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PARSHU RAM

v.

REGINAM

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[COURT OF APPEAL, 1967 (Gould V.P., Marsack J.A., Bodilly J.A.),
5th, 18th July]

Criminal Jurisdiction

Criminal law—offence—attempting to conspire—whether an offence known to the law—relation between incitement and attempt to conspire—Penal Code (Cap. 8) ss.3, 21, 41, 106, 112(2), 120(a), 125(1) (i), 408, 409, 414.

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Criminal law—principles of criminal liability—conspiracy—participation—one person agreeing to commit offence on persuasion by another—whether conspiracy formed—Penal Code (Cap. 8) ss.3, 21, 41, 106, 112(2), 120(a), 125(1) (i), 408, 409, 414.

The appellant endeavoured to persuade one Daya Ram to give false evidence with the intention of securing the acquittal of Abhimannu, who was charged with official corruption. Daya Ram refused to alter his testimony. The appellant was tried upon a charge of “attempting to conspire to pervert the course of justice” contrary to section 120(a) and section 409 of the Penal Code, and was convicted of that offence.

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Held: 1. (Per Gould V.P. and Marsack J.A. — Bodilly J.A. dissenting). That the conviction should be upheld on the grounds —

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(a) That the charge disclosed an offence known to the law of Fiji, and

(b) That though, if Daya Ram had agreed, it would have been for him alone to give the perjured evidence, there would nevertheless have been a completed conspiracy because, under the provisions of the Penal Code, the appellant would have been deemed to have taken part in the offence of perjury and (per Gould V.P.) the appellant’s act of incitement would have constituted a sufficient participation as being a continuing encouragement to Daya Ram to commit that offence.

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2. (Per Bodilly J.A., dissenting). In the absence of clear authority, to hold that every incitement may be charged at the election of the prosecution as an attempted conspiracy, would be wrong in principle. However possible an offence of attempting to conspire may be as a matter of logical deduction from academic distinctions between the concepts of “attempt” and “incitement” it is not an offence known to the law at the present time.

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Cases referred to: *Kabunga v. Reginam* (1955) 22 E.A.C.A. 387; *Mulcahy v. Reginam* (1868) L.R. 3 H.L. 306; *State v. King* (1898) 104 Iowa 727; *Board of Trade v. Owen* [1957] A.C. 602; [1957] 1 All E.R. 411; *R. v. De Kromme* (1892) 8 T.L.R. 325; 66 L.T. 301; *R. v. Aspinall* (1876) 2 Q.B.D. 48; 36 L.T. 297.

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Appeal from a conviction by the Supreme Court.

A B. C. Ramrakha for the appellant.

T. U. Tuivaga for the respondent.

The facts sufficiently appear from the judgments.

The following judgments were read:

B GOULD V.P. [18th July, 1967]—

This is an appeal against a conviction by the Supreme Court on a charge of "attempting to conspire to pervert the course of justice" contrary to s.120 (a) and s.409 of the Penal Code of Fiji. There was also an appeal against sentence but it was not pursued. As the appeal raises a novel point of law the Court has found it convenient that separate judgments be written.

C The particulars of the charge alleged that the appellant and one Dhrup Chand attempted to conspire with Daya Ram to pervert the course of justice in that they did attempt to persuade and induce the said Daya Ram to give false evidence in a judicial proceeding against one Abhimannu. The evidence showed that the appellant and Dhrup Chand visited Daya Ram and tried to persuade him to give false evidence with the intention of securing the acquittal of Abhimannu, who was charged with Official Corruption; it is irrelevant, though ironic, that though Daya Ram refused to alter his testimony Abhimannu was nevertheless acquitted. The result of the trial in the Supreme Court was that the appellant was convicted on the charge abovementioned but Dhrup Chand was not; he was convicted of "attempting wrongfully to interfere with a witness in a judicial proceeding" contrary to s.125 (1) (i) of the Penal Code. The logic of this is not easy to follow, particularly as the appellant and Dhrup Chand were not charged with conspiring together but with attempting to conspire with Daya Ram. However this Court is concerned only with the appeal by the appellant against his conviction.

