

Understanding Conspiracy as Inchoate Crime under Indian Criminal Law

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INTRODUCTION

Apart from the commission of offence at the spur of the moment there are four stages of the actual commission of any crime. The *first stage* is the stage of contemplation or forming intention of the commission of the offence. However, mere intention to commit a crime is not punishable. As Brian C.J also observed that “the thought of a man is not triable for the devil himself knoweth not the thought of a man.” But when such intent is expressed in words and can be inferred from his acts, the person can be held criminally responsible. The second stage is of *stage of preparation*, which consists in arranging means or measures necessary for the commission of a crime. Generally, preparation to commit an offence is not punishable. The simple reason behind this is the impossibility to prove the object of preparation. But exceptionally, there are cases where mere preparation to commit offence is punishable because sometimes such preparations preclude the possibility of an innocent offence. The *third stage* is of attempt to commit the offence. An attempt is a direct movement towards the commission of an offence after the preparation has been made. The fourth and *final stage* is the actual commission of the intended crime. When the attempt is successful the crime is said to have been accomplished.

ELEMENTS OF CRIME

To constitute a crime two elements are always necessary, namely, *mens rea* and *actus reus*. The law does not punish a mere evil intention i.e *mens rea* or design unaccompanied by any overt act, technically called *actus reus*, in furtherance of such design.

However, though *actus reus* is necessary to constitute a crime, yet there may be crime even where the whole of the *actus reus*, that was intended, has not been consummated.

INCHOATE CRIMES

A person who starts a criminal path but who is checked before he can accomplish his purpose may commit what is in itself an offence conveniently called an inchoate crime. The word “inchoate crime”, not much used in ordinary discourse, means ‘just begun’, ‘undeveloped’. The common law has given birth to three general offences which are usually termed as inchoate crimes- attempt, conspiracy, and incitement. A principal feature of these crimes is that they are committed even though the substantive offence is not successfully consummated. An attempt fails, a conspiracy comes to nothing, and words of incitements are ignored- in all these instances there may be liability for committing inchoate crime. Amongst all inchoate offences conspiracy is one of the most complicated one. The law of conspiracy may seem to be arbitrary¹ and as Glanville Williams also writes²-

“If the mere intention of one person to commit a crime is not punishable, why should the agreement of two people to do it make it criminal? The only possible reply is that the law is fearful of numbers, and the act of agreeing to offend is regarded as such a decisive step as to justify its own criminal sanction”

On the contrary, the House of Lords has declared that the purpose of making such agreements punishable is to prevent the commission of substantive offence

¹ PSA Pillai's *Criminal Law*, Ed. 9th, 2000, p.268.-

² Glanville Williams, *Text Book of Criminal Law*, Ed. 2nd, First Indian Reprint, 1999, p.420.

before it has even reached the stage of an attempt.³ Conspiracy in common law started its career primarily as a civil injury but was later punishable on an indictment. In its earlier meaning conspiracy was the agreement of persons who combined to carry on legal proceedings in a vexatious or improper way. The Star Chamber gave it more concrete form and the agreement was indictable as a substantive offence, even when no act was done in pursuance of it.

The definition of criminal conspiracy in section 121-A has been taken from Lord Brompton, who defined conspiracy in a case of *Quinn v. Leatham*⁴, in the year 1901. He defined criminal conspiracy by holding that- “ if two or more persons agree together to do something contrary to law or wrongful or harmful towards another person or to use unlawful means in the carrying out of an object not otherwise unlawful, the person who so agree commits the crime of conspiracy.” No overt act in pursuance of the conspiracy is necessary, the illegal combination itself being the gist of the offence. In *Mulcahy v. R.*⁵ Willis J. has also stated that-

“A conspiracy consists not merely in the intention of the two or more but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is only indictable. When two agree to carry it into effect, the very plot is an act in itself and the act of each of the parties promise against promise *actus contra actum* capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means.”

Coming to the Indian context, originally the Indian Penal Code made conspiracy punishable only in two forms i.e conspiracy by way of abetment and conspiracy involved in certain offences.⁶ In the former

case, an act or illegal omission must take place in pursuance of conspiracy in order to be punishable. The latter is a conspiracy by implications and the proof of membership is enough to establish the charge of conspiracy. But, in the early part of this century in India, specially in Bengal, some anarchical crimes were committed on a large scale. Therefore the then Government of India thought it advisable to amend the law on conspiracy and as a result Chapter V-A was added to the Penal Code expressly providing for the punishment for the conspiracy for all types whether an overt act has been done or not. This was done by passing of the Criminal Law (Amendment) Act, 1913⁷. The necessity to widen the scope of the law of conspiracy has been explained in the statement of object and reason⁸ of the Criminal Law (Amendment) Act, 1913, which may be quoted in *extenso*:

The section of Indian Penal Code which deal directly with the subject of conspiracy are those contained in Chapter-V and section 121-A of the Code. Under the latter provision it is an offence to conspire to commit any of the offences punishable by section 121 of the Indian Penal Code or to conspire to deprive the king of the sovereignty of India or any part thereof, or to overawe by means of criminal force or the show of criminal force, the Government of India or any local government and to constitute a conspiracy under this section it is not necessary that any act or illegal omission should take place in pursuance thereof. Under section 107 abetment includes the engaging with one or more persons in any conspiracy for the doing of a thing if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing that thing. In other words, except in respect of the offences particularized in section 121-A,

person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing.(sec.107,I.P.C.)

⁷ Act VIII of 1913

⁸ Vide Gazette of India, 1913, Part V.

³ Kenny, *Outlines of Criminal Law*, Ed. 17th, p. 89. See also *Board of Trade v. Owen* (1957)2 WLR 351 at 357.

⁴ (1901) Ac 495

⁵ (1868) LR 3 HL 306. See also *Barendra Kumar Ghosh v. Emperor*, 14 C.W.N. 1114.

⁶ A person is said to abet the doing of a thing by conspiracy if he engages with one or more other

conspiracy *per se* is not an offence under the Indian Penal Code.

On the other hand by the common law of England, if two or more persons agree to do anything contrary to law, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons who so agree, commits the offence of conspiracy. In other words, conspiracy in England may be defined as an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means, and the parties to such a conspiracy are liable to indictment.

But experience has shown that dangerous conspiracies are entered into India which have for their objects aims other than the commission of the offence specified under section 121-A of the Indian Penal Code and the existing law is inadequate to deal with modern conditions. The present Bill is designed to assimilate the provisions of Indian Penal Code to those of the English law with the additional safeguard that in case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence and when such a conspiracy is to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, and no express provision is made in the Code, provides punishment of the same nature as that which might be awarded for the abetment of such offence. In all other cases of criminal conspiracy the punishment contemplated is imprisonment of either description for a term not exceeding six months or with fine or with both.

Thus, criminal conspiracy after 1913 has been dealt with in the Penal Code in the following forms-

- (i) Where overt act is necessary
- (ii) Where overt act is not necessary and an agreement *per se* is made punishable.

By the reading of the objects and reasons of the Criminal Law (Amendment) Act, 1913, it seems that the main object was to assimilate the Indian law with that of England. But a deep study of the law as incorporated in Chapter V-A of the Indian Penal Code reveals that it is really wider in many respects than the English law of criminal conspiracy and has even led to certain absurd results. In the words of a learned commentator, "The statement of objects and reasons appears in this respect to be inaccurate, since it goes beyond merely assimilating the criminal law of India so that in force in England."⁹ Before the enactment of sections 120-A & 120-B IPC, conspiracy was treated as an abetment. Now it has been defined separately but major conspiracies still continue to be punished as abetment.¹⁰ In criminal conspiracy as defined in section 120-A IPC four ingredients are required:

- i. An agreement between persons.
- ii. To do an illegal act.
- iii. To do a legal act by illegal means.
- iv. An overt act done in pursuance of the conspiracy.

However, under English law only first three ingredients are required and an agreement itself is treated as an overt act and no separate overt act is necessary unless the rule is limited by statute. While, under section 120-A IPC, overt act in furtherance of conspiracy is also required if the act to be done or cause to be done is not illegal (proviso to section 120-A IPC).

Thus, prior to the Amending Act of 1913, conspiracies under the Indian Penal Code could be punished only under section 107 as an abetment and only when the conspired act took place, except under the special provisions,¹¹ where they were specially punished. But after 1913 the commission of the conspired act is not necessary. Now therefore there are two kinds of

⁹ Gour, *The Penal Law*, Ed. 6th, Vol.I, p. 508.

¹⁰ Y.P.Singh, "What is Conspiracy", 1997 Cri.L.J.93.

¹¹ Under sections 121-A, 311, 400, 401 and 402.

conspiracies punishable under the Indian Penal Code, though they are not wholly exclusive of each other. These conspiracies are: (i) conspiracies falling under section 107(2), and (ii) conspiracies which are outside the definition of abetment under section 107 but which fall within section 120-A of the Indian Penal Code.

