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86-1506/

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To be Submitted by:
EUGENE BOGAN, ESQ.

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

— against —

CHANG AN-LO, et al,

Defendants-Appellants.

BRIEF FOR APPELLANT JACK MA

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 86-1506

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATE OF AMERICA,

Appellee,

- against -

AN-LO, et al,

Defendants-Appellants.

-----x
BRIEF FOR APPELLANT JACK MA
Docket No. 87-1002

PRELIMINARY STATEMENT

Appellant Jack Ma appeals from a judgment of conviction after jury trial held in the United States District Court for the Southern District of New York (Carter, J.), rendered on December 17, 1986, convicting him of violations of [1] Title 18 U.S.C. §§1962(d) and 2) (RICO conspiracy); [2] Title 21 U.S.C. §846 (conspiracy to distribute marijuana and cocaine); [3] Title 21 U.S.C. §§812, 841(a), 841(b)(1)(B), and Title 18, U.S.C. §2 (distribution of marijuana); [4] Title 21 U.S.C. §§846 and 963 (conspiracy to import and distribute heroin); and [5] Title 18 U.S.C. §§922(a)(5) and (2) (transport of firearms

in interstate commerce): and acquitting him of charges of violating [1] Title 18 U.S.C. §§1962(c) and 2 (substantive RICO); and [2] Title 18 U.S.C. §§1952 and 2 (promotion of illegal gambling).

The appellant was sentenced to concurrent terms of ten years imprisonment for the violations in [1], [2], [3] and [4] above and five years imprisonment for the violation in [5]; and for the violation in [4] was given a special parole term upon release of five years.

Appellant is incarcerated pending appeal.

QUESTIONS PRESENTED

I. Was there sufficient evidence for the jury to conclude that the defendant was guilty?

II. Should defendant's conviction under three of the counts for which he was indicted be reversed because of inconsistent verdicts?

III. Did any of the issues raised by the other appellants in this case, particularly as to the judges ex parte communications with the jury and jury misconduct, warrant reversal of appellant's convictions?

STATEMENT OF THE FACTS

Appellant Jack Ma was indicted on January 28, 1986, along with thirteen other defendants in a fourteen count indictment

alleging violations of RICO, the Travel Law, and federal drug laws, among other things. Ma was indicted under seven of the counts, and after jury trial of eleven of the defendants held from July 29, 1986 through September 22, 1986, was found guilty by the jury on five of the counts (the jury's verdict is in brackets):

COUNT ONE: RICO conspiracy with alleged participation in four racketeering acts, 18 U.S.C. §§1962(d) and 2 [GUILTY]

- (a) Act Six: conspiracy to distribute 150 pounds of marijuana and cocaine [JURY DIVIDED]
- (b) Act Seven: distribution of 150 pounds of marijuana [PROVEN]
- (c) Act Nine: conspiracy to import and distribute heroin [PROVEN]
- (d) Act Ten: violation of Travel Law [JURY DIVIDED]

COUNT TWO: substantive RICO with alleged participation in four racketeering acts, 18 U.S.C. §§1962(c) and 2 [NOT GUILTY]

- (a) Act Six: conspiracy to distribute 150 pounds of marijuana and cocaine [JURY DIVIDED]
- (b) Act Seven: distribution of 150 pounds of marijuana [PROVEN]
- (c) Act Nine: conspiracy to import and distribute heroin [JURY DIVIDED]
- (d) Act Ten: violation of Travel Law [JURY DIVIDED]

COUNT SEVEN: conspiracy to distribute 150 pounds of marijuana and an unstated quantity of cocaine, 21 U.S.C. §846 [GUILTY]

COUNT EIGHT: distribution of 150 pounds of marijuana, 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(B), and 18 U.S.C. §2 [GUILTY]

COUNT TEN: conspiracy to import and distribute heroin, 21 U.S.C. §§846 and 963 [GUILTY]

COUNT ELEVEN: violation of Travel Law, 18 U.S.C §§1952 and 2 [MISTRIAL DECLARED BY COURT]

COUNT TWELVE: transporting firearms, 21 U.S.C. §§922(a)(5) and
2 [GUILTY]

The Indictment alleged that the defendants were associated with a criminal enterprise called the "United Bamboo" or Bamboo Union", an international Chinese gang founded in Taiwan some 28 years before; that it developed by organizing and operating local groups called "Tongs" that functioned in New York and other cities in the United States and elsewhere; and that its purposes included its establishment and advancement in the United States, dealing in narcotic drugs, facilitating the formation and operation of illegal gambling and prostitution, extorting individuals and businesses, and murdering the journalist Henry Liu. (Ind. 1-4).

