THE INDICTMENT OF CRIMINAL CONSPIRACY

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I. INTRODUCTION

The prosecution has for a very long time enjoyed a position of considerable privilege in relation to criminal conspiracy. To begin with, there has been some uncertainty as to the scope of the unlawful (though not necessarily criminal) purposes which suffice to render an agreement for their effectuation indictable as a criminal conspiracy.[1] As the British Law Commission's recent proposals exemplify, along with their partial enactment by the British Parliament in the Criminal Law Act of 1977, the scope of the crime may readily be contracted at this level in brief and unambiguous terms, thereby mitigating the major of the criticisms that have been directed towards conspiracy up to this time.[2]

It may happen that the Law Commission's proposals will come to be adopted in many common law jurisdictions, and that conspiracy will be restricted to agreements for purposes which are themselves criminal. For the sake of convenience, this paper will proceed on the basis that the crime is indeed confined to conspiracies for the commission of a crime or conspiracies to defraud, though the analysis to which conspiracy is subjected is equally applicable to other more marginal heads of conspiracy.[3]

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[1] The situation is not necessarily relieved by the statutory codification of the crime in, for example, Australia: Crimes Act 1914-1973 (Aust.), s. 86; Crimes Act 1900 (N.S.W.), s. 393; The Criminal Code Act, 1899 (Q.), ss. 541-43; The Criminal Code Act Compilation Act, 1913 (W. Aust.), ss. 558-61; Criminal Code Act 1924 (Tas.), s. 297; and in Canada: CRIMINAL CODE, R.S.C. 1970, c. C-34, s. 21.

[2] The Criminal Law Act 1977, U.K. 1977, c. 45, in effect confines the scope of criminal conspiracy to conspiracy for a crime, conspiracy to defraud (as defined by the common law authorities), conspiracy to corrupt public morals and conspiracy to outrage public decency (again as defined by the common law authorities, subject to the qualification that if the object of the agreement is itself criminal, then the offenders must be charged with conspiracy for a crime, rather than with conspiracies of this designation). For a commentary upon this reform, *see* Smith, *Conspiracy Under the Criminal Law Act 1977(1) and (2)*, [1977] CRIM. L. REV. 598, 638.

The draft bill proposed by the Law Commission earlier provides for the contraction of the scope of criminal conspiracy to that of its primary common law head of conspiracy for a crime, though the Commission also proposed the temporary preservation of the common law head of "conspiracy to defraud" pending the enactment of a general offence of fraud. *See* THE LAW COMMISSION, REPORT ON CONSPIRACY AND CRIMINAL LAW REFORM, LAW COM. No. 76 (1976).

[3] In practice, most conspiracy charges in the various common law jurisdictions are for purposes criminal in themselves, or for conspiracies to defraud; and again, most of

More fundamental and intractable problems will remain, however, in the conspiracy context. These take their root in the elemental conception of conspiracy, and express themselves eventually in the prosecution and trial of the crime. It is at this level, where the course of events is largely governed by the indictments policy pursued by the courts, that the defendant encounters a significant potential disability, and where the Crown enjoys an imposing position of privilege.

This imbalance is dependent ultimately upon the ingrained formlessness of the crime, in both its substantive and procedural perspectives. It is, for reasons to be noted shortly, a recurrent characteristic of conspiracy indictments that they fail to indicate adequately the scope of the charge, or, in other words, the case to be led by the prosecution. Conspiracy counts typically are too general in their terms. The failure to adequately define the issues of trial injects a vagueness into proceedings that is prejudicial to the defendant. Before elaborating on the shortcomings of conspiracy indictments and making proposals for change, some general comments about the crime and its trial will need to be made.

