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HOUSE OF LORDS

DPP v NOCK and ALSFORD**Lord Diplock, Lord Edmund-Davies, Lord Russell of Killowen, Lord Keith of Kinkel and Lord Scarman****25 May 1978****[1978] AC 979; [1978] 3 WLR 57; [1978] 2 All ER 654; 67 Cr App R 116****CRIMINAL LAW AND PROCEDURE – NOT A CRIMINAL CONSPIRACY AT COMMON LAW TO AGREE TO COMMIT AN OFFENCE, WHERE COMMISSION OF THE OFFENCE IS IMPOSSIBLE.**

(The following is an extract of the decision which is reported in 52 ALJ at page 515)

The House of Lords carried to a logical conclusion in the area of criminal conspiracy its decision in *R v Smith* (1975) AC 476 (noted in (1976) 50 ALJ 328) to the effect that, at common law, an accused cannot be convicted of an attempt to commit a criminal offence where the commission of the relevant offence as to which the charge is laid was in the circumstances impossible of commission. It was unanimously held by Lord Diplock, Lord Edmund-Davies, Lord Russell of Killowen, Lord Keith of Kinkel and Lord Seaman, reversing the Court of Appeal that where two or more persons agree upon a course of conduct with the object of committing a criminal offence (whether statutory or common law), but, unknown to them, it was not possible to achieve their object by the course of conduct agreed upon, they cannot be charged with committing the common law crime of conspiracy. The decision represents a confirmation, and a re-affirmation at the same time of *R v Smith* for, although their Lordships took note of the statement to them that *R v Smith* "was causing difficulties in some respects", Lord Scarman, delivering the key speech (concurrent in by his colleagues), specifically disposed of this proposition by declaring: (a) that *R v Smith* was a very recent decision unanimously reached after hearing full argument; and (b) that it was "correct in principle".

The respondents were two of five defendants convicted of a conspiracy to contravene s4 of the *Misuse of Drugs Act 1971* (UK) by producing a "controlled drug" of Class A, namely cocaine. Reducing the alleged offence of conspiracy to the specific particulars of the case, what the defendants had agreed to do was to seek to obtain cocaine from a certain anaesthetic substance used in dentistry, the name of which suggested a content of cocaine, but which in fact contained no cocaine. It was not disputed by the Crown that it was impossible by separation or by any other process to produce cocaine from this substance. Under the mistaken belief none the less that the substance could yield cocaine, the defendants made unsuccessful attempts to extract cocaine therefrom, and it was only after they had been arrested that they learned that there was no way in which cocaine could be produced from the substance.

Both the trial judge in his summing up and the Court of Appeal had however treated this aspect of impossibility as irrelevant, holding that the crucial matter was the agreement between the defendants to produce cocaine, it was immaterial that cocaine had not been, and could not be produced.

On the Court of Appeal's reasoning *R v Smith* did not apply to a conspiracy to commit the impossible because: (a) conspiracy ought not to be treated as a "preliminary" or "inchoate" crime, in the same way as in attempt, inasmuch as the criminal nature of conspiracy did not depend upon its being like an attempt, a step towards the commission of a criminal act; the gist of conspiracy was the fact of agreement representing the *actus reus*, the *mens rea* being the intention to do the unlawful act; and (b) the scope of the agreement was thus irrelevant, as was therefore also, the aspect whether or not anything was, or could be done to implement the agreement.

The House of Lords did not however agree with this rationalisation of a criminal conspiracy. Conspiracy according to Lord Scarman was likewise a "preliminary" or "auxiliary" crime, and common sense and justice combined to require of the law that no man should be punished merely for his guilty intention in entering into an agreement, unless it could be shown that what he had agreed to do was unlawful, that is to say, agreeing to do an unlawful act, or to do a lawful act by unlawful means. Here the course of conduct contemplated by the defendants could not in any circumstances have been unlawful because it could not have resulted in the commission of the statutory offence of producing cocaine in contravention of the *Misuse of Drugs Act* 1971.

Lord Scarman was careful to distinguish the facts of the instant case from those of a case of an agreement to commit a crime, capable of being committed in the way agreed upon, but frustrated by a supervening event making its completion impossible. It would seem, therefore, that only in the case of impossibility *ab initio* is a conspiracy to try to do the impossible non-criminal.
