COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Farinacci, 2015 ONCA 392
DATE: 20150603
DOCKET: M44719, C56313 and C56422

MacFarland, Tulloch and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Len Farinacci Jr. and Lucas Farinacci

Appellants

Frank Addario and Rebecca McConchie, for the appellant Lucas Farinacci

R. Craig Bottomley and Chris Sewrattan, for the appellant Len Farinacci Jr.

Morris Pistyner and Lucas Price, for the respondent

Iain A.C. MacKinnon, for the moving parties Sun Media Corporation and Toronto Star Newspapers Ltd.

Heard: February 25, 2015

On appeal from the convictions entered on July 5, 2012 by Justice Linda M. Walters of the Superior Court of Justice, sitting with a jury.

Pardu J.A.:

[1] Leonard and Lucas Farinacci appeal from their convictions for conspiracy to traffic in cocaine and for possession of proceeds of crime. They argue that their convictions must be overturned because jurors were exposed to extrinsic

information about the case during the trial, and because the judge made a legal error in her instructions to the jury about conspiracy.

A. BACKGROUND

[2] The appellants were arrested at the culmination of an investigation which included extensive surveillance and interception of thousands of private communications. Leonard Farinacci testified at trial and explained that he trafficked in steroids, not cocaine, and that his various meetings for product delivery and payment, and guarded telephone conversations had nothing to do with cocaine but were all for the purpose of dealing in steroids. Dwayne Forde was his biggest customer. While Dwayne Forde and his associates may well have been dealing cocaine and other drugs, Leonard Farinacci testified that he knew nothing about those activities.

[3] Lucas Farinacci did not testify. He took the position at trial that there was no evidence to connect him with trafficking in cocaine. There were no incriminatory statements by him amongst the thousands of intercepted communications and he was never found in possession of cocaine or any of the equipment associated with a trafficking operation.

[4] Both appellants were arrested on September 4, 2008. On that date, Leonard Farinacci travelled to Toronto and picked up an orange and black gym bag. It contained $200,840 in cash. He dropped the bag off at 2:03 p.m. at his brother Lucas's home, then went to Gary Ball's home. He accompanied Ball as

Ball took a suitcase with $437,005 in it and placed it in Ball's Infiniti. Ball then drove to Lucas's home, and transferred the suitcase into Lucas's wife's vehicle, a black Yukon. He removed the orange and black gym bag from Lucas's garage (placed there minutes earlier by Leonard) and put it in the Yukon.

[5] Earlier that day, Lucas had left his home and returned with a blue and black gym bag. He was not there when Leonard dropped off the orange and black gym bag but returned at 2:27 before Ball left. At 2:31 Ball came out of Lucas's house and left in the Yukon with the suitcase and gym bag loaded with money. Lucas then removed Ball's Infiniti from his driveway and was back home in 40 seconds or so.

[6] Ball was arrested and the suitcase and gym bag were seized at about 2:37 p.m.

[7] By 4:47 Leonard heard that Gary Ball was not answering his phone, and says he became concerned about his welfare. At 4:47 Leonard called Ball and there was no answer. At 4:48, Leonard called Lucas to relay his concerns and to see if Lucas knew where he was.

[8] At 5:03, Joe Nikitczuk, close friend to Lucas, arrived at Lucas's home. He was there for two minutes and came out with the blue and black gym bag. He was arrested four minutes later. Inside the gym bag was a notebook, highly suggestive of a debt list for substantial amounts of money, some amounts over a

million dollars. Lucas's fingerprints were identified in multiple locations in the notebook.

[9] Both Lucas and Leonard were arrested later that day.

[10] At trial Leonard called a witness who identified himself as a business consultant to suggest that the cash was intended for a legitimate business investment in Venezuela by Leonard Farinacci Sr., his father. The appellant Leonard Farinacci and his sister Leah both testified to the same effect at trial.

B. PROCEDURAL HISTORY

[11] The appellants were originally charged in a 15 count indictment in which they were charged with having conspired with Kent Akiyama and Gary Ball to traffic in cocaine, and to have done so in association with a criminal organization. They were also charged jointly with Gary Ball of possession of proceeds of crime. Leonard Farinacci was charged jointly with his mother and father (with whom he lived) with production of marihuana and possession for the purpose of trafficking in marihuana. Both Lucas and Leonard were charged with various firearms offences jointly with others and Leonard was also charged with possession of brass knuckles.