II. The Conspiracy Agreement

The crime of conspiracy is complete upon the formation of an agreement for an illegal purpose. Notionally, conspiracy is an inchoate crime. In fact this status is almost entirely fictional, for almost invariably the conspiracies charged are consummated conspiracies.[4] Conspiracy as an illegal agreement is presumed from the overt acts committed in the execution of the conspiracy. The overt act of a conspiracy to murder, for example, may be the act of murder itself. Formally, the overt acts are not a part of the crime of conspiracy, which is confined to the mere fact of consensus. In practice they are crucial as evidence of the form and content of the agreement, and of the parties to it. Realistically, of course, the overt acts *are* the conspiracy.[5]

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these are for frauds which are themselves criminal. The other common law heads of criminal conspiracy which still exist in modern times may be regarded as sub-categories of the major common law head of conspiracy for a crime. The House of Lords declared in Kamara v. D.P.P., [1974] A.C. 104, [1973] 2 All E.R. 1242, [1973] 3 W.L.R. 198 (H.L.) that the offence of conspiracy to commit a tort does exist at common law. The decision was given, however, in defiance of respectable authority and is certainly questionable in its reasoning. *See* Gillies, *The Law of Criminal Conspiracy in Australia and England*, 8 Sydney L. Rev. 107 (1977).

[4] It would be uncommon that an unconsummated conspiracy would be detected and so prosecuted, though there are exceptions, *e.g.*, R. v. Banks, 12 Cox. C.C. 393 (Assizes 1873); R. v. King, [1966] Crim. L. Rev. 280 (C.C.A.); R. v. Hancock (No. 7), [1975] 6 W.W.R. 225, 32 C.R.N.S. 112 (B.C. Prov. Ct.), *aff'd on other grounds* [1976] 5 W.W.R. 609 (B.C.C.A.).

[5] A conspiracy may of course be continuous, a feature of the crime that reinforces the identification of the agreement and of the overt acts transacted in pursuance of it. The English Court of Criminal Appeal expressly stated that the crime is a potentially continuous one in R. v. Simmonds, [1969] 1 Q.B. 685, [1967] 2 All E.R. 399, [1967] 3 W.L.R. 367 (C.A.).

A conspiratorial agreement that must be inferred a step removed from its actual formation is clearly an almost metaphysical concept. Its form is irrelevant; what matters is that, having regard to the evidence of the individual's overt acts the general inference may be drawn that he was privy to an agreement and was concerned in some way to see it or some part of it effected. His precise role, or the means whereby he assented to the scheme is immaterial. In these terms, the conspiratorial agreement is capable of linking together many individuals and overt acts (each representing a discrete illegal purpose) in one general scheme. The pattern of events is presumed to disclose sufficient unity as to be characterized generally as an undivided scheme or conspiracy. Some of the schemes that have qualified as single conspiracies have been improbably extensive.[6]

Frequently, where the participants in these schemes play different roles in the organization (some as principals responsible for initiation and direction, others as subsidiaries), there arise real problems in distinguishing degrees of liability. The tests for conspiratorial intention or purpose are sufficiently vague that a participant playing merely a subsidiary role in a multiple-object conspiracy may be indicted as a principal conspirator in the whole of the conspiratorial scheme. In *Rex v. Meyrick*,[7] for example, the English Court of Criminal Appeal was content to draw a broadly-cast inference of agreement from evidence which clearly revealed several independent conspiracies, so as to make a minor conspirator liable for the supposedly unified scheme. Later the same court, while taking a more rigorous approach in *Regina v. Griffiths*,[8] was nonetheless content to state *obiter* that a minor participant in an overall scheme might be enrolled in the totality of the scheme if he had a simple "awareness" that the conspiracy went beyond the terms of his own immediate involvement.[9]

The vagueness of the concept of "agreement", as reflected in cases like *Meyrick* and *Griffiths*, is reinforced by a judicial vagueness as to the very nature of the crime itself. The crime is complete upon the simple formation of an agreement to fulfil an illegal purpose. Is it enough, then, in respect of a conspiracy count, that only one illegal consensual purpose be proven against the defendants for a conviction to follow, even if numerous other purposes particularized or led in evidence, are not proven to the satisfaction of the jury? Is it enough if only a

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[6] *See, e.g.*, R. v. Meyrick, 45 T.L.R. 421, 21 Cr. App. R. 94 (C.C.A. 1929); R. v. Williams, [1964] CRIM. L. REV. 666 (C.C.A.). *But contrast* R. v. Dawson, [1960] 1 All E.R. 558, [1960] 1 W.L.R. 163, 44 Cr. App. R. 87 (C.C.A.) for a rare case in which an appellate court disapproved a conspiracy count as being bad for duplicity.

