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CRIMINAL LAW NEWSLETTER

WHAT CONSPIRACY?

Warnings and lessons for conspiracy cases

RICHARD MOSS (2005)

Abstract

This article considers the recent case of *R v Johnson* [2020] EWCA Crim 482 and its implications for practitioners drafting conspiracy indictments and advising clients in relation to them.

Introduction

What conspiracy? Not a comment made on arrest, but something that should be at the forefront of every practitioner's mind when considering a conspiracy indictment. What is the *precise* conspiracy that is being alleged?

Those involved in conspiracy cases cannot say they have not been warned.

"We venture to say that far too often…accused persons are joined in a charge of conspiracy without any real evidence from which a jury may infer that their minds went beyond committing with one or more other persons the one or more specific acts alleged against them in the substantive counts, or went beyond a conspiracy to do a particular act or acts."

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So said the court in *Griffiths [1968] 1 QB 589.* This warning was reiterated in *R v Shillam* [2013] EWCA Crim 160 where the court further emphasised at paragraph 25:

"The moral of the case is that the prosecution should always think carefully, before making use of the law of conspiracy, how to formulate the conspiracy charge or charges and whether a substantive offence or offences would be more appropriate."

In *R v Johnson* [2020] EWCA Crim 482 an appeal against conviction was upheld so far as one defendant was concerned. The case bears a salutary lesson for those drafting conspiracy indictments and those advising their clients in relation to such indictments to give careful consideration to what exactly it is said that the individual defendant is said to have conspired or agreed to do.

General principles

This article will not rehearse the law of conspiracy, but some of the key principles as set out in *Johnson* at paragraph 25 *et seq* are worthy of repetition (with emphasis added):

" 25. It is of the essence of a conspiracy that ***there must be an agreement*** to which the defendant is a party and that each defendant charged with the offence must be proved to have shared a ***common purpose and design***, rather than similar or parallel purposes and designs, see for example, *Shillam* [2013] EWCA Crim 169 at [19]-[20].

26. However, it is possible for the evidence to show the ***existence of a conspiracy of narrower scope*** and involving fewer people than the prosecution originally alleged, in which case it is not intrinsically wrong for the jury to return guilty verdicts accordingly: *Shillam* at [20].

27. What are referred to as ***'chain' conspiracies and 'wheel' conspiracies are different*** in structure. In a chain conspiracy, A agrees with B, B with C and C with D. In a wheel conspiracy: A at the hub recruits B, C & D. ***In each it is necessary that the defendants must be shown to be a party to the common design and aware that they are part of a common design to which they are attaching themselves…***

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28. The need to show a common design and an awareness of the common design highlights ***the danger to the prosecution of charging a single conspiracy rather than what may be a series of substantive offences or different conspiracies***, when the offending involves a group of people over a substantial period. Such offending may, on proper analysis, be the result of a series of transactions or agreements, and a single conspiracy may be impossible to prove, see *Mehtab* [2015] EWCA Crim 1260."

R v Shillam

Many readers will be familiar with *Shillam.* That case was said to involve a wheel or chain conspiracy with R at the head of the conspiracy. From the judgment it is unclear whether the Crown nailed its colours to the mast as to whether it was a wheel or a chain.

The jury should have been directed that they first had to consider the guilt of R. If he was not guilty then the other defendants should be acquitted. If he was guilty the jury should then have been directed to consider:

"that if they were sure of his guilt, they must then consider whether the prosecution had proved as against each of the other defendants that they shared a common purpose or design (as distinct from separate but similar designs) so as to be a party to the *same* conspiracy, i.e. a conspiracy wider than the supply of cocaine to that particular defendant"

The court described the Appellant's role as no more than a regular buyer of drugs from R which he would sell to his own customers. There was no evidence of phone contact between him and any other conspirator other than R. He was distinct from being an agent acting for R as part of a single network. To regard him as part of the same wider conspiracy would be, in the court's view, to include every person from the original wholesaler down to the end user.

