

CONSPIRACY

I

“The crime of conspiracy” remarks Russell, “affords support for any who advance the proposition that criminal Law is an instrument of government.”¹ The opportunity which the vagueness of this crime can offer to governmental oppression has been recognised by an independent judiciary conscious of the need to preserve the liberty of the subject. As Fitzgerald, J., said, “The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be zealously regarded and never to be pressed beyond its true limits.”² The abuse, of the law of criminal conspiracy in the hands of Government creates a genuine fear in all minds. Prof. Sayre writes, “A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law ; it is a veritable quicksand of shifting opinion and ill-considered thought.”³ He further emphasizes that, “it would seem, therefore of transcendent importance that judges and legal scholars should go to the heart of this matter, and with eyes resolutely fixed upon justice, should reach some common and definite understanding of the true nature and precise limits of the elusive law of criminal conspiracy.”⁴

“The above remarks may also apply with equal emphasis to the law of criminal conspiracy in India. There is close affinity between the Indian and the English law of Criminal conspiracy.

II

Conspiracy in common law started its career primarily as a civil injury⁵ but was later punishable on an indictment.⁶ In its earliest meaning conspiracy was the agreement of persons who combined to carry on legal proceedings in a vexatious or improper way.⁷ The Star Chamber gave it a more concrete form⁸ and the agreement was indictable as a substantive offence even when no act was done in pursuance

1. Russell on Crimes, Vol. 1 p. 213 (11th Ed.)

2. Irish State Trials (1867) quoted in Russell, *op cit.* p. 216.

3. Sayre: ‘Criminal Conspiracy’, 35 Harv. L.R. p. 393.

4. *Ibid*, p. 394.

5. 28 Edw. 1., C. 10.

6. 33 Edw. 1, C. 2.

7. Stephen, History of Criminal Law, Vol. II, (1883) p. 227.

8. In *Poulteror's case* (1611) the criminal aspect of conspiracy was developed by the Star Chamber. This case forms the source of modern law on conspiracy.

of it. However, the gradual evolution of the law of conspiracy, its widened scope and general application can be discerned in close association with the law of principal and accessory.⁹

In English law, "if two or more persons agree together to do something contrary to law, or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons who so agree commit the crime of conspiracy."¹⁰

In *Mulcahy v. R.*¹¹ the House of Lords stated, "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 by unlawful means. So long as such a design rests 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 *actus contra actum* capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means."

The term conspiracy will include all combinations involving violation of the private rights which, if done by a single, person would give a civil though not a criminal remedy against the wrong-doer.¹² However, the common law of conspiracy has not been altogether uniform.¹³

9. Russell on Crimes (11th Ed.) Vol. 1, p. 214.

10. Halsbury's Laws of England, (3rd Ed.) Vol. 10, p. 310-11.

In *R. v. Parnell*, (1881) 14 Cox. C. C., at p. 513 Fitzgerald, J., stated, "Conspiracy has been aptly described as divisible under three heads: where the end to be attained is in itself a crime, where the object is lawful but the means to be resorted to are unlawful, and where the object is to do injury to a third party or to a class, though if the wrong were effected by a single individual it would be a wrong but not a crime."

11. (1868) L.R. 3 H.L. 306.

The House of Lords in *Mogul S.S. Co. v. McGregor* (1892) A.C. 25 further explained that, an agreement which is immoral or against public policy or in restraint of trade, or otherwise of such a character that the courts will not enforce it, is not necessarily a conspiracy. An agreement, to be a conspiracy, must be to do that which is contrary to or forbidden by law, as to violate a legal right or make use of unlawful methods, such as fraud or violence, or to do what is criminal.

12. *R. v. Parnell* (1881) 14 Cox. C. C. 505.

13. In *R. v. Turner* 13 East, 228, it was held that an indictment will not lie for a conspiracy to commit a mere civil trespass. But an opposite view was taken in *R. v. Rowlands* 170 B. 671. (See also *Quinn v. Leatham* 1901 A.C. 495; *Mulcahy v. R.* 3 H. L. 306; *Kromme v. R.* 17 Cox C.C. 492). But the view in *Turner's* case was re-established in *Mogul S. S. Co. v. Mcgregor* 33 Q.B.D. 591. However Sir Wright held an opinion that the result of the case law on the subject reveals as a general rule, that a combination to injure a private person is not criminal unless the means to be employed are criminal, in other words conspiracy as such is not punishable unless it is conspiracy to commit a crime (Wright, 'Law of Criminal Conspiracies and Agreement')

But so far as the law of present day is concerned the House of Lords has declared (a) that the gist of conspiracy is the agreement, whether or not the object is attained (b) that the purpose of making such agreements punishable is to prevent the commission of the substantive offence before it has even reached the stage of attempt and (c) that it is all part and parcel of the preservation of the Queen's peace within the realm.¹⁴

III

Originally the Indian Penal Code made conspiracy punishable only in two forms *viz.*, conspiracy by way of abetment and conspiracy involved in certain offences.¹⁵ In the former case an act or illegal omission must take place in pursuance of conspiracy in order to be punishable. The latter is a conspiracy by implication and the proof of membership is enough to establish the charge of conspiracy.

