

## **An Overview of the Law of Conspiracy in Selected Jurisdictions**

**Dr. A. O. filani**

Senior Lecturer

Department of Jurisprudence and International Law

Ekiti State University

Nigeria

### **Abstract**

*The paper examines the law of conspiracy in Nigeria, Australia, India, Uganda and England. It examines the applicable laws in these jurisdictions and the position of the judiciary. The paper equally examines defences available to persons charged with conspiracy. The idea of punishing conspirators as if they had committed the offence they conspired to commit as shown in various enactments in Nigeria is a welcome development.*

**Keywords:** Conspiracy, Agreement, Over Act, Jurisdiction, Punishment.

### **Introduction**

The offence of conspiracy in Nigeria is governed primarily by the Penal Code<sup>1</sup> and the Criminal Code.<sup>2</sup> In India, the offence is governed by the Indian Penal Code.<sup>3</sup> In the Australian State of Queensland, the primary legislation is the Criminal Code of 1899<sup>4</sup> from which the Nigerian Criminal Code and the Ugandan Penal Code are derived.<sup>5</sup> In England, the offence is both a common law offence and a statutory offence under the Criminal Law Act, 1977. The offence of conspiracy has no definition under the Penal Code and the Criminal Code of Nigeria. But since the common law is in force in Nigeria, it must bear the same meaning as in England as an agreement of two or more persons to do an act which is an offence to agree to do so.<sup>6</sup> In *Eyo v State*,<sup>7</sup> defining conspiracy, the court had this to say to wit: Conspiracy is an offence in the agreement of two or more persons to do or cause to be done an illegal act or legal act by illegal means. The actual agreement alone constitutes the offence of conspiracy and it is not necessary to prove that the act has in fact been committed. In *R v Hoar*, the court held:<sup>8</sup>

It is generally accepted that conspiracy has two rationales. The primary justification in . . . law is arguably that conspiracy is an inchoate crime, which enables the law to reach out and punish criminal preparation before it reaches the stage of attempt. Secondly, it is said that because several persons are planning together, there is a new “dangerousness” inherent in the plotting: either because several may achieve what an individual would find difficult or impossible, or because other criminal plans may emerge from the group.

### **Statutory Provisions**

Sections 96 and 97 of the Nigerian Penal Code and sections 120<sup>A</sup> and 120<sup>B</sup> of the Indian Penal Code similarly provide as follows:

- S. 96(1) – when two or more persons agree to do or cause to be done
- (a) an illegal act, or
  - (b) an act which is not illegal by illegal means;
- such an agreement is called a Criminal Conspiracy

<sup>1</sup> Sections 96 – 97B, Penal Code, Cap. P3, LFN, 2004.

<sup>2</sup> Sections 516 – 518B, Criminal Code, Cap. C38, LFN, 2004

<sup>3</sup> Sections 120A – 120B, Act No. 46 of 1860

<sup>4</sup> Sections 541 – 543A

<sup>5</sup> Sections 373 – 375, Penal Code Act, Cap. 106, Laws of Uganda (Revised Edition) 1996.

<sup>6</sup> *The State v Haruna* (1972) 8 – 9 S.C, p. 174

<sup>7</sup> (2013) 1 NWLR (pt. 1335) p. 324 at 346, Paras E – F. See also, *Benson Obiakor v The State* (2002) 10 NWLR (pt. 776) p. 612 at 628, Para G.

<sup>8</sup> (1981) 34 A.L.R 357 at 364

(2) Notwithstanding the provisions of subsection 1, no agreement, except an agreement to commit an offence, shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. Sections 97(1) and (2) state as follows:

- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death or with imprisonment shall where no express provision is made in this Penal Code for the punishment of such a conspiracy be punished in the same manner as if he had abetted such offence.
- (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment for a term not exceeding six months or with fine or with both.

Sections 96 and 120<sup>A</sup> of the Nigerian and Indian Penal Codes respectively define conspiracy and are identical to the common law definition while sections 97 and 120<sup>B</sup> of the respective Codes are the penal provisions under which offenders are charged and tried. Sections 97 and 120B apply where no express provision is made in the Codes for the punishment of a particular conspiracy.

Under section 97A of the Nigerian Penal Code, a society is unlawful if declared to be dangerous, and by section 97B, membership of an unlawful society is punishable by up to seven years imprisonment. The sections are designed to reinforce the law of conspiracy by covering the activities of societies dangerous to good governance in the Northern part of Nigeria where no adequate evidence of conspiracy may be available.<sup>9</sup> The Indian Code does not have a similar provision.

The ingredients of conspiracy under both Penal Codes are:

- i. an agreement between two or more persons;
- ii. to do an illegal act
- iii. to do a legal act by an illegal means, and
- iv. the agreement being followed by an overt act.<sup>10</sup>

The provisions of the Criminal Code applicable in Southern Nigeria, the Queensland Criminal Code and the Uganda Penal Code relating to conspiracy are similar. Taking the Nigerian Criminal Code as a guide, they provide as follows:

(a) Section 516 states:

Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Nigeria would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony, and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to such lesser punishment.

(b) Section 517 states:

Any person who conspires with another to commit any offence which is not a felony, or to any act in any part of the world, which if done in Nigeria would be an offence but not a felony and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a misdemeanor and is liable to imprisonment for two years.

The offender cannot be arrested without warrant.

(c) Section 518 states: Any person who conspires with another to effect any of the following purposes:

1. to prevent or defeat the execution or enforcement of any Act, Law, Statute or Order; or
2. to cause any injury to the person or reputation of any person, or to depreciate the value of any property of any person; or
3. to prevent or obstruct the free and lawful disposition of any property by the owner thereof for its fair value, or
4. to injure any person in his trade or profession, or

<sup>9</sup> Richardson, S.S (1987) *Notes on the Penal Code Law*, 4<sup>th</sup> Edition Zaria: A.B.U Press, p. 77

<sup>10</sup> Gour, H.S. (1982) *The Penal Law of India*, 10<sup>th</sup> Edition. Allahbad: Law Publishers, p. 1094. See also, *Waziri v. State* (1977) 3 NWLR (pt. 496) 689 at 723; *Oladejo v State* (1994) 6 N.W.L.R (pt. 348) p. 101 at 127

5. to prevent or obstruct, by means of any acts which if done by an individual person would constitute an offence on his part, the free and lawful exercise by any person of his trade, profession or occupation; or
6. to effect any unlawful purpose; or
7. to effect any lawful purpose by any unlawful means; is guilty of a misdemeanor, and is liable to imprisonment for two years.

An offender cannot be arrested without warrant.

