative and policy background to the Act, which Canada enacted in 1998 (and which came into force in 1999) in response to its enforcement obligations as a member of the Organisation for Economic Co-operation and Development (OECD) and as a signatory to the *Convention*. As the trial judge stated at para. 41: "[t]he convention seeks to promote a level playing field for the pursuit of international business among member states."

[41] The trial judge was clearly entitled to look to the *Convention* and the anti-corruption policy it represents as part of the context for the interpretation of the Act.

[42] The now well-established approach to statutory interpretation requires examining the words of the provision in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament: see *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21 and, more recently, *R. v. Paterson*, 2017 SCC 15, 35 C.R. (7th) 229, at para. 31. Other principles of interpretation – such as the strict construction of penal statutes – only receive application where the provision's meaning is ambiguous: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 28: *R. v. Mac*, 2002 SCC 24, [2002] 1 S.C.R. 856, at para. 4.

[43] In s. 3, the offence is committed when a person "directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official." As the appellant submits, the offence is clearly committed when a person agrees with a foreign public official to give that official a benefit. But equally clearly, the offence is not limited to that scenario. It includes both a direct and an indirect agreement to give or to offer an advantage. There is no limiting language on who must "agree", prescribing the parties to the agreement. It does

not say that the agreement must be with the foreign official, only that the loan, reward, advantage or benefit that is the subject of the agreement must be a loan, reward, advantage or benefit *to* (or for the benefit of) a public official. On the language alone, there is no basis to read in a limitation on who must be parties to an agreement.

[44] Further, from a policy perspective, I agree with the trial judge that to read in such a limitation would constrain the ability of the Crown to enforce the policy of the Act in accordance with Canada's obligations under the *Convention*. Article 1 of the *Convention* includes conspiracies to bribe as well as actual bribes of foreign officials. It provides in relevant part:

> Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
>
> Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

[45] I also accept the submission of the Crown that the new s. 6 does not affect the interpretation of s. 3, and in particular, it does not add an offence of conspiracy. The new section addresses the exclusive ability of the RCMP to lay charges under the Act. It is not a charging section. Nor does the fact that it refers specifically to a conspiracy to commit an offence under the Act undermine the meaning of "agrees" in s. 3. That reference is part of a list of ancillary offences that are included for clarity in establishing the exclusive jurisdiction of the RCMP to lay any charges under the Act. The two charging sections are s. 3 and s. 4.[3] Unlike s. 3, s. 4 does not specifically include an agreement to commit the offence as part of the offence itself. Therefore, to the extent that Parliament wished to establish exclusive charging jurisdiction for all offences under the Act, the reference to conspiracy to commit would apply to such a charge under s. 4 specifically.

3) Co-conspirators' exception to the hearsay rule

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[3] Section 4 provides the following offence under the Act:
4 (1) Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,
(a) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;
(b) makes transactions that are not recorded in those books and records or that are inadequately identified in them;
(c) records non-existent expenditures in those books and records;
(d) enters liabilities with incorrect identification of their object in those books and records;
(e) knowingly uses false documents; or
(f) intentionally destroys accounting books and records earlier than permitted by law.

[46] The appellant makes two submissions under this heading. He does not dispute the finding of a conspiracy among Barra, Berini and himself. He disputes the trial judge's finding that the witness Bell was an unindicted co-conspirator. In oral argument, counsel explained that his position is that the trial judge erred in this regard because Bell testified that after he understood what was being proposed in one of the meetings, he absented himself from the meeting and from the discussions. However, the evidence is clear that Bell continued to assist the company to carry out the bribery scheme by, for example, preparing profit projections based on the chart that showed the amounts to be paid to the Air India officials as part of the bid for the contract. I see no error in the trial judge's acceptance that Bell was an unindicted co-conspirator who could give in evidence against the appellant the statements of other co-conspirators. Of course, his evidence as a witness recounting events from his own knowledge was not hearsay and was admissible as direct evidence.

[47] The appellant also objects that the trial judge did not identify which individual hearsay statements from which co-conspirator were being admitted and used against the appellant. There was no need for the trial judge to do so as all were co-conspirators. Nor does the appellant identify for the court any hearsay statement that he says should not have been admitted.

[48] Finally, the appellant says that the trial judge erred by considering as evidence against the appellant, the participation of Govindia in the ongoing

scheme with Barra and Berini after they had fallen out with the appellant. Specifically, the trial judge used the evidence of Barra and Berini's attempts to pursue the contract with Air India by paying bribes through Govindia as further evidence of the existence of the agreement to offer bribes that earlier involved the appellant.

[49] With respect to the trial judge, it is not clear what this evidence added in respect of the existence of the agreement. There was ample evidence of the agreement and of the appellant's role in it from the evidence of Bell, the documents, and the statements of the appellant as "Buddy" to the US authorities, and his statements to the RCMP. The Govindia evidence was redundant at best and any reliance on it by the trial judge was of no consequence in respect of the overall analysis and conclusion of the appellant's guilt reached by the trial judge.

4) Misapprehension of the evidence

[50] The appellant identifies six alleged misapprehensions of evidence by the trial judge. They are listed in his factum as follows:

> The evidence at trial does not support the conclusion that Robert Bell was an unindicted co-conspirator nor that he was "intimately involved in virtually the entire course of events";
>
> The learned trial judge gave undue weight to evidence of potentially unethical business practices of the appellant which he improperly used as a basis to conclude that the appellant was guilty as charged;

> The learned trial judge in determining that a transfer of $200,000 USD from Cryptometrics USA to the appellant was for the purpose of a bribe, without considering the evidence led regarding salaries or operating expenses for Cryptometrics India or its employees;
>
> The learned trial judge erred in that he found as a fact that “PP” referred to in an email was Praful Patel, the Minister of Indian Civil Aviation without evidence to support the conclusion;
>
> The learned trial judge erred in that there was insufficient evidence before the court to establish who, if any were to be recipients of any bribes or payments;
>
> The learned trial judge failed to consider the lack of evidence regarding the ability of any alleged recipient of a bribe to use his or her position to influence any act or decision of the foreign state or public international organization for which the official performs duties or functions.

[51] These allegations amount to a request for this court to reweigh the evidence and draw different conclusions. First, that is not the role of this court. Rather, a court on appeal defers to the findings of fact made and inferences drawn from the evidence by the trial judge. For example, the appellant challenges the trial judge’s finding that the US$200,000 transferred to him by Cryptometrics US was for the payment of a bribe, when it could have been for his salary or other expenses. In its factum, the respondent details the evidentiary basis for distinguishing such payments from the $200,000 transfer. In any event, the appellant confirmed that the $200,000 was for a bribe in his 2008 email to the

US Department of Justice. The trial judge was entitled to make this finding and made no error in doing so.

[52] Second, some of the alleged misapprehensions of evidence are complaints that the trial judge erred in law. For example, the appellant raises as an issue a lack of evidence that the targeted foreign public officials had the ability to influence decision-making. There is no merit in this submission. The evidence was clear that the appellant and the co-conspirators believed that Praful Patel and Captain Mascarenhas, officials with Air India, had that ability. The offence under s. 3 of the Act only requires proof of the agreement to bribe a foreign public official – not that the official has any particular power or authority.

[53] I would not give effect to this ground of appeal.

Conclusion

[54] I would dismiss the appeal.

Released: “K.F.” July 6, 2017

“K. Feldman J.A.”
“I agree. G. Pardu J.A.”
“I agree. M.L. Benotto J.A.”