

CONSPIRACY

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

DEFINITION OF CONSPIRACY

There are two types of conspiracy - statutory and common-law. Common law conspiracy is seen less frequently - though even with the dawn of a new statutory regime for fraud offences under the Fraud Act 2006 we still see the Crown using the common-law offence of conspiracy to defraud and cheating the revenue. However, in this article we will concentrate on what is by far and away the most common of conspiracy allegations; statutory 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.

This simply means that just as it is a criminal offence to rob or murder or steal so it is a criminal offence for two or more persons to agree with one another to commit that offence. The essence of the offence of conspiracy is agreement.

THE LAW: '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 taped conversations taken by a covertly placed bug or, more riskily for the police/customs/SOCA, 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.

This is what lawyers call a 'confess and avoid' case. In a confess and avoid case it can be tempting just to let the Defendant do the explaining - i.e. the 'avoiding'. That approach risks failing to see which parts of the evidence are the prosecution's highlights and tackling them in the preparation stage as well as before the jury. Care and skill is required to identify these areas and consider how best to attack the prosecution's case - e.g. cross-examining an officer about how many times he didn't see the suspect, or establishing that a series of calls in isolation may look suspicious but against the background of the parties history is not so suspicious.

The advantage of a conspiracy indictment for the prosecution is the lack of precision required. For example, 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. 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 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 are 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 in a conspiracy case. But 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 principals 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 principal 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.

PREPARATION: INVESTIGATION & DISCLOSURE

The Crown may not have to pin their colours to the mast too firmly in a conspiracy case however there must be a case - a theory of what role a suspect is said to play in the alleged conspiracy. 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 being hatched by others.

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 - nothing is found but phone contacts between him and Y are clearly established and all around times when X is going to or coming from the Continent.

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 offences 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 smuggled 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 could be disclosable under the disclosure rules. In preparation care always needs to be taken to take the right approach to sensitive disclosure issues and, importantly, the drafting of the Defence Statement. 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 (still a Category C drug) where C provides a car but in fact A and B import cocaine (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 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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