[7] *Id.*

[8] [1966] 1 Q.B. 589, [1965] 2 All E.R. 448, [1965] 3 W.L.R. 405 (C.C.A.).

[9] This is as detailed as the English courts' comments appear to have been on the issue of conspiratorial agreement.

representative few of the twenty acts of arson comprehended by a count of conspiracy to commit arson are proven against a defendant for a conviction on this count? To put things another way, is a conspiracy for ten acts of arson any different, legally, from one for two such acts?[10] Judges have rarely made this distinction in their formally correct (if practically absurd) dismissal of the overt acts of conspiracy as of evidential consequence only. This has been a disincentive for judges in determining the precise scope of the conspiracy before them, or degrees of liability between the individual defendants to the count.

In truth, the typical conspiracy indicted is factually complex and unwieldy. The courts have by and large taken the line of least resistance, and have not sought to make a science out of a doctrine that has engendered many perplexities. Rather, the judges have brought to conspiracy law an extreme pragmatism, especially in procedural matters, which would be quite foreign to the rest of the criminal law. Conspiracy trials have frequently been inaugurated by a general, poorly particularized count alleging an extensive illegal scheme involving many discrete illegal objects and numerous participants, all of whom are commonly indicted for it irrespective of the actual scope of their different roles. In an extreme, the various illegal objects may only come to be fully disclosed in the prosecution's evidence.

During the trial, the co-conspirator's rule of evidence[11] operates to make the whole of the prosecution's case admissible against each defendant. In this way, the differences in the degree of participation on the part of each defendant are obscured. The jury is tempted to acquit or convict the defendants as a group rather than individually. Confusion of the jury is made all the more probable because of the sheer volume of evidence characteristic of such trials. The jury may be incapable of discriminating between evidence admissible and inadmissible against an individual defendant or unsure of the issues which relate to each defendant.[12] Because there is a common count, the jury may be unable to specify its verdict against each defendant. It may not know whether to convict an individual defendant of a given count if unsure as to whether his involvement comprehended all of the illegal purposes

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[10] Considerations of punishment may of course differ from one defendant to the next following upon their convictions on a common conspiracy count; *but see* R. v. West, [1948] 1 K.B. 709, at 719, [1948] 1 All E.R. 718, at 722 (C.C.A.).

[11] Discussions of this rule of evidence include Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159 (1954); Holman, *Evidence in Conspiracy Cases*, 4 AUST. L.J. 247 (1930); G. WILLIAMS, CRIMINAL LAW 681 ff. (2d ed. 1961); R. HAZELL, CONSPIRACY AND CIVIL LIBERTIES 78-81, 121-22 (1974); M. GOODE, CRIMINAL CONSPIRACY IN CANADA ch. 6 (1975). *See also* THE LAW REFORM COMMISSION OF CANADA, REPORT ON EVIDENCE 26, 72 (1975), which recommends the inclusion as an exception to the hearsay rule of "a statement by a person engaged with the party in common enterprise made in pursuance of their common purpose".

[12] *See* R. v. Dawson, *supra* note 6, at 563, [1960] 1 W.L.R. at 170, 44 Cr. App. R. at 93; R. v. Partridge, 47 W.N. (N.S.W.) 173, 30 N.S.W. St. R. 410 (S.C. 1930).

attributed to the scheme by particulars or brought forward in the course of evidence. By establishing a link between a defendant and *any* conspiracy broadly resembling the conspiracy partially particularized in the count, a minor participant is exposed to conviction and punishment as a principal conspirator.