The RICO conspiracy and substantive RICO charges under COUNTS ONE and TWO, respectively, concern the alleged activities of the United Bamboo.

The allegations in COUNT SEVEN in the indictment corresponded exactly with the allegations in Racketeering Act Six in both COUNT ONE and COUNT TWO. (tr. 5590).¹ Nevertheless, the jury found the defendant guilty of the charges in Count Seven but was divided as to whether the charges in Racketeering Act six of Counts One and Two were proven.

The allegations of COUNT EIGHT corresponded exactly with the allegations in Racketeering Act Seven in COUNT ONE and COUNT TWO. (tr. 5615) The jury found the defendant guilty on

¹"tr" refers to trial transcript.

Count Eight and found the charges proven in Racketeering Act Seven.

The allegations of COUNT TEN corresponded exactly with the allegations of Racketeering Act Nine of COUNT ONE and COUNT TWO. (tr. 5590) Nevertheless, the jury found the defendant guilty of the charges in Count Ten and found the charges proven as to Racketeering Act Nine of Count Two, but was divided as to whether the charges in Racketeering Act Nine of Count One were proven.

The allegations of COUNT ELEVEN corresponded exactly with the allegations in Racketeering Act Ten of COUNT ONE and COUNT TWO. (tr. 5635) The jury was divided with regard to all of them, and a mistrial declared on COUNT ELEVEN.

The relevant facts concerning defendant Jack Ma is detailed in Point One of the argument below.

The defendant made a post-judgment motion for reversal, claiming insufficient evidence and inconsistent verdicts, but the motion was denied by order of the trial court dated November 19, 1986.

ARGUMENT

POINT I

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT ON ANY OF THE COUNTS UNDER WHICH HE WAS FOUND GUILTY.

There is no mention in the evidence of Jack Ma appearing in the alleged schemes in any manner until well into July, 1985. He had nothing to do with the murder of Henry Liu. He had nothing to do with, nor was he a member nor was he associated with United Bamboo.

The multitude of tape recordings reveal that, at most of the meetings attended by Jack Ma, he did absolutely nothing. He just sat there. During the few times he did speak he was merely asked to interpret and to translate conversations for individuals who could not understand the particular dialect being spoken.

Jack Ma never negotiated any drug transaction. He never negotiated any gun sales; he never purchased any guns; nor did he supply any guns to anyone. He never participated in any gambling activity, nor did he negotiate any gambling activity.

Jack Ma was merely present at various meetings held by other defendants. He was not a part of any of the alleged conspiracies. Nor did he participate in any of the alleged substantive violations.

In reviewing the sufficiency of the evidence, the basic principle is that it is to be viewed in the light most favorable to the government, with all reasonable inferences drawn in favor of the jury's verdict. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457 (1942). A defendant's participation in a conspiracy may be established by circumstantial evidence. United States v. Torres, 740 F.2d 122, 125 (2d Cir. 1984); United States v. Soto, 716 F.2d 989, 991 (2d Cir. 1983). "The test is not whether the reviewing court is convinced beyond a reasonable doubt of the defendant's guilt, but whether a rational jury could find without a reasonable doubt that these defendants were guilty." United States v. Torres, supra at 126; Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89 (1979).

Nevertheless, mere "[a]ssociation with a conspirator, without more, is insufficient to establish the requisite degree of participation in a conspiratorial venture." United States v. Steinberg, 525 F.2d 1126, 1134 (2d Cir. 1975). See also, United States v. Terry, 702 F.2d 299, 320 (2d Cir. 1983). Nor does knowledge of the existence and goals of a conspiracy itself make one a conspirator. United States v. Cianchetti, 315 F.2d 584, 588 (2d Cir. 1963).