However, in 1870 the law of conspiracy was widened by adding, S. 121-A to the Indian Penal Code.¹⁷

A conspiracy to commit an offence under section 121 Indian Penal Code or to overawe the government by means of criminal force or the show of criminal force, is punishable. But to constitute a conspiracy in such a case it is not necessary that any act or illegal omission should have taken place.¹⁸

So far, the law of conspiracy in India required the doing of an overt act in order to be punishable, except in respect of the offences particularised in S. 121-A Indian Penal Code. However, in 1913

Harris : *Criminal Law* (20th Ed.) p. 49 ; See also *R. v. Newland* ((1953) 37 Cr. App. R. 1541.

14. Kenny : *Outlines of Criminal Law* (Ed. Turner 17th Ed.) p. 89 ; See also *Board of Trade v. Owen* (1957) 2 W.L.R. 351 at p. 357.

15. A person is said to abet the doing of a thing by conspiracy if he engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing (S. 107, I.P.C.).

16. Thugi (S. 310) ; Belonging to a gang of thieves (S. 401) ; Being member of a gang of dacoits (S. 402).

17. Inserted by Act XXVII of 1870 ; S. 4.

18. Sulaiman, C. J., in *Jhabwala v. Emperor* 1933 A.L.J. 799, observed :—In law, the King never dies ; it is enough for the prosecution to prove that there was a conspiracy to deprive the King Emperor of the Sovereignty of British India. Having regard to S. 3(23) of the General Clauses Act, it is not necessary to prove that the conspirators were conspiring for such deprivation to take place within the life time of the King Emperor. Criminal Conspiracy is complete as soon as two or more persons agree to do or cause to be done an illegal act, or an act which is not illegal by illegal means.

Indian Criminal Law Amendment Act¹⁹ was passed as an emergent piece of legislation which gave an extended effect to the law of conspiracy in India, by adding Ch. V-A (Ss. 120A & 120B Indian Penal Code) to the Penal Code. The necessity to widen the scope of the law of conspiracy has been explained in the statement of objects and reasons thus :

“Experience has shown that dangerous conspiracies are entered into in India, which have for their object aims other than the commission of the offences specified in S. 121-A of the I.P.C. and that the existing law is inadequate to deal with modern conditions. The present Bill is designed to assimilate the provisions of the Indian Penal Code to those of the English Law with the additional safeguard that, in the case of a conspiracy other than a conspiracy to commit an offence, some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence.....”

Thus criminal conspiracy after 1913 has been dealt with in the Penal Code in the following forms :

(a) where overt act is necessary ; and

(b) where overt act is not necessary and an agreement *per se* is made punishable.

The former will include cases (i) where two or more persons agree to do or cause to be done an illegal²⁰ act excluding the commission of an offence,²¹ (ii) where an act which is not illegal is done by illegal means ;²² and (iii) conspiracy by way of abetment.²³

In the latter instance agreement to commit an offence shall amount to a criminal conspiracy,²⁴ (without proof of any overt act).

IV

As stated above the inclusion of Chapter V-A in the Penal Code was designed to assimilate the provisions of English law. In the words however, of a learned commentator, “The Statement of objects and Reasons appears in this respect to be inaccurate, since it goes beyond

19 Act VIII of 1913.

20. The word ‘illegal’ is applicable to every thing which is an offence or which is prohibited by law, or which furnishes ground for a civil action ; (S. 43 I.P.C.).

21. S. 120-A I.P.C.

22. *Ibid.*

23. See S. 107 I.P.C.

24. Proviso to S. 120-A I.P.C.

merely assimilating the criminal law of India to that in force in England.”²⁵

The use of the word “illegal” in the definition of criminal conspiracy in S. 120-A I.P.C. is extremely comprehensive and would make even a case of civil trespass indictable, as a criminal conspiracy.²⁶

It is an established rule of the law of conspiracy that there should be at least two persons. One person alone cannot conspire.²⁷ However, anomalous results follow from certain cases where either one of the conspiring parties is incapable of committing the crime or is immune or has been pardoned.²⁸ In such cases the desirability of punishing a mere conspiracy not followed by an overt act may be examined.

The gist of the offence of conspiracy is an unlawful agreement between two or more persons. In other words, joint evil intent is necessary to constitute the offence. A mere criminal intention formed in a man's mind is insufficient and that stage is never criminally cognisable. “The forum of conscience alone can take notice of such cases but the municipal law can only deal with matters and not merely with mind save as manifested by action.....Consistency therefore required that a mere conspiracy should be considered a substantive offence only when the object of conspiracy is so serious as the waging of war against the sovereign and other acts of equally grave nature,

25. Gour : *The Penal Law* 6th Ed. Vol. 1 p. 508.

26. (i) See Note of Dissent by Pt. M.M. Malviya, to the Indian Criminal Law Amendment Bill. (Quoted in Roy-Law Relating to Press and Sedition at pp. 48-50)

(ii) The result of this sweeping enactment is to make a mere breach of contract by two or more persons punishable as a crime. If, for instance a husband and wife agree to sell their house and then think better of it and refuse to convey they would be punishable under Sec. 120-B of the Penal Code though the civil court may not have enforced a specific performance of the contract. The exception of English law that wife and husband are treated as one person, is not acceded to in this chapter (Gour : *op. cit.* p. 508). This adds to the absurdity of Indian Law on conspiracy which is not found in the English law.