Sections 516<sup>A</sup> and 517<sup>B</sup> deal with conspiracy to do an act in another state rather than abroad.<sup>11</sup> Under the Queensland, the word “crime” is used instead of “felony” in sections 541 and 542 which correspond to sections 516 and 517 of the Nigerian Criminal Code and sections 373 and 374 of the Ugandan Penal Code. “Crimes” are defined in section 3 of the Queensland Criminal Code to be indictable offences, that is, the offenders cannot, unless otherwise expressly stated, be prosecuted or convicted except upon indictment. “Felony” on the other hand is defined in section 3 of the Nigerian Criminal Code and section 4 of the Ugandan Penal Code as any offence which is declared by law to be a felony, or is punishable, without proof of previous conviction, with death or with imprisonment for three years or more.<sup>12</sup>

Section 518(1) of the Nigeria Criminal Code provides for “enforcement of any Act, Law, Statute or Order”, section 543(1) of the Queensland Criminal Code provides for “enforcement of any statute, law” and section 375(a) of the Uganda Penal Code provides for “enforcement of any written law”. These provisions all have the same meaning. Also, the penalty stipulated in sections 517 and 518 of the Nigerian Criminal Code is imprisonment for two years, but under sections 542 and 543 of the Queensland Code, it is three years with hard labour and under sections 374 and 375 of the Ugandan Penal Code, the penalty is five years imprisonment.<sup>13</sup>

The three Codes all contain provisions for the punishment of specific conspiracies in various parts of the Codes. Such conspiracies include, conspiracy to commit treason, to bring false accusation, to pervert the course of justice, to defile a woman or girl, to murder, to defraud *etc.*<sup>14</sup> Unlike the Penal Codes of India and Northern Nigeria, the Criminal Codes of Southern Nigeria and Queensland as well as the Ugandan Penal Code do not define conspiracy. Resort has therefore been had to the common law definition. In *Okosun v A-G Bendel State*<sup>15</sup> and *R v Rogerson*,<sup>16</sup> the Supreme Court of Nigeria and the High Court of Australia respectively adopted the well-known definition of Willes J. in *Mulcahy v R* as follows:<sup>17</sup>

A conspiracy consists not merely in the common 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. So long as a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself . . . punishable if for a criminal object or for the use of criminal means.

The ingredients of conspiracy under the three Codes are:

- i. the agreement between two or more persons;
- ii. to do an unlawful act
- iii. to do a lawful act by unlawful means.

In England, there are two types of conspiracy:

### **1. Agreements to Commit a Crime**

These are termed statutory conspiracies and are governed by the provisions of section 1 of the Criminal Law Act, 1977 as amended by section 5 of the Criminal Attempts Act, 1981.

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<sup>11</sup> The Queensland and Ugandan Codes do not have similar provisions

<sup>12</sup> The difference in terminology appears to be one of form only and it does not create any substantive difference between the provisions of the three jurisdictions.

<sup>13</sup> The stipulation that an offender cannot be arrested without warrant under sections 517 and 518 of the Nigerian Criminal Code is not contained in the corresponding sections in the Queensland and Ugandan Codes.

<sup>14</sup> Sections 518<sup>A</sup> of the Nigerian Criminal Code and 543<sup>A</sup> of the Queensland Criminal Code exclude conspiracy relating to trade and industrial dispute

<sup>15</sup> (1985) 2 N.S.C.C, p. 1327 at 1328. See also, *Majekodunmi v R* (1952) 14 W.A.C.A, p. 64

<sup>16</sup> (1992) 66 A.L.J.R, p. 500 at 503

<sup>17</sup> (1968) L.R, 3 H.L 306 at 318. See also, Clarkson, C.M.V and Keating, H.M (1998) *Criminal Law: Text and Materials*, 4<sup>th</sup> Edition. London; Sweet and Maxwell, p. 509

The Act provides as follows:

Section 1(1) – subject to the following provisions of this part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either:

- (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
- (b) would do so but for the existence of facts which render the commission of the offence or any of the offence impossible, he is guilty of conspiracy to commit the offence or offences in question.

2. Where liability for any offence may be incurred without knowledge on the part of the person committing it or any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection(1) above unless he and at least one other party to the agreement intend or know that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

The ingredients of conspiracy under the Criminal Law Act, 1977 are:

- (a) an agreement between two or more persons,
- (b) the object of the agreement

There must be an agreement that:

- (i) a course of conduct be pursued;
- (ii) which if carried out in accordance with their intentions;
- (iii) will necessarily amount to a crime

## 2. Common Law Conspiracies

The Criminal Law Act, 1977 abolished the offence of conspiracy at common law.<sup>18</sup> It however, preserved two species of common law conspiracy:

### (a) Conspiracy to Defraud

Section 5(2) as amended by section 12 of the Criminal Justice Act, 1987 provides that the common law rules continue to apply “so far as they relate to conspiracy to defraud”.

### (b) Conspiracy to Corrupt Public Morals or Outrage Public Decency

Section 5(3) provides that the common law rules continue to apply to such conspiracies provided the object of the agreement does not amount to a crime.<sup>19</sup>

The definition of statutory conspiracy substantially repeats the common law, except that:

- (i) It is more restricted than the common law in requiring the object of the conspiracy to be criminal.
- (ii) It is wider than the common law by not requiring the object of the conspiracy to be possible.
- (iii) It creates doubts as to the mental element which did not exist at common law.<sup>20</sup>

## Elements of the Offence of Conspiracy

### (a) Agreement

This is the actus reus of the offence. In *R v Mulcahy*, Willes, J. declared:<sup>21</sup> The gist of the offence of conspiracy lies, not in doing the act or effecting the purpose for which the conspiracy is formed, but in the forming of the agreement between the parties.<sup>22</sup> Conspiracy is an offence consisting in the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. Unless two or more persons are found to have combined, there can be no conviction. In *R v Plummer*,<sup>23</sup>

<sup>18</sup> Section 5(1) of the Act

<sup>19</sup> Section 5(3)(b)

<sup>20</sup> Glanville Williams (1983) *Textbook of Criminal Law*, 2<sup>nd</sup> Edition. London: Stevens and Sons, p. 421

<sup>21</sup> *Supra*

<sup>22</sup> This dictum has been adopted and followed in other jurisdictions. See *Dattatraya v State of Maharashtra* (1982) Cr. L.J. p. 1025; *R v Rogerson* (1992) 66 A.L.J.R. 500 at 503 and *Oladejo v State* (1994) 6 N.W.L.R (pt. 348) p. 101 at 127.

<sup>23</sup> (1902) 2 K.B, p. 339. See also, Elliott, C. and Quinn, F. (2010) *Criminal Law*, 8<sup>th</sup> Edition. Edinburgh: Pearson Education Limited, p. 264.

The court applied the basic rule to a case in which three persons were charged jointly with conspiracy and one pleaded guilty and the other two were acquitted. The conviction of the third was quashed. It was held that the three accused being jointly indicted, the trial should be regarded as joint, with the result that the record of conviction “would be inconsistent and contradictory, and so bad on its face”.<sup>24</sup> This case was followed in *Dharmasena v R*.<sup>25</sup>

In *State v Mushtaq Ahmad*,<sup>26</sup> the Respondent and four other accused persons were tried and acquitted of the offences of theft and conspiracy. The State appealed against the acquittal of the Respondent only and this was dismissed because he alone could not be found guilty of conspiracy after his alleged co-conspirators had been found not guilty.

This area of the law was subjected to a rigorous review in *DPP v Shannon*.<sup>27</sup> Shannon was one of a number of defendants charged on an indictment containing 22 counts. In one of those counts, he was charged with one Tracey with conspiring dishonestly to handle stolen goods. Shannon pleaded guilty and was accordingly convicted and sentenced to imprisonment for four years to run concurrently with sentences imposed in respect of other offences. Tracey pleaded not guilty, and was eventually acquitted. Shannon then appealed on the ground of mutually inconsistent entries on the record touching the guilt of Tracey and himself, there being but one record notwithstanding the different pleas and the fact that there was no joint trial. The House of Lords refused to set aside the conviction. The dual rationale given for departing from the settled rule was that the reasons for the acquittal of one conspirator may have nothing to do with the other and that an acquittal does not amount to a finding of innocence. The High Court of Australia followed the decision in Shannon in *R v Darby*.<sup>28</sup>

In *Shodiya v State*,<sup>29</sup> the Court of Appeal, in setting aside the conviction of the Appellant, stated that the acquittal of the Appellant would not affect the conviction of the 1<sup>st</sup> accused in so far as the evidence against the 1<sup>st</sup> accused was properly admitted. The Court referred to and adopted the decision in Shannon.

