CASE LAW

CRIMINAL CONSPIRACY

REG. v. *WITHERS*

In *Reg.* v. *Withers*[1] the House of Lords has decided unanimously that "there is no separate and distinct class of criminal conspiracy called conspiracy to effect a public mischief".[2] The decision may be regarded as surprising in view of the Lord Chancellor, Lord Hailsham's statement in *Kamara* v. *D.P.P.*[3] that "a combination to commit a public mischief can be indictable. The categories are not closed",[4] and with the whole tenor of that judgment which appeared to support a very expansive view of conspiracy. Thus the unanimity of recent cases from the House of Lords might give a misleading impression that the progeny of *Shaw's Case*[5] have developed regular features.

In *Withers* the appellants ran a private investigation agency, making reports on the financial standing of third parties for their clients. They made enquiries, usually by telephone, to banks, building societies, government departments and local authorities, pretending to act in an official capacity and representing themselves as authorised to receive the confidential information they sought. They were charged with two counts of conspiracy to effect a public mischief, the first relating to the deception of the banks and building societies, the second to the public authorities.

The decision heralds a retreat from an adventure upon which the House embarked in *Shaw's Case*. To understand the strength and pertinacity of the objections to an offence of conspiracy to effect a public mischief, it is necessary to examine the character of the proposed offence which balked the house.

If there is a separate and distinct class of conspiracy to effect a public mischief, the immediate question is: what is its scope? In the instant case Caulfield, J. directed the jury, *inter alia*, that if the defendants agreed to do deceitful acts which would cause extreme injury to the community as a whole, they would be guilty of conspiracy to effect a public mischief. The Court of Appeal approved the formulation, citing *Shaw* v. *D.P.P.*[6] Extreme injury to the public was the substance of the proposed offence,[7] and Lord Hailsham's extensive review of the authorities in *Kamara*[8] reveals no general link more tangible than "matter of public concern"[9] or that the public interest is directly involved.[10] "The public has sufficient interest . . . when the carrying into execution of the agreement would have consequences sufficiently harmful to call for penal sanctions."[11] If the circuitous formulas are elminated, the gravamen of the offence can be put in the question: is this conduct deserving

[1] (1974) 3 W.L.R. 751.
[2] *Id.* at 759.
[3] (1973) 2 All E.R. 1242; (1973) 3 W.L.R. 198; (1974) A.C. 60.
[4] (1974) A.C. 60, 126 D-E; (1973) 2 All E.R. 1242, 1258.
[5] (1962) A.C. 220.
[6] (1962) A.C. 220, 283 (Lord Tucger).
[7] *Per* Lord Simon of Glaisdale (1974) 3 W.L.R. 769.
[8] (1973) 2 All E.R. 1258.
[9] *Id.* at 1261.
[10] *Id.* at 1254.
[11] *Per* Lord Cross, *id.* at 1263.

of penal sanctions as contrary to the public interest?

This public interest element, or injury to the community, may be criticized as an unsatisfactory limitation because it is too vague and descriptive to provide a stable judicial base, and leaves the question of liability too much at large, depending not merely on the attainment of some degree, but in effect leaving it to the tribunal to declare a new offence on every occasion. *Kamara*, therefore, may be regarded as provoking the reversal in *Withers*, because it showed how extensive and wholesale would be the operation of a generalised offence of conspiracy to effect a public mischief.