[12] As a result of an agreement with the Crown, Leonard and Lucas each pleaded guilty to weapons offences before the jury trial. Leonard pleaded guilty to one count of transporting a firearm without authority and to possession of a

prohibited weapon, the brass knuckles. Lucas pleaded guilty to possession of a prohibited weapon, a stun gun, without having a licence.

[13] Counsel agreed that the trial judge would decide the criminal organization count after the jury verdict came in, and the accused were acquitted on that count.

[14] In the result, the jury trial for the appellants proceeded on a two count indictment only, the conspiracy to traffic in cocaine, and the possession of the proceeds of crime. The jury did not know the appellants had pleaded guilty to weapons offences. They were convicted on both counts in the abbreviated indictment on July 5, 2012 following a four week jury trial.

[15] After conviction but before sentencing, one of the jurors happened to be in a coffee shop commiserating with his uncle whose son had been charged with a criminal offence. He related some of his experiences as a juror and recommended to his uncle that his son opt for a trial before a judge without a jury. Someone happened to overhear the conversation, and juror #3 was soon visited by private investigators who asked him about whether he had been exposed to extrinsic information.

[16] As a result of that information, the trial judge held an inquiry on October 23 and 25, 2012, and questioned each juror as to whether he or she had seen or heard extrinsic information during the trial and deliberations. The purpose of the inquiry was to establish a record of what had happened.

[17] The appellants were ultimately sentenced to lengthy terms of imprisonment.

C. WHAT EXTRINSIC EVIDENCE ENTERED IN THE JURY ROOM?

[18] There was no real consensus amongst the jurors as to what if any extrinsic information made its way into the jury room. Without findings of fact by a judge at first instance, we are faced with the difficulty of making those findings on the basis of a transcript only.

(1) Was there information from a retired police officer?

[19] For example, juror #3 said that juror #6 said he had a friend who was a retired police officer in Hamilton. Juror #3 said that when he asked why there were no evidence of guns juror #6 said that this friend told him the rest of the family was charged, that someone's wife or sister was going to be charged. Juror #6 denied that he knew any retired police officers or that he had said any such thing.

(2) Was there information from another friend?

[20] Juror #3 said that juror #11 said someone told him Leonard Farinacci Sr. had spent some time in jail and that a lot more money over and above what was seized was involved. Juror #11, seated between jurors #3 and #6, did not recall hearing any information attributed to a retired police officer or a friend, and said he did not hear or provide any extrinsic information.

[21] Nine of the jurors testified that they did not hear any information said to have come from a friend or any individual outside of the jury. In the end, I cannot find as a fact that information said to have been originally supplied by any friend or other individual was provided to the jury.

(3) Information from Internet searches

[22] Juror #6 admitted to having read at least two four year old articles in the St. Catharines Standard right after the trial started. He said other jurors wanted to know how old the appellants were, and that he looked that up and told the other jurors the appellants' ages. He said he read something about a marihuana grow op and guns. He read that the appellants' family members, father and sister had also been charged. He testified that he didn't give this information to other jurors, but juror #1 said that on the first day of trial another juror mentioned having looked something up on the St. Catharines Standard website that a dozen or so had been charged with cocaine related offences, including Dwayne Forde and that some others had been convicted. Juror #2 said someone searched the internet and said charges had been laid against other family members but that nothing was said about criminal activity by the appellants. There was some mention of Dwayne Forde, Leonard Farinacci Sr. and a marihuana grow op, and a charge against someone related to guns. This was mentioned sometime in the first half of the trial. Juror #3 said a few people made reference to googling something. Juror #12 heard someone mention that the father was charged. Many

jurors said they did not hear this, but I am satisfied there was some discussion amongst some jurors of information contained in a local newspaper article published at the time of arrest four years before the trial, that there were other family members charged, and mention of a grow op and gun charges against unspecified other persons. .

[23] Juror #5 said one of the other jurors said he read in a newspaper before trial that Kent Akiyami was involved. Jurors #9 and #10 remembered mention in the middle of the trial that Akiyami and Forde had had drug charges or trials related to cocaine. Juror #4 said that several times someone said others like Dwayne Forde who were alleged to be connected to the cocaine conspiracy were in jail or charged. She said this came as no surprise to the jurors, as they had guessed he was probably in jail.