The first three grounds in the Notice of Appeal are the only grounds which require consideration. They read —

- F " (1) *WHETHER* the offence with which the Appellant was charged is known to law.
- (2) *WHETHER* the learned trial Judge erred in law in not holding that the facts as adduced by the Prosecution did not constitute an attempt to conspire to pervert the course of Justice contrary to Section 120 (a) and Section 409 of the Penal Code Cap. 8.
- G (3) *WHETHER* the learned trial Judge erred in law in not making a distinction between an incitement to commit an offence and an attempt to commit an offence."

H The issue raised is whether the offence of attempting to conspire is one known to the law and whether, if so, the evidence adduced justified the appellant's conviction on the charge. It will be necessary first to look at certain sections of the Penal Code. Section 414 enacts that any person who conspires with another to commit a misdemeanour is guilty of a misdemeanour. There is no definition of "conspire", but by section 3 of the Code, expressions in it are to be presumed, as far as is consistent with

their context and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law. Section 409 provides that any person who attempts to commit a felony or misdemeanour is guilty of an offence, which, unless otherwise stated, is a misdemeanour. Section 120 (a) of the Code, which is one of the sections under which the appellant was charged, provides (inter alia) that any person commits a misdemeanour who conspires with any other person to do anything to pervert the course of justice. Prima facie therefore, an attempt to conspire for any purpose within the ambit of s.120 (a) is a misdemeanour. A
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There may, however, be some situations in which the rigidity of the Penal Code must be relaxed. An attempt to commit an attempt is technically within its provisions but it would be repugnant to right thinking to acknowledge it as a legal concept. It is stated in *Archbold's Criminal Pleading Evidence and Practice* (36th Edn.) para. 4103 that it is said that there cannot, *ex vi termini*, be an attempt to commit perjury. C

I do not think that an attempt to conspire falls within the class of necessary exceptions. It is said that at one stage in the development of conspiracy as a crime there was a tendency to regard it as a form of attempt; *Russell on Crime* (12th Edn.) p.201. Lord Tucker, in *Board of Trade v. Owen* (1957) 1 All E.R. 411 at 416, having discussed the history of the crime, said — D

“Accepting the above as the historical basis of the crime or conspiracy, it seems to me that the whole object of making such agreements punishable is to prevent the commission of the substantive offence before it has even reached the stage of an attempt, and that it is all part and parcel of the preservation of the Queen’s peace within the realm.” E

It could be argued that if an attempt to commit an attempt is unknown to the law, an attempt to commit something which has not even reached the stage of an attempt is equally objectionable. I find such an argument attractive but think the better view is that conspiracy as a substantive crime has become so firmly entrenched in the law that its history and object do not really enter into the present problem. In my view, when the offence of attempted conspiracy has been embodied in the Code, I ought not to permit a distaste for the concept to deter me from acknowledging its existence provided it is a practicable possibility. I think it is practicable possibility though in some cases there would be practical and evidential difficulties. It is easy to envisage a conversation between two prospective burglars concerning the possibility of breaking a safe, which might go through the stages of exploration, preparation, attempt, conspiracy and even recantation. It might be a moot point whether they conspired first and discussed the difficulties afterwards, or discussed the difficulties to ascertain whether conspiracy was desirable, practicable or worth while. This sort of thing would present difficult problems to any court. On the other hand where one clearly endeavours to persuade another to enter into an agreement with him that they together will commit a certain crime I think he is attempting to enter into a conspiracy. The only case to which our attention has been drawn, in which the question has been discussed, is *Reg. v. Kabunga* (1955) 22 E.A.C.A. 387, in which the Court of Appeal for Eastern Africa said that they did not think that F
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“one alone” could attempt to conspire because there could be no offence without mutuality. The point was not essential to their decision and the dictum appears to me to confuse attempt to conspire with attempt to carry out a conspiracy. Certainly a conspiracy requires at least two parties, but if A clearly invites and tries to persuade B to enter into a conspiracy with him is he not attempting to conspire? In view of the particular nature of the crime of conspiracy mere words would I think be a sufficiently proximate overt act to comply with the essential requirements of an attempt. There is one case, though it was not mentioned in argument before this court in which, though the words “solicit” and “incite” are much used, the conviction was, I think, one of an attempt to conspire. It is in *Regina v. De Kromme* (1892) 8 T.L.R. 325, decided by five judges of the Queen’s Bench Division. The case reserved “raised a question whether a person can be convicted of soliciting and inciting another to commit a larceny, or to conspire with him to commit it, so as to cheat and defraud.” The evidence showed that the accused had offered an employee money with the object (unsuccessful) of inducing him to sell his master’s goods at a price below that which was authorized by the master. The conviction was upheld and in the judgment Lord Coleridge said at p.326 —

