

1963
*Dec. 16
Dec. 16

ROBERT J. WRIGHT, JOSEPH P. }
McDERMOTT AND VINCENT } APPLICANTS;
B. FEELEY }

AND

HER MAJESTY THE QUEENRESPONDENT.

MOTION FOR A REHEARING

Criminal law—Conspiracy to effect unlawful purpose—Obtaining from constable information which it was his duty not to divulge—Whether indictment disclosed an offence under Criminal Code—Criminal Code, 1953-54 (Can.), c. 51, ss. 103, 408(2)—The Ontario Provincial Police Act, R.S.C. 1960, c. 298—Rule 61 of the Supreme Court of Canada.

Following the dismissal of their appeal to this Court in June 1963, two of the appellants, M and F, applied for a rehearing of the appeal in December 1963. They argued that the indictment that they conspired to effect the unlawful purpose of obtaining from a constable of the Ontario Provincial Police information which it was his duty not to divulge, did not disclose an offence under the *Criminal Code* of Canada.

Held: Assuming that this Court had jurisdiction to entertain the application, it should be dismissed.

The purpose alleged in the charge was an unlawful purpose. The fact that the purpose or the breach of trust contemplated by the conspirators, whether as their ultimate aim or only as a means to it, could be, if carried into effect, punishable either under s. 103 of the *Criminal Code* or under s. 60 of the *Ontario Provincial Police Act*, manifested the unlawfulness of the purpose within the meaning of the law attending Common Law conspiracies.

APPLICATION by two of the appellants for a rehearing of this appeal following the judgment rendered by this Court¹. Appeal dismissed.

C. Thomson, for the applicants.

C. Powell, contra.

The judgment of the Court was delivered by

FAUTEUX J.:—On June 24, 1963, this Court dismissed an appeal¹ entered by Robert J. Wright, Joseph P. McDermott and Vincent B. Feeley against their conviction on the following charge:

2. And further that the said Robert J. Wright, Joseph P. McDermott and Vincent Bernard Feeley between the 1st day of January, 1960 and the

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Judson and Hall JJ.

1st day of July, 1960 in the Province of Ontario did unlawfully agree and conspire together to effect an unlawful purpose, to wit:

To obtain from George Scott, a constable of the Ontario Provincial Police, information which it was his duty not to divulge, contrary to the Criminal Code of Canada, Section 408(2).

1963
 WRIGHT,
 McDERMOTT
 AND FEELEY
 v.
 THE QUEEN
 Fauteux J.

Some six months later, in December 1963, both McDermott and Feeley, purporting to be so entitled under rule 61 of the Rules of this Court, applied to this Court for an order granting a rehearing of the appeal on the ground that the above indictment did not disclose an offence under the *Criminal Code* of Canada. Having heard and considered the submissions of counsel for the applicants, the Court, indicating that reasons would later be delivered, declared that, assuming it had jurisdiction to entertain the application, the ground upon which it was made was ill-founded. The application was dismissed.

The charge is laid under s. 408(2) of the *Criminal Code* providing that:

408.(2) Every one who conspires with any one

(a) to effect an unlawful purpose or,

(b) to effect a lawful purpose by unlawful means,

is guilty of an indictable offence and is liable to imprisonment for two years.

The argument made in support of the application is centred upon the meaning to be ascribed to the term "unlawful purpose". It was contended that the unlawful purpose contemplated in the section must be one which, if carried into effect, would constitute an act declared to be criminal by the *Criminal Code* of Canada and that, as the purpose alleged in the charge was made unlawful under s. 60 of *The Police Act*, R.S.O. 1960, c. 298, the charge did not disclose an offence under the *Criminal Code*. The case of *Regina v. Sommervill and Kaylich*¹ was particularly relied on.

While marginal notes in the body of an Act form no part of the Act, the marginal note appended to s. 408(2) accurately designates as "Common Law conspiracy" the offence described in this section which, as defined by Lord Denman in *Rex v. Jones*², consists in a combination "either to do an unlawful act, or a lawful act by unlawful means". Common Law conspiracy is one of the few Common Law offences which, upon the 1954 revision of the *Criminal*

¹ (1963), 2 C.C.C. 178.

² (1832), 4 B. & A. 345, 110 E.R. 485.

1963
 WRIGHT,
 McDERMOTT
 AND FEELEY
 v.
 THE QUEEN
 Fauteux J.

Code, Parliament thought advisable to perpetuate by codification. Martin's Criminal Code 1955 ed., p. 35. Hence the law pertaining to this offence, its elements and the wide embracing import of the term "unlawful purpose", remains unchanged. While the term, as shown in Harrison The Law of Conspiracy, encompasses more than criminal offences, sufficient it is to say, for the purpose of this case, that the purpose alleged in the charge, to wit, the obtention from a constable of information which it is his duty not to divulge, is an unlawful purpose. In the language of Lord Mansfield, in *Rex v. Bembridge*¹:

A man accepting an office of trust concerning the public, especially if attended by profit, is answerable criminally to the King for misbehaviour in his office.

The fact that the purpose or the breach of trust contemplated by the conspirators, whether as their ultimate aim or only as a means to it, be, if carried into effect, punishable either under s. 103 of the *Criminal Code* (vide *Rex v. McMorran*²) or under s. 60 of the Ontario Provincial *Police Act*, adequately manifests the unlawfulness of the purpose within the meaning of the law attending Common Law conspiracies.

With deference, I am unable to agree with the decision rendered in *Regina v. Sommervill and Kaylich*, *supra*, and to accept as well founded the ground alleged in support of this application which, as indicated above, has been dismissed at the issue of the hearing.

Application dismissed.

¹ (1783), 3 Doug. K.B. 327 at 332, 99 E.R. 679.

² (1948), 5 C.R. 338 at 345 et seq., O.R. 384, 91 C.C.C. 19, 3 D.L.R. 237.