

U.S.A. v. R.

Facts

The defendant was accused of – at least on or about January 1996 - facilitating the illegal entry of two Yugoslavian irregular migrants with the purpose of obtaining a financial or other material benefit. He would have bought the tickets from the then Yugoslavia to Canada. The defendant would have acted in complicity with another individual who would have transported the migrants into the United States. The defendant is reported to have met the migrants in a local MacDonald's restaurant, in Vermont (U.S.A.).

The Prosecution submitted evidence regarding other migrant smuggling cases in which the defendant had been previously involved (see “*Background*”) in order to prove plan, intent, knowledge, opportunity, identity and involvement of the defendant in a common scheme. The defendant presented a motion against the admissibility of such evidence.

Elements of success

- Balancing due process *vis-à-vis* evidence probative value

Challenges

- Lack of corroborating evidence
- Fluidity of *modus operandi*

Background

The prior migrant smuggling activities regarding which the Prosecution submitted evidence were the following:

NEW YORK (USA)

In July 1996, the defendant was arrested in Champlain, New York, for alien smuggling. The charges involved two Yugoslavian irregular migrants, who flew from the then Yugoslavia to Frankfurt (Germany) using their real names, and from Frankfurt to Montreal (Canada) under false German identification. The defendant had arranged and purchased the tickets, while another individual transported the aliens across the border to the United States. The defendant was to meet the migrants at a local MacDonald's restaurant. He was arrested precisely at the said restaurant while signalling the two migrants to enter into his car.

MICHIGAN (USA)

In 1993, the defendant was accused of migrant smuggling in the Eastern District of Michigan. The indictment targeted a pattern of activity occurring between January and April 1993, involving numerous irregular migrants. Five individuals were involved in the smuggling activity. With the exception of the defendant, none of the other alleged co-conspirators was mentioned in the Vermont indictment. The Michigan charges remained outstanding at the time the case under analysis was decided.

Key issues

- ❖ Evidence (admissibility of evidence on prior criminal activity)

Investigation

In ascertaining the facts, authorities relied much on testimonial evidence. The Prosecution's case was based much on prior indictments, for migrant smuggling, against the defendant.

Reasoning

On its motion against the admissibility of evidence related to prior migrant smuggling activity, the Defence argued such evidence was intended to show propensity to commit the crime (i.e., migrant smuggling), which was prohibited under the Federal Rules of Evidence (FRE).

The Court *ad quem* disagreed. Under FRE, evidence of "*other crimes, wrongs, or acts*" to prove character or criminal propensity is inadmissible. It will be admissible for other purposes, including "*proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident*". If such evidence is admissible, the court must balance the probative value of it against the prejudicial impact deriving therefrom for the defendant. In assessing relevance and probative value, it is critical to take into account *inter alia* the degree of similarity between the charged offense and the prior acts. A greater degree of similarity increases the relevance of the prior acts. Evidence of other acts may be admitted even if these have occurred after the charged offense. In such circumstances, the court must exercise greater judicial scrutiny since subsequent acts may be less probative.

The evidence of migrant smuggling activity in New York is offered to prove plan or common design. The similarity between the Vermont and New York charges make that purpose particularly relevant. With the exception of location, the Vermont and New York acts are virtually identical, showing a similar *modus operandi*. The events in the New York case are also relevant to prove knowledge, intent, identity and absence of mistake. The extreme probative value of the episode in New York is not, in the instant case, substantially outweighed by its prejudicial impact on the defendant.

The Michigan smuggling episode presented two similarities with the instant case: in both instances, the defendant (i) played a behind-the-scenes organizational function, (ii) was responsible for transporting the irregular migrants once they were in the United States. However, the differences between the two cases outweighed the resemblances: the Michigan event involves several co-conspirators, many more irregular migrants, repeated trips across the border, no proof that the defendant purchased the airplane tickets, and the exchange of large sums of money. There is almost a three-year gap between the Vermont and Michigan offences. Evidence that the defendant was part of a much larger conspiracy to smuggle irregular migrants few years before and involving considerable amounts of cash is highly prejudicial as it may lead jurors to infer guilt based upon propensity to commit the crime. Hence, in the instant case, the prejudicial impact of the Michigan episode evidence substantially outweighs its probative value.

Verdict/Decision

Motion *in limine* partially granted. The evidence relating to the New York smuggling episode was deemed admissible. However, the evidence regarding the smuggling episode in Michigan was held inadmissible and, as such, the Defence's motion was granted in respect thereof. Still with regard to the facts concerning the Michigan case, the Court *ad quem* clarified its decision could be reviewed in view of the evidence submitted in trial. That is, it could come to admit the Michigan episode evidence in order to refute or contradict evidence or arguments raised by the Defence.

Opinion

The case provides significant insight into the details of admissibility of evidence related to prior criminal activity the defendant was – allegedly or as a matter of fact – involved in. This appears a relevant matter insofar as many migrant smugglers are likely to be involved in more than one smuggling venture.