[24] Juror #12 said he googled the name “Farinacci” after the trial started and saw an article reporting on the prosecutor’s opening statement.

[25] Juror #12 said that he and another juror looked up the price of cocaine on the internet at the beginning of the trial but that this information was confirmed later by the evidence of a Toronto detective who testified. His evidence was unchallenged. Juror #4 confirmed that one of the jurors looked up the price of cocaine.

D. ANALYSIS: IS THERE A REASONABLE POSSIBILITY THAT EXTRINSIC INFORMATION AFFECTED THE JURY'S VERDICT?

[26] It is common ground that *R. v. Pan; R. v. Sawyer*, 2001 SCC 42, [2001] 2 S.C.R. 344, at para. 59, expresses the governing test, "[E]vidence indicating that the jury has been exposed to some information or influence from outside the jury should be admissible for the purpose of considering whether or not there is a reasonable possibility that this information or influence had an effect upon the jury's verdict."

[27] On the other hand, jurors are not blank slates. They are expected to use their general knowledge, life experience and knowledge in coming to a decision. As observed in *R. v. Pan*, at para. 61:

> Jurors are expected to bring to their task their entire life's experiences. It is on the basis of what they know about human behaviour, knowledge that they have obviously acquired outside the courtroom, that they are requested to assess credibility and to draw inferences from proven facts. Even though not the object of evidence tendered in the trial, an opinion, a piece of general information, or even some specialized knowledge that a juror may reveal in the course of the deliberations, is not an extrinsic matter. Typically, such information would not be the object of evidence tendered at trial. It would be viewed as either irrelevant, too remote, or as attempting to usurp the functions of the jury. On the other hand, if a juror, or a third party, conveys to the jury information that bears directly on the case at hand that was not admitted at trial, by reason of an oversight or a strategic decision by counsel or, worse yet, by operation of an exclusionary rule of admissibility, then it is truly a matter "extrinsic" to the deliberation

> process and the fact that it was introduced into that process may be revealed.

[28] Mention that Dwayne Forde had been charged or convicted of cocaine offences could not have affected the verdict in this case, given the manner in which the evidence unfolded at trial. The substantial evidence that persons such as Dwayne Forde were trafficking in cocaine was uncontradicted. As juror #4 observed, the information that Dwayne Forde had been tried or convicted came as no surprise. There was very little mention of Akiyami in this trial. The whole tenor of Leonard Farinacci's evidence was that he did not know about the others' activities, admittedly powerfully suggestive of trafficking in cocaine and other drugs. Lucas Farinacci's defence was that he had nothing to do with those activities.

[29] In my view the evidence that other family members had been charged was of no consequence, given the appellants' sister's evidence that "all the family was co-accused."

[30] It is not surprising that the arrests four years before trial were reported in the local newspaper. Lucas Farinacci was a local businessman charged with serious offences. No juror would have been disqualified for simply having read the news report. There was no challenge for cause on the ground of pretrial publicity in this case. I would infer that it was not considered a significant concern. It is reasonable to presume that jurors will honour their oath to decide the case only on the evidence heard in the courtroom. The information reported

to the jurors by juror #6 was non-specific. Four jurors repeatedly reminded the others that they were to decide the case only on the evidence heard in the courtroom.

[31] I am not satisfied that the other information, research about the price of cocaine and reading a report about the prosecutor's opening statement had any impact on the jury's decision.

[32] This is not a case where a jury was exposed to specific prejudicial information excluded from the trial. In other jurisdictions, courts have ordered new trials where the extrinsic information may have had a real impact on the verdict. In *Karakaya* a new trial was ordered for an accused charged with rape and indecent assault because the jury had downloaded articles critical of the justice system's treatment of rape cases. In *Dallas* an accused charged with grievous bodily harm was given a new trial because a juror had gone on the internet and found the accused had been previously charged, though acquitted of rape. Similarly in *R. v. Thompson and other appeals*, [2010] EWCA Crim 2352, and *R. v. Thakrar*, [2008] EWCA Crim 2359 convictions were set aside when jurors discovered the accuseds' previous convictions. In *Benbrika v. The Queen*, [2010] VSCA 281 a verdict in a terrorism case was not compromised by jury research on definitions.