(iii) Huda is of the opinion that, “It is not the policy of law to create offences that cannot ordinarily be proved. There probably would have been no danger and inconvenience if the law in India were left exactly where it was before the passing of the Criminal Law Amendment Act, 1913”. (T.L.L. p. 107.).

27. *Topan Das v. State of Bombay* A.I.R. 1956 S.C. 33.

28. It has been held in English law that the personal immunity of one in respect of a prosecution for crime is a defence to a charge against the other for conspiring with the former to commit it. See *Duguid* 75 L.J.K.B. 470; Sharp. (1936) 1 All. E.R. 48.

In *Bimbadhar Pradhan v. State of Orissa*, A.I.R. 1956 S.C. 469, one person was convicted of conspiracy while the other enjoyed immunity on his turning approver though he was privy to the conspiracy.

and that other cases of conspiracy should be deemed an offence only, when they fall within the definition of abetment.”^{29*}

Conspiracy is an inchoate crime and is punishable primarily because an agreement to commit a crime is a decisive act, fraught with potential dangers; but to bring an agreement to commit a civil wrong within the range of criminal conspiracy is to stretch the rationale of law to the farthest limit. In its broad reach it can be made to do great evil.

It has also been reiterated³⁰ that the law of criminal conspiracy is an instrument of the governmental oppression. Needless to say that the Indian Criminal Law Amendment Act, 1913,³¹ was passed as an emergent piece of legislation and this measure was motivated by political expediency.³² No efforts were made to deal with the matter in the ordinary and regular way. It was neither circulated for opinion among the judicial and executive officers of government nor the representative public men and bodies were consulted.³³ The result was that a piece of legislation was hurriedly, enacted and inconsistent

29. Huda, Principles of Criminal Law (T.L.L. p. 106-107.)

* The Supreme Court in a recent decision (*The State of Andhra Pradesh v. Subbaiah* 1961 (2) S.C.J. 686) held that where the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been actually committed in pursuance thereof the accused can be charged with the specific offences alleged to have flown out of the conspiracy along with the charge of conspiracy. The Court observed “Conspiracy to commit an offence is itself an offence and a person can be separately charged with respect to such a conspiracy. There is no analogy between section 120-B and section 109, Indian Penal Code. There may be an element of abetment in a conspiracy; but conspiracy is something more than an abetment. Offences created by Sections 109 and 120-B, Indian Penal Code, are quite distinct and there is no warrant for limiting the prosecution to only one element of conspiracy, that is, abetment when the allegation is that what a person did was something over and above that. Where a number of offences are committed by several persons in pursuance of a conspiracy it is usual to charge them with those offences as well as with the offences of a conspiracy to commit those offences. As an instance of this we may refer to the case in *S. Swaminathan v. State of Madras*.” (A.I.R. 1957 S.C. 340).

The Court however pointed out that it is not desirable to charge the accused persons with conspiracy with the ulterior object of letting in evidence which would otherwise be inadmissible and that it is undesirable to complicate a trial by introducing a large number of charges spread over a long period. But it would only be a question of propriety which should be left to the discretion of the trial judge to decide in the facts and circumstances of the case: [Ed.]

30. See *Supra* Note. 1.

31. Act VIII of 1913.

32. See statement of Objects & Reasons, Indian Criminal Law Amendment Bill, 1913.

33. Dissenting note of Pt. M.M. Malviya (See *Roy, op. cit.* p. 48-50),

and unintelligible principles of law were put into action. It may be suggested that the sweeping provision of S. 120-A I.P.C. needs re-examination and irrationality which has imperceptibly crept into the Indian law may require elimination.³⁴ To apply the law of criminal conspiracy for an agreement to commit torts generally is not wholesome.³⁵ The conspiracy to do an 'illegal act' is uncertain and covers a wide area with regard to the commission of offences. The law also needs statutory modification in this respect and its use may be limited to determinate heads of offences only.³⁶

34. See *Supra* Notes 26.

35. If deemed necessary it may be applied in cases of specific torts only ; such as torts to commit fraud, malicious prosecution, malicious defamation, to procure breach of contract etc.

36. (a) As has been already provided in S. 121-A I.P.C.

(b) The Draft Code of 1879 in England classified the objects of conspiracy as (1) treasonable (2) seditious (3) to bring false accusations (4) to pervert justice (5) to defile women (6) to murder (7) to defraud (8) to commit indictable offences (9) to prevent by force the collection of rates and taxes.

The above recommendations were adopted in the New Zealand Code. South Africa is content with a doctrine that limits its conspiracies to commit crimes (See Williams, *op. cit.* p. 559).