The concept of punishing conspiracy has been one of the most controversial issues, still existing in the criminal law jurisprudence. While supporting the concept of inflicting punishment for conspiracy, Willis J. has observed that, conspiracies are punished because-

The number and the compact give weight and cause danger and this is more specially the case in a conspiracy... *the gist of the offence of conspiracy then lies*, not in the doing of the act or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but *in the forming of the scheme or agreement between the parties*. The external or overt act of the crime is the concert by which mutual consent to a common purpose is exchanged. In an indictment, it suffices if the combination exists and is unlawful, because it is the combination itself which is mischievous and which gives the public an interest to interfere by indictment.¹²

So long as the design to do a wrongful act rests in the intention only, it is not criminal, but as soon as two or more persons agree to carry it out, the agreement goes beyond mental concept of a design and therefore is an offence of conspiracy. As observed by Mukherjee J.-

The offence of criminal conspiracy is of a technical nature and the essential ingredient of the offence is the agreement to commit the

offence and not actually committing an offence.¹³

But on the contrary there are jurists who have vehemently criticised the concept of punishing the offence of conspiracy. Accordingly, jurists like Russell say that “The crime of conspiracy affords support for any who advance the proposition that criminal law is an instrument of government.”¹⁴ The opportunity, which the vagueness of this crime can offer, to governmental oppressions has been recognized also by an independent judiciary. The law of conspiracy may serve as an easy handle for the oppression in the hands of the executive. As Fitzgerald J. has also stated “the law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be zealously regarded and never to be pressed beyond its true limits”¹⁵ In modern times the tendency of the English and the American courts has been to keep within bounds the employment of charges of conspiracy. Humphrey J.¹⁶ observes-

“There is a growing tendency to charge persons with criminal conspiracy rather than with the specific offences which the evidence shows them to have omitted. The stringent observations of Cockburn C.J. in the case of *Boulton & Others* are in a danger of being overlooked.”

The observation of Cockburn C.J.¹⁷ referred by Humphrey J. are-

“I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of the crime, it is not the proper course to charge the parties with conspiracy 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

¹² *Mulcahy v. R.* (1868), L.R.3 H.L., 306, 317.

Approved by House of Lords in *Queen v. Leatham*, 1957 S.C. 648.

¹³ *B.N. Mukherji v. Emperor*, AIR 1945, Nag. 163, 166; *F.N. Roy v. Collector of Customs*, AIR 1957, SC 648.

¹⁴ *Russell on Crimes*, Vol. I, Ed. 11th, p. 213.

¹⁵ *Irish State Trials* (1867) quoted in Russell, id. at 216.

¹⁶ *R v. West and Others* (1948) 1 K.B., 709, 720.

¹⁷ *R v. Boulton* (1871) 12 Cox, 87, 93.

the possibility of giving evidence against one defendant to the prejudice of the other and which deprives defendant of the advantage of calling their co-defendants as witnesses.”

Huda, being very critical on the Amending Act of 1913, criticised the inclusion of conspiracy as a separate offence. His criticisms are mainly fourfolds-

Firstly, A conspiracy, on principles should be punished only when its object is very serious like waging war against the government (sec.121-A, IPC) and the other cases of conspiracies should be punishable only when they fall under section 107.

Secondly, this Amending Act of 1913 introduces a law which punishes a person, even before the stage of preparation which should not be punishable. This law has thus created an anomaly.

Thirdly, preparations are not punished because they do not cause alarm to the society as also because ordinarily they do not disclose the existence of a criminal intent. Similarly, he argues, a conspiracy though it may itself technically be an overt act, has not the publicity of an overt act and does not produce the same disturbing effect on society, as an ordinary overt act towards the commission of a crime. Conspirators often work in secret and it is seldom that a conspiracy is revealed unless something is done in pursuance of that conspiracy. Therefore, there would be no danger and no inconvenience, if the existing law related to criminal conspiracy were left exactly where it had been before the Amendment Act of 1913.

Fourthly, Huda argues that, it is not the policy of the law to create offences that cannot ordinarily be proved. An individual attempting to commit an offence is given a *locus poenitentia*, while a conspirator has none. The conspiracy is complete as soon as the agreement or combination is formed. Bret J. observed that the crime of conspiracy is completely committed; if it is committed at all, the moment two or more have agreed that they will do, at once or at future time, certain things. No repentance, no desire to withdraw can protect him from punishment under Indian

criminal law. On the contrary, it may be noticed that in cases of attempts, the adoption of means absolutely un-adopted to the end excuses the criminal. For example, a person to kill his enemy by black-magic or witchcraft is not punishable, but once an agreement is entered into to commit murder, even if the means agreed upon are absolutely insufficient, that will not be accepted as an excuse.

