

AN IMPOSSIBLE SITUATION IN IPC

If I were to say that you can commit criminal conspiracy to do an illegal act and still may not be prosecuted for it, well you wouldn't believe me, but the endeavour is to prove the same.

The preamble of IPC reads “*WHEREAS it is expedient to provide a general Penal Code for India*”, the idea is to provide for a Code which applies to all, irrespective of their religion, caste, creed or sex.

The East India Company was created by Royal Charter of 1600. The Regulating Act, 1773¹ was introduced by the British and thereby established separate Civil and Criminal Courts. A first of its kind Supreme Court² was also created by the said Regulating Act at Fort William at Calcutta. Now the charter was to be renewed every 20 years thereby extending the rule of British East India Company for a further 20 years. After The Regulating Act of 1773, the Charter were renewed in the year 1793, 1813 and 1833.

IPC owes its origin to The Government of India Act, 1833, also popularly called as The Charter of 1833. In 1833, Macaulay moved the House of Commons to codify the whole criminal law in India and bring uniformity. It was reasoned by him in the House of Commons that Muslims were governed by Quran and in the Bombay Presidency, the Hindus were governed as per Manusmriti. Thus, the Pundits and the Kazis were to be consulted on points of law, and the subjects in certain respects had to face the decision of court, at times, grossly arbitrary. During that period, the laws were often uncertain and differed widely from province to province. This charter of 1833 had a provision for first Law Commission of India. The first Law Commission of India was set up in 1834 and Macaulay became its first chairman. Now

¹ Also called as East India Company Act, 1772

² Sadar Nizamat Adalat

Macaulay was given the task of writing a common penal code for India and hence he started drafting IPC.

T.B. Macaulay had completed the draft IPC in 1837. A draft code was submitted to Governor General in Council on 14.10.1837. The Code remained a draft for 22 years, undergoing many revisions. Following the Indian Rebellion of 1857, the Government of India Act 1858 was passed thereby transferring all the territories of The East India Company to The British Crown. India formally came under the British Rule and IPC was read in Legislative Council and on 06.10.1860, Governor General gave his assent. It was originally intended to be given effect from 01.05.1861, however the same was finally given effect from 01.01.1862.

In the original IPC, Macaulay had dealt with Criminal Conspiracy in two different manners. Firstly, section 107 which provides for Abetment by Conspiracy and Secondly, Implied Conspiracy as it came to be understood in offences like sections 310, 400, 401 IPC. The latter is a conspiracy by implication and the proof of membership is enough to establish the charge of conspiracy.

Section 310 IPC defines a Thug as *“Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder, is a thug.”*

Whereas section 400 and 401 IPC provides for punishment for belonging to a gang of dacoits and gang of thieves. In all these provisions, the accused associates with other persons habitually for committing offences. Belonging would mean having common intention, an important element of conspiracy, and hence belonging to a gang of thugs, dacoits or thieves implies Criminal Conspiracy.

Macaulay while specifically introducing the concept of Criminal Conspiracy in section 107 had incorporated a very important element, that an act must take place in pursuance of criminal conspiracy. Section 107 defines 'Abetment of a thing' as:

“A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or

Secondly.—Engages with one or more other 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; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.”

Now in section 107 in order to qualify as Abetment by Conspiracy, there should be one person called 'Abettor'¹ who engages one or more person in any Conspiracy and an act or illegal omission must take place in pursuance of that conspiracy.

As per section 107, First step would be that one person engages another in Conspiracy and second step would be that an act must take place in pursuance of that conspiracy, meaning thereby that if any act in pursuance of conspiracy does not take place then the concept of abetment by conspiracy would not be applicable.

Now this concept as provided by Macaulay in section 107 IPC is almost akin to section 34 IPC which provides “*When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him*

¹ Defined in section 108 IPC

alone.” Meaning thereby that section 34 can also be invoked only in those situations where ‘a criminal act is done’.

However, whenever we talk about Criminal Conspiracy, the dedicated chapter provided for the same in IPC is Chapter V-A having only two sections i.e. section 120-A and 120-B IPC. However, it is important to understand, that sections 120-A and 120-B IPC were not the first sections to be added by way of an amendment in IPC pertaining to criminal conspiracy. In-fact the first amendment was section 121-A and the said amendment of section 121-A was result of a judgment.

The House of Lords delivered a judgment in the year 1868, *Mulcahy v. R¹*. the House of Lords stated, “A *conspiracy consists not merely in the intention of 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 not 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.*”

So the House of Lords held that mere intention is normally not punishable, but when two or more persons agree to carry it into effect, the very agreement is an act itself and no further act is needed. It means for the offence of criminal conspiracy an agreement to do an act is an act itself and no further act in pursuance of conspiracy is required.

However, as discussed above, Macaulay intended that in order to be punishable an act or illegal omission must take place in pursuance of conspiracy.

¹ (1868) L.R. 3 H.L. 306

But with the passing of *Mulcahy v. R*, the scope of law of conspiracy was widened, within 2 years, by the Amending Act of the year 1870, thereby adding section 121-A¹. The explanation added to section 121-A reads as under

“Explanation.—To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.”

A conspiracy to commit an offence under section 121 Indian Penal Code or to overawe the government by means of criminal force or the show of criminal force, is punishable. But to constitute a conspiracy in such a case it is not necessary that any act or illegal omission should have taken place.

Every Indian wanted to overthrow the British Government. The British Government had just partitioned the Bengal in 1905. A nationalist movement had started throughout the Country and there was complete political turmoil. Britishers knew that in order to maintain law and order, they need to curb all the conspiracies being hatched against them and hence in 1913 Indian Criminal Law Amendment Act was passed which gave an extended effect to the law of Conspiracy in India. Chapter V-A was added, thereby adding two sections i.e. 120-A and 120-B IPC. The necessity to widen the scope of law of conspiracy has been explained in the statement of objects and reasons as under:

“Experience has shown that dangerous conspiracies are entered into in India, which have for their object aims other than the commission of the offences specified in S. 121-A of the I.P.C. and that the existing law is inadequate to deal with modern conditions. The

¹ Conspiracy to commit offences punishable by section 121

present Bill is designed to assimilate the provisions of the Indian Penal Code to those of the English Law with the additional safeguard that, in the 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.”

Thus section 120-A IPC defines Criminal Conspiracy and now not only for waging war against India but for any offence in IPC, no overt act was necessary and an agreement *per se* is made punishable. Section 120-A read as under:

“When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object. “

Now here the criminal conspiracy would be when two or more persons agree to do an illegal act. The use of the word ‘illegal’ in the definition of criminal conspiracy creates a nearly impossible situation. The word ‘illegal’ is very comprehensive, as the same is defined in section 43 IPC which is as follows:

“The word “illegal” is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action”

Though the word offence is not defined in IPC *per se*, but we may borrow the definition from Code of Criminal Procedure, 1973 which defines an offence as an act which is made punishable by law¹.

So it means, word illegal in IPC is applicable to anything which is

- (i) An offence: Prohibited by law and made punishable by law, or
- (ii) Prohibited by law: to be differentiated from an offence, which is also punishable, or
- (iii) Furnishes grounds for a civil action.

Now enormity of concept of Criminal Conspiracy can be adjudged from two facts. Firstly para 2 of section 40 IPC makes it clear that in Chapter V-A the word offence denotes a thing punishable under this Code, or under any special or local law. It means the acts covered in category (i) would cover not only the offences in IPC but any offence provided under any law in entire India. Secondly, the enormity can be adjudged from the fact that the cases falling under category (ii) and (iii) are otherwise not punishable in IPC. If you commit an act which is simply prohibited by law but not punishable or an act which is Civil in nature and only gives you grounds for civil action, are not punishable, but any conspiracy to do such an act is criminal conspiracy and is liable to be punished.

It is for this reasons that the proviso to section 120-A says that ‘no agreement except an agreement to commit an offence shall amount to criminal conspiracy’ unless some act is done in pursuance of conspiracy. Meaning thereby that in cases of offences, an agreement to commit an offence *per se* is criminal conspiracy and hence punishable, as declared by *Mulcahy*

¹ Section 2(n) of the Code of Criminal Procedure, 1973

v. *R* and as declared by Explanation to section 121-A. However, remaining agreements i.e. agreements falling under category (ii) and (iii) will not become criminal conspiracy merely on the basis of agreement but an overt act would be necessary, as originally intended by Macaulay in section 107.

An analytical approach makes it clear that the use of the word ‘illegal’ in section 120-A is a bit of an oxymoron. It creates a situation where two persons agree to do an act which simply furnishes you grounds for civil action and even if the object is achieved, it would still provide grounds for civil action, but just because two persons decided to do such an act, where the act itself is not punishable but the agreement to do such an act is punishable by defining the agreement as Criminal Conspiracy.

The idea behind the offence of Criminal Conspiracy is to discourage criminal association. But it is difficult to understand that if the object sought by a combination is in no way criminal and if the means utilised are in no way criminal, then where lies criminality?

To illustrate, a husband conspires with his family members to desert his wife. Now desertion gives the wife, right to take civil action in the form of Divorce, but the desertion is not punishable. However, as per section 120-A the conspiracy to desert wife, provided the actual desertion takes place, is punishable.

Ironically 120-A IPC leaves space for the situation to be created where the act for which criminal conspiracy is being hatched is not punishable but the act of conspiring is punishable.

Section 120-B is the punishing section which provides:

“(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.”

Now, even with skewed interpretation, if it is construed that such an improbable situation arises that where a man is going to be punished for a criminal conspiracy to do an illegal act and the illegal act being not an offence, but only either prohibited by law or which gives ground for civil action then the same would be punishable by sub-section (2) of section 120-B.

The reason for not having such prosecutions, commonly, is probably the cumbersome procedure, as in order to invoke section 120-B (2) we may have to follow the procedure under section 196 Cr.P.C. which reads:

“.....

(2) No Court shall take cognizance of the offence of any criminal conspiracy punishable under section 120B of the Indian Penal Code (45 of 1860), other than a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings....”

Another reason for not having to see 120-B(2) being invoked for conspiracy to commit an act prohibited by law or which give grounds for civil action is that, Conspiracy is understood as an inchoate offence. Commonly called as one-legged offences. It is normally to be read with another enabling offence. Like section 302 IPC read with 120-B IPC. Now a bit of conundrum stands created in cases falling under category (ii) and (iii). With whom shall we attach section 120-B in cases falling under clause (ii) and (iii).

Well I think it is time to revisit my promise. Like I said, it is possible that you can commit conspiracy to do an illegal act and still may not be prosecuted for it.

Law of criminal conspiracy is an instrument of governmental oppression. Needless to say that the Indian Criminal Law Amendment Act, 1913, was passed as an emergent piece of legislation and motivated by political expediency. It was neither circulated for opinion among the judicial and executive officers of government nor the representative public men and bodies were consulted. The result was that a piece of legislation was hurriedly enacted and inconsistent and unintelligible principles of law were put into action. Sweeping provision of section 120-A IPC needs re-examination. To apply the law of criminal conspiracy for an agreement to commit torts generally is not wholesome. The conspiracy to do an 'illegal act' is uncertain and covers a wide area with regard to the commission of offences. The law also needs statutory modification in this respect and its use may be limited to determinate heads of offences only.

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