File No. 34284

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

J.F. (a young person)

Appellant
(Appellant)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent)

and

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

INTERVENER'S FACTUM
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, INTERVENER

(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW OF ARGUMENT

1. Some ninety years ago, the scholar F. B. Sayre,[1] writing in the *Harvard Law Review*, described criminal conspiracy as "a veritable quicksand of shifting opinion and ill-considered thought", and tendered the following plea:

> It would seem, therefore, of transcendent importance that judges and legal scholars 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 precise limits of the elusive law of criminal conspiracy. ["Criminal Conspiracy" (1921-22), 35 *Harv. L. Rev.* 393, at pp. 393-394]

Thanks to this Court[2] and to Parliament,[3] the law of conspiracy in Canada has made some progress since then. The present appeal, however, shows how much remains to be done.

2. At issue in this case is the alleged offence of aiding or abetting conspiracy to murder. Both the existence of the offence and its elements are matters of debate between the parties and the lower courts of this country.

3. Since 1954, Canada has gone without common law criminal offences (see S.C. 1953-54, c. 51, s. 8; now s. 9 of the *Criminal Code*). Accordingly, the issue reduces to one of Parliamentary intent: do the provisions of the *Criminal Code* disclose an intention to criminalize aiding or abetting a conspiracy to murder?

4. The Crown finds the necessary expression of legislative intent in a combination of ss. 21 and 465(1)(a). The Crown argues that the effect of s. 21 is that a person may be guilty of conspiracy to murder by being "one who conspires" under s. 465(1)(a), or by aiding or abetting those who conspire.

5. Curiously absent from the law reports are records of any successful prosecutions for aiding or abetting conspiracy, at least until the 1980s. Yet the provisions that are the source of

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[1] A Professor of Harvard Law School and distinguished academic, Sayre was better known for a time as the son-in-law of President Woodrow Wilson, then High Commissioner of the Philippines.

[2] See, for instance, *Papalia v. R.*, [1979] 2 S.C.R. 256, clarifying the elements of the offence.

[3] In 1985, Parliament pruned from the *Criminal Code* the unduly broad, "unlawful purpose" / "lawful purpose by unlawful means" conspiracy offences found in the former s. 423(2) (later s. 465(2)). See R.S.C. 1985, c. 27, s. 61.

controversy in this case have not been significantly altered since their initial introduction in *The Criminal Code, 1892*, S.C. 1892, c. 29, as ss. 61 and 234.

6. This presents something of a mystery. How can such a broad zone of criminal responsibility (which is by no means confined to murder, and indeed would make liable those who aid or abet *any* form of conspiracy) have remained dormant for so long? Can the Crown and the courts alike have overlooked – for more than 80 years – the alternate path to criminal liability for conspiracy that a "parties instruction" would have afforded?

7. In the end, the answer to these questions is simple. A review of the background to the creation of our first *Criminal Code* indicates that the parties provision – what is now s. 21 – was never intended to operate in respect of conspiracy. Conspiracy stood, and ought still to stand, at the outer limit of criminal liability for preparatory acts.

PART II: POINTS IN ISSUE

8. This intervener, the British Columbia Civil Liberties Association (the "BCCLA"), will focus its argument on the first point taken by the appellant, J.F.: that the Court of Appeal erred in concluding that aiding or abetting conspiracy to murder is an offence known to the law of Canada. The BCCLA will advance three points in that respect:

A. The alleged offence necessarily would be made out upon proof not of intentional furtherance of the objects of the conspiracy, as the Crown argues, but upon proof of intentional assistance in the making of the conspiratorial agreement.

B. Once the nature of the offence in issue is properly characterized, *Déry* controls the analysis in this case, despite differences in the statutory language of the attempts and parties provisions.

C. The purpose of the relevant provisions and the entire context of the *Criminal Code* confirm that Parliament did not intend to create the alleged offence.

PART III: ARGUMENT

9. In this case, as in *R. v. Déry*, 2006 SCC 53, [2006] 2 S.C.R. 669, the Crown's argument hinges on the proposition that "the provisions governing inchoate liability can be stacked one upon the other, like building blocks" (para. 40). *Déry* addressed whether the attempt provision

can be stacked upon a conspiracy provision. The Court held unanimously that it cannot be. Now the Crown reiterates that conspiracy is an "offence", and says that s. 21 provides, simply and absolutely, that an offence is committed by aiding or abetting its commission. The attempts provision at issue in *Déry*, the Crown emphasizes, was worded differently. So the Crown's argument in this case reprises the stacking theory, maintaining that the result in *Déry* was driven by some language in the attempts provision that is absent from the parties provision (respondent's factum, para. 27).