“.....they had not been able to bring themselves to entertain any doubt that this man was rightly convicted on the count charging an attempt to incite the servant to conspire with him to defraud his master by selling to him his master’s goods at prices below what would give any profit.”

The words used do not indicate a charge that A attempted to conspire with B but that A attempted to incite B to conspire with A, a difference, as I think, in approach rather than in substance. My opinion on this aspect of the appeal is, therefore, that while a charge of attempted conspiracy should be brought only as a last resort, there is no cogent reason for not giving effect to the clear provisions of the Penal Code which in terms create the offence. I would add that in the present case it is apparent that the appellant could have been charged with inciting perjury under sections 112 (2) and 106 of the Penal Code in respect of which a maximum sentence of two years’ imprisonment is authorized.

The next question is whether in the circumstances of the case the appellant was rightly convicted of attempting to conspire. What was established against him at the trial was that he endeavoured to persuade Daya Ram to give false evidence in a judicial proceeding, the giving of which would, of course, have amounted to perverting the course of justice. The normal way of regarding the appellant’s action would be as an incitement to give false evidence. In his summing-up the learned trial Judge defined conspiracy, but did not enter into explanation of the meaning of that term or of what constituted an attempt. I think that the essence of his direction to the Assessors, so far as the appellant is concerned is really to be implied from the following words —

“.....you must ask yourselves whether you are satisfied beyond reasonable doubt that the first accused.....did try to persuade Daya Ram to give false evidence in the case against Abhimannu at Nadi Magistrate’s Court as alleged by the prosecution”.

The implication is that if they were so satisfied they could advise conviction. There is no discussion of the question in the judgment and it is

to be gathered from its terms that the learned Judge regarded trying to persuade Daya Ram to give false evidence as equivalent to an attempt to conspire with him. A

This can only be regarded as a satisfactory direction if in law every incitement to commit a crime is necessarily an attempt to conspire. That such is the case is the conclusion of Mr. Glanville Williams where in his text book on *Criminal Law* (2nd Edn.) at p.669, he says —

“If the argument is correct so far, a further consequence follows. Suppose that D incites E to commit a crime, and E gives way to the persuasion: D is guilty of incitement and also (as has just been argued) conspiracy, even though it is not intended that D shall be present or assisting at the crime. E also becomes guilty of conspiracy by the mere fact of lending ear to the solicitation and agreeing to act. On this view, every act of incitement is an attempted conspiracy.” B

This involves the proposition that one who only incites another to commit a crime becomes guilty of conspiring to commit that crime if that other accedes to the persuasion, even though the inciter takes no part in the crime beyond the incitement. The incitement must necessarily precede the conspiracy because the conspiracy (if any) would arise out of the incitement. In terms of the present case, if Daya Ram had acceded to the appellant's request there is no suggestion in the evidence that the appellant would have played any further active part. The actual crime of giving false evidence could only have been committed by Daya Ram. It would have been possible for the appellant to have assisted by suggesting the details of the evidence to be given but this had in fact been done as part of the act of incitement. In the *De Kromme* case, if the employee had been persuaded, further action by both parties pursuant to the conspiracy would have been necessary — the payment of the bribe and the sale of the goods. C
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Brett J.A. said in *Reg. v. Aspinall* (1876) 2 Q.B.D. 48, at p.58 —

“Now, first, 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 some future time, certain things.”