Under the Indian Penal Code, it has been decided by the Supreme Court in *Bimbadhar Pradhan v State of Orissa* that it is not essential that more than one person should be convicted of the offence of criminal conspiracy.<sup>30</sup> It is enough if the court is in a position to find that two or more persons were actually concerned in the criminal conspiracy. Sinha, J. observed: Contention raised on behalf of the appellant was that the other accused having been acquitted by the trial Court, the appellant should not have been convicted because the evidence against all of them was the same. There would have been a great deal of force in this argument, not as a question of principle but as a matter of prudence, if we were satisfied that the acquittal of the other four accused persons was entirely correct.<sup>31</sup> In England, under the Criminal Law Act and at common law, a husband and wife cannot alone be found guilty of conspiracy.<sup>32</sup> They are considered, in law, as one person and are presumed to have but one will. The doctrine equally applies under the Criminal Codes of Queensland<sup>33</sup> and Nigeria.<sup>34</sup> Although, the doctrine essentially derives from monogamous practice, the Privy Council in *R v Mawji*, held that it also applied to potentially polygamous marriage as well.<sup>35</sup> There are no statutory provisions of this point in the Penal Codes of Uganda, Nigeria and India.<sup>36</sup>

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<sup>24</sup> *Ibid* Per Bruce J. at p. 348

<sup>25</sup> (1951) A.C. p. 1

<sup>26</sup> (1988) Yearly All-India Criminal Digest, p. 603

<sup>27</sup> (1975) A.C. p. 717

<sup>28</sup> (1982) 40 A.L.R. 594. There was a parliamentary sequel to Shannon in 1977, when section 5 (8) of the Criminal Law Act, 1977 abolished the rule that the acquittal of all other alleged conspirators must necessarily result in the acquittal of the person accused of conspiring with them. That result will now follow only when under all the circumstances of the case, the conviction is inconsistent with the acquittal of the others.

<sup>29</sup> (1992) 3 N.W.L.R. (Pt. 230) p. 457

<sup>30</sup> (1956) S.C. p. 469

<sup>31</sup> *Ibid* at p. 474

<sup>32</sup> Section 2 (2) of the Act

<sup>33</sup> Section 33

<sup>34</sup> Section 34

<sup>35</sup> (1957) A.C. 126. This decision would not apply under the Nigerian Criminal Code as the doctrine is restricted to husbands and wives of Christian marriage.

<sup>36</sup> Gour, H.S *Op.cit.* at pp. 1070 – 1071

The truth of the matter is that there can be no objection to either (a) a husband and wife being indicted for conspiracy together with another defendant (or other defendants): or (b) husband and wife being indicted alone for conspiracy where the particulars alleged that they conspired with named or unnamed persons.<sup>37</sup> Also, a person cannot conspire with another who is under the age of criminal responsibility, 10 years in England<sup>38</sup> and 7 years in the other jurisdictions.<sup>39</sup>

Under section 2(1) of the Criminal Law Act, 1977, a person who is an intended victim of an offence shall not be liable for conspiracy to commit the offence. Also, by section 2(2)(c) of the Act, a person shall not be guilty of conspiracy to commit any offence or offences if the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) an intended victim of that offence or each of those offences. In all the jurisdictions, a company may be convicted of an offence of conspiracy.<sup>40</sup> However, in *R v McDonnell*,<sup>41</sup> it was decided that there cannot be a conspiracy between a person and a company of which he is the sole person responsible for the acts of the company. Provided that there has been an agreement of at least two, it does not matter that only one of them has been caught. The charge should allege conspiracy with person or persons unknown.<sup>42</sup>

Since the essence of conspiracy is agreement, it is no defence to say that having been a party, for example, to plotting a robbery, the accused later had second thoughts and withdrew from the criminal enterprise.<sup>43</sup> In *Erim v State*,<sup>44</sup> the court held that the offence of conspiracy is completely committed the moment two or more persons have agreed that they will do, immediately or at some future time, certain things. It is not necessary, in order to complete the offence that any one thing should be done beyond the agreement reached. At that stage, even if the conspirators repented and stopped or had no opportunity to carry out their agreement or are prevented or fail in what they agreed to do, the offence is already a *fait accompli*. A conspiracy does not end with the making of the agreement. It will continue so long as there are two or more parties intending to carry out the design. It is a crime of duration, a continuing offence.<sup>45</sup>

### **(b) The Unlawful Act / Unlawful Means**

The *mens rea* in criminal conspiracy can be described as an intention to be a party to an agreement to do an unlawful act or to do a lawful act by an unlawful means.<sup>46</sup> The meaning of the word “Unlawful” is uncertain. In *R v Parnell*,<sup>47</sup> the conspiracy was for the purpose of inducing tenants to refuse the payment of the legitimate rents for their farms. This was held to be a criminal conspiracy even though, the non-payment of rent *per se* at best can only give rise to civil liability. Fitzgerald, J. summarised the law as follows: A conspiracy consists in the agreement of two or more persons to commit an unlawful act or to do a lawful act by unlawful means . . . “illegal” or “unlawful” may extend to and embrace many cases in which the purpose is a conspiracy as for instance, if several persons combined to violate a private right.

In *R v Mulji Jamnadas and ORS*,<sup>48</sup> the Court of Appeal for Eastern Africa held that the term “unlawful” used in the Penal Code of Uganda, includes civil wrongs as well as acts punishable criminally. This statement of the law applies to both Penal Code and Criminal Code.

### **(c) Knowledge of the Unlawful Object**

A person cannot truly agree to something without knowing what it is that is supposed to be agreed to and the courts have long insisted that for a person to be guilty of conspiracy,

<sup>37</sup> Stephen Mitchell and Richason, P.J. (eds.) (1988) *Archbold Pleading, Evidence and Practice in Criminal Cases*, 43<sup>rd</sup> Edition. London: Sweet and Maxwell, p. 2661. See also, *R v Chrestny* (No. 1) (1992) 1 All E.R. p. 189

<sup>38</sup> Section 16 (1) Children and Young Persons Act, 1963

<sup>39</sup> Section 29, Queensland Criminal Code, section 14, Uganda Penal Code, section 30, Nigerian Criminal Code, section 50, Nigerian Penal Code and section 2, Indian Penal Code

<sup>40</sup> *R v I.C.R Haulage Co. Limited* (1944) 1 All E.R., p. 691

<sup>41</sup> (1966) 1 All E.R., p. 193

<sup>42</sup> Okonkwo, C. (1980) *Criminal Law in Nigeria*, 2<sup>nd</sup> Edition. London; Sweet and Maxwell, p. 203

<sup>43</sup> Archbold, *Op. cit.* p. 2663. See also, *R v Aspinall* (1876) 2 Q.B., 48.