The dangers of poorly particularized counts have occasionally been recognized. Mr. Justice Ferguson, in the New South Wales case of *Rex v. Partridge*,[13] expressed regret, in discharging the jury in a conspiracy to defraud case, that the defendants did not apply for particulars of the overt acts eventually relied upon by the Crown to establish the conspiracy, "and if necessary, obtain an order for their delivery".[14] As it happened, it had only been in the course of evidence that the inference of a general conspiracy had emerged, and then only in such terms as to leave the issues of both its content and the scope of participation by each alleged participant in a state of vagueness. But all of the defendants had been charged "with one conspiracy with one object, and they are expected to look to the depositions [in the Police Court] to find the case they are prepared to meet".[15] The trial had miscarried because of the uncertainty in the case against each defendant and in the issues of the trial. As it happened, it was possible, at the conclusion of an unduly lengthy trial, to define with precision the charge against each defendant, but only after such an interim confusion of justice as to raise the "serious risk of a failure of justice". To leave the case to the jury in that form would be to "invite the jury to wander through the wilderness of evidence in the expectation that if they do not find one conspiracy proved they may possibly find another".[16]

In contrast, it will be seen, the English Court of Criminal Appeal has frequently refused to order a complete particularization of the conspiracy count. The reasons are various, not the least of them being the onerous nature of the task that would be cast on the prosecution in the circumstances of an extensive conspiracy.

A rigorous indictment policy is needed, firmly providing for the full particularization of the consensus charged. Such a policy must in turn be based upon a reasonably sophisticated concept of conspiratorial agreement which permits a realistic discrimination of degrees of individual participation in multiple-object conspiracies, and which charges each defendant with an agreement embracing purposes particular to his involvement in a scheme and not those wholly tangential to it.

The conspiracy indictment, in common with the indictment in the criminal law generally, has several obvious specific functions. The

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[13] R. v. Partridge, *id.*
[14] *Id.* at 174, 30 N.S.W. St. R. at 411.
[15] *Id.* at 174, 30 N.S.W. St. R. at 412.
[16] *Id.* at 175, 30 N.S.W. St. R. at 413.

count should provide a detailed statement of the offence, isolating the factual issues of the trial. The statement should forewarn the defence of the case to be met and afford the basis for the reception and evaluation of evidence — something especially crucial in conspiracy trials given the usual volume of the evidence and its tendency to perplex the jury. The division of the charge against a given defendant into individual counts, each of which alleges no more than one discrete offence, would permit the jury to specify its verdict and to indicate precisely the scope of the defendant's wrongdoing.

The extent to which the prosecution may evade the requirement of particularization, which is considered basic to substantive offences, forms the substance of this paper. Two initial headings are taken:

(A) Is the particularization of conspiracy counts mandatory?

(B) If so, to what extent must such a count be particularized?

Finally, it is submitted that even if particulars are provided they only offer a partial remedy.

It will be observed by way of further preliminary comment that in the field of conspiracy indictments, the prosecution is afforded two great concessions vis-à-vis the charging of substantive offences: (a) the ability to indict a consummated multiple-object conspiracy in one count represents in substance, though not formally, the indictment of several substantive offences in one count (this being prohibited in the case of substantive crime by the rule against duplicity of allegations);[17] (b) to the degree that a court refuses to insist upon full particularization of a conspiracy count, it tacitly disapproves that related rule of indictment demanding certainty in charges (which is, again, rigorously insisted upon by judges in the context of substantive crime). In respect of both the rule against duplicity and the principle of certainty in counts, the conspiracy indictments policy formulated by the courts represents a significant relaxation of the general philosophy of criminal law and procedure.

What follows is a review of representative or leading cases in several of the common law jurisdictions. It is recognized that the attitudes of the courts may vary from time to time and from place to place — even from one individual judge to another. As well, statutory provisions modify the situation somewhat in each of the various jurisdictions, although generally such influences are minor. The focus of attention will be on the more general consequences and possibilities of policy reflected in these decisions. In all of the common law jurisdictions, it is felt, the issues are fundamentally the same.