"There must be something more than '[m]ere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy * * *.' Cleaver v. United States, 238 F.2d 766, 771 (10th Cir. 1956). This 'something more' is generally described as a 'stake in the venture.' '[I]n prosecutions for conspiracy * * * [the defendant's] attitude towards the forbidden undertaking must be more positive. * * * he must in some sense promote their venture himself, make it his own, have a stake in its outcome.' United States v.

Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940)."

United States v. Cianchetti, 315 F.2d at 588 (brackets and asterisks in original).

Applying these standards to the case at bar, it is clear that the the evidence was legally insufficient to support the jury's guilty verdict.

With regard to Count One, the RICO conspiracy, the government had to establish that Jack Ma was a member of the United Bamboo. Nevertheless, even though he was associated personally with Chen Chih-Yi, not one of the government's chief witnesses, Robert Chung, Steven Wong, or Damon Taylor, testified that Ma was a member of the United Bamboo. Indeed, Chung, who was a member of the undercover team investigating the United Bamboo, testified that neither Jack Ma nor anyone else told him that Ma was a member of the United Bamboo. (tr. 967). When Steven Wong was given the history of the United Bamboo in July, prior to the organizational initiation ceremony held on July 2, 1985, no one mentioned Ma in connection with the United Bamboo or its history.

Among the meetings recorded by the government's agents, there were at least eight at which Jack Ma was not present. One was on June 25, 1985 in New York City when there was a discussion about the marijuana deal. (Gov. Ex. 125). There were several meetings at the end of June, 1985 (Gov. Exs. 126-28, 130), and the meetings on July 1st and on July 2, when the United Bamboo induction took place. He was not present on August 7, 1985 coming back from the West Side Highway after the

transaction of the marijuana and firearms had taken place. (Gov. Ex. 160). The \$25,000 for the drug transaction was in Steve Wong's car and Jack Ma was not with them. Ma was also absent from the August 21, 1985 meeting that took place at 4:23 p.m. in the New York Hilton.

With regard to the sale and distribution of the 150 pounds of marijuana, the deal to purchase was made at the June 25, 1985 meeting. (Gov. Ex. 125). On June 26th, the very next day, a \$5,000 deposit was made and plans laid out for the delivery of the marijuana. (Gov. Ex. 126). We learn that the price for the marijuana and guns is \$55,000 and we know by July 2, 1985 the names of the individuals who will supply the marijuana. But there is no evidence that Jack Ma knew at that time of the deal or the details concerning its consummation.

Nobody was even aware of Jack Ma until June 30, 1985 and then he is merely casually introduced to goverment witness Chung at a Houston club called the Honeymoon Club. (tr. 938). No discussion of any criminal activity took place at that encounter.

The first evidence that Jack Ma knew anything about the marijuana and guns deals comes on August 4, 1985, on the day he makes the trip to New York with Chen Chih-Yi - only three days before the actual transaction takes place. For the first time he is sitting and listening to what is going on about the marijuana and guns transactions and about who may be bringing them. But he took no part in the discussion. (Gov. Ex. 160).

Steve Wong, a government agent, claimed that Chen Chih-Yi told him that he should give the \$25,000 payment for the marijuana to Jack Ma. Wong told Robert Chung, another government agent, to give the money to Ma. (tr. 1008). But the money was not actually intended for Jack Ma. At the time of the marijuana transaction, Jack Ma was sitting in the back of the car. The money was merely passed to him and he immediately passed it on. He was merely a momentary conduit who had no proven stake in the transaction. He was merely present at the transaction and played no integral part in the delivery of the marijuana or guns.

With regard to the guns, the first time they were mentioned was at a meeting on July 7, 1985. Jack Ma was not at that meeting. (tr. 947). They were also discussed in a telephone conversation between Steve Wong and Chen Chih-Yi on July 26, 1987. (Gov. Ex. #153). Jack Ma was not a party to that conversation. There is no testimony that he ever participated in the shipment of these guns to New York. Government witnesses Steve Wong and Robert Chung both testified that Jack Ma never talked to them about the delivery of the guns. (tr. 3381)

There was a discussion of the guns on August 4th - three days before the transaction - which took place in the presence of Ma. But he did not participate in it. This is the first evidence that Ma is aware of the transaction and this occurs when the shipment of both the guns and marijuana were already on the way. (Gov. Ex. 160). Thus, there is no evidence that

Jack Ma knew anything about the deal before it was already consummated. There is no evidence that Jack Ma ever spoke to anyone about any marijuana. There is no evidence that he was a party to any agreement concerning marijuana. There is no evidence that he ever spoke to anyone about the guns, or was a party to the firearms transaction.

At the time of the delivery and exchange of the marijuana and guns - at Leroy Street and the West Side Highway in Manhattan at 1:00 a.m. on August 7, 1985 - Jack Ma got out of the car and looked around. The government's videotape shows that he was not at the back of the car when the marijuana and the guns which were wrapped in a blanket were exchanged. The prosecuting attorney suggested in his summation that Ma was acting as a lookout, but there is no evidence that anyone asked Ma to act as a lookout. His conduct is more consistent with someone who felt insecure with such a transaction going on in a not very well lit or safe area of Manhattan at an early morning hour.

He was merely present at the scene of the exchange. There is no evidence that he played any role in the agreement to sell the marijuana and guns, that he played a role in arranging for the delivery of the guns or marijuana, that he actually played any role when the guns arrived. The next day an additional \$25,000 was paid for the transaction. But that money did not go to Jack Ma.

Indeed, the jury was divided as to whether the government proved its allegations in Racketeering Act Six of Counts One

and Two which alleged Ma's association with a conspiracy to distribute marijuana and cocaine. The jury itself could not agree that Ma had anything to do with that alleged conspiracy. The evidence was obviously insufficient. Nevertheless, they inconsistently found him guilty of Count Seven which alleged precisely the same conspiracy. If the evidence was insufficient for the racketeering acts, it was insufficient for the independent count.

Regarding Jack Ma's alleged participation in the 300 kilo heroin deal, the evidence shows at most his mere presence at a number of discussions concerning the deal. His only possible connection was his being asked to act as a interpreter during some of those meetings; asked for the most part by Steven Wong and Damon Taylor, both government agents. He was asked to do so because he was only one of three people who knew the Chinese dialect called Chao Chow, the others being defendant Ah Min and Steve Wong. But Wong testified that he did not understand Chao Chow well enough to hold a conversation with Ah Min. So he asked Jack Ma to interpret for him and to ask questions of Ah Min and to give responses to what Ah Min had to say. Again, he was acting at most as a mere conduit. Aside from this interpreting and mere presence at the meetings, there is no evidence that he ever agreed to participate or play any role in the alleged conspiracy to import and distribute heroin. He never took any overt act to further the alleged conspiracy.

Again, the jury itself could not agree that there was sufficient evidence to prove his participation in the heroin

conspiracy under Racketeering Act Nine of Count Two. Yet, they inconsistently found him guilty under Count Ten and found it proven under Racketeering Act Nine of Count One.

A finding of insufficiency of the evidence regarding the charge of conspiracy to distribute marijuana and cocaine would invalidate the guilty verdict under Count Seven.

A finding of insufficiency regarding the charge of distributing marijuana would invalidate the guilty verdict under Count Eight and Count One, the latter because there would be no conclusion of guilt on two racketeering acts.

A finding of insufficiency regarding the charge of conspiracy to import and distribute heroin would invalidate the guilty verdict of Count Ten and Count One, the latter again because there would be no conclusion of guilt on two racketeering acts.

A finding of insufficiency regarding the charge of distributing firearms would invalidate the guilty verdict under Count Twelve.

A finding of insufficiency on all of the foregoing matters would invalidate all of the guilty verdicts against Jack Ma.

POINT II

THE JURY RENDERED SEVERAL LOGICALLY INCONSISTENT VERDICTS AGAINST THE DEFENDANT REQUIRING REVERSAL OF THE CONVICTIONS ON THOSE VERDICTS

Although the general rule is that consistency in jury verdicts is not required, United States v. Powell, 469 U.S. 57, 105 S.Ct.471 (1984), Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189 (1932), United States v. Zane, 495 F.2d 683 (2nd Cir. 1974), the Supreme Court has left open the possibility that in cases in which verdicts are strictly logically incompatible, reversal might be warranted. United States v. Powell, 469 U.S. at , 105 S.Ct. at 479. The defendant submits that the verdicts rendered against him constitute such a situation.

The charges contained in Racketeering Acts Six and Nine of Counts One and Two are identical with the counterpart charges of Counts Seven and Ten. They each involved precisely the same events, are based upon precisely the same facts offered in evidence, and they each cite violations of precisely the same laws. Yet the jury came to differing conclusions. This inconsistency - contradictory verdicts on identical charges - is plainly a logical absurdity.

In its opinion of November 19, 1986, the trial court, in denying the motion to reverse because of inconsistent verdicts, said that:

"The inconsistency here is unquestionably the result of the court taking a partial verdict before the jury had completed its deliberations on the RICO counts...

"After additional deliberations, the jury returned guilty verdicts on the substantive counts which mirrored the elements of the RICO offenses on which the jury had announced verdicts of not guilty."

Opinion, p. 2. Unfortunately the court's recollection was incorrect, at least as to Jack Ma. In fact, the jury returned guilty verdicts on the substantive counts "which mirrored the elements of the RICO offenses" at same time as they returned the acquittals on RICO, including the inconsistent divided verdicts. (tr. 5693-5701). It was only on Count Twelve, the firearms charge, that the jury returned a guilty verdict after its additional deliberations. (tr. 5717-18). That count had nothing to do with the RICO counts and does not reflect the inconsistencies treated here.

Hence, with regard to Jack Ma, the court's conjectural conclusion "that more defendants would have been found guilty under RICO counts" had the court not allowed the partial verdicts on the RICO counts to stand until they had reached deadlock, is inapplicable.

The general rule against overturning inconsistent verdicts, "justified as a check on the 'excessive zeal of prosecutors,' ...should not be converted into an inflexible shield for the overzealous and irrational behavior of a jury." United States v. Bethea, 483 F.2d 1024 (4th Cir. 1973).

There should be some bounds on the determinations of the jury. Their scope of decision should not be absolute. Verdicts which are superficially inconsistent may be allowed to stand. But the leeway given juries to render inconsistent verdicts shouldn't be allowed to cross the frontier of logic.

Otherwise truly anomalous and paradoxical verdicts are likely to occur, raising difficult questions as to whether the basic purposes of the imposed criminal sanctions are being accomplished. What will be the effect of punishment on an individual where the verdicts are logically inconsistent? Such an instance cries out as an injustice and demonstrates that juries can go too far astray of the responsibilities assigned to them. Fundamental fairness demands that logically inconsistent verdicts be reversed.

The absurd inconsistencies in the instant case certainly fall outside the bounds of logic and hence are grounds for reversing the guilty verdicts against the defendant on Counts One, Seven and Eight. This conclusion requires reversal on Count One because invalidation of the jury finding on Racketeering Act Nine leaves a finding of "proven" for only one racketeering act under Count One. RICO requires proof of the commission of least two racketeering acts for conviction.

POINT III

THE APPELLANT JACK MA HEREBY JOINS
IN ALL ARGUMENTS SEPARATELY BRIEFED
BY CO-COUNSEL TO THE EXTENT APPLI-
CABLE TO HIM.

With regard to points raised by co-counsel, defendant Jack Ma particularly joins in the issues raised as to the judges ex

parte communications with the jury and any issues which may be raised as to jury misconduct, among all others which may be applicable to him.

CONCLUSION

For the reasons discussed above, appellant Jack Ma's conviction should be reversed on all counts and the indictment dismissed or, alternatively, a new trial ordered, or the sentence be reduced. .

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Respectfully submitted,

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