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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v MILLS

Young CJ, Crockett and King JJ

14-15, 18 March, 23 October 1985

[1986] VicRp 21; [1986] VR 179; (1985) 17 A Crim R 214

CRIMINAL LAW – PROCEDURE – SUBSTANTIVE OFFENCE COMMITTED – CHARGE OF CONSPIRACY LAID – WHETHER PROCEDURALLY PROPER – WHETHER OPPRESSIVE OR ABUSE OF COURT'S PROCESS.

Where a substantive charge is available, but the accused is presented on and convicted of a conspiracy charge, generally, the conviction will not be set aside unless it is shown that such proceedings were an abuse of the Court's process. In the present case, there was nothing to suggest that the Crown had proceeded in abuse of the Court's process.

THE COURT: *[After setting out the facts and another ground of appeal not relevant to this Report, the Court continued]:* ... **[13]** The next submission of the applicant was based upon grounds 3 and 5 of his notice and was summarized in counsel's summary of argument as follows:

> "1. It is undesirable to charge conspiracy when a substantive offence has been committed and there is a sufficient and effective charge available to the prosecution. Such a course involves injustice to the accused and a conviction obtained in such circumstances should be quashed. Such a charge is oppressive and amounts to an abuse of process."

Mr Sher referred us to a number of cases in which Courts have expressed disapproval of charges of conspiracy where a substantive charge was available. The argument suggested that the trial Judge had a discretion to refuse to allow the Crown to proceed upon a charge of conspiracy if it could be seen that it would be unfair to do so. In the end, however, Mr Sher was obliged to concede that in order to persuade the Court to quash the presentment or set aside the conviction he had to show that to proceed as the Crown had proceeded was to abuse the process of the Court. It is not necessary to refer to all of the cases mentioned by Mr Sher. In many of them there is no more than a judicial disapproval of the Crown's charging conspiracy in general. There are many such cases but we **[14]** shall quote only from one of the more complete statements. In *R v Cooper* [1947] 32 Cr App R 102, Humphreys J speaking for the Court of Criminal Appeal (Lord Goddard CJ, Humphreys and Singleton JJ) said (at pp110-111):

> "It was said in the judgment of this Court in *Luberg and Others* [1926] 19 Cr App R 133, that difficulty had arisen in that case as the result of including a count for conspiracy together with a number of counts charging particular offences against that section of the *Larceny Act*, 1916, s32, which makes it an offence to obtain goods by false pretences.
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> Sankey J, as he was in those days, said this at p136:
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> > 'But we do desire to say one word about the whole indictment. It will be observed that it starts with the general count for conspiracy. I am far from saying that that is wrong. It is perfectly open to prosecutors to do that, but it does, in our judgment, place the defendants in a case like this in some difficulty. The reason is that it renders admissible evidence of what one prisoner says in the absence of the others, because if they are all conspirators, what one of them says in furtherance of the conspiracy would be admissible evidence, even though it was said in the absence of the other conspirators. This is not only my own opinion. There is the well-known case of *Boulton and Others* [1871] 12 Cox CC 87, where Cockburn CJ, in summing up, refers to this procedure and says (at p93): "I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety

> of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses".
>
> It is perfectly true that that case was different from the present one. It is equally true that since the decision in that case an Act of Parliament has been passed which enables a prisoner to go into the witness-box and give evidence. It is a perfectly admissible and **[15]** proper course to pursue, and a course which is often pursued, but we think that if that course is pursued, great care and great caution is necessary during the hearing of the evidence to be quite sure that no evidence is given which is inadmissible, and great care is required in the summing-up to keep all the several issues perfectly clear.'"

In that particular case the vice was the joinder in one indictment of a count of conspiracy with substantive counts. The accused had been convicted of conspiracy to steal although acquitted of four counts of robbery and four counts of larceny. The conviction was quashed on the ground that the verdicts were inconsistent. So with the other authorities to which we were referred. In any case where a conviction has been quashed, it has always been quashed for some reason other than the oppressive nature of the charge of conspiracy. See e.g. *Gerakiteys v R* [1984] HCA 8; (1984) 153 CLR 317; 51 ALR 417; (1984) 58 ALJR 182; 12 A Crim R 54 (no evidence to support conspiracy); *R v Dawson* [1960] 1 All ER 558; [1960] 44 Cr App Rep 87 (convictions quashed because several conspiracies charged as one); *R v Griffiths* [1966] 1 QB 589 (several conspiracies charged as one and substantive counts in the same indictment).

We were not referred to any case in which a conviction for conspiracy was quashed solely on the ground that the charging of the conspiracy was oppressive, although we were referred to a number of cases in which the Court expatiated upon the undesirability of charging conspiracy. See e.g. *R v Hoar* [1981] HCA 67; (1981) 148 CLR 32; [1981] 55 ALJR 43, [1981] 37 ALR 357 especially at pp361-2; *Grunewald v United States* [1957] 353 US 391 at p404; 62 ALR 2d 1344; 1 L Ed 2d 931; 77 SCt 963; 1 L Ed 931; *R v Ryan* [1984] 55 ALR 408; (1984) 13 A Crim R 97. It is unnecessary to cite more. The principles are clear.

The Court does not look with favour on charges of conspiracy **[16]** realising the disadvantage at which an accused can be placed thereby and although the Court retains the power, in the interests of justice, to quash a conviction which is the result of oppression, it will rarely, if ever, do so except where the charge is brought as an abuse of the process of the Court. It was no doubt considerations such as these which drove Mr Sher to concede that he had to show an abuse of process. Mr Sher did not shrink from attempting to do so, but in our opinion, there is nothing in the present proceedings to suggest that the Crown proceeded in abuse of the Court's process and this argument must therefore fail.

[The Court then dealt with the remaining grounds of appeal and dismissed the application for leave to appeal.]

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Solicitors for the Crown: JM Buckley, Solicitor to the Director of Public Prosecutions.