10. The Crown says further, relying mainly on policy grounds and American jurisprudence, that party liability for conspiracy "includes aiding or abetting in the development or furtherance of the plan to commit the principal offence" (respondent's factum, para. 29; emphasis added; see also the Court of Appeal, at paras. 26-27). On this theory, party liability is linked not only with the *creation of the conspiracy* to which the accused is said to be an accessory, but also with the *pursuit of the principal offence* that is the object of the conspiracy.

11. The Crown's approach necessitates that the analysis in this case begin by identifying the elements of the offence that stacking the party and conspiracy provisions would in fact produce. What will become apparent is that such double-stacking would create a species of criminal liability that is both more narrow, and more remote from any principal offence, than the offence for which the Crown advocates. And as to that narrow and remote offence, it is clear that its recognition would be at odds with the *Criminal Code*'s original and continuing design.

A. *The Nature of the Alleged Offence*

12. It would distort fundamental principles of party liability to conclude, as the Crown contends, that acts in furtherance of a conspiracy's object give rise to party liability for conspiracy. Rather, the real gravamen of the offence proposed by the Crown in this case must be an act of *assistance in the making of an agreement* to commit a crime, and nothing more.

13. The prohibition against conspiracy targets a completed criminal agreement, not its implementation. That is conspiracy's special and distinguishing feature. To put it in historical context, the criminalization of certain types of agreement – of the mere act of "confederating together" – was the crucial innovation brought about by the Court of Star Chamber in the famous

Poulterers' Case, decided in 1611. From there it was "an easy step" to the courts' further conclusion that "the gist of the crime is the conspiracy, [therefore] no other overt act is necessary" (Sayre, *supra*, at pp. 398-399). Thus was the indictable offence known as criminal conspiracy born. In this country, *Brodie v. The King*, [1936] S.C.R. 188, affirmed that "the very plot is an act in itself" (p. 198, citing *Mulcahy v. The Queen* (1868), L.R. 3 H.L 306, at p. 317). Once the agreement itself is proven, acts in fulfillment of the agreement are beside the point when the charge is conspiracy. Hence Dickson J.'s majority judgment in *Papalia*, *supra*:

> The word "conspire" derives from two Latin words, "con" and "spirare", meaning "to breathe together." To conspire is to agree. The essence of criminal conspiracy is proof of agreement. On a charge of conspiracy the agreement itself is the gist of the offence: *Paradis v. R.*, [1934] S.C.R. 165 at p. 168. The *actus reus* is the fact of agreement: *D.D.P. v. Nock*, [1978] 3 W.L.R. 57 (H.L.) at p. 66. The agreement reached by the co-conspirators may contemplate a number of acts or offences. […] The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy.[4] [pp. 276-277; emphasis added]

14. Turning on this footing to accessory liability, it is equally well-established that the parties provision of the *Criminal Code* is responsive to the elements of the offence for which primary liability is imposed. Under s. 21(1)(b) and (c) (*i.e.*, the aiding and abetting provisions), one is a party to a crime by "doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator to commit the offence" (the *actus reus*), with the intention of assisting the perpetrator to commit the offence and with knowledge of the principal's intention to commit the crime (the *mens rea*): *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at paras. 14-17; see also *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, at para. 76 (*per* Justice LeBel, concurring). In this case, as has been shown, "the offence" is committed by making the criminal agreement.

15. Party liability for conspiracy can therefore only be framed as follows: doing something that assists or encourages the formation of an agreement to commit a crime, with the intention of

[4] See also *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 87 ("[t]he Crown is simply required to prove a meeting of the minds with regard to a common design to do something unlawful").

assisting the making of the agreement, and with knowledge that the conspirators intend to criminally agree. On the other hand, acts in furtherance of a conspiracy's objects do not assist the making of the agreement, and cannot logically produce accessory liability. Depending on the evidence, such acts may either (1) establish that the accused is himself a member of the conspiracy; or (2) establish that the accused aided or abetted the principal offence; but otherwise they provide no basis to impose criminal liability. This was the conclusion reached by Costigan J.A., speaking for the Alberta Court of Appeal in *R. v. Trieu*, 2008 ABCA 143, 89 Alta. L.R. (4th) 85, at paras. 30-34.