The decision demonstrates the need to focus upon whether there is a common purpose or design as opposed to separate but similar designs. This obviously begs the question as to where a common purpose ends and a separate design begins? In *Shillam* the fact that he

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was selling for his own benefit as opposed to those higher up the chain seems to have been determinative. This was not, however, the case in *Johnson.* Each case will of course turn on its own facts, but *Johnson* offers some useful illustrative examples.

R v Johnson - Background

Johnson involved a defendant W prosecuted under an indictment known as Sidra 1. W gave evidence under a SOCPA agreement against a number of defendants who were then prosecuted under an indictment known as Sidra 2.

The utility of the case is that it sets out the distinct roles of each defendant in the conspiracy and why or why not they should be held to be conspirators.

The Sidra 2 indictment was drafted in these terms:

"Between the 1 January 2014 and 1 June 2015 conspired together with other persons to supply a controlled drug of Class A, namely cocaine, to another."

A defendant DS pleaded to that indictment thus proving the existence of that conspiracy.

The facts of the case for the purposes of this article can be summarised thus. W ran two cocaine safehouses maintained by three others. They assisted with mixing the drugs, delivering and collecting. When W was out of the country his operation was run by Wi, his right-hand man.

Following a police raid on his safehouses W used R to provide a safe house and deliver drugs.

During the indictment period W supplied cocaine to Bl, a major supplier in his own right, who also leant money to W. Bl and W had been charged under Sidra 1.

Another important piece of evidence from W was that the terms of

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business were that the purchaser of cocaine at this level would be given a specified time to pay to allow them to realise the money through their own onward supply. As the court put it "onward supply was a necessary precondition to payment". It was therefore important as to the interest of a party in onward supply.

The various Appellants were said to be involved in the supply of W or the onward sale of the cocaine supplied by W.

The Appellants arguments can be summarised thus. Those that we can term as "wholesalers" argued that there was evidence of supply to W but nothing to suggest they were party to an agreement for onward supply by W. For those further down the chain that we can terms as "dealers" they submitted that there was no evidence of an agreement with W for onward supply by them. In the alternative they argued that if the Crown could demonstrate that there were any such agreements then they were no more than a series of distinct agreements. Fundamentally they argued that there was no evidence of a common purpose or design. A broad intention to supply cocaine was insufficient to establish a common purpose.

The prosecution contended that the conspiracy encompassed those involved in the Sidra 1 indictment. It involved the purchase of wholesale cocaine for onward transmission to others whether diluted or undiluted in order that they should supply it within a relatively confined geographical area.

R v Johnson – Individual Appellants

Those held to be part of the conspiracy on appeal

A – A supplied W and dealt with Wi in W's absence. Given the quantity and purity he would have known that it was to be diluted for onward supply. Even if A did not know the specific persons that it was to be supplied to, he would have known, stating the obvious somewhat, that some person(s) would have been in the chain of recipients. The court was satisfied that A was party to a wider agreement involving W's onward supply of the drugs supplied by A to

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him.

Be and McB – These were bulk purchasers from W. They introduced W to Bl and were also linked with Wi and R. They supplied to S to whose home they went with W. S paid W for drugs supplied to him by Be and McB. According to the court there was "clear evidence" they shared a common purpose with W. They must have had an appreciation of the scale of the operation and that it went beyond their own supplying with W.

J – J was a wholesale supplier to W. He was aware of one of W's safehouses and that W was cutting cocaine behind the back of Bl. He communicated with Wi whilst W was out of the country. The court stated there was evidence that J knew about and had an interest in W' s activities with the drugs supplied to him by J.

R v Johnson – The successful Appellant

C – C was a lower level dealer. He received cocaine from W in a quantity beyond personal use. He dealt with Wi when W was out of the country. W supplied C as he was a cash buyer and had a network of customers. There was no evidence to show that C knew where W sourced the drugs from. Though, at the risk of stating the obvious, it was said to be a reasonable assumption that they must have been sourced from somewhere with the money being paid back up the line to W and onwards.

In allowing the appeal the court said at paragraph 51:

"Whilst it may have been open to the jury to conclude that [W] and [C] were parties to an agreement which involved [C's] onward supply of the drugs, we do not think that the evidence in his case was sufficient to establish that [C] was party to the larger conspiracy. The particular features which have led us to different conclusions for the other appellants are not present for [C]."

Understanding R v Johnson

The notion of common purpose as opposed to distinct but similar

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purposes is perhaps more clearly demonstrated in *Shillam,* discussed above, than in *Johnson.* When one considers the roles of the various Appellants in *Johnson* at first blush one may consider *C* to have been somewhat fortunate.

C certainly bears similarity to the successful Appellant in *Shillam* in that they were both regular buyers from the central figure in the conspiracy but then distributed through their own network as opposed to a network controlled by or leading back to the said central figure. The same can be said, however, for the conspirators Be and McB.

Johnson is an interesting case as Wi, though central, was not placed at the top of the chain. He was, however, the key link in the conspiracy with those above him, such as Bl, A and J and those below such as Be and McB. Since this network operated on a basis of buy now pay later one can readily understand that the wholesalers supplying W shared a common purpose with W for the onward supply of that cocaine which would ultimately benefit them all.

The dividing line for the mid-level dealers Be and McB when contrasted with C is much finer. The features of evidence which the court suggested lead to Be and McB being caught by the conspiracy included a connection with the right-hand man Wi, supplying S with S paying W and an appreciation of the scale of the operation. It must also be remembered that they introduced W to Bl.

The court, however, made similar observations regarding C as to money being paid back up the line, which would indicate one may think an appreciation of the scale of the operation. Equally C was connected with Wi.

So dealing for your own benefit was not enough to extricate McB and Be from the conspiracy in contrast to *Shillam* and C for whom it was.

Additionally appreciation of the scale of the operation was another factor deemed sufficient to implicate McB and Be, but not C.

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Furthermore connection with other conspirators, in the cases of McB, Be and C all were connected with Wi, cannot be viewed in and of itself conclusive of involvement in the conspiracy.

Johnson does not therefore provide a clear and unequivocal list of what will ensnare you in a conspiracy and what will allow you to wriggle free. It, as with any case, turns upon its own facts. It does, however, provide a useful application of *Shillam* in that one can say that onward dealing for one's own benefit may be insufficient to extricate yourself from a conspiracy.

Equally connections with co-conspirators and awareness of the scale of an operation may not be sufficient for a defendant to be found to be part of a conspiracy. Ultimately C seems to have been involved or aware, but not quite as involved or aware as the other Appellants. The court accordingly drew the conclusion that he was therefore not sufficiently involved or aware to be a part of the common purpose. Mutual benefit as opposed to geographical location appears to have been more of a determinative factor for the court in establishing what the common purpose in fact was.

Conclusion

Returning to the title of this article "What conspiracy?" *Johnson* serves as a useful reminder of the earlier warnings of the courts as far back as *Griffiths*.

When considering conspiracy indictments the central focus must be upon what the precise common purpose that the defendants are said to be agreeing to is. Is it in fact a common purpose as opposed to distinct but similar designs. If the latter then a series of substantive counts or separate conspiracies should be laid.

There are no hard and fast rules as to what behaviour and acts will implicate and those which will extricate in drug conspiracies. *Johnson* certainly illustrates that onward dealing for your own benefit is insufficient in and of itself.

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There is nothing wrong with standard drafting practice of conspiracy to supply a drug of a particular class within a defined time period, but prosecutors need to be cognisant of the requirement to properly identify what that conspiracy is said to involve. A general assertion of an intention to supply a drug is not enough to establish a common purpose or design.

One must really burrow down to the essence of what the purpose is said to be. Prosecutors drafting such indictments must have this at the forefront of their minds and those advising their clients in such cases must be ready to take the prosecution to task as to what the precise purpose is that they are alleging.

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12th June 2020

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