In *Mulcahy v. Regina* (1868) L.R. 3 H.L. 306, p.317 it is put — F

“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.” G

These words do not seem particularly apt to describe the situation which would have arisen in the present case had Daya Ram agreed to do what was asked. Yet it would appear that only a very slight degree of participation is required on the part of any person to involve himself in a conspiracy. Mr. Glanville Williams bases the passage I have quoted above largely upon words of Wright (*Law of Criminal Conspiracies and Agreements*) to the effect that “mere assent to and encouragement of the design” is enough. Passages from Mr. Justice Wright's text book were also quoted by Lord Tucker in *Board of Trade v. Owen* (supra) at pp.414-5, which indicates that the work is regarded as having some measure of authority. H
I think that the correct answer in the present case is that the act of incitement was ample and active encouragement to Daya Ram, and had he assented to the plan, would have been a continuing encouragement: what

is now regarded as an attempt, though it probably would not as a matter of law have merged as an offence in the completed crime, would in its factual effect be carried over and become part of the conspiracy. There is nothing which prevents a single act forming a constituent element of two separate crimes. From another point of view, if Daya Ram had assented and actually given false evidence the appellant could also have been charged with perjury, either as a principal offender or with counselling, under s.112 of the Penal Code. Having regard to this consideration I think that as from the time of Daya Ram's consent there would have been such common purpose or mutuality of intention on the part of the appellant and Daya Ram as would constitute a conspiracy in law.

I have considered this matter in relation to the definition of "attempt" in section 408 of the Penal Code; only the first paragraph is material in the present case —

"When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence."

It might be suggested that conspiracy was not the offence which the appellant intended — he intended to incite or procure the giving of false evidence and if he attained that object it was really immaterial for his purpose whether in the meantime Daya Ram expressed agreement or not. The co-relation of the words "an offence" and "the offence" (twice used) indicates that a person may only be convicted of attempting to commit the offence he intended. This argument, however, was not advanced at the hearing of the appeal, and I think the true answer must be that, whatever a person's ultimate design may be, he must be deemed to intend to commit any offence which is the inevitable consequence of his method of proceeding to the attainment of his object.

For the reasons I have given I consider that the direction given by the learned trial Judge to the assessors was adequate in the circumstances and I would therefore dismiss the appeal. As the majority of the Court is of that opinion the appeal is dismissed; the appeal against sentence, not having been pursued is also formally dismissed.

MARSACK J.A. —

I have had the advantage of reading the careful and detailed judgments of Gould V.P. and Bodilly J.A. and do not find it necessary to repeat the recital of the facts, and of the arguments of counsel, which appears in those judgments. I will confine myself to explaining very shortly my own view and the considerations upon which that view is based.

The matter is, in my opinion, one of great difficulty. There appears to be a singular lack of authority directly in point. I am in agreement with my brother judges that logically there may be such an offence as attempting to conspire. The difficulty lies in deciding whether the proved and admitted facts in the present case justify a conviction for that offence.

Although the term "conspiracy" is not defined in the Penal Code the definition given in *Mulcahy v. R.* (1868) L.R. 3 H.L. 306 at p.317 has been widely accepted as authoritative. This reads:

"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, or to do a lawful act by unlawful means."

Where one man approaches another with a proposal that they should in concert carry out a criminal act, and the other person agrees, then there can be no doubt, in my view, that a conspiracy has been formed. Each party would then be guilty of the crime of conspiracy. If the person approached does not agree, there still has in my opinion been an attempt by the first person to form a conspiracy, and he can properly be charged with an attempt to conspire.

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The case which to me presents a real difficulty is one, like the present, where the person who makes the approach in the first instance will not be an active participant in the commission of the crime. The whole basis of the crime of conspiracy seems to me to involve the concerted action of two or more persons. Accordingly, where one is inciting another to commit a crime to be carried out solely by that other, it can well be argued that there is no conspiracy but only an incitement. In the United States case of *State v. King* (1898) 104 Iowa 727, cited in *Glanville Williams on Criminal Law* 2nd Edition page 382, a person charged with conspiracy was acquitted on that count because there was no agreement for concert of action.

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The weight of English authority, scanty though that authority is, seems however to widen considerably the scope of the term "conspiracy". As *Glanville Williams* says, op. cit. at page 668:

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"Mere knowledge of and mental consent to a crime about to be committed by another does not make a man a conspirator; but quite a slight participation in the plan will be sufficient."

In *Wright on the Law of Criminal Conspiracies and Agreements* the learned author, in a passage cited by *Glanville Williams* op. cit. at page 668, sets out in still broader terms the circumstances in which a person may become a conspirator:

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"..... a person may involve himself in the guilt of a conspiracy by his mere assent to and encouragement of the design, although nothing may have been assigned or intended to be executed by him personally."

It is by no means easy to reconcile the conflicting principles which have been expressed in the courts and in the recognised text books on the subject of the degree of participation necessary to constitute a person a party to a conspiracy, and accordingly guilty of the crime of conspiracy. On the one hand there is the passage quoted from *Wright* which is approved by *Glanville Williams*. On the other hand there is the American decision to which reference has already been made, and also the East African case of *R. v. Kabunga* (1955) 22 E.A.C.A. 387 cited in the judgment of the learned Vice President, in which it was held that there must in a conspiracy be an element of mutuality. As a matter of general principle I should have been inclined to hold that there cannot be a conspiracy between two or more persons to carry out a criminal purpose unless both or all the persons involved are to be participants in the carrying out of the plan; but it would appear from the English authorities that the meaning of the term "conspiracy" has been broadened so as to include a great deal more than that. As is stated in *Russell on Crime* 12th Edition page 201:

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"In the common law courts it was received as a loosely expressed doctrine capable of almost indefinite extension."

A The point therefore arises: can it be said that if Daya Ram had agreed to the proposal put to him by the appellant a conspiracy would have been brought into being, although the appellant would have played no active part in the commission of the criminal act?

B I think the answer may be found in section 21 of the Penal Code, which provides that when an offence is committed any person who counsels or procures any other person to commit the offence is deemed to have taken part in committing the offence and may be charged with actually committing it. By reason of this provision the appellant would have been regarded as a participant in the crime of perjury, if perjury had been committed by Daya Ram. This would have the effect of bringing the appellant within the generally accepted definition, and making him a party to a conspiracy if, in fact, his plan had been carried out. If this view is correct then he could properly be convicted of an attempt to conspire in the circumstances of the present case.

C I come to this conclusion with hesitation. The course adopted in the present case from the beginning seems unusual and in my view hard to justify. On the evidence produced by the prosecution there could have been brought the perfectly straightforward charge of inciting perjury under section 112 (2) of the Penal Code. It is difficult to understand the reason which impelled the prosecution, in the circumstances disclosed, D to bring a charge of attempting to conspire, a charge which is almost unknown in the courts of the Commonwealth.

For the reasons I have endeavoured to set out I have reached the same conclusion as the learned Vice President and would dismiss the appeal.

BODILLY J.A. —

E This is an appeal against conviction and sentence of the appellant by Hammett J. on the 9th March, 1967, sitting in first instance, on an information alleging an attempt to conspire to pervert the course of justice contrary to section 120(a) and section 409 of the Penal Code. There was also an alternative count in the information of attempting wrongfully to interfere with a witness in a judicial proceeding which was not proceeded with upon the conviction of the appellant upon the count of attempted conspiracy.

F The information read as follows —

“ INFORMATION BY THE ATTORNEY-GENERAL
PARSHU RAM s/o GOPAL and DHRUP CHAND alias MUNNA s/o SUKHU are charged with the following offence :—

STATEMENT OF OFFENCE

G ATTEMPTING TO CONSPIRE TO PERVERT THE COURSE OF JUSTICE: Contrary to section 120 (a) and section 409 of the Penal Code.

PARTICULARS OF OFFENCE

H PARSHU RAM s/o GOPAL and DHRUP CHAND alias MUNNA s/o SUKHU on the 28th day of August, 1966, at Suva in the Central Division did attempt to conspire with DAYA RAM s/o SAHADEO to pervert the course of justice in that the said PARSHU RAM s/o GOPAL and DHRUP CHAND alias MUNNA s/o SUKHU did attempt to persuade and induce the said DAYA RAM s/o SAHADEO to give false evidence in a certain judicial proceeding then pending in the Nadi

Magistrate's Court against one ABHIMANNU s/o CHIKURI, namely, REGINA v. ABHIMANNU s/o CHIKURI (Case No. 292 of 1966, Nadi Magistrate's Court).

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ALTERNATIVE COUNT
STATEMENT OF OFFENCE

ATTEMPTING WRONGFULLY TO INTERFERE WITH A WITNESS
IN A JUDICIAL PROCEEDING:

Contrary to section 125 (1) (i) of the Penal Code.

B

PARTICULARS OF OFFENCE

PARSHU RAM s/o GOPAL and DHRUP CHAND alias MUNNA s/o SUKHU on the 28th day of August, 1966 at Suva in the Central Division did wrongfully attempt to interfere with DAYA RAM s/o SAHADEO, when the said DAYA RAM s/o SAHADEO was a witness in a judicial proceeding in that the said PARSHU RAM s/o GOPAL and DHRUP CHAND alias MUNNA s/o SUKHU did attempt to persuade and induce the said DAYA RAM s/o SAHADEO to give false evidence in a certain judicial proceeding then pending in the Nadi Magistrate's Court against one ABHIMANNU s/o CHIKURI, namely, REGINA v. ABHIMANNU s/o CHIKURI (Case No. 292 of 1966, Nadi Magistrate's court).

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DATED at Suva this 23rd day of February, 1967."

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After hearing the evidence and argument the learned judge convicted the appellant on the first count and sentenced him to twelve months imprisonment and did not proceed, in his case, with the second count. He convicted the second accused, namely Dhrup Chand alias Munna s/o Sukhu on the second or alternative count and did not proceed, in his case, upon the first count.

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The appellant has raised five grounds of appeal in respect of his conviction and, in respect of the sentence, the general ground that it is harsh and excessive in view of the crime committed.

I shall deal firstly with the grounds of appeal against his convictions. They read as follows —

- "(1) *WHETHER* the offence with which the Appellant was charged is known to law. F
- (2) *WHETHER* the learned trial Judge erred in law in not holding that the facts as adduced by the Prosecution did not constitute an attempt to conspire to pervert the course of Justice contrary to Section 120 (a) and Section 409 of the Penal Code Cap. 8.
- (3) *WHETHER* the learned trial Judge erred in law in not making a distinction between an incitement to commit an offence and an attempt to commit an offence. G
- (4) *WHETHER* the learned trial Judge erred in law in giving inconsistent verdicts in holding that the 1st Appellant was guilty on the 1st Count and the 2nd Appellant was guilty on the 2nd Count. H
- (5) *WHETHER* the learned trial Judge erred in law in treating SHIURAM and STEPHEN HARI RAM as independent witnesses to find corroboration of the evidence given by Dayaram.

DATED this 30th day of March, 1967."

A I shall discuss the first three grounds of appeal together. Indeed the first ground of appeal embraces both the second and the third. It is to be noted that according to the record, this ground of appeal was never raised in defence, in terms, before the trial judge.

B Mr. Ramrakha, for the appellant, urges us to take the view that there is no such offence known to the law as attempting to conspire. He relies, as I understand his argument, upon two propositions — firstly, that there is no reported case in the history of the law in which such an offence has been found. In this connection, neither Counsel have been able to draw our attention to any such authority, and, speaking for myself, I neither know of any such authority nor have I been able, with the research facilities available to me, to find any. But on the contrary, Mr. Ramrakha has drawn our attention to an East African appeal case, namely *Kabunga son of Magingi v. Reginam* (1955) 22 E.A.C.A. 387 in which the accused was charged with such an offence, together with other offences, and was convicted by the trial court. The Court of Appeal unfortunately did not deal with the issue before us now in any detail because that appeal was disposed of on other grounds. However the court commented upon the matter in the following terms —

D “We must now consider the 3rd count (attempting to conspire) which has given us the most difficulty in this appeal. The Acting Attorney General has supported the conviction on this count on the ground that theoretically it is an offence to attempt to conspire with another. He has not been able to cite to us any reported case nor is one known to any member of this court. We doubt greatly whether such an offence can lie. The essence of the crime of conspiracy is of course agreement by two or more minds; as *Russell* puts it at page 1798 of the 10th Edition “The external or overt act of the crime in concert by which mutual consent to a common purpose is exchanged One alone cannot conspire. Neither do we think that one alone can attempt to conspire because there can be no offence without mutuality”.

F With respect to the learned court in my view it is a *non sequitur* to say that because the completed offence of conspiracy cannot arise until at least two minds are in agreement that therefore it is necessary that two minds should be involved in the attempt to bring about the joinder of such two minds. Surely, if the proposition is to be accepted at all, it must be possible for one person to endeavour to persuade another and, if successful, he brings about that consensus of minds which is required to give rise to the completed offence of conspiracy, and hence one person may commit the offence of attempting whereas not less than two are required to conspire. However that may be, Mr. Ramrakha seeks in aid the expressions of opinion in *Kabunga's* case. Secondly, again if I have understood him rightly, Mr. Ramrakha submits that to attempt to conspire is impossible because conspiracy is an embodiment of mutuality. This argument, I feel, is really an elaboration of the view expressed in the above case.

H For the Crown, Mr. Tuivaga, relies also upon two propositions. He relies firstly upon the wording of the Penal Code, under which, after all, the charge in question is brought; and secondly he relies upon the opinion expounded by the well known text book writer, Mr. Glanville Williams, in the second edition of his work on the Criminal law to the effect that an

attempt to conspire is possible. Mr. Tuivaga, arguing from those sources, urges us to uphold the conviction of the appellant upon the first count of the information.

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Firstly I wish to consider the relevant provisions of Penal Code under which the charge is brought. Section 120 (a) reads as follows —

“120 Any person commits a misdemeanour who —

- (a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice, or”

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In this case the issue is perversion of the course of justice.

Section 409 reads as follows —

“409. Any person who attempts to commit a felony or misdemeanour is guilty of an offence, which, unless otherwise stated, is a misdemeanour”.

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The offence, if it is known to the law, of “attempting to conspire” is an offence which is not “otherwise stated” in the Code and is therefore a misdemeanour.

Section 41 of the Penal Code provides that where no other penalty is specifically provided in respect of a misdemeanour the maximum penalty shall be two years’ imprisonment or a fine or both such penalties. The alternative count in the information, namely that charged under section 125 (1) (i) of the Penal Code carries a maximum penalty of three months’ imprisonment. There is therefore, as far as the accused is concerned, a matter of practical importance involved.

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The whole issue on the first three grounds of appeal is whether the appellant was guilty at law, the evidence being the same in either case, of the offence charged in count one of the information or only that charged in count two. In other words, does the first count disclose an offence known to the law. If it does not then the appellant can only be guilty on the second or alternative count of the information. I may say at once that, having read the trial record, I find abundant evidence upon which the appellant might have been convicted on the second count.

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I now turn to a consideration of the primary question in this appeal, namely is there such an offence known to the law as an attempt to conspire as opposed to conspiracy itself.

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As already mentioned Mr. Tuivaga for the Crown relies upon the wording of section 409 of the Penal Code and says that any attempt to bring about a criminal offence must itself at least be a misdemeanour. But there is a limit to that proposition for it is axiomatic that although an attempt to commit an offence is itself an offence there can be no such offence as an attempt to make an attempt for the attempt itself constitutes the full offence. Similarly attempting to commit treason in the form of compassing the Queen’s death, is an offence which is not known to the law because the very attempt or compassing is itself the full offence. Mr. Glanville Williams in paragraphs 197 and 198 of the second edition of his work entitled “*Criminal Law*”, in the course of discussing the distinction between incitement to commit an offence and an attempt to commit an offence, refers to the matter summarily in paragraph 197 as follows —

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"A person may be convicted of attempting to incite, or (presumably) attempting to conspire".

A In paragraph 198 he distinguishes incitement and attempt as follows —

B "The difference between incitement and attempt is that in the former the inciter will, if successful in his incitement, become a secondary party (an accessory or principal before the fact or in the second degree) whereas the attempter intends to be the principal in the first degree. (There may of course be a principal in the second degree to an attempt)."

C Now it follows, if this distinction is accepted for all purposes, that every incitement must also be an attempt to conspire, because conspiracy necessarily involves a consensus of two or more minds and if the person incited either overtly agrees with the inciter to commit the offence urged or, by committing it, tacitly agrees with him, there immediately arises the completed offence of conspiracy, and if he does not agree although there arises the completed offence of incitement, there also must arise an attempt to conspire, because although the inciter may not intend to become the principal in the first degree to the offence urged he cannot help but become the principal in the first degree to conspiracy if the incitement succeeds; and if it does not succeed he is left in the position of having endeavoured to bring about that consensus of minds which, if he had succeeded, would have given rise to the completed offence of conspiracy. The result of Mr. Glanville Williams' reasoning as he points out at page 669 of his work, when dealing with acts of conspiracy, is therefore, that every incitement and every attempt to incite must necessarily be an attempt to conspire; and the completed offence of conspiracy arises whenever an incitement succeeds. Consequently in strict logic there would appear to be such an offence as attempted conspiracy, and indeed one which is very frequently committed.

F However all this theoretical logic may be, the question remains, is there such an offence known to the law in practice? I am persuaded that there is not. I approach the problem pragmatically. Firstly it is strange that, if this proposition is correct, there are no recorded cases on the subject, except that of *Kabunga* in 1955, and, if known to the law, it must clearly be an offence of frequent occurrence. Secondly if the result to which Mr. Glanville Williams' reasoning leads us is the legal position, then strange consequences ensue. The circumstances of this case under appeal afford an excellent example — the appellant endeavoured to persuade Ram Daya to give false evidence in certain criminal proceedings. The second accused, his co-defendant in the court below, Dhrup Chand, did exactly the same thing. They each failed in their purpose. The assessors and the trial judge found on the facts that there was insufficient evidence to establish that the appellant and the second accused had acted in concert. The position therefore is that the appellant undoubtedly committed the offence of incitement as also did the second accused. By charging the appellant with attempted conspiracy he is charged with a misdemeanour for which no specified penalty is provided and therefore upon conviction he becomes liable by virtue of section 41 of the Penal Code to imprisonment for two years or a fine or both imprisonment and fine. But if he were charged with the actual offence of attempting to interfere with Daya Ram, a witness, by attempting to persuade him to give false evidence,

(which is exactly what he did) then upon conviction he becomes liable only to imprisonment for three months. If in law every form of incitement is also to be regarded as an entirely different offence also known to the law the consequences will be far reaching and will, as indicated by the example in this case, give rise to many unfortunate anomalies. It is a matter of public importance that the law, as far as may be, should be clear and free from confusion. Incitement is a distinct offence. Conspiracy is also a distinct offence. But to hold that the commission of the one offence is *ipso facto* an attempt to commit the other and may be charged by the prosecution as such at election, is to my mind, in the absence of clear statutory or legal authority to the contrary, wrong in principle. For those reasons, speaking for myself, I am persuaded that an attempt to conspire is not an offence which is known to the law at the present time, however possible it may be as a matter of pure logical deduction from academical distinctions between the concepts of "attempt" and "incitement".

My conclusion on the first three grounds of appeal renders it unnecessary for me to consider the fourth ground of appeal, and I find no substance in the fifth. Counsel for the appellant conceded before this court in respect of the fifth ground that there was no suggestion that either Shiu Ram or Stephan Hari Ram were accomplices of the appellant and therefore there is no reason why such relevant evidence as they gave should not be accepted as corroborative.

In the result therefore I would set aside the conviction on the first count of the information and substitute therefore a conviction on the second or alternative count which was not proceeded with and which still remains upon the record. As regards the sentence it also follows that the sentence of twelve months' imprisonment must be quashed and a sentence appropriate to the offence charged in the second count substituted therefore. As the learned judge has stated in the court below, attempts to pervert the course of justice must not be treated lightly and I can see no reason why a sentence less than the maximum in respect of conviction on the second count should be passed, and I would therefore substitute a sentence of three months' imprisonment for that of twelve months.

Appeal dismissed