16. What all of this shows is that if there is party liability for conspiracy, then such liability anticipates even the making of the criminal agreement. The function of the alleged offence can only be to prohibit conduct that is neither conspiratorial in its own right, nor of assistance in the commission of a principal offence, as conspiracies and aiding and abetting principal offences are otherwise captured by the *Criminal Code*. In this sense, party liability for conspiracy is further removed from the evil ultimately sought to be prevented than any of attempts, aiding or abetting, or conspiracy itself.

17. Did Parliament intend to create such an offence? The recent decision in *Déry* strongly suggests otherwise.

B. Déry *is the Controlling Authority*

18. In this case no less than in *Déry*, the Crown's stacking approach is "seductive in appearance but unsound in principle" (para. 41). There is, no doubt, a more powerful attraction in the instant case than in *Déry*, as s. 21 lacks an equivalent to s. 24(2), which reads:

> The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

In *Déry*, Justice Fish addressed this provision. In his view, the provision was instrumental in framing the question, which he ultimately answered in the negative, whether "the definition of attempt in s. 24 captures, as a matter of law, an attempt to *conspire*" (*ibid*.; italics are Fish J.'s).

19. The substantive content of Justice Fish's answer to that question focussed not on a minute parsing of the language of the *Criminal Code*, but on fundamental criminal law principles extracted from the jurisprudence. Justice Fish began his reasons by highlighting the fact that "[a]ttempting to conspire to commit a substantive offence has never previously been recognized as a crime under Canadian law", as he later discussed at some length (para. 2; and see paras. 11-39). Ultimately, in the final portion of his reasons, Justice Fish rooted his decision in his conclusion that "acts that precede a conspiracy" are not "sufficiently proximate to a substantive offence to warrant criminal sanction" (para. 45). That is an expansive *ratio* that, given the nature of the offence in question here, is of direct relevance to this appeal.

20. Indeed, the Court's holding could not have turned on the text of s. 24(2) alone. According to its own terms, s. 24(2) simply governs the inquiry into whether the accused's conduct is properly regarded as an attempt to commit a crime, or instead is merely preparatory. The subsection says nothing about whether conspiracy is an "offence" that, under s. 24, is *capable* being attempted. Yet that is the question *Déry* decided: no matter how far one goes beyond preparing to conspire, no matter how closely one's conduct approaches a completed conspiracy, the *Déry* Court held categorically that such conduct will not amount to an offence until the conspiracy is complete. The relevance of s. 24(2), therefore, is not that it creates a mechanism by which courts can pick and choose which offences may be the subject of an attempt; the subsection does no such thing. Rather, s. 24(2) is notable because it accommodates a *structural principle* that governs the point at which the criminal law intervenes, based upon the proximity of the accused's conduct to a principal offence. It was on that principle that *Déry* turned.

C. *Parliament Never Intended the Alleged Offence Would Exist*

21. The purpose, context, and scheme of the *Criminal Code* provisions at issue in this appeal confirm the result that *Déry* suggests.

22. When the *Criminal Code* was first promulgated in 1892, party liability for conspiracy was unknown to the law. That is significant in two ways. First, it should not escape attention that even the reviled Court of Star Chamber – the inventors not only of criminal conspiracy as it is now understood, but also of compelled self-incrimination and secret trials – was not prepared

to go as far as the Crown wishes to go today. Second, the existing state of the law in the years leading up to 1892 is a crucial part of the interpretive context, as will now be shown.

23. In this case, the inquiry into Parliament's intent is necessarily historical, as the parties and conspiracy provisions have not changed materially since they were first promulgated in 1892.[5]

24. To understand the 1892 *Criminal Code* we must look to England. Canada's first *Criminal Code* was modelled on a proposed "Draft Code" that was an appendix to the English *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879). Many of the provisions that eventually emerged in Canada's code were identical to those proposed in the Draft Code. Accordingly, to resolve interpretive questions relating to provisions from Canada's first *Criminal Code*, it is appropriate to have resort to the Royal Commission's report: see, for instance, *Amato v. The Queen*, [1982] 2 S.C.R. 418, at pp. 443-444.

25. The parties provision appeared in Part IV of the Draft Code, as s. 71. The Commissioners explained their design:

> Each [of the Provisions in Part IV] effects a change, not so much in the substance as in the language of the existing law. […]
>
> Section 74 in this Part deals with attempts to commit offences, [the law of which the Commissioners wished to change in one particular]. […] This alters the law from what it has been held to be. The other sections are not believed to do more than declare the existing law. [p. 19; emphasis added]

26. The Commissioners were clear: the provisions in Part IV, including the parties provision, were not intended to change the "existing law" of accessory liability, except in the ways the Commissioners specifically described. It follows, therefore, that if party liability for conspiracy was not an offence at the time of the *Criminal Code*'s promulgation, the Commissioners did not intend that codifying the law of accessory liability in s. 21's predecessor would create such an offence.

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[5] For completeness, it might be noted that while conspiracy to murder was initially a standalone provision (s. 234), in 1954 all of the conspiracy provisions were amalgamated in what is now s. 465 (see S.C. 1953-54, c. 51, s. 408).

27. In *R. v. Taylor* (1984), 40 C.R. (3d) 222 (B.C.S.C.), which was decided shortly after *McNamara* (in 1981) provided the genesis of the alleged offence in Canada, Toy J. (as he then was) remarked upon the very short history of party liability for conspiracy:

> I find myself in difficulty because of the *obiter dicta* expressed by Martin J.A. in *R. v. McNamara*. This is the first and only time that I am aware of that such a pronouncement has been made by a judge in England or Canada. There are American authorities that seem to say precisely that, but those cases I do not find helpful because the cases I have read clearly indicate that the conspiracies there under consideration are statutory as opposed to common law conspiracies and by definition those conspiracies not only encompass the agreement but must be accompanied by some overt act in furtherance thereof before that crime is complete. [p. 228; emphasis added]

28. The Crown tenders just one authority that would extend the lineage of the alleged offence prior to *McNamara*: *R. v. De Kromme* (1892), 17 Cox. C.C. 492 (CCR). *De Kromme* is, similarly, the sole authority that the English Law Commission in its *Working Paper No 50 – Inchoate Offences* (June 5, 1973) could find in support of double inchoate liability involving conspiracy. The Law Commission read *De Kromme* as "authority for the existence of the offence of attempting or inciting to conspire" (p. 27; emphasis added). After *Déry*, which declared no such offence to exist, *De Kromme* must be regarded as discredited authority. In fact, the Law Commission itself anticipated *Déry*:

> Our provisional view is, however, that, as a matter of principle, such extensions [as *De Kromme*] of the law of inchoate offences in relation to conspiracy cannot be justified. […] [W]e believe that extending the law in this way takes it further back in the course of conduct to be penalised than is necessary or justifiable. [pp. 27-28; emphasis added]

29. Nor can scholarship be taken to have added to the "existing law" what the jurisprudence did not. The scholars are, and have been, divided on the question.[6] Toy J.'s analysis in *Taylor* corroborates the conflict:

[6] See J.C. Smith, "Secondary participation and inchoate offences" in *Crime, Proof and Punishment* (London, 1981), p. 29; and compare George P. Fletcher, *Rethinking Criminal Law* (1978), at p. 660, cited by Smith, *ibid*.; and Don Stuart, *Canadian Criminal Law: A Treatise* (6th ed., 2011), at p. 743 ("[t]his restraint [in *Déry*] restricting the scope

> Martin J.A.'s judgment [in *McNamara*] seems to be premised on an acceptance by him of the passage from Wright's text, published in 1887. It is to be noted, however, that the author of that text cites no authority for that proposition. There are other authors such as Goode, *Criminal Conspiracy in Canada* (1975), and Harrison, *Conspiracy as a Crime and as a Tort in English Law* (1924), who make no reference to any such concept. [p. 229]

30. Two further points complete the interpretive analysis.

31. The first is a point of context arising from the original structure of the conspiracy to murder provision. Before the conspiracy provisions were re-organized in 1954, conspiracy to murder was prohibited by paragraph (a) of s. 234 (and its successor provisions). Paragraph (b) of s. 234 is of interest. It provided that it was an offence to "counse[l] or attemp[t] to procure any person to murder such other person anywhere, although such person is not murdered in consequence of such counselling or attempted procurement." Importantly, the parties provision (then s. 61) also prohibited counselling.

32. Parliament clearly cannot have intended that the counselling offence in s. 61 could be stacked upon the counselling offence in s. 234. This casts further doubt on the viability of the Crown's stacking theory generally. Taken as a whole, the provisions seem to suggest that s. 61 was intended to operate in relation to the (completed) principal offence, while s. 234 independently operated to capture certain further conduct (which need not involve a completed murder).[7]

33. The final point is this: to recognize the offence alleged by the Crown would create an incongruity in the scheme of the *Criminal Code*. This Court said in *Déry* that s. 24(2) was intended to "fix the threshold of criminal responsibility" (para. 43). The Crown observes that it is possible to aid or abet an attempt, and says that conspiracy is akin to an attempt (respondent's factum, para. 28). The Crown says that accessory liability for conspiracy is therefore consistent with the "threshold" recognized in *Déry*. But this Court, speaking through Cory and Iacobucci

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of combining incomplete offences is welcome. It is to be hoped that similar circumspection will prevail respecting other combinations").

[7] This understanding of the relationship between the parties and conspiracy provisions helps to explain why, in cases like *R. v. Kravenia*, [1955] S.C.R. 615, and *R. v. Koury*, [1964] S.C.R. 212, conspiracy and aiding and abetting were discussed as separate and alternative streams of inchoate liability, not as overlapping and mutually reinforcing means by which a conviction may be secured.

JJ. in *Dynar*, has already said that "[c]onspiracy is in fact a more 'preliminary' crime than attempt" (para. 87). Drawing on that proposition (at para. 44), the *Déry* Court declined to use the attempt provision to extend liability for conspiracy to those who are not conspirators. In the result, to accept the Crown's argument would be to push the threshold of criminal responsibility outward, and thereby to do through accessory liability what Parliament intended *not* to do in the context of attempts.

34. Ultimately, the double inchoate offence proposed by the Crown captures conduct that is too remote, both mentally and physically, from the principal offence. The gist of the offence is an act of assistance in the making of an agreement. Such conduct not only precedes the principal offence (which need never in fact occur); it precedes even the agreement to commit the offence. And the accused need never share the conspirators' design; he need only intend to assist people in forming their common design.

35. The criminal law's net already captures those who are part of a criminal agreement, those who attempt to commit the offence that is the subject of the agreement, and those who assist in the commission of that offence. That goes far enough.

PART IV: SUBMISSIONS REGARDING COSTS

36. The BCCLA does not seek costs, and asks that no award of costs be made against it.

PART V: ORDER SOUGHT

37. The BCCLA respectfully submits that the appeal should be allowed, and a new trial ordered, at which the jury may be instructed in accordance with the principles described herein.

38. The BCCLA seeks leave to make oral argument for up to 10 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 14th day of August, 2012.

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Ryan D. W. Dalziel

PART VI: TABLE OF AUTHORITIES

CASES	**PARAS. CITED**
Amato v. The Queen, [1982] 2 S.C.R. 418	24
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F. B. Sayre, “Criminal Conspiracy” (1921-22), 35 *Harv. L. Rev.* 393	1, 13
J.C. Smith, “Secondary participation and inchoate offences” in *Crime, Proof and Punishment* (London, 1981)	29 fn 6
Don Stuart, *Canadian Criminal Law: A Treatise* (6th ed., 2011)	29 fn 6

PART VII: STATUTORY PROVISIONS

Criminal Code, R.S.C. 1985, c. C-46, ss. 9, 21, 24, 465(1)

Criminal offences to be under law of Canada

9. Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730

(a) of an offence at common law,

(b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

Parties to offence

21. (1) Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

Common intention

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

Attempts

24. (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

Question of law

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

Conspiracy

465. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

(a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life;

(b) every one who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and liable

(i) to imprisonment for a term not exceeding ten years, if the alleged offence is one for which, on conviction, that person would be liable to be sentenced to imprisonment for life or for a term not exceeding fourteen years, or

(ii) to imprisonment for a term not exceeding five years, if the alleged offence is one for which, on conviction, that person would be liable to imprisonment for less than fourteen years;

(c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable; and

(d) every one who conspires with any one to commit an offence punishable on summary conviction is guilty of an offence punishable on summary conviction.

The Criminal Code, 1892, S.C. 1892, c. 29, ss. 61, 234

61. Every one is a party to and guilty of an offence who –

(a) actually commits it; or

(b) does or omits an act for the purpose of aiding any person to commit the offence; or

(c) abets any person in commission of the offence; or

(d) counsels or procures any person to commit the offence.

2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

234. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who –

(a) conspires or agrees with any person to murder or to cause to be murdered any other person, whether the person intended to be murdered is a subject of Her Majesty or not, or is within Her Majesty's dominions or not; or

(b) counsels or attempts to procure any person to murder such other person anywhere, although such person is not murdered in consequence of such counselling or attempted procurement.