[33] Here the trial judge instructed the jury to ignore extrinsic information on her opening and closing addresses:

> You must disregard completely any radio, television, newspaper accounts or Internet information you may have heard, seen or read about this case, or about any of the persons or places involved or mentioned in this trial. Those reports, and any other information about the case from outside the courtroom are not evidence.
>
> It would not be fair to decide the case on the basis of information not introduced or tested by the parties in court and made part of the evidence at trial. You, not the media or anyone else, are the only judges of the facts.

[34] She reiterated "to decide what the facts are in this case, you must consider only the evidence that you saw and heard in the courtroom" and defined evidence as the answers of witnesses to questions, exhibits and agreed facts. She told them not to be influenced by public opinion.

[35] In many communities, members of the jury may well have been exposed to pretrial publicity about an accused. As observed in *R. v. Hubbert* (1975), 29 C.C.C. the mere fact that a juror has prior information about a case or even that he or she holds a tentative opinion does not disqualify the juror.

[36] Here, given the nature of the issues at trial, the diffuse nature of the information disclosed to other jurors from a four year old newspaper report, the fact that that extrinsic information disclosed was largely replicated by uncontested evidence at trial, and the instructions by the judge to consider only evidence adduced in the courtroom, I am not satisfied that there is a reasonable possibility that the extrinsic information that was disclosed in the jury room affected the jury's verdict.

[37] The articles themselves, dated September 24 and 25, 2008 listed the charges against 16 named persons of over 20 persons charged as a result of the investigation. As far as the jury knew, the accused were not tried on other charges mentioned in the article. After the trial judge' opening statement, the questioning of witnesses over four weeks, counsel's closing statements, and the trial judge's instructions, I am not satisfied that there is a reasonable possibility that juror #6's reading of these articles, previously published in the community, on the first days of a four week trial affected the verdict.

E. WAS THERE AN APPEARANCE OF UNFAIRNESS?

[38] The appellants argue that even if there was no reasonable possibility that the extrinsic information affected the jury's verdict, the appearance of unfairness resulting from exposure of the jury to outside information requires a new trial.

[39] I disagree. Jurors do not live in a bubble but are drawn from the community where the trial takes place. In any significant prosecution there will be some exposure to news reports of the arrest. During the trial jurors may seek news reports of the trial. The reporter's opinion of the testimony may not always be subtly expressed. Sometimes retrials take place after the original evidence has been broadly publicized. There is however a distinction to be drawn between the "mere publication of the facts of a case and situations where the media misrepresents the evidence, dredges up and widely publicizes discreditable

incidents from an accused's past or engages in speculation as to the accused's guilt or innocence."(*R. v. Sherratt*, [1991] 1 S.C.R. 509 at p. 536)

[40] In some cases where there is extensive publicity, at least some, if not all the jurors will be inevitably exposed to some aspects of it. This does not mean that a juror will not abide by his or her oath. Judges, after all, sometimes decide case in a sea of publicity.

[41] Jurors, like judges, are presumed to govern themselves by the oath they swore to try the accused on the evidence adduced in the courtroom. As observed in *R. v. Spence*, [2005] 3 SCR 458 at para. 22:

> Our collective experience is that when men and women are given a role in determining the outcome of a criminal prosecution, they take the responsibility seriously; they are impressed by the jurors' oath and the solemnity of the proceedings; they feel a responsibility to each other and to the court to do the best job they can; and they listen to the judge's instructions because they want to decide the case properly on the facts and the law. Over the years, people accused of serious crimes have generally chosen trial by jury in the expectation of a fair result. This confidence in the jury system on the part of those with the most at risk speaks to its strength. The confidence is reflected in the *Charter* guarantee of a trial by jury for crimes (other than military offences) that carry a penalty of five years or more (s. 11 (*f*)).

[42] Here then, what to make of the fact that some jurors "googled" information about this case, contrary to the instructions of the trial judge? In this information rich age, devices able to access the internet are ubiquitous. Some people use their cell phones as reflexively as others might glance at a wristwatch. They

might use them as a dictionary, to look at maps, the search the names of the accused, counsel, the judge, or to seek technological information. Legal research is available at the click of a button. Communication with others is nearly instantaneous. During the jury inquiry in this case, it was apparent that some jurors did not understand that they were violating the instructions of the trial judge. Some jurors may simply be curious, others may be trying to be helpful or get a better understanding of the case. The other reality is that in most cases, unless a juror talks about his or her online activity, it is likely to go undetected. While the information gathered here was relatively benign, and did not undermine the verdict or the fairness of the trial, that might not always be the case.

[43] In *Online and Wired for Justice; Why Jurors Turn to the Internet*[1] the authors refer to a San Diego court which had jurors sign declarations "saying they will not use personal electronic and media devices (including computers, cell phones and laptops) to research or communicate about any aspect of the case."

[44] The authors also refer to a sample jury instruction dealing with these issues:

> You may not receive information about this case from any source other than what you are presented in this Courtroom concerning the case. That means do not "google" any party or lawyer or court personnel in this case; do not conduct any research whatsoever on the

[1] Douglas L. Keene and Rita R, Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet*, The Jury Expert, The American Society of Trial Consultants, Nov. 2009, pp. 14-15, http://thejuryexpert.com/2009/11/online-and-wired-for-justice-why-jurors-turn-to-the-internet-the-google-mistrial'.

> Internet about this case or the parties or facts involved in it; you may not "blog" about the case or events surrounding the case or your jury service; you may not "tweet" about anything to do with the parties, events or facts in this case or your jury service on this case. Do not send any email to anyone conveying your jury experience or information about this case. In the jury room, you are not to use your cell phone at recesses or lunch to call anyone to ask questions about issues in this case or to report facts about this case. You may not use Facebook, YouTube or any other "social" network on the Internet to discuss your jury service or issues in this case or people involved in the case, including the lawyers. Do not attempt to recreate by experiment at home any evidence which you hear as testimony in this Courtroom. Failure to abide by these instructions could result in your being found in contempt of court, or cause the trial to end.

[45] They suggest this jury instruction could be given to jurors daily or more often; it could be given to the jurors in writing at the beginning of a case, and they could be asked to sign a copy to acknowledge that they have received the instruction and understand it.

[46] Jurors could be told that if by happenstance they receive any extrinsic information they are not to share that with the other jurors. Model jury instructions tell the jurors to advise the trial judge immediately if someone tries to talk to them about the case. This could be expanded to direct the jurors to advise the judge if any member of the jury speaks about independent internet research.

[47] Some trials, particularly a re-trial or one surrounded by extensive publicity may require an instruction about electronic research to the jury panel as a whole, to the jury at the start of the trial, part way though the trial, and in the final

instructions. Useful examples of those instructions can be found in D. Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 2015). For example, preliminary instruction 20A provides:

> [5] Finally, in this case you are judges of the facts, *not* lawyers or investigators. You must *not* seek out any information, or do any research about the case, the persons involved in it, or the law that applies. Do *not* consult other people or other sources of information printed or electronic. Do *not* investigate any part of the case on your own or together with anybody else. Do *not* visit or have a look at any place or thing mentioned during the trial.
>
> [6] Some, perhaps many of you, may (often) use communication devices like cellular telephones, PDA or other Blackberry devices or laptop computers. Some, perhaps many of you, may have an email account or a social networking account, such as Facebook, MySpace, LinkedIn or Twitter.
>
> [7] We live in an age of instant electronic communication and research. In addition to not talking face-to-face with anyone about anything related to this case, or about any person or place involved in it, you must *not* communicate with anyone about this case or anyone or anything related to it by any other means. By "communicate" I mean you must not give, send, receive or research anything about or related to this case or any person involved in it. By "any other means", I include (by) telephone, text messages, email, internet chat(s), blogs or social websites like Facebook, MySpace or Twitter.
>
> [8] Do not provide any information about the case or anything, anyone, or any place involved in it to anyone by any (electronic) means whatsoever. Do not post any information about the case or anything, anyone, or any place involved in it, or what you are doing in this trial, on any device or internet site, including blogs, chat rooms, social websites or any other means.

[9] Do *not* Google or otherwise *search* for any information about this case, about the law that applies to this case, or about anyone, anything or any place involved in the case, including the person(s) charged, the witnesses, the lawyers or me.

[10] Let me explain to you why these rules are so important.

[11] First, we do not permit communications of the kind I have mentioned, either to you or from you, because, as jurors, you are the only persons our law authorizes to render a verdict. No one else can do so in this case. You are the only persons who have promised to be fair. No one else has made that promise. No one else has those qualifications.

[12] Second, we do not permit these communications because premature discussion or other information can lead to a premature or erroneous final decision about the case as a whole or essential parts of it.

[13] Third, we do not permit you to visit any place mentioned in the evidence. After all, you cannot always be sure that the place is the same now as it was when the events with which we are concerned took place. But even if the place were in the same condition now as then, once you go there to evaluate the evidence you have heard, or will hear, in light of what you see, you become a witness, not a juror. As a witness, your view of the scene may not be correct. But more importantly, neither party can do anything to correct your error. That is not fair to either party. How would you feel as a party if the judge or jury decided your case against you on this basis?

[14] Fourth, as you have all promised to do, you must base your decision solely on the evidence presented to you in this courtroom, by these parties, during this trial. It would not be fair to either (any) party for you to base your decision on information you have obtained outside the courtroom, information that may be incomplete, unreliable, or simply wrong.

[48] Other brief trials with little or no publicity may require a much shorter instruction.

[49] Human nature being what it is, it would be unrealistic to expect perfect compliance by jurors in all cases. In the event a breach comes to light, the inquiry must be made as the extent of the extrinsic information received, and whether other jurors were exposed to it.

[50] In some cases, severe sanctions have been imposed on jurors who disobeyed instructions to refrain from internet research. In *Attorney General v. Dallas* [2012] EWHC 156 a juror was sentenced to six months jail for contempt of court for conducting research on the Internet, definitions of the word “grievous” and a newspaper report of an earlier rape allegation against the accused, and for sharing that information with other jurors.

[51] This problem has affected trials in many jurisdictions. As observed in *R. v. Thompson* [2010] EWCA Crim 1623, by the Court of Appeal, Criminal Division:

> The use of the internet has expanded rapidly in recent years and it is to be expected that many, perhaps most, jurors, will be experienced in its use and will make habitual reference to it in daily life. It has already impacted on the court in cases such as *R v Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 77, *R v Marshall* [2007] EWCA Crim 35 and *R v Thakrar* [2008] EWCA Crim 2359, [2009] Crim LR 357; see also the experience in New Zealand, *R v B* [2008] NZCA 130, [2009] 1 NZLR 293. Just as it would in any other instance where it was satisfied that extraneous material had been introduced, the approach of this court is to make inquiries into the material. If, on examination, this material strikes at the fairness of the trial, because the

> jury has considered material adverse to the defendant with which he has had no or no proper opportunity to deal, the conviction is likely to be unsafe (*R v Karakaya*). If the material does not affect the safety of the conviction, the appeal will fail.

[52] Here I am not persuaded that there is a reasonable possibility that the verdict was affected by the extrinsic information, that the trial was rendered unfair by the juror conduct or that the conviction is unsafe.

F. WAS THERE A LEGAL ERROR IN THE INSTRUCTIONS ON CONSPIRACY?

[53] The trial judge instructed the jury in accordance with *R. v. Carter* and *R. v. Mapara*, allowing a jury "to consider a hearsay statement of a co-conspirator in furtherance of the conspiracy only after it has found (1) that the conspiracy existed beyond a reasonable doubt and (2) that the accused was probably a member of the conspiracy, by virtue only of direct evidence against him." (*Mapara* at paras. 8 and 22)

[54] The appellants submit that the trial judge should have added an additional requirement, that the Crown prove that "it is probable that the other alleged conspirator whose acts and declarations are in question is a party to the agreement based on his own acts and declarations."

[55] I am not satisfied that this proposed additional instruction is necessary. It adds an additional layer of complexity to an already difficult charge. The requirement that the statement be made in furtherance of the conspiracy is a

sufficient link to render the statement of the declarant admissible, given that by this stage the jury must have been convinced beyond a reasonable doubt that the conspiracy existed and on the balance of probabilities by evidence admissible directly against an accused that he was a member of the conspiracy.