<sup>44</sup> (1994) 5 N.W.L.R (pt. 346) 522 at 534

<sup>45</sup> *D.P.P v Doot* (1973) A.C. 807; *Woss v Jacobson* (1985) 60 A.L.R, 313

<sup>46</sup> *Churchill v Walton* (1967) 2 A.C, p. 224; *R v Cooke* (1986) 2 All E.R, p. 985

<sup>47</sup> (1881) 14 Cox, C.C. p. 508

<sup>48</sup> (1946) 13 E.A.C.A. 147

He must at least have been cognisant of the object of the conspiracy. In *Schussler v Director of Enforcement*,<sup>49</sup> the Supreme Court of India held that if in the furtherance of the conspiracy, certain persons are induced to do an unlawful act without the knowledge of the conspiracy of the plot, they cannot be held to be conspirators, though they may be guilty of an offence pertaining to the specific unlawful act. Where a person conspired to commit one offence in furtherance of which his co-conspirators committed another offence, the person is not guilty of conspiracy to commit that latter offence unless he, at least, foresaw its commission.<sup>50</sup> The basic requirement of *mens rea* was re-affirmed by the House of Lords in *Churchill v Walton* where it held that knowledge of what the object of the alleged agreement is, including knowledge of any circumstances by reason of which the object is unlawful, must be proved against a defendant even though, the object is unlawful only because it is an offence of strict liability, and such knowledge may be negated by a positive mistake or simple ignorance. Although, a conspirator must know what it is that is allegedly agreed to, he needs not know that it is unlawful. Neither ignorance of the unlawfulness of the object nor a positive belief that it is lawful is a defence.<sup>51</sup> However, if the substantive offence allegedly agreed upon is so defined as to require knowledge of the law for its commission, such knowledge will also be required for a conspiracy to commit it.<sup>52</sup>

#### **(d) Knowledge of Other Parties**

A person may conspire with another, although, he does not know his identity and is not in direct communication with him, but he must at least know or believe that there is another who agrees with him. Without such knowledge or belief, a party would be ignorant of the existence of the alleged agreement.<sup>53</sup> Where the number of alleged conspirators exceeded two, however, some doubt may arise as to what parties must know before they could be held to have conspired together. In *R v Griffiths*,<sup>54</sup> D, had contracted with seven farmers to supply lime and D, his book-keeper and seven farmers were subsequently convicted of conspiring together to defraud the Government when claiming a subsidy payable under a statutory scheme. These convictions were quashed on appeal because there was no evidence to support the allegation that the farmers were co-conspirators for, although each might have conspired with D to defraud the Government, and each might have, in fact, participated in a wider scheme conceived by D, yet, there was no evidence that any of the farmers knew of any contract or fraud, apart from the one he was directly concerned with.

The Court held that, for any of the farmers to be guilty of the wider conspiracy, it had to be proved that he, at least, knew that there were other parties in addition to D. he must, at least, have known that he was participating in “a scheme” which went beyond the particular illegal act he was directly concerned with. *R v Griffiths* was applied in *R v Chrastny* (No. 1) where the Court held a wife liable for conspiracy when she agreed with her husband to commit an offence knowing that there were other conspirators notwithstanding the fact that she had no detailed knowledge of who the other conspirators were or had not come to any positive agreement with any of them.<sup>55</sup>

#### **(e) Additional Mental Element**

Apart from the awareness of the alleged object and other persons which a person must have before he can have the necessary intention to conspire, additional state of mind must be proved before it can be said that a person intentionally agreed to an unlawful object so as to be guilty of conspiracy.

Firstly, a defendant may become a conspirator by expressing his assent to the pursuit of the unlawful object even though it is not intended that he should personally do anything to further it beyond encouraging it by joining the agreement.

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<sup>49</sup> (1970) A.I.R, p. 549

<sup>50</sup> *R v Kerr* (1921) 15 Cr. App. Report, p. 165

<sup>51</sup> *Clark v State* (1986) 4 N.W.L.R (pt. 35) p. 381 at 395

<sup>52</sup> For instance, knowledge that the property is stolen is required before a defendant can be guilty of the offence of receiving stolen property under section 427 of the Criminal Code of Southern States of Nigeria. One may be deemed to have such knowledge if judging from the circumstances of the case, a reasonable man ought to have suspected the property in question to have been stolen. See also, *R v Adebowale* (1941) 7 W.A.C.A p. 142

<sup>53</sup> Orchard, G. (1974) “Agreement in Criminal Conspiracy”. *Criminal Law Review*, p. 335 at 336. See also, *R v Claytom* (1943) 33 Cr. App. R, 113 at 118

<sup>54</sup> (1965) 1 All E.R, p. 448

<sup>55</sup> (1992) 1 All E.R, p. 189

In *R v Gurney*,<sup>56</sup> the court ruled that a defendant could be convicted of conspiracy to defraud by means of the publication of a false prospectus but it was held that he could not be convicted of “having published or concurred in publishing” it, apparently because he had taken no part in the actual preparation or publication of the prospectus. In *Erim v State*,<sup>57</sup> the Supreme Court of Nigeria stated that a person may involve himself in the offence of conspiracy by his mere assent to and encouragement of the design, although nothing may have been assigned to or intended to be executed by him personally.

On the other hand, the court held in *R v Thomson* that a person who merely pretended to carry out the unlawful object, which he really “had no intention of doing anything of the kind” – was not guilty of conspiracy.<sup>58</sup> This decision seems to suggest that a party is not a conspirator, even though he expresses his agreement to an unlawful object, unless he intends that the object be achieved, or he intends to do something which he knows will further that object. It also appears that conspiracy at common law generally requires an intention to commit the unlawful object, that is, an intention that the unlawful object be achieved. In *R v Hollinshead*, the House of Lords confirmed that intent was necessary for conspiracy to defraud.<sup>59</sup> In the case, the agreement was to sell devices to persons who could themselves use them to defraud the Electricity Board by attaching the devices to meters and paying lower charges. The actual causing of pecuniary loss would have been carried out by third parties and not by any of the conspirators, but the House of Lords held that, at common law, it was sufficient that the conspirators had the intent to defraud.

Dishonesty is an essential element of *mens rea* in conspiracy to defraud. In *R v Ghosh*,<sup>60</sup> the court set out a two-stage test. Thus, a person acts dishonestly if:

- (a) his behaviour would be regarded as dishonest by the standards of ordinary decent people; and
- (b) the person realises that his behaviour is so regarded. If he did, then he was dishonest, even by his own particular standards, he saw nothing wrong with his behaviour.

In the Australian case of *R v Walsh and Harney*,<sup>61</sup> the appellants were convicted of conspiracy to defraud members of the general public and members of the Warnambol Greyhound Racing Club by manipulating the entries in a race so as to gain an unfair advantage, namely, the No.1 starting box for a particular greyhound. It was contended on their behalf that in order to obtain a conviction for conspiracy to defraud, the Crown must prove that the fraud contemplated amounts, at least, to a civil wrong. It was held that the intended means by which the purpose of the conspirators is to be achieved must be dishonest. This needs not involve fraudulent misrepresentation such as is required to constitute the tort of deceit. Dishonesty of any kind is enough. The above discussion of *mens rea* is applicable to the Penal Codes of India, Nigeria, Uganda, the Criminal Codes of Queensland, Nigeria and the Common Law of England.

### ***Agreement followed by an overt act***

Under the Penal Codes of India and Nigeria, agreement alone does not suffice to constitute the offence of conspiracy. The doing of an overt act, independent of the agreement, is a step further in prosecution of the object of the conspiracy and stamps it as criminal within the meaning of section 120A of the Indian Penal Code.<sup>62</sup> In *Oladejo v State*,<sup>63</sup> the court stated that “. . . under the Penal Code, mere agreement does not amount to conspiracy unless there has been an overt act done in the execution or pursuit of the agreement”. In *Abiodoye v State*,<sup>64</sup> the Court of Appeal, in distinguishing conspiracy under the Penal Code from conspiracy under the Criminal Code stated that, whilst under the Penal Code, criminal conspiracy involves an agreement to do an illegal act and in addition the doing of the act in pursuance thereof, under the Criminal Code, it is the agreement to do an unlawful act that constitutes the offence of conspiracy.

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<sup>56</sup> (1869) 11 Cox, p. 414

<sup>57</sup> (1994) 5 N.W.L.R (pt. 346) 522 at p. 535. If a conspiracy is already formed and a person joins it afterwards, he is equally guilty. See *Daboh and Anor v State* (1977) 5 S.C., p. 197 at 222

<sup>58</sup> (1965) 50 Cr. App. R. p. 406

<sup>59</sup> (1985) A.C., p. 975

<sup>60</sup> (1982) Q.B., 1053

<sup>61</sup> (1984) V.R. 474

<sup>62</sup> Gour, H.S *Op. cit.* p. 1098

<sup>63</sup> *Supra*

<sup>64</sup> *Supra*

In *Rajaram Gupta & Ors v Dharamchan & Ors*, it was held that: The mere act of engaging in an agreement to do an illegal act is an overt act, and the word “act” also includes an illegal omission. The overt acts constituting a conspiracy are acts either (i) signifying agreement, or (ii) preparatory to the offence and (iii) acts constituting the offence itself. The gist of the offence. . . therefore lies in forming the scheme or agreement between the parties. The external or overt act of the crime is concert by which mutual consent to a common purpose is exchanged. It therefore suffices if the combination exists and is unlawful. Mere allegation of conspiracy without any evidence signifying the agreement itself or acts preparatory to the offences or acts constituting the offence itself is not enough.<sup>65</sup>

### ***Proving Conspiracy***

For the prosecution to succeed in proving the offence of conspiracy, it must prove the conspiracy as described in the charge and that the accused persons were engaged in it or prove the circumstances from which the judge or jury may presume or infer it. To prove the existence of conspiracy, it must be shown that the alleged conspirators were acting in pursuance of a criminal purpose held in common between them.<sup>66</sup> Since privacy and secrecy are the elements of criminal conspiracy, it is difficult to obtain direct evidence in its proof.

In *R v Gokaldas Kanji & Anor*, the East African Court of Appeal held: Certainly, there was no direct evidence of an agreement but how rely is conspiracy proved by such evidence . . . conspirators do not normally meet together and execute a deed setting out the details of their common unlawful purpose. It is a common – place to say that an agreement to conspire may be deduced from any acts which raise the presumption of a common plan.<sup>67</sup>

In *Benson Obiakor v The State*,<sup>68</sup> the Supreme Court held: . . . In view of the nature of the offence of conspiracy, it is rarely or seldomly proved by direct evidence but by circumstantial evidence and inference from certain facts. It is inconceivable that two or more persons will set out to do an unlawful act or commit a crime of whatever magnitude without a sort of meeting of their minds one way or the other. There must be a discussion, an agreement, a planning and then the execution of that agreement. Except one of the conspirators is arrested and he agreed to give evidence on how the agreement was struck, it is rather difficult to have direct evidence of conspiracy. Where persons are charged with conspiracy in addition to the offence committed in pursuance of it, care must be taken in considering the evidence relevant to conspiracy and keep several issues clear. Proof of conspiracy does not necessarily have to be by direct evidence of an actual agreement as such is not always easy to come by. Conspiracy to commit an offence is usually inferred from proved facts or unbroken chains of events pointing irresistibly to the meeting of the minds between two or more persons to commit crime.<sup>69</sup>

It is probably because of the incapability of positive proof of conspiracy that made the Supreme Court to suggest the proper approach to indictment which contains a charge of conspiracy and a substantive charge in *Okanlawon v State* thus:<sup>70</sup> The proper approach to an indictment which contains offence of conspiracy as a charge and a substantive charge is to deal first with the main charge and the charge of conspiracy.

In *Shodiya v State*,<sup>71</sup> the Court stated that proof of the existence of conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them. In *Ongodia and Erima v Uganda*,<sup>72</sup> the two accused captains in the Ugandan Army appealed to the Court-Martial Appeal Court against the findings of a General Court-Martial at Kampala. Both appellants had been convicted, *inter alia* of the charge: that they had conspired together and with other persons unknown to effect an unlawful purpose, namely to set up a road block and arrest the then Prime Minister Dr. A.M Obote contrary to section 375 (6) of the Penal Code.

The material facts as believed were as follows: on February 24, 1966, the two appellants arrived at the Officers’ Mess at Entebbe at about 2P.M.

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<sup>65</sup> (1983) CRI. L.J. 612

<sup>66</sup> *Gbadamosi v State* (1991) 6 N.W.L.R (pt. 196) p. 182

<sup>67</sup> (1949) 16 E.A C.A, p. 116

<sup>68</sup> (2002) 10 N.W.L.R (pt. 776) p. 612 at pp. 628 – 629

<sup>69</sup> See also, *Njovens v The State* (1973) 5 S.C p. 17; *Ikemson v The State* (1989) 3 N.W.L.R (pt. 110) p. 455

<sup>70</sup> (2015) 63 N.S.C.Q.R, p. 128 at pp. 180 – 181

<sup>71</sup> (1982) 2 N.W.L.R (pt. 230) 457 at 472

<sup>72</sup> (1967) E.A.L.R. 137

The first appellant, Ongodia, in the presence of the second appellant, Erima, informed Anguram and Guweddeko in the Mess that war had broken out, that the Army Headquarters had been surrounded and they had managed to escape. Ongodia asked Anguram if he had confidence in his platoon and on receiving an affirmative reply, Ongodia asked Anguram to take his platoon and set up a road block with the object of arresting Dr. Obote. Ongodia added that other troops were advancing from Kampala and they would be arriving any moment. Erima remained silent throughout the conversation but nodded his head from time to time. It was not established at what precise moment of the conversation he nodded his head.

In affirming the conviction of the first appellant, the Court stated: In our judgment, there was sufficient evidence to justify an inference that Ongodia had conspired with a person or persons unknown to arrange for a road-block . . . with the object of arresting the Prime Minister. Both Anguram and Guweddeko testified that Ongodia had said to Anguram that reinforcements were on the way. How could Ongodia have known about reinforcements unless he was a party to some scheme to send them to Entebbe? In our judgment, there was sufficient evidence to justify a finding that the first appellant had conspired with others to waylay and arrest the Prime Minister in the . . . road despite the absence of any direct evidence of an agreement.<sup>73</sup>

Also, in *Subhas Bhattacharyya v State*,<sup>74</sup> the appellant, a senior cashier in a Bank, was convicted on a charge of conspiracy with other accused person to rob a bank. There was uncontroverted evidence that the appellant was frequently seen in the company of the other accused before the robbery. On the day of the robbery, the applicant left the bank just before the robbery and talked with the other accused persons on his way out. The Court held that the conduct of the Appellant was sufficient to draw an inference of conspiracy and his conviction was upheld.

In order to convict on a charge of conspiracy, it is not necessary to prove that the defendants met to concoct the scheme, the subject-matter of the charge, nor that they should have originated the conspiracy. If a conspiracy is already formed and a person joins it afterwards, that person is also guilty.<sup>75</sup> A conspiracy may exist between persons who have never seen each other or corresponded with each other.<sup>76</sup>

In *Erim v State*,<sup>77</sup> the Supreme Court of Nigeria stated that in order to prove conspiracy, it is not necessary that there should be direct communication between each conspirator and every other. All that needs be established is that the criminal design alleged is common to all of them. Proof of how they connected with or amongst themselves or that the connection was made is not necessary for there could even be cases where one conspirator may be in one town and the other in another town and they may never have seen each other but there would be acts on both sides which would lead the trial court to the inference.

Direct proof of conspiracy is rarely available. In dealing with such cases based on circumstantial evidence, however, an inference of guilt needs only be drawn when the circumstances are such as to be incapable of being reasonably explained on any other hypothesis than the guilt of the accused.<sup>78</sup>

### ***Impossibility as a Defence***

At common law, impossibility is a defence to conspiracy. In *D.P.P v Nock*,<sup>79</sup> the accused agreed to obtain cocaine by separating it from the other substances contained in a powder obtained from a co-accused. They believed that the powder was a mixture of cocaine and ligocaine, and that they would be able to produce cocaine from it. This was not so. The agreement was to pursue a course of action which could never in fact have produced cocaine. The House of Lords acquitted him of the charge of trying to produce cocaine.<sup>80</sup> In Nigeria, the opinion of legal writers seems to favour the view that impossibility does not afford a defence to conspiracy.<sup>81</sup>

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<sup>73</sup> *Ibid* at p. 141                      *Supra* at p. 141

<sup>74</sup> (1985) Cr. L.J 1807

<sup>75</sup> *D.P.P v Doot* (1973) 2 W.L.R, 532: *Clark v State* (1986) 4 N.W.L.R (pt. 35) p. 381

<sup>76</sup> *R v Parnell* (1981) Cox, 508

<sup>77</sup> *Supra*

<sup>78</sup> *Hari Ram v State of Himachal Pradesh* (1982) Cr. L.J. 294

<sup>79</sup> (1978) 2 All E.R. 654

<sup>80</sup> This decision was reversed by section 1(1) of the Criminal Law Act, 1977 as amended by the Criminal Attempts Act, 1981 which clearly states that there can be liability, even though, there exists facts which render the commission of the offence impossible. This provision is, however, limited to statutory conspiracies.

<sup>81</sup> Okonkwo & Naish, *Op. cit*, p. 203

The authority cited in support of this view is *R v Majekodunmi*,<sup>82</sup> where a statute punishes postal workers for criminal acts connected with their work. They conspired with a lawyer to tamper with postal matters and on being charged with conspiracy, it was argued on behalf of the lawyer that since he was not working in the post office and as the statute envisaged only employees of the postal services, he could not be liable as a conspirator. This argument was rejected and it was held that one can be convicted of a conspiracy for agreeing to commit a crime which, if he were alone, he could have been incapable of committing in law.

### ***Bona fide claim of right as a defense to conspiracy***

A claim of right exists whenever a man honestly believes that he has a lawful claim, even though it may completely be unfounded in law or in fact. Therefore, defence of bona fide claim of right validly raised is a complete defence to a charge of conspiracy. In *Ibeziako v State*,<sup>83</sup> the Supreme Court held that:

While a mistake of law is not a good defence, a sincere belief in a state of facts which if true would render the illegal conduct legal would be a good answer to any charge of conspiracy. For instance, if conspiracy to trespass be a crime, belief in a state of facts which would give rise to an enforceable right of way would be a defence.

### ***Husband and Wife***

By virtue of section 34 of the Nigeria Criminal Code, a husband and wife of christian marriage are not criminally responsible for conspiracy between themselves alone. The provision of section 34 of the Criminal Code only gives defence to a christian couple charged and tried for conspiracy between the two of them only. This is based on the common law presumption that a husband and wife are one, each being part of the other and since conspiracy requires the agreement of at least two persons to commit an offence, such husband and wife cannot commit the offence.<sup>84</sup> But they will be liable for conspiracy with a third party.<sup>85</sup>

### ***Complete Offence Committed***

Even when the substantive offence is actually committed, the parties can nevertheless be charged additionally with conspiracy. Where there are substantive charges which can be proved, it is generally undesirable to complicate and lengthen the trial by a count for conspiracy to commit any of those charges.<sup>86</sup> In *Clark v State*, the Court of Appeal stated that it is undesirable to combine a charge of conspiracy with a charge of the substantive offence because: evidence which otherwise would be inadmissible on the substantive charges against the accused becomes admissible, and such a joinder of charges adds to the length and complexity of the case so that the trial may easily be well near unworkable and impose a quite intolerable strain on the court.<sup>87</sup> Where such a course is adopted in Australia, the jury would be directed to consider the substantive charges first and then proceed to consider how far the count of conspiracy should be there at all and if so, whether it is made out.<sup>88</sup> The practice is also discouraged in England unless the prosecution can justify both charges as being in the interest of justice.

To this end, a Practice Direction was issued in 1977 as follows:<sup>89</sup>

1. In any case where an indictment contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the joinder or, failing justification, to elect whether to proceed on the substantive or on the conspiracy counts.
2. A joinder is justified for this purpose if the judge considers that the interest of justice so demands it.

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<sup>82</sup> (1952) 14 W.A.C.A, 64

<sup>83</sup> *Ibeziakor v The State* (1989) 1 ACLR, 123 at 135

<sup>84</sup> *Obiakor v The State Supra* at p. 627, Paras A – C. See also, Fakayode, E.O (1977) *The Nigerian Criminal Code Companion*. Benin City; Ethiopie Publishing Corporation, p. 18; Omage, V.A.O. (1993) *Elements of the Law of Torts: Libel and Slander*. Benin City: Hilgerson Publishers, p. 12

<sup>85</sup> *Keshiro and Anor v Inspector – General of Police* (1955) W.R.N.L.R, 84

<sup>86</sup> Carter, R.F (1974) *Criminal Law of Queensland*, 4<sup>th</sup> Edition. Butterworths, p. 429

<sup>87</sup> *Atano v State*(2005) 4 ACLR p. 25 at p. 54; *Francis Tete Lawson and Ors v The State* (1975) 4 S.C, p. 115 at 123; *R v Sweetland* (1957) 42 Cr. App. R, 62 at 66; *Ogbozor v Inspector – General of Police* (1964) 1 All NLR, 9 at p. 55; *R v Jones* (1974) 59 Cr. App. R, p. 120 at 131.

<sup>88</sup> *R v Dawson and Wenlock* (1960) 44 Cr. App. R, 87

<sup>89</sup> (1977) 2 All E.R, 540

There are, however, cases when it is permissible to include the count of conspiracy with that of the commission of the substantive offence. In *Clark v State*,<sup>90</sup> examples were given as follows:

- (a) Where there is evidence that some, but not all, of the accused persons committed a few, but not all, of the overt acts, or
- (b) Where the principal culprits are not before the court, or
- (c) Where conspiracy can be inferred from the facts and circumstances of the commission of the substantive offence, particularly where available evidence of the commission of the substantive offence is not direct, a count of conspiracy may quite properly be joined with that of the commission of the substantive offence.

Conspiracy does not merge into the substantive offence. It is therefore not an inflexible rule of law that a discharge on a count of conspiracy must involve a discharge on the substantive offence or offences or vice versa. The course to be taken by the court must be dictated by the circumstance of the case.<sup>91</sup> The doctrines of election and severance are also relevant to the offence of conspiracy where there has been a joinder of a count of conspiracy with another for the commission of the substantive offence. This is the rule in *R. v Cooper & Crompton*.<sup>92</sup> In that case, the charge of conspiracy adds nothing to that of the substantive offences, and the court held it was not desirable to include it.

### **Jurisdiction**

Under the Indian Penal Code, Gour has stated that “it is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the court”.<sup>93</sup> However, the Indian Supreme court decided in *Mukherjee v State of Madras* that the court having jurisdiction to try offences committed in pursuance of the conspiracy can try the offence of conspiracy even if it was committed outside its jurisdiction.<sup>94</sup>

Similarly, under the Nigerian Penal Code, it is not only the court having jurisdiction over the area where the offence of conspiracy was committed that can try the defendants; the defendants can also be tried by the court having jurisdiction over the area where an overt act was done in pursuance of the conspiracy. In *Haruna v State*,<sup>95</sup> the conspiracy was hatched in Lagos, while the offence conspired at was committed in Bida. The court held that by virtue of section 96(2) of the Penal Code, the submission by one of the accused persons of a forged payment voucher in Bida and his receipt of a cheque in payment of the amount stated therein amounted to criminal conspiracy in Bida by all the accused, even though the agreement to obtain payment by means of the forged vouched was made in Lagos.<sup>96</sup>

In *Njovens & Others v State*,<sup>97</sup> the first three defendants who were senior police officers and the fourth defendant, a politician were convicted by the High Court of Kwara State of various offences including abetment of conspiracy contrary to section 85 of the Penal Code arising from their acts or omissions in Ibadan in the then Western State in connection with an armed robbery committed in Kwara State by four other persons. On appeal, they contended that under section 4(2)(a) of the Penal Code, they were not triable in Kwara State for the offence because the “initial element” of the offence did not occur in Kwara State, nor indeed any of the elements; and section 4(2)(b) could not in any case apply as the defendants did not “afterwards enter” Kwara State but were brought there involuntarily under arrest.

It was held by the Supreme Court as follows, that:

- (1) In the context of section 4(2) of the Penal Code Law, the word “element” therein is more widely received and is not limited either to an *actus reus* or the *mens rea* in conventional jurisprudence.

<sup>90</sup>(1986) 4 N.W.L.R (pt. 35) p. 381 at 395

<sup>91</sup> *Lawson v State* (1975) N.S.C.C p. 245

<sup>92</sup> (1947) 32 Cr. App. R. p. 102

<sup>93</sup> Gour, H.S *Penal Law of India Op. cit.* at p. 1094

<sup>94</sup> (1961) S.C, 1601

<sup>95</sup> (1972) N.S.C.C 550

<sup>96</sup> Section 96(2) of the Penal Code states that “no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof”

<sup>97</sup> (1973) All NLR, 371

For the purpose of applying the subsection, it is necessary to look for the “initial element” of the offence, that is, the “initial act or omission” concerned. If that initial act or omission occurs in the State even though the other “elements” do not, the person who does or makes that initial act or omission is punishable by the State under the Penal Code. On the other hand, if that initial act or omission occurs outside the state, the other or others occurring within the state, and the person who does or makes that initial act or omission afterwards enters the state, he is by such entry triable by the state under the Code.

(2) On a charge of abetment of an offence, the initial element is the instigation or positive act of encouragement to do or make the act or omission which constitutes the offence. In this case, the initial element took place outside Kwara State, but the commission or the act abetted, which is an element of a charge under section 85 of the Penal Code took place in Kwara State. On the evidence, the defendants were apprehended in that State. They were therefore properly triable in Kwara State by virtue of section 4(2)(b) of the Penal Code.

Under the Penal Code of Uganda and the Criminal Codes of Queensland and Nigeria, the courts have virtually the same jurisdiction with the English Courts with regard to trial of conspiracy. In *Board of Trade v Owen*,<sup>98</sup> the House of Lords held that a conspiracy to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie in England. Carter observed that section 541 of the Queensland Criminal Code states the law as declared in *Board of Trade v Owen*.<sup>99</sup> The decision in *Board of Trade v Owen* is applicable in Nigeria and Uganda under section 516 of the Criminal Code and section 373 of the Penal Code respectively.

In England, a conspiracy formed out of jurisdiction is indictable in England if acts in furtherance of that agreement are committed in England. In *D.P.P v Doot*,<sup>100</sup> the defendants were convicted of conspiring “fraudulently to evade the prohibition imposed by the Dangerous Drug Act, 1965 on the importation of cannabis resin into the United Kingdom”. The evidence revealed that the conspiracy involving the defendants had been formed abroad. The whole scheme had been worked out in detail while the defendants were in Belgium and Morocco. The House of Lords held that conspiracy is a continuous offence. Accordingly, Lord Pearson held:

*I think a conspiracy to commit in England an offence against English law ought to be tried in England if it has been wholly or partially performed in England. In such a case, the conspiracy has been carried out in England with the consent and authority of all the conspirators. It is not necessary that they should all be present in England – one of them, acting on his own behalf and as an agent for the others, has been performing their agreement with their consent and authority in England. In such a case, the conspiracy has been committed by all of them in England . . . The Crime of conspiracy in the present case was committed in England, personally or through an agent or agents, by all the conspirators.*<sup>101</sup> The decision in *D.P.P v Doot* was followed in Australia in *Woss v Jacoboon*.<sup>102</sup> It is submitted that the law is same under the Ugandan Penal Code jurisdiction and the Nigerian Criminal Code jurisdiction. Under section 96 of the Administration of Criminal Justice Act, 2015 in Nigeria and section 68 of the Ugandan Criminal Procedure Code, a continuing offence committed in more than one division or district can be tried or inquired into by a court having jurisdiction in any such division or district. As conspiracy is a continuing offence, it can be tried and inquired into not only by the courts with jurisdiction in the division or district where the agreement was entered into, but the courts with jurisdiction in the division where the agreement was carried into effect.<sup>103</sup>

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<sup>98</sup> (1957) A.C. 602

<sup>99</sup> Carter, R.F. (1974) *Criminal Law of Queensland*, *Op. cit*, p. 428

<sup>100</sup> (1973) A.C. 807. See also, Jefferson, M. (1997) *Criminal Law*, 3<sup>rd</sup> Edition. London; Pitman Publishing, p. 331,

<sup>101</sup> *D.P.P v Doot*, *Op. cit* at p. 827

<sup>102</sup> (1985) 60 A.L.R, 313

<sup>103</sup> Doherty, O. (1990) *Criminal Procedure in Nigeria*. London; Blackstone Press Limited, p. 165. With the enactment of the Administration of Criminal Justice Act, 2015 (ACJA), the era of dual application of two different Criminal Procedure Laws, that is, Criminal Procedure Act (CPA) in the Southern part of Nigeria and Criminal Procedure Code (CPC) in the North stopped, thereby creating a new unifying Criminal Procedure Law for Nigeria. See also, Olakanmi, J. (2015) *Administration of Criminal Justice Act, 2015 and Cybercrimes (Prohibition, Prevention etc) Act, 2015*. Abuja: Lawlords Publication, p. 1.

## **Punishment**

Where there is a conspiracy to commit a crime in Queensland or a felony in the case of Nigeria and Uganda, section 541 of the Queensland Criminal Code, section 516 of the Nigerian Criminal Code and section 373 of the Ugandan Penal Code all provide that the offender is liable, if no other punishment is provided, to imprisonment for seven years, or if the greatest punishment to which a person convicted of the crime or felony in question is liable is less than imprisonment for seven years, then to such lesser punishment.<sup>104</sup> With regard to conspiracy to commit misdemeanours and other conspiracies, the three Codes provide for imprisonment for two years,<sup>105</sup> five years<sup>106</sup> or three years with hard labour.<sup>107</sup> For conspiracy to commit murder, the Codes stipulate a punishment of fourteen years, imprisonment, with hard labour in Queensland.<sup>108</sup> Under the Penal Codes of India and Nigeria: *Whoever is a party to a criminal conspiracy to commit an offence punishable with death or with imprisonment shall where no express provision is made in the Codes for the punishment of such a conspiracy be punished in the same manner as if he had abetted such offence.*<sup>109</sup>

Sections 109 and 85 of the Indian and Nigerian Penal Codes respectively provide: *Whoever abets any offence, shall if the act abetted is committed in consequence of the abetment and no express provision is made by this (Penal) Code (or by any other law for the time being in force) for the punishment of such abetment, be punished with the punishment provided for the offence.*<sup>110</sup>

Section 91(1) and section 115 of Nigerian and Indian Penal Codes respectively state: *Whoever abets the commission of an offence punishable with death or imprisonment for life shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this (Penal) Code (or by any other ordinance or law for the time being in force) for the punishment of such abetment, be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.*<sup>111</sup>

Section 115 of the Indian Penal Code states further that: *and if any act, for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment . . . for a term which may extend to ten years and shall be liable to fine.*

Section 91(2) of the Nigerian Penal Code provides that: *If the abettor is a public servant whose duty it is to prevent the commission of such offence, he shall be liable to imprisonment for a term which may extend to ten years and shall be liable to fine.*

In cases where the offence abetted does not involve punishment with death or life imprisonment and the offence is not committed in consequence of the abetment, the offender shall be punished with imprisonment for a term which may extend to one fourth part of the longest term provided for that offence or with such fine as is provided for that offence or with both. In the case of a public servant, he shall be punished with imprisonment for a term which may extend to one half of the longest term provided for that offence or with such fine as is provided for the offence or with both.

Going by the provisions of the various Codes, it is clear that the punishment prescribed by law, that is, the Codes, for conspiracies to commit various offences is generally lower than that prescribed for the complete offences themselves. The rationale for this is that the wrong sought to be done by the conspirators has not been done, society suffers no loss.<sup>112</sup> Under the Penal Codes of India<sup>113</sup> and Nigeria,<sup>114</sup> where the offence conspired at is actually committed, the conspirators shall be liable to the same punishment prescribed for the complete offence.

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<sup>104</sup> With hard labour under section 541 of the Queensland Criminal Code

<sup>105</sup> Sections 517 – 518, Nigerian Criminal Code

<sup>106</sup> Sections 374 – 375, Ugandan Penal Code

<sup>107</sup> Sections 542 – 543, Queensland Criminal Code

<sup>108</sup> Section 324, Nigerian Criminal Code, section 201, Ugandan Penal Code and section 309, Queensland Criminal Code

<sup>109</sup> Section 97(1) Nigerian Penal Code, section 120B(1) Indian Penal Code

<sup>110</sup> The words in brackets are from the Penal Code of Nigeria

<sup>111</sup> The words in bracket are from the Penal Code of Nigeria.

<sup>112</sup> It should be noted that the same *mens rea* is required for conspiracy to commit an offence and for the complete offence.

See Smith J.C (1971) “The Element of Chance in Criminal Liability” *Crim. L.R.* p. 63

<sup>113</sup> Section 116 of the Indian Penal Code

<sup>114</sup> Section 85 of the Nigerian Penal Code

These provisions are somewhat similar to the position in England under section 3 of the Criminal Law Act, 1977 which limits the punishment for conspiracy, contrary to section 1 of the Act, to the maximum sentence for the complete crime which the defendants conspired to commit. The difference between the Indian and Nigerian Penal Code, on the one hand and the English Criminal Law Act on the other hand, is that in India and Nigeria, the complete offence must have been committed before the conspirators can be sentenced to the maximum punishment applicable for the complete offence whilst in England, it is sufficient that the defendants merely conspired to commit the offence for the purpose of imposing the sentence prescribed for the complete offence. Under sections 37(2) and 37(4) of the Nigerian Criminal Code and the Queensland Criminal Code respectively, conspiracy to commit treason is punishable as the complete offence by death in Nigeria and imprisonment with hard labour for life in Australia. The Nigerian Government has enacted various laws such as the Advance Fee Fraud and Other Related Offences Act<sup>115</sup> the Money Laundering (Prohibition) Act,<sup>116</sup> 2011 and Corrupt Practices and Other Related Offences Act<sup>117</sup> to curb an up surge in drug and fraud related crimes in Nigeria. These various enactments make conspiracy to commit an offence under these various enactments subject to the same punishment prescribed for the relevant offences.<sup>118</sup>

What is, therefore, the rationale behind the harsher penalties stipulated in the Criminal Law Act, 1977 and the above-mentioned enactments? At common law, it was held in *Verrier v Director of Public Prosecutions* that some conspiracies might call for a greater punishment than could be imposed for the completed offence where the circumstances warranted the conclusion that any offence, whether inchoate or completed, which is committed by a number of people acting in concert may be viewed as presenting a greater social danger than the same offence committed by an individual.<sup>119</sup> On general deterrent grounds, the sentence for “group” offences may, therefore, be longer. Sentences for rape by gangs are on this account higher than those for rape by an individual.<sup>120</sup> According to Howard:<sup>121</sup>

*A conspirator by reason of his organisational ability is considerably more of a menace than the principal offender. Individual crime is nothing like so great a menace to society as organised crime. In a well organised criminal group, the actual perpetrators of offences are the least significant members, for they depend for their effectiveness on the opportunities and instructions furnished by others more able and powerful than themselves. Frequently, conspiracy is the only weapon available in the Criminal Law with which to strike at the organisers of large-scale crime.*

For this reason, there is nothing wrong in punishing conspirators as if they had committed the offence they conspired to commit.

### **Conclusion**

Conspiracy is a complex offence. The law does not sanction the mere intention of one person to commit a crime, but when two or more people agree to commit the same crime, the act of agreement is criminal. From the analysis of the provisions in the various jurisdictions, it is apparent that all the jurisdictions make use of the same common law principles in applying their various statutory provisions on conspiracy. The only exception is England which has two kinds of Conspiracy – Statutory and Common Law Conspiracies. With regard to statutory conspiracy in England, it is observed that, although, the *actus reus* is not different from that of Common Law Conspiracy, the *mens rea* is not easily identifiable. The decision in *D.P.P v Shannon* which has been followed in Australia and Nigeria does not accord with the definition of the offences, as it takes, at least, two to commit the offence of conspiracy. It is difficult to see how A can be found guilty of conspiring with B in one trial while in another trial or the same trial, B would be found not guilty of conspiring with A.

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<sup>115</sup> Cap. A6, Laws of the Federation of Nigeria, 2004

<sup>116</sup> An Act to repeal the Money laundering (Prohibition) Act, 2004 and enact the Money Laundering (Prohibition) Act, 2011

<sup>117</sup> Cap. 80, Laws of the Federation of Nigeria, 2004

<sup>118</sup> See section 8 of the Advance Fee Fraud and Other Related Offences Act, 2004, section 18(a) and (c) of the Money Laundering (Prohibition) Act, 2011 and section 29 of the Corrupt Practices and Other Related Act, 2004

<sup>119</sup> (1967) 2 A.C, p. 195

<sup>120</sup> Cross, R. and Ashworth, A. (1981) *The English Sentencing System*, 3<sup>rd</sup> Edition. Butterworths, p. 156

<sup>121</sup> Howard, C. (1965) *Australian Criminal Law*. Brisbane; The Law Book Company Limited, p. 219

The idea of punishing conspirators as if they had committed the offence they conspired to commit as shown in section 8 of the Advance Fee Fraud and Other Related Offences Act, 2004, section 18(a) and (c) of the Money Laundering (Prohibited) Act, 2011 and section 29 of the Corrupt Practices and Other Related Act, 2004 is a welcome development. The *mens rea* for conspiracy is the same with the commission of the substantive offence.