

CONSPIRACY - AN EXPANDING NET

The common law offense of conspiracy may be defined as an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means, see Mulcahy v. The Queen (1868) L.R. 3 E & I App. 306, at 316.

THE 'ELASTIC, SPRAWLING AND PERVASIVE OFFENSE'

The above description of the offense of Conspiracy is taken from the concurring opinion of Justice Jackson of the United States Supreme Court wherein he describes succinctly the rationale driving the offense of conspiracy but also noted in strong terms the problems inherent to such an offense. Of conspiracy Justice Jackson wrote, "Its history exemplifies the 'tendency of a principle to expand itself to the limit of logic.' The unavailing protests of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice. The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also chameleon-like, takes a special coloration from each of the many independent offenses on which it may be overlaid. It is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent....It is not intended to question that the basic conspiracy principle has some place in modern criminal law, because to unite, back of a criminal purpose, the strength, opportunities, and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer...However, even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." Justice Jackson, concurring opinion Krulewitch v. United States (1949) 336 U.S. 440,

THE ORIGINS OF CONSPIRACY

The offense of conspiracy originated during the reign of Edward I when the statute the Ordinance of Conspirators (1305), was enacted to prohibit the false procurement of indictments. But the evolution of the modern doctrine of conspiracy did not begin until the Star Chamber assumed jurisdiction over the offense and in 1611 it decided the landmark *Poulterers case* wherein it was held by the Star Chamber that under this offense the agreement was punishable even if the object of the agreement was never carried out. Throughout the seventeenth century the courts particularly, the Star Chamber successfully sought to extend the scope of the doctrine. In the case of Shaw v. D.P.P (1962) A.C. 220, Lord Reid citing Kenny's Outlines of Criminal Law noted, "There it is said that the criminal side of conspiracy was 'emphasised by the Star Chamber which recognised its possibilities as an engine of government and moulded it into a substantive offence of wide scope whose attractions were such that its principles were gradually adopted by the common law courts'" Shaw supra at pg. 272-273.

The drive to extend and entrench the doctrine of conspiracy was successful such that at one point it was widely accepted that the acts contemplated by the conspiracy need not be criminal but only wrongful in order to make the conspiracy punishable, see Developments in the Law - Conspiracy, 72 Columbia Law Review 920, at 923, (1959), Stephen Whitzman, citing Hawkins, Pleas Of The Crown, 446 (8th Ed. 1824).

HISTORICAL DEVELOPMENT

Perhaps beginning with the *Poulterers Case*, the offense of Conspiracy has developed as an

inchoate crime. Under the conspiracy doctrine criminal liability attaches at a much earlier stage than it does for the crime of attempt. Under the common law no overt act was required to satisfy a charge of conspiracy save the act of agreeing itself. The leading case of Mulcahy v. The Queen exemplifies this feature of the doctrine. In Mulcahy the Defendants were charged and convicted of conspiring to overthrow the crown. The Defendants argued on appeal that the indictments should have failed because no overt act was charged. The House of Lords dismissed the appeal, holding that, "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rest in intention only, it is not indictable. When two agree to carry it into effect, the very plot, is an act in itself, and the act of each of the parties, promise against promise, act contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means... Indeed, it seems a reduction to absurdity that procuring a single stand of arms should be sufficient overt act to make the disloyal design indictable and conspiring with a thousand men to enlist should not."

The traditional common-law approach to virtually dispensing with an overt act requirement (save the fact of the agreement) has strong support: "Since we are fettered by an unrealistic law of criminal attempts, overbalanced in favour of external acts, awaiting the lit match or the cocked and aimed pistol, the law of criminal conspiracy has been employed to fill the gap. If there are two persons involved, legal sanctions can be applied to the actor's intentions; this can seldom be done if only one person is involved and if he is wise in the way of the law but act unsuccessfully alone." 14 U. Toronto Faculty Law Review 56, at 61-62 (1956).

Nonetheless, this aspect of conspiracy has also been criticised; it can be argued that by dispensing with an overt act requirement the offense of conspiracy becomes more or less 'mental', see Criminal Law and Its Processes, by Kaddish & Schulhofer, 5th ed., at pg.763.

Another important feature of Conspiracy is its evidentiary advantages. In conspiracy trials the

acts and/or declarations of any one conspirator committed in furtherance of the conspiracy is admissible against all the conspirators to prove the nature and scope of the conspiracy, see R. v. Blake and Tye (1844) 6 Q.B. 126. This exception to the hearsay rule is not unique to conspiracy charges and is in fact based upon the doctrine of agency, see Phipson on Evidence, 14th ed. at paragraphs 25-10 and 25-11. Nonetheless, the operation of the hearsay exception in conspiracy cases is often harsh on defendants as evidence that would not be admissible on the charge of the substantive offence, is admissible on a conspiracy charge. Legal observers in England have noted that when the hearsay exception rule is utilized in a conspiracy trial where the charge involves an agreement between a number of persons and involves as well a number of transactions, the influx of evidence can have a prejudicial effect upon the jury in that the jury may have difficulty keeping evidence that is admissible against one accused separate from the evidence admissible against another, additionally, the jury may have the same problem dealing with evidence related to different transactions. This results in the possibility that an individual accused is convicted because the jury is unable to differentiate between the mass of evidence presented. See, Current Law Statutes Annotated 1977, The Criminal Law Act 1977 c 45.

These three aspects of conspiracy, the inchoate nature of the offense, the relative lack of an overt act requirement and the hearsay rule exception, have made the charge of conspiracy a powerful weapon in the prosecution's arsenal. Both in American and English jurisdictions it was frequently complained of that conspiracy charges were often bought in lieu or in addition to the substantive offenses charges in order to put defendants at an extreme disadvantage. (It should be noted however, that some American jurisdictions in an effort to limit the scope of conspiracy have higher overt act requirements than traditional common law conspiracy. For example, the state of Maine requires that for a conspiracy charge to be valid the conduct must include a 'substantial step' towards the completion of the crime, and further, that speech alone is not a substantial step, see Criminal Law and Its Processes, by Kadish and Schulhofer, 5th ed. at pg. 764.)

The doctrine of conspiracy under English common law was also strongly criticised as allowing

the courts, using the doctrine's loose definition of an 'unlawful act', to create new offenses, and/or to charge conspirators for acts that would not have been a crime if done by a sole individual. The case of Shaw v. D.P.P (1962) A.C. 220 best illustrates this trend in common law conspiracy. In this case the defendant, Mr. Shaw was charged and convicted of, inter alia, conspiring to corrupt public morals by publishing a directory which consisted primarily of advertisements of the names, address and specialized services of prostitutes. It was argued strongly on appeal that no such offense of conspiring to corrupt public morals existed at common law. In support of that contention was the fact that no precedents concerning such a charge could be found. The House of Lords acknowledged the lack of precedents but nevertheless still held that such a charge existed at common law and that furthermore the common law courts retained "a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare." Shaw supra at pg.268. (The Shaw case is also significant in that the Lords found that a conspiracy did exist and was established because the directory as published by Mr. Shaw could have no legitimate purpose.)

The Shaw case was sharply criticised by leading legal commentators as an instance of the courts improperly acting as legislators. This and complaints of prosecutorial misuse of the offense led to legal reform in England. The result was the passage of The Criminal Law Act of 1977. Under this act conspiracy is defined as, "if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question." The Criminal Law Act of 1977, section 1. This definition of conspiracy is narrower than the common law definition of conspiracy which included agreements for any unlawful purpose "even though that purpose might not be criminal if effected by one person acting entirely alone." Current Law, supra.

In addition to narrowing the ambit of conspiracy through the enactment of the Criminal Law Act of 1977, a practice direction was issued advising judges that, "In any case where an indictment

contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the joinder, or failing justification, to elect whether to proceed on the substantive or on the conspiracy counts.” Practice Direction (1977) 1 W.L.R. 537. The direction was issued in response to complaints that unjustified charges of conspiracy were being brought to enable the prosecution to take advantage of the hearsay exception rule of the conspiracy doctrine, see Current Law supra.

The Jamaican jurisdiction has not sought to reform the law of conspiracy as the English have, and as a result in this jurisdiction the wide common law ambit of conspiracy still applies. Because Jamaica retains the common law standard with relatively no overt act requirement and without a narrowing of the doctrine, Jamaica courts remain vulnerable to the kinds of prosecutorial abuses that have been associated with the doctrine of conspiracy.

PRESENT DAY STATUS

ENTERPRISE CONSPIRACY

Perhaps the most interesting modern day development in the law of conspiracy has occurred within the Federal jurisdiction of the United States. It was the Federal Government’s experience that traditional conspiracy doctrine was in fact too limited in scope to adequately combat the problem of organized crime within the United States. Organized crime may be described as an organizational structure, an enterprise, whose main objective is the continuing business of crime, and which consists of such infrastructure as, “the division of labor, specialization, diversification, complexity of organization, and the accumulation of capital,” Kadish,

Schulhofer, *supra*, at pg. 815. It was felt that traditional conspiracy could not accommodate this concept of “enterprise conspiracy”, because traditional conspiracy requires a single agreement or a common objective to commit one or more crimes, and within the context of organized crime, such a single agreement, or common objective can not be inferred from the diverse activities undertaken by apparently unrelated individuals who belong to or work for the criminal enterprise, see Kadish, Schulhofer, *supra* at pg. 819.

In response to this situation the Racketeer Influenced and Corrupt Organizations law (RICO) was enacted. This law “has added a new dimension to criminal jurisprudence...Whereas traditional conspiracy law focused on individuals who had agreed to engage in group crime, RICO struck directly at the organizational structure that allowed conspiracies to succeed. Under RICO, the criminal enterprise replaces the individual as the cornerstone of each trial.” RICO and Enterprise Criminality: A Response to Gerald E. Lynch, 88 Columbia Law Review 774, at 774, by Michael Goldsmith.

Although RICO has been much debated by legal commentators in the U.S. there can be not doubt that this statute has enabled prosecutors to mount complex trials linking together unrelated individuals engaged in diverse criminal activity, in a way that traditional conspiracy law would not allow. “[Ordinarily]...a single agreement ...cannot be inferred from the commission of highly diverse crimes by apparently unrelated individuals. RICO helps to eliminate this problem by creating a substantive offense which ties together these diverse parties and crimes. Thus, the object of a RICO conspiracy is to violate a substantive RICO provision - here to conduct ...the affairs of an enterprise through a pattern of racketeering activity ...The gravamen of the conspiracy charge in this case is ...each defendant... agreed to participate directly and indirectly, in the affairs of the enterprise...” Goldsmith *supra* at pg. 797, citing United States v. Elliot 571 F.2d 880, 902 (5th Cir.).

Some American legal commentators have expressed the fear that RICO has the effect of criminalizing an individual’s status, that is, that an individual’ s mere association with a criminal

organization could render that individual liable to a RICO violation charge. Others however, have pointed out that the statute requires that an individual be charged with two predicate crimes before that individual can be considered a part of a RICO enterprise conspiracy.

It is interesting that the United States has effectively, through RICO, enlarged the scope of conspiracy allowing prosecutors to mount complex, lengthy trials involving diverse individuals engaged in diverse activities, whereas in England, reform of the conspiracy was undertaken in part as a response to complaints from the courts that prosecutors were using conspiracy charges to bring unnecessarily long and complex trials. For example, in the case of R. v. Dawson (1960) 1 W.L.R. 163, the Court complained, "This court has more than once warned of the dangers of conspiracy counts, especially these long conspiracy counts, which one counsel referred to as a marathon conspiracy count. Several reasons have been given. First of all, if there are substantive charges which can be proved, it is in general undesirable to complicate and to lengthen matters by adding a charge of conspiracy. Secondly, it can work injustice because it means that evidence which otherwise would be inadmissible on the substantive charges against certain people becomes admissible. Thirdly, it adds to the length and complexity of the case so that the trial may easily be wellnigh unworkable, and impose a quite intolerable strain both on the court and on the jury." Dawson supra at pg. 170.

DRUG CONSPIRACIES

Another interesting modern day trend in conspiracies is the manner in which conspiracies are being detected and brought for adjudication by law enforcement officials. More than ever it appears that undercover agents and/or informers, so-called "agent provocateurs" are being used

to detect and infiltrate conspiracies, especially those conspiracies involving the illegal importation/exportation/sale of illicit drugs.

It is black letter law that a conspiracy must involve an agreement between two or more persons. The method of using undercover officers and/or informers to ferret out conspiracies has given rise to the question of whether a conspiracy can be said to exist when one of the two parties allegedly agreeing to the commission of a crime, is in fact an undercover officer. Such an issue came up in the Privy Council case of Yip Chiu-cheung v. R. (1994) 2 All E.R. 925. In that case the appellant was charged and convicted of conspiring with an undercover D.E.A. officer to illegally export heroin. The Appellant argued on appeal that the charge for conspiracy could not stand because the undercover officer did not have the requisite mens rea to commit the crime. The Council held that based upon the evidence at trial it was clear that the undercover officer had the intention to carry to completion the aim of the conspiracy, that is, the officer had intended to and in fact planned on taking the heroin out of the country. The fact that the officer was to do so with the consent and under the instruction of the relevant authorities did not serve to exempt the officer from being in breach of the law prohibiting the exportation of heroin. As such the undercover officer was properly considered under the law as a co-conspirator, even though the authorities had no intention of actually charging him as such. "Neither the police, nor customs, nor any other member of the executive have any power to alter the terms of the Ordinance forbidding the export of heroin, and the fact that they may turn a blind eye when the heroin is exported does not prevent it from being a criminal offence." Chui-cheung supra at pg. 928.

In Chui-cheung the undercover agent indeed had planned to carry the illegal drugs out of the country, but failed to do so at the last moment for concerns by the authorities over the officer's personal safety. What the Privy Council decision makes clear is that the undercover agent is indeed engaged in the commission of crime in order to identify an alleged law breaker, and that furthermore the agent was willing to go beyond mere agreement and fully intended to commit the substantive offence. In the case of R.v. Shahzad (1996) 1 W.L.R. 104, the law enforcement official involved, (a British customs officer), did indeed commit the substantive offense of

bringing illegal drugs into England in order to lure a Pakistani drug dealer to England where he could be arrested and tried.

In Shahzad it was argued on behalf of the defendant that the law enforcement officials involved with their paid informer incited the defendant to commit the offense and as such the criminal proceedings should be stayed as to proceed would constitute an abuse of the judicial process.

As to the actions of the customs officer in bringing the illegal drugs into England, Lord Stein speaking for the House of Lords stated, "I am prepared to assume, without deciding, that the customs officer was guilty of an offence." Shahzad supra at pg. 112. Furthermore, the Court also found that the defendant "probably would not have committed the particular offence of which he was convicted of..." but for the criminal conduct of the law enforcement officers and their paid informer, Shahzad supra at pg. 112.

Nonetheless, the House of Lords, as did the courts below, concluded that no abuse of the judicial process such that an affront to the public conscience had occurred. In concluding that no abuse of the judicial process had occurred the House of Lords noted that in the real world trickery and deceit are sometimes necessary to bring some law breakers to trial. But, in this instance, more than just trickery and deceit had been employed by the authorities. Actual criminal behaviour on the part of the law officers had occurred. The larger implications of the Chiu-cheung and Shahzad decisions are disturbing. In the name of a war on drug conspiracies the courts appear to be sanctioning criminal conduct on the part of law enforcement officials. There appears to be a kind of duality of approach at work. Thus Chiu-cheung points in the direction of control and limitation of the undercover agent's activity by identifying such participatory activity plainly as criminal: A defendant here would then have at least the right to a tribunal's direction that the undercover agent is an 'accomplice' who requires the application of the doctrine of corroboration. Shahzad on the other hand points in the direction that although the undercover agent's activity is in itself criminal, the Courts may tend to condone it by refusing to apply the doctrine of abuse of process.

It should also be noted that the Chip-cheung involves an American D.E.A. agent conspiring with a Chinese Defendant in Hong Kong, whereas Shahzad involves British agents conspiring in Pakistan with a Pakistani. The effect of cases such as Shahzad is the judicial sanctioning of the creation and furtherance of criminal transactions on the part law enforcement officials and their paid informers, all in the name of crime detection. It remains to be seen what effect such case will have upon the perceived integrity of the judicial process.

THE FUTURE OF CONSPIRACY

The American RICO statute as well as the principles of the Shahzard and Chip-cheung cases point to future of conspiracy. Despite attempts to confine the doctrine of conspiracy, this offence will retain its “elastic” nature as noted by Justice Jackson. Efforts on the part of law enforcement officials the world over to contain organized crime and control the illegal sale of drugs, will include the use of the conspiracy doctrine to bring suspects to court. Additionally, it should be noted that the concept of enterprise conspiracy in the United States has been extended to areas other than organized crime. For example, anti-abortion protestors have been charged with RICO violations. This best illustrates that the concept of enterprise conspiracy has become a permanent part of the American law culture, and given the American commitment to fighting the “war on drugs” abroad, this concept could well be exported to other jurisdictions.

It may serve the Jamaican practitioner well to familiarize himself with the concept of enterprise conspiracy as the Jamaican Government continues to seek favour with the U.S. government through various drug detection cooperation agreements.

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