

CONSPIRACY

Law Tactics & Strategy in Defending in Conspiracy Allegations - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

DEFINITION OF CONSPIRACY

Just what does it mean to be charged with conspiracy? In this article we concentrate on statutory conspiracy as this, as opposed to common-law conspiracy is the most commonly charged type of conspiracy. Under section 1 of the Criminal Law Act 1977 it is an offence "if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions." results in the commission of an offence.

THE AGREEMENT

Judges will also remind juries that for the prosecution to prove an 'agreement' they do not have to produce a signed contract agreeing to commit an offence. Juries are invited to make common-sense inferences from the evidence - for example, a series of suspicious meetings, links to other co-Defendants by telephone calls or even, more directly, taped conversations taken by a covertly placed bug or, more riskily for the police/customs, the use of an undercover officer in the alleged pre-offence discussions. Often the facts in such allegations are agreed but the inferences that can be drawn from these facts are not agreed. Tactical care and skill is required to identify these areas and consider how best to attack the prosecution's case - i.e. that a series of calls/meetings etc equals participation in some unlawful agreement.

Where there is a large haul of drugs or guns and more than one person has been arrested the police will almost automatically charge this as a conspiracy to supply rather than a substantive offence of possession with intent to supply. They will allege that the conspiracy started on X date (often the start of a police operation) and finished on Y date (the date of arrests). There is no pretence that these dates are anything other than just convenient. That way the Crown can make assertions about different Defendants' roles but are not locked into proving that a particular act was committed by a particular Defendant on a particular day - the jury may just decide 'he's defiantly involved' and the Judge will sentence on how he sees the roles established by the evidence.

ACTS AND DECLARATIONS

In conspiracy cases there will often be significant areas of evidence which on the face of it seem damning but which

in fact is not admissible against a particular Defendant. A basic rule of evidence is that, ordinarily, acts done or words uttered by 'A' cannot be evidence against 'B'. But in conspiracy cases there is the so-called 'acts and declarations' rule. This provides that the acts or declarations of any conspirator or co-accused made in furtherance of the alleged common design may be admitted as part of the evidence against any other conspirator.

The Criminal Justice Act 2003 preserves this rule - i.e. as an exception against the common-law exclusion of such evidence; s118(1). To be admissible against a co-Defendant the declaration in question must be in furtherance of the common design; it must "be demonstrated to be one forming an integral part of the machinery designed to give effect to the joint enterprise" - *R v Reeves*, unrep. Dec 4, 1998. Descriptions of past events etc are not made in furtherance of the common design and are therefore not admissible against anyone other than the maker. For example say an undercover officer covertly records a suspect X discussing the preparations for an offence where Y is mentioned. This could be admissible evidence against both X and Y.

The acts and declarations rule can, and very often should, be tested by the defence. In *R v Gray and Liggins* [1995] 2 Cr. App. R 100 the Appeal Court went back to basic principles by recalling that "the basic reason for admitting the evidence of the acts or words of one against the other is that the combination or pre-concert to commit the crime is considered as implying an authority to act to or speak in furtherance of the common purpose on behalf of the others. From the nature of the case it can seldom happen that anything said by one which is no more than a narrative statement or account of some event that has already taken place...can become admissible under this principle against his companions in the common enterprise." Thus it maybe that X's comments can in truth be shown to be no more than grandstanding or describing past events - and even if that is not clear there remains a discretion for the Judge to direct the jury not to hold X's words against Y.

THE INVESTIGATION AND DISCLOSURE

The police will sometimes get it wrong and build a case against a suspect who has 'appeared on the radar' during their investigations. Or it maybe that the suspect is actually guilty of something entirely different to the plot be-

ing hatched by others. What is important to remember is that virtually all conspiracy cases turn on what inferences can be made from primary facts; in most cases the basic facts are agreed - it is what they mean that is in dispute.

For example, say, X is seen by police whilst they were keeping Y, a suspected major drug dealer, under surveillance. X is seen going frequently to the channel ports. X is then arrested prior to Y's arrest. X's home is searched and phone contacts between him and Y are established. It is plain in the police interview however that the police are really at a loss about what to say X's supposed role is. The two men are clearly close and the police are very suspicious. X says nothing in interview aside that he is not guilty of any involvement in drugs and the police reluctantly release him. Y is then arrested and says in interview, 'I am not a drug dealer, I get my money from bringing in cigarettes from the Continent and I get the cigarettes from X'. The police of course don't believe that it is cigarettes that are being brought in and X is re-arrested and suddenly a positive case is put to him about his role as an importer of drugs. In those circumstances there could be scope for X at least to demand disclosure of at least some of the initial intelligence. It maybe that the original police case started from an informant's information that Y got his drugs from a source in London; i.e. not from the Continent. That could undermine the case against X and therefore be disclosable under the disclosure rules. These sorts of issues crop up in many trials and care always needs to be taken to take the right approach to sensitive disclosure issues. This is even more so in conspiracy cases as the very fluid nature of the charge means that the defence have to concentrate as hard as they can on what concrete 'facts' led the prosecution to their theory in the first place.

PROBLEMS FOR THE PROSECUTION

The requirement for a proved agreement can raise other very thorny issues for the prosecution. What if, for example, A, B and C agree to import cannabis (now a Category C drug) where C provides a car but in fact A and B import cocaine (still a Category A drug)? In that situation C would in fact be acquitted (see *R v Taylor* [2002] Crim LR 205). But the point is made - there are many difficult scenarios. What is the situation for example where A and B agree to commit an offence abroad? What if A and B agree with C to commit an offence but C, in reality, had no intention to go through with it, or if B later changed his mind? What if A, B and C agreed with D and D turned out to be an undercover officer? What if A agreed with B but did not meet C or even know D? It would take a short book to explain all the many variables of this offence. The essential thing to remember is that conspiracy really means agreement - the Crown must always show that an agreement of some sort has been reached and that a Defendant is a party to it - that is sometimes easier said than done.

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