[56] In this case the trial judge instructed the jury as follows:

> To determine whether you are satisfied beyond a reasonable doubt that Len Farinacci was a member of the conspiracy to traffic in cocaine, you are entitled to consider all of the evidence. You are not limited to Len Farinacci's own words and conduct. Besides that evidence, you may take into account anything that any other member of the conspiracy said or did while the conspiracy was ongoing for the purpose of achieving its object or purpose, of trafficking in cocaine.
>
> It is not everything said or done by any member of the conspiracy, charged or uncharged, on trial or not on trial, on which you may rely to decide whether Crown counsel has proven beyond a reasonable doubt that Len Farinacci was a member of that conspiracy. There are two requirements. The words must be spoken and the acts must [be] done:
>
> 1) while the conspiracy remains in existence; and
>
> 2) in furtherance of the object or purpose of the conspiracy.
>
> To be 'in furtherance of' the object or purpose of the conspiracy, the words or acts must be for the purpose of advancing the objects of the conspiracy, carrying forward the common design, or taking steps in order to achieve its purpose. Recruiting others to join, obtaining any necessary funds or equipment, arranging for delivery of items required, and checking out escape routes are examples of words or acts in furtherance of the object or purpose of a conspiracy. The acts done do not have to be unlawful, but what is said must not be

> solely a recounting of prior events or references to other crimes unrelated to the conspiracy.
>
> It is not necessary that Len be the person who actually did the act in furtherance of the conspiracy, or even that he understood it or knew about it. Similarly, it is not necessary that Len be the person who actually spoke the words in furtherance of the conspiracy, or even that he was there when they were spoken. A conspiracy is like a partnership in crime. Each member is an agent or partner of every other member and is bound by or responsible for the words and conduct of every other member spoken or done to further their unlawful scheme.
>
> So, at this stage you will consider all of the evidence, that is Len's own words and actions along with the words and actions or conduct of any other member of the conspiracy, that is Mr. Forde, Mr. Ball, Mr. Aykiama, Len Farinacci, Lucas Farinacci and any other unknown member of the conspiracy, as long as what was said or done was while the conspiracy remained in existence and was in furtherance of the purpose of the conspiracy.

[57] Nothing in the evidence in this case required the additional instruction now suggested by the appellants. They argue for example that the trial judge's instruction required the jury to apply the evidence relating to Akiyama to the appellants. It is doubtful that a jury would have considered the acts of Akiyama to be in furtherance of a conspiracy. There were no declarations by Akiyama in evidence. His car was seen in proximity to Lucas's Acura on one occasion. He was at the same restaurant as Leonard Farinacci and Leonard Farinacci Sr. on one occasion and there was an exchange of bags between Len Jr. and Len Sr. with Akiyama present, with no evidence as to the contents except from Leonard Farinacci who testified as to the anodyne nature of the switch of gym bags from

one car to another. A search of Akiyama's home uncovered trace amounts of cocaine and scales. The evidence relating to Akiyama was a miniscule part of this trial.

[58] The appellants argue that the evidence of unknown males who purchased cocaine from Dwayne Forde could have been unfairly attributed to them. The many unknown males who purchased cocaine from Dwayne Forde did not make statements in furtherance of the conspiracy, as defined by the trial judge. The recordings of their conversations with Forde were cogent evidence that Forde was trafficking in cocaine, a matter not seriously in dispute. It was not necessary here for the trial judge to tell the jury that the statements by the unknown males could not be used unless there was direct evidence admissible against each showing that they were members of the conspiracy.

G. REQUEST FOR PUBLICATION BAN

[59] With the release of these reasons, the publication ban imposed below expires.

[60] In the event that this matter was sent back for a new trial, the Crown and the defence requested a publication ban of information which would identify the jurors or the extrinsic information. The media opposed the proposed ban, but agreed that the identities of the jurors should not be published. Since there will not be a new trial, no further publication ban is necessary, except, on the consent

of the parties and the media, there will be an order prohibiting publication of any information which would identify any of the jurors.

H. DISPOSITION

[61] For these reasons, the appeals from conviction by the appellants are dismissed.

Released: June 3, 2015
(GP)

"G. Pardu J.A."
"I agree J. MacFarland J.A."
"I agree M. Tulloch J.A."