In *Withers*, the existence of a distinct class of conspiracy to effect a public mischief was thought objectionable for the following reasons:

(i) Whoever answers the question whether the conduct amounts to a public mischief, new offences will in fact be created; a jurisdiction which the courts do not now have.[12] It is for the legislature to fill the gaps in the law.[13]

(ii) This class of offence might be extended very widely, and indeed almost indefinitely,[14] thereby introducing an "uncontrollable dynamism" into this branch of the law.[15] This branch of the criminal law is not to be governed by labels or generalisations or vague and descriptive phrases, this process requiring special caution and advertence in the criminal law context.[16]

(iii) All claims to certainty in the criminal law would be lost and the guilt or innocence of persons charged with the offence would, to an unwholesome degree, depend upon the personal views and prejudices of those constituting the tribunal appointed for their trial.[17]

(iv) The task of a judge instructing a jury becomes almost impossible.[18]

The last of these (iv) stems from contradictions in the cases.[19] The issue is whether "the judge should direct the jury as to what element of fact if established to have been part of the agreement would be an invasion of the public field".[20] In *R.* v. *Foy*[21] the Court of Appeal said that the approach adopted must depend on the facts alleged. Where they had p reviously been held to disclose illegal conduct, the judge can so direct the jury. Where questions of public standards of morality or questions of degree or opinion arise, then the decision is to be left to the jury. What is the meaning of this division of functions when "public mischief" is alleged? "Injury to the public" might fall to be defined as a question of law, in which case the judge will legislate; or as a question of degree or opinion, in which cas the jury will legislate. Neither position is tenable.

"In effect the concept enjoins an English criminal court to act like a 'people's court' in a totalitarian regime, and declare punishable and to punish conduct held at large to be 'extremely injurious to the public.' "[22] This objection (iii) can be compared to *Knuller's Case*,[23] where the House of Lords dismissed objections that conspiracy to corrupt public morals was vitiated as uncertain, and left it open to juries to enforce their own moral standards. The analogous issue was clouded by discussion of the strength of the word "corrupt", but the hard line adopted is illustrated by a statement of Lord Morris:[24]

[12] *Withers* (1974) 3 W.L.R. 751, 756, 771, 776.
[13] *Id.* at 760, 772.
[14] *Id.* at 757.
[15] *Id.* at 771.
[16] *Id.* at 767.
[17] *Id.* at 758, 769.
[18] *Id.* at 756, 766.
[19] See Viscount Dilhorne, *id.* at 756.
[20] *Per* Lord Hailsham in *Kamara* (1973) 2 All E.R. 1242, 1261.
[21] (1972) Crim. L.R. 504.
[22] *Per* Lord Simon, *Withers* (1973) 3 W.L.R. 751, 769.
[23] (1973) A.C. 435.
[24] *Id.* at 463.

"Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in." Nor was any distinction drawn between civil and criminal liability as to the principles which should apply. However, since *Withers*, some types of uncertainty, beyond questions of standard and degree, are of special importance in the criminal law.

In particular, the uncertainty which stems from vagueness and generality in defining the scope of the offence (iii) is repugnant to the criminal law. As to grounds (i) and (ii), great reliance was placed on *Knuller* as authority. Since no generic offence of conspiracy to effect a public mischief was held to exist, and the labels attached to various classes of conspiracy mean no more than the cases which support them, *Knuller's Case* has an accordingly greater scope of application. The danger is that the courts can avoid the force of *Knuller* by saying that the offence is well known to the law, as was done in *Knuller's Case* where it was decided that conspiracy to outrage public decency was an offence.

> . . . the line between, on the one hand, applying to new circumstances a rule which defines an existing offence and, on the other, the extension of an existing offence is one which is often difficult to draw. . . .[25]

To that extent uncertainty remains, but only the ordinary uncertainty which besets the process of reasoning from past cases, not the licence to legislate which might have been derived from *Shaw* and *Kamara*.

The reception received by those two cases is instructive. The most important question was whether there existed, despite the numerous objections in principle, a compendious genus of conspiracy to perpetrate conduct which is extremely injurious to the public, founded on the authorities.