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[17] The courts have quashed counts alleging an improbably diversified conspiracy, which in fact clearly comprehends several independent conspiracies; *e.g.* R. v. Dawson, *supra* note 6.

A. *Is Particularization Required?*

An excellent statement of the orthodox (and wholly uncritical) legal requirements governing the indictment of criminal conspiracy is found in a passage from Wright's century-old study, which even today would be regarded as acceptable:

> [I]n general, it may be said that the ordinary rules of criminal pleading apply to conspiracy, with exceptions arising from the fact that the design of the conspirators need not have been executed or completely ripened into detail, and that the details consequently not only cannot be stated in all cases, but commonly may be immaterial. Thus there may be a criminal design to defraud persons of things by means not yet completely determined; and in such a case these undetermined matters must necessarily be treated as to the jurors unknown, or stated generally; and this necessity has given rise to more rules, such as that in an indictment for a conspiracy to defraud by false pretences — the false pretences, even where they are known, need not be particularly set out.[18]

It is true that in the case of an unconsummated conspiracy, "the design need [*i.e.* will] not have...ripened into detail", so that it is impossible to particularize it fully in the terms in which it may come to be consummated; but that is not to say that where the conspiracy has been consummated and details of it are fully known, the Crown ought not to particularize it.[19]

The continued pretence that conspiracy is an inchoate crime has had its effect, however, as Wright succinctly noted, in the courts' frequent tendency to treat a consummated conspiracy as an agreement that has not proceeded beyond the point of formation, for the purposes of indictment. To do so involves the legally correct if unrealistic conclusion that the overt acts of the consummated conspiracy are no part of the crime, and that as such they ought not, or even cannot, be particularized. In the case of a more wide-ranging conspiracy whose terms must be collected from the overt acts whose transaction defines it, such a position involves the fallacious assumption that the conspiracy does not continue in time beyond its conception, but rather, is completed and concluded at the time of conception.

In these terms the Crown is permitted a wholly unreasonable liberty. It can collect the character of an agreement from a finite number of specific acts and yet disregard such evidence in the formulation of the indictment, the defendant being charged generally, say, with "a conspiracy to cheat and defraud ...". The method of proof will be correspondingly undemanding — of all of the overt acts which the

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[18] R. WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS 57 (1887).

[19] Even in the case of a consummated conspiracy, some of the details may not be known, and, therefore, cannot be particularized. An example of this situation is R. v. De Berenger, 3 M. & S. 67, 105 E.R. 536 (K.B. 1814), which charged a conspiracy to inflict loss on members of the public by the circulation of false rumours designed to affect the price of public securities. The victims of this fraud were in general "persons unknown".

prosecution will actually lead in evidence, proof against the defendant of only one of them will suffice to establish the generally alleged illegal purpose in the count. The defendant will be concurrently stigmatized by the implication or open suggestion of a much wider ambit of joint wrongdoing contained in the count and fortified by the course of evidence, even though only a small part of it may satisfy the conventional standard of proof.

The courts have sanctioned such a practice on numerous occasions. Such was the universal view of the courts in the early English cases; Lord Mansfield observed in *Rex v. Eccles*[20] that because the offence of conspiracy does not consist in doing the acts with which the mischief contemplated by the agreement is effected, such overt acts do not need to be particularized. In *Eccles* itself the indictment alleged a conspiracy to impoverish a man by preventing him from working at his trade, without stating the means by which the conspiracy (which obviously had been consummated) was to be effected. The case is typical of less sophisticated decisions of the period. Comparably bland sentiments are found in *Rex v. Gill,*[21] in which Abbott C.J. upheld a conspiracy to defraud count drafted in traditional form, *i.e.*, alleging simply a conspiracy "by divers false pretences, and subtle means and devices, to obtain and acquire [from the victims] divers large sums of money ... and to cheat and defraud them respectively thereof", as not being too vague.[22]

In *Rex v. Seward*, Littledale J. asserted that the overