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THE OPINION OF THE COURT OF APPEALS

Upon the question, whether a conspiracy to cheat and defraud a bank, by the officers thereof, is an offence at common law, and punishable in Maryland?

Court of Appeals, Dec. Term, 1821.

THE STATE vs. BUCHANAN, *et. al.*

(Continued.)

The position, that "a confederacy each to maintain the other, whether the matter be true or false," is a common law offence, is distinctly adopted in 1 *Hawk. P. C.* 190, *ch.* 72, and 5 *Coke's Rep.* (The *Poulterer's* case) 56, and the principle of the case noted in the *Book of Assises*, to wit, that conspiracies are punishable at common law, though nothing be put in execution, is fully recognized in the *Poulterer's* case, in which that book is referred to; and this further principle also laid down, that the law punishes the conspiracy, "to the end to prevent the unlawful act;" and in the same case, speaking of another, article 19, also in the *Book of Assises*, 138, relative to combinations among merchants to regulate the price of wool, it is said, "and in these cases, the conspiracy or confederacy (not the false conspiracy or confederacy) is punishable, altho' the conspiracy or confederacy be not executed." Hence it is manifest, that the "*nota*" at the end of the case, which seems to be relied on to show, that both malice and falsehood are indispensable ingredients of a punishable conspiracy, and must be united in the same case, was not intended by Lord *Coke* as applicable to all confederacies, but to such false conspiracies only, as are of the character of those, of which he had treated immediately preceding the *nota*; for he does not speak of the case of a conspiracy between merchants to fix the price of wool, as a false conspiracy, nor does either falsehood or malice, necessarily enter into such a combination. And these combinations among merchants, (which are not within the statute 33d *Edward* the 1st.) were, and remained punishable at common law, and were not first made so by the statute staple 27th *Edward* the IIId, *ch.* 9, as has been supposed in argument. That statute does indeed prohibit the exportation of wool under a very severe penalty, but neither creates, nor provides a punishment for, the offence by merchants, of combining to fix a price beyond which they would not go. All that is said in relation to the purchasing of that article is, that "all merchants, as well subjects as foreigners, may purchase woolfolk, &c. throughout the whole of our kingdom and territories, without covin or collusion to lower the price of the said merchandizes, so nevertheless as they bring them to the staple;" from which it would seem that all covin and collusion to lower the price of merchandize was before unlawful, and that the statute meant to leave the law as it was. In the *Poulterer's* case, it was clearly considered as an offence at common law; and in 4 *Blk. Com.* 154, the exportation of wool, which, as has been before observed, was prohibited by the statute staple, under a very heavy penalty, is said to have been forbidden at common law, but more particularly by that statute; and if that, which it was the principal object of the statute to prevent and to punish, was before, an offence at common law, it may readily be supposed, that *no* new offence was intended to be created; but that a conspiracy to fix the price of wool, was an offence at common law. Moreover, the words of the statute are "without covin or collusion to lower the price," &c. and a combination to "fix a price, beyond which they would not go," might not necessarily be to "lower" the price. On an information against *Brerton, Townsend* & others, *Noy's Rep.* 103, for the suppression of a will, to the prejudice of *Egerton*, the relator, whose wife was thereby disinherited, all the defendants but one were convicted and fined. This was a case of fraud effected by a confederacy, and the injury was to an individual; the suppression of a will by one was not an indictable offence, though a fraud highly injurious to the party affected by it. It was the confederacy alone which rendered it criminal, and therefore, the information was against the offenders conjointly. In *Timberly and Childe, Siderfin* 68, the indictment was for a conspiracy to charge one with being the father of a bastard child, with intent to extort money from him; and on motion to quash the indictment, it was held by the court to be good. In *Child vs. North and Timberly*, 1 *Keble* 203, the indictment was for a conspiracy to deprive the prosecutor of his fame, and to extort money from him, by falsely charging him with being the father of a bastard child. There was a motion to quash the indictment, because the conspiracy as laid, was to charge the prosecutor with matter that the court had no cognizance of; which was overruled, on the ground that it *might* be a loss to the prosecutor; and it was held that the conspiracy was punishable, though the court had no cognizance of the matter of it. And in the same case in 1 *Keble* 254, it was moved after verdict in arrest of judgment, that the indictment only charged the parties with a conspiracy to deprive the prosecutor of his fame, and to extort money from him, and not with a conspiracy to charge him before any tribunal having cognizance of the matter of bastardy. But the motion was overruled, and judgment rendered for the king, on the *two* grounds distinctly taken, that it was a conspiracy for lucre and gain, to charge and disgrace a man with having a bastard, and that the *crime* was the conspiracy, which whether it was to defame or disgrace a man, or to charge him with heresy, was punishable at common law. In *The Queen vs. Armstrong, Harrison* and others, 1 *Ventris* 304, the defendants were indicted for conspiracy to charge (or burden) one with the keeping of a bastard child, and thereby to bring him to disgrace. After verdict there was a motion in arrest of judgment, on the ground that it did not appear, that the party was actually burdened with the keeping of a child; but on the contrary that it was alleged to be only a pretended child; and also, that the party was not stated to have been brought before a justice of the peace on that account; but only that the defendants went and affirmed it to himself, intending to obtain money from him, that it might be no further disclosed; and that a bare unexecuted conspiracy was not a subject of indictment. The objection was overruled and the parties were punished by fine. The principle of this case cannot well be misunderstood. It was a conspiracy to extort money from an individual, by going to him, and affirming that he was the father of a bastard child, with a view of inducing him to pay them to say no more about it. And it was decided on the ground (expressly taken by the court) that it was a contrivance by *conspiracy*, to defame the person, and *cheat* him of his money, which was an indictable crime of a very heinous nature. In *The Queen vs. Best* and others, 2 *Ld. Raym.* 1167, the indictment was for a conspiracy, falsely to charge the prosecutor with being the father of a bastard child, with which one *Elizabeth Carter* was pretended to be ensient, in order to defraud him of his money, and destroy his reputation. On demurrer it was among other things objected to the indictment, that it was not alleged, that the child was likely to become chargeable to the parish, and that it did not appear, that the prosecutor was by the accusation put in danger of being subjected to any penalty; but that it amounted only to a charge, that the defendants conspired to *tell* the prosecutor that he was the father of the child the woman was big with, and that a *bare conspiracy*, to do an *ill* act, was not indictable. But the demurrer was overruled, on the principle broadly laid down by the court, that the defendants being *charged* at least with a *conspiracy*, to charge the prosecutor with fornication, though that was only a spiritual defamation, yet the *conspiracy* was the gist of the *indictment*, and was a temporal offence and punishable as such. *The King vs. Kinnersly and Moore*, 1 *Strange* 193, was a case of conspiracy to extort money from Lord *Sunderland*, by charging him with an attempt to commit sodomy with one of the defendants. It was not charged as a conspiracy to accuse him in a course of justice, but only *in pais*. The object was to extort money, by means of a verbal slander, for which the party injured had his civil remedy, and the mere verbal slander by one only, would not have been indictable. And in *The King vs. Martham Bryan*, 2 *Strange*, 866, the court in speaking with reference to *The King vs. Armstrong and Harrison*, say, "there the conspiracy was the crime; and an indictment will lie for that, though it be to do a lawful act." In this class of conspiracies, the meditated end, was not accomplished in either of the cases. The object in each, was to defame and extort money from an individual; and the indirect or wrongful means, by which that object was intended to be effected was verbal slander—a combination to do that, which if actually done by one alone, would not be the subject of an indictment; for if one verbally defames another, or extorts money from him, not under colour of office, it is not an indictable offence. The *conspiracy* therefore for a corrupt purpose, was the offence for which they were punished; and there is no pretence for supposing, as has been urged in argument, that the prosecutions were sustained on the ground, that the conspirators contemplated an abuse of judicial authority, by falsely accusing or causing the parties to be accused, of having bastard children, before justices of the peace having cognizance of such matters. A conspiracy of that character, would there is no doubt have been an indictable offence, having for its object, the subjecting the party accused, to the provisions of the statutes in relation to bastardy. But that is not the nature of the conspiracy charged in either of the cases referred to. In every case the defendants were indicted for a conspiracy to defame and extort money from the prosecutor, by charging him with being the father of a bastard child, not before justices of the peace, but the charge is laid as having been made *in pais*; and in *The King vs. Timberly and North*, one of the objections to the indictment was, that it did not lay the conspiracy to be, to charge the prosecutor before any that had jurisdiction of the matter; and in *The Queen vs. Armstrong, Harrison*, and others, the same objection was raised, and also, that the defendants only went and affirmed it to the prosecutor himself; and so in *The Queen vs. Best*, and others, which with the exception also taken in *The King vs. Timberly and North*, that it was not within the statute 33 *Edward I.* was disregarded by the judges. "Every indictment must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offence, and the party be put upon his trial for another, without any authority." 1 *Chitty's Criminal Law* 169. And "the charge must be sufficiently explicit to explain itself, for no latitude of intention can be allowed, to include any thing more than is expressed."—*Ibid* 172, 2 *Burr.* 1127. And the accused is put upon his trial only for that, with which he is charged, and against which alone, he is called on to defend himself. The prosecutions therefore in the cases referred to, could not have been supported on the ground, that the defendants contemplated an abuse of judicial power, by falsely accusing the prosecutors before justices of the peace; for no matter what they contemplated, that was not what they were charged with, and if they were only punishable on that ground, as the judges could not by intendment, have supplied what was not expressed, the indictments must have been quashed, or the judgments arrested for want of sufficient matter in law, (which was brought fully under the consideration of the courts,) otherwise it would have been, to punish the defendants for what they were not convicted of, for they could only have been convicted of what was alleged against them in the indictments. And thus the singular picture would have been exhibited in criminal jurisprudence, of men *convicted* of what was no offence in law, and *punished* for what they were neither convicted nor accused of, and for any thing appearing might never have contemplated; but such a stain is not to be found on any page of juridical history. It is not possible to suppose that in either of the cases, the judges went on the ground, that the defendants had accused, or meditated the accusation of the prosecutor before those who had jurisdiction of the matter; on the contrary the idea is expressly negatived by the proceedings themselves. The absence of the allegation was urged in each case, as an objection to the indictment, and the court decided, not that it might be inferred from what was alleged, but that it was not necessary, and that the conspiracy alone to defame and extort money from an individual, without any abuse, or meditated abuse of judicial power, was *per se* an indictable offence at common law. If they had not stated the grounds on which they acted, then indeed any legal principle that could be extracted from the cases, might, in support of the decisions, properly be assumed as the ground on which they were given. But the ground that is here attempted to be assumed, as that on which the conspirators were punishable, is not only different from that, on which the judges expressly place their decisions, but is an illegal ground, and one on which the indictments could not have been supported. Illegal, not because a conspiracy to accuse a man of being the father of a bastard child before those who had cognizance of such matters, was not an indictable offence, but because it was, what was not charged in the indictments, and could not legally be *inferred* from what was expressed. To say therefore, that those conspiracies were indictable, or that the prosecutions were sustained only on the ground, that the conspirators meditated the abuse of judicial power, by falsely accusing the prosecutors before a tribunal having cognizance of such offence, would be to overturn altogether the authority of the cases, which has not been attempted; on the contrary their authority seems to be admitted, and their application only to the cases under consideration is resisted, on the hypothesis, that they were decided on grounds not appearing in the indictments, and entirely different from those on which the judges professed to act. But the fallacy of the argument becomes obvious, when it is seen, that without a violation of the principle, that "every indictment must contain a certain description of the crime of which the defendant is accused, and a statement of the facts, by which it is constituted," the indictments in those cases, could not have been sustained upon the grounds on which the decisions are attempted to be placed. Those cases therefore must stand or fall on the grounds upon which they are placed by the judges who decided them, not the *reasoning* of the judges, but the *principles* on which their decisions are made to rest. *The King vs. Parsons* and others, 1 *Blk. Rep.* 392, was a conspiracy to take away the character of an individual, and accuse him of murder, by means of a mere phantom, which could have no reality—pretended communications with a ghost; and the actual fact of conspiring, was left to the jury to be collected from all the circumstances. The only object of the conspiracy in that case, was to injure the man's reputation. And in *The King vs. Rispal*, 1 *Blk. Rep* 368, 3 *Burr.* 1320, which was a prosecution for a conspiracy to extort money from an individual, by charging him generally with having taken a quantity of human hair out of a bag; on the objection being raised to the indictment, that the defendants were not charged with having conspired to fix any crime on the party, but only generally with taking the hair, which might be lawful, it was said by Lord *Mansfield*, the other judges concurring, "the crime laid, is an unlawful conspiracy; this, whether it be to charge a man with criminal acts, or such only as may *affect* his reputation, is fully sufficient." That case if received as authority, settles this principle, that a conspiracy to defraud another by verbal scandal is equally indictable, whether it be to charge the party with a crime, or only to injure his standing in society, and is a full answer to the argument that the principle of the cases last referred to, is not applicable to this, because they are of conspiracies to fix punishable offences upon the parties. In *The King vs. Skirret*, and others, 1 *Siderfin* 312, the defendants were prosecuted for reading a release to an illiterate man, in other words than those in which it was written, by which he was induced to sign it. It does not appear by the short report of the case, what the form of the indictment was, but as it was against them conjointly, they must have been charged either with conspiracy or combination. The fraud was practised upon an individual, and if it had been perpetrated by one *only*, would not have been an indictable cheat. It was the combination therefore alone which made it criminal, and that too is a case not within the statute 33 *Edward I.* In *The Queen vs. Mackarty and Fordenbourgh*, 2 *Ld. Raym.* 1179 2 *East's C. L.* 823, the defendants were conjointly indicted, for falsely and deceitfully bargaining and exchanging with another, a quantity of pretended wine, alleging it to be good new *Lisbon* wine, for a certain quantity of hats, which were exchanged and delivered by the party practised upon, on the faith of their false representations, when in fact the pretended *Lisbon* wine, was not *Lisbon* wine. The indictment in this case was not under the statute 33 *Henry VIII. ch.* 1, which prohibits cheating by "means of false privy tokens, and counterfeit letters in other men's names;" nor the statute 30 *Geo. II. ch.* 24, which provides, under heavy penalties, against cheating by "false pretences," (and which was passed long afterwards,) but was for a cheat at common law, and though it did not charge the defendants with a conspiracy *eo nomine*, yet it charged that they together, did the act imputed to them; and as there were no false public tokens, which were necessary at common law, to constitute a cheat effected by *one* an indictable offence, it was the combination alone on which the prosecution could have been sustained. A cheat perpetrated by the use of false public tokens, such as false weights and measures, is an indictable crime at common law, only because they are means calculated to deceive, and are such, as common care and prudence are not sufficient to guard against; and so, as ordinary care and prudence are no safeguard against the machinations of conspirators, cheats effected by conspiracy are punishable at common law, for "*pari ratione, eadem est lex.*" And in *The King vs. Wheatly*, 2 *Burr.* 1127, cheats effected by conspiracy, are expressly placed on the same footing with cheats effected by false weights and measures. In *The Queen vs. Orbell*, 6 *Mod.* 42, the indictment was for a combination to cheat one J. S. of his money, by getting him to bet a certain sum on a foot race, and prevailing on the party to run booty; and the court sustained the indictment on the ground as they said, that "being a cheat, though it was private in the particular, yet it was public in its consequence." That was a case emphatically of individual injury, and as little connected with any public concernment, as any private transaction could well be, and it was the combination alone on which the prosecution rested; for such a cheat practised by *one*, was clearly not an indictable offence. In *The King vs. Edwards* and others, 8 *Mod.* 320, the parties were indicted for giving money to a man, to marry a poor helpless woman who was an inhabitant of the parish of B. and incapable of marriage, on purpose to gain a settlement for her in the parish of A. where the man was settled. In that case there was a motion to quash the indictment, on the ground that it was not unlawful to marry a woman and give her a portion. But the object of the conspiracy, being to impose a pauper on a parish to which she did not belong, it was held by the court to be an indictable offence at common law: for that a bare conspiracy to do a *lawful* act to an *unlawful* end, was a crime, though no act should be done in consequence thereof. The conspirators certainly meditated a fraud on the