Lord Simon of Glaisdale, in *Withers* dealt with *Shaw* most fully,[26] and distinguished three possible ratios:

> (a) that the law recognised an offence when committed by an individual of corrupting public morals . . . ; (b) that an examination of the authorities shows that the law has consistently recognised an offence of conspiracy to corrupt public morals; (c) that a conspiracy to corrupt public morals is a subgenus of the genus conspiracy to committ a public mischief, which the law recognises. Lord Tucker [speaking for the majority] expressly did not reject (a) and undoubtedly relied on (c).[27]

Relying on *Bhagwan*,[28] Lord Simon found a genuine choice to exist between ratios (b) and (c). Accordingly he rejected (c). Viscount Dilhorne[29] interpreted *Shaw* to the same effect.[30]

In *Kamara*, however, Lord Hailsham had reviewed the authorities which he considered to establish a generalised offence of conspiracy to effect a public mischief. His observations on this category, in a case on conspiracy to commit a trespass, were strictly *obiter*. He recognized that most of the "public mischief" cases involved some element of fraud, yet appeared to distil a common element of "extreme injury to the public", independent of fraud, as generically linking those cases and supporting a generalised category of offence, thereby drawing support for the additional requirement of "invasion of the public domain" as a necessary element in conspiracy to commit a trespass where substantial damage was not proved. The House in *Withers* denied that Lord Hailsham's approach involved recognizing an independent generically linked offence, and explained that those cases cited to support it were really instances of conspiracy to defraud or conspiracy to defeat the course of justice, or wrong. That they

---

[25] *Per* Lord Simons in *Withers*, *supra* 771.
[26] *Withers*, *supra* 770-1.
[27] *Shaw*, *supra* 283, 285, 289, 290.
[28] (1972) A.C. 60, 80, which is interesting considering Lord Hailsham in *Kamara*, *supra*, had relegated *Bhagwan*, *supra*, to situtaions where a statute had intervened "fully".
[29] With whom Lord Reid agreed (1974) 3 W.L.R. 751, 754.
[30] *Id.* at 758. Lord Kilbrandon does not mention *Shaw*.

had previously been considered as a separate head was unimportant; "it matters not which label is attached'.'[31]

As has been shown, the objections to the existence of the generalised crime are now recognized as overwhelming. If *Shaw's Case* was an attempt to launch a *Donoghue* v. *Stevenson*[32] type principle with regard to public injury through criminal conspiracy, that attempt must now be taken as decisively abandoned.

Furthermore the House took the opportunity to explode some fictions used to explain the incursions of the law of conspiracy into areas not otherwise criminal. These fictions included the following propositions:

(i) that the courts have an inherent power to declare conduct not previously held so to be criminal;[33]

(ii) that conspiracy is a vehicle by which the Crown can remedy deficiencies and loopholes in the criminal law;[34]

(iii) that a man might fairly encounter the actions of one, but the criminal law will protect him from the "dangerous and alarming" prospect of confronting concerted action.[35]

The doctrinal basis of this field of liability stands indicted by Lord Diplock's observation that ". . . this branch of the criminal law is irrational in treating as a criminal offence an agreement to do that which if done is not a crime".[36] It appears that this branch of the criminal law is supported by nothing but authority.

It is equally clear that certain types of conspiracies, the well-established heads, remain unimpeached. These are, principally: conspiracies to cheat and defraud, conspiracies to pervert or defeat the course of justice, conspiracy to corrupt public morals or to outrage public decency, and conspiracy to commit a tort involving an "invasion of the public domain" or the infliction of damage. The objections raised to the more vague and amorphous category of conspiracy to effect a public mischief will not apply so forcefully to these other conspiracies which have been continuously recognized. Moreover, it may be that these well-established heads are generically linked internally. No suggestion was made that the labels given to those heads were inapposite, for example: "Fraud, like contempt of court, may take many forms and a conviction for conspiracy to defraud may well be sustained though the fraud has taken a novel form."[37]

The *Knuller* objection to the creation of new offences has not inhibited the same House that decided *Withers* from upholding the conviction in *Scott*[38] of conspiracy to defraud. By a process of reasoning which transcends many categories of offences the House of Lords may have deduced an offence of vast and unknown dimensions.

The employees of cinema owners were induced to temporarily abstract cinematograph films for the purpose of making infringing copies for distribution without the consent of the owners of the copyright and distribution rights. The defendant was charged with conspiracy to defraud. It was held that deceit was not a necessary ingredient of the offence. "Dishonesty of any kind is enough."[39]

> An agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary

[31] *Id.* at 755.
[32] (1932) A.C. 562.
[33] E.g., Viscount Simonds in *Shaw*, *supra* 268. Rejected in *Reg.* v. *Knuller*, *supra* 435.
[34] Rejected in *Withers*, *supra* 760, 773-4, 772.
[35] E.g., *Mogul Steamship* (1892) A.C. 25, 45; *Quin* v. *Leathem* (1901) A.C. 495, 530, *per* Lord Brampton. Rejected in *Withers*, *supra* 773, 769.
[36] *Per* Lord Diplock, *Withers*, *supra* 761, and see Lord Kilbrandon, *id.* at 773.
[37] *Per* Viscount Dilhorne, *id.* at 758.
[38] *Id.* at 741.
[39] *Id.* at 750 *per* Lord Diplock.

right of his, suffices to constitute the offence of conspiracy to defraud.[40] A generalised offence of this character would render criminal conduct which discloses no criminal offence against property or proprietary rights, liabiilty attaching to the agreement, not to any criminality in its objects.

Even if Viscount Dilhorne's formulation is not "vague and descriptive", it prospectively includes in its abstract terms conduct of great diversity, including conduct not previously held criminal. It is unclear how the principles asserted in *Withers* and the approach adopted in *Scott* are to interact. Is conspiracy to defraud generically grouped around the concept of "dishonesty" and thereby cover any conduct which might be so described? Or is the dictum really only general and descriptive, like Lord Hailsham's in *Kamara*? Viscount Dilhorne's discussion certainly ranges very widely in seeking the meaning of fraud. Although the inductive, "syncretic" process of generalising from specific instances is more firmly based here than in conspiracy to commit public mischief, the extent to which the process has been taken in *Scott* might be thought to offend against the principle that labels should not control this branch of the criminal law.[40a]

Other points of interest to emerge from *Scott* and *Withers* concerned the branch of conspiracy to defraud which involves inducing persons performing public duties to act in breach of those duties. In *Withers* the Court of Appeal[41] decided that the facts disclosed such an offence, and in doing so extended the concept of "public duties" to cover those duties of confidentiality owed by financial institutions to their customers. The House of Lords rejected the extension,[42] and thought it unnecessary to decide if the deception of the public authorities was within this head, since the form of the indictment and the conduct of the trial precluded a proper conviction of conspiracy to defraud. That this head of conspiracy existed, however, was not doubted. Lord Diplock[43] thought the crime of conspiracy to induce breaches of public duty was within the category of conspiracy to defraud, but Lord Simon[44] considered it to have come of age as a new head. He sees in this new head "a potential which seems desirable in an increasingly bureaucratic society".

The power to legislate and create new offences behind such labels as conspiracy to effect a public mischief has been firmly disavowed by the House of Lords, and the principles espoused in *Withers* will be welcomed as a countermeasure to prevent the repetition of an aberation like *Shaw*. It is also apparent that the law of conspiracy still harbours great scope for the development of criminal liability in new situations.

J. E. THOMSON — Second Year student.

T. E. GRIFFITHS, B.A.—Second Year student.

---

[40] *Id.* at 749 *per* Viscount Dilhorne.

[40a] In fixing upon "dishonesty" as an ingredient, conspiracy to defraud, runs parellel to the English *Theft Act*, 1968, which redefines theft in terms of "dishonesty" (s. 7). No doubt this element will have a similar meaning and operation in each offence.

[41] (1974) 2 W.L.R. 28 (C.A.).

[42] *Withers, supra* 760.

[43] *Scott, supra* 750.

[44] *Withers, supra* 772.