However, in defence of this Amending Act, three arguments have been advanced. *Firstly*, that the combination of two or more persons to commit an illegal act gives a momentum to the act and therefore the punishment at the earliest possible stage is justified. Bowen J. in *Moghul case*¹⁸

Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal among several, there can be no doubt. The distinction is based on the sound reason, for, a combination may make oppressive and dangerous that which if it proceeded only from a single person would be otherwise and the fact of the combination may show that the object is simply to do harm to the exercise of one's just right.

The argument may appear to be sound in regard to the offences of rioting or the like relating to the disturbance of the public peace, but may have no force in relation to the offences like forgery and still less in relation to acts which are merely illegal. Similarly, in *Pulin Bihari Das v. Emperor*¹⁹, it was held that-

“The combination is the gist of the offence. There is nothing in the word conspiracy; it is the *agreement*, which is the gist of the offence. The rational of the crime of conspiracy as an inchoate crime is thus, that act of agreeing with another person to commit a crime is a sufficiently decisive act on the road of criminality to make a person subject to the discipline of the law.”

¹⁸ *Moghul Steamship Co. v. McGregor & Co.*, 23 Q.B.D,598.

¹⁹ 16 C.W.N. 1105.

Secondly, all kinds of inchoate crimes are punished on the basis of the reasoning which has been propounded by Bentham, who observes:

“The more these preparatory acts are distinguished for the purpose of prohibiting them, the greater the chance of preventing the execution of the principal crime itself. If the crime not stopped at the first step of his career, he may at the second, or the third. It is thus that a prudent legislator, like a skilful general, reconnoiters all the external post of his enemy with the intention of stopping his enterprises. He places in all the defiles, in all the winding of his rule, a chain of works, diversified according to circumstances, but connected among themselves in such a manner that the enemy finds in each new dangers and new obstacles.”²⁰

But the policy outlined in the observations of Bentham has not been consistently followed in our Code.

Thirdly and finally, it has been suggested that the secrecy with which the conspirators generally act is another ground for departing from the ordinary principles in dealing with the few that are caught.

But however plausible the explanation may be, it is hardly convincing that there is any justification for treating as an offence, an agreement to commit an act that is merely illegal and not an offence when done by a single individual. Russell on crimes observes:

“The application of this theory has caused much difficulty and controversy, especially as to combination with reference to trade or of employees against workmen or of workmen against employers; and the rule has been altered by statute with respect to certain acts done legitimately and not maliciously in furtherance of trade disputes.”²¹

It may be of interest to note that conspiracy as a distinct offence has been taken away from the revised codes of Russia, Bavaria, Austria, Germany and many

other countries. It will cause no inconvenience if the law of conspiracy in our country is amended and the limits to which it has been extended, be curtailed. The framers of the Indian Penal Code must have realized the difficulties in incorporating in the Indian law, the very vague provisions of the English law. But the jurists responsible for the Amending Act of 1913 in their enthusiasm to assimilate Indian law with English law overlooked many things at that time and therefore the change made by them seems hardly justified specially in the context of the modern development of the political and the social structure of the society. At present, the abuse of the law of criminal conspiracy in the hands of Government creates a genuine fear in the minds of its citizens. In this context, it would be worthy to quote Prof. Sayre. He has rightly pointed out that, “A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a variable quicksand of shifting opinion and ill-considered thought.”²² He further emphasizes that, “it would seem, therefore of transcendent importance that judges and legal scholar should go to the heart of this matter, and with eyes resolutely fixed upon justice, should reach some common and definite understanding of the true nature and limits of the elusive law of criminal conspiracy.”²³

CONCLUSION

Thus, conspiracy is an inchoate crime and is punishable primarily because an agreement to commit is a decisive act, fraught with potential dangers; but to bring an agreement to commit a civil wrong within the range of criminal conspiracy is to stretch the rationale of law to the farthest limit. It has been reiterated that Indian Criminal Law Amendment Act, 1913, was passed as an emergent piece of legislation and this measure was motivated by political expedience. No efforts were made to deal with the matter in the ordinary and regular way. It was neither circulated for opinion among the judicial and executive officers of the Government nor the representative public men and bodies were consulted. The result was that a piece of legislation was hurriedly enacted and inconsistent and

²⁰ Bentham, *Principles of Legislation*

²¹ W. Cecil Turner, II, *Russell on Crimes*, 1715 (Universal Law Publication, New Delhi, 11th Ed.).

²² Sayre, “*Criminal Conspiracy*”, Harv. L.R., p.393

²³ *Id.* at 394

unintelligible principles of law were put in action. It may be suggested that the provisions of section 120-A, IPC needs re-examination. Despite the recent amendment and revival of indian criminal laws section 120-A has been copied verbatim. The BNS section 61-A which replaces 120-A retains the core concepts and punishments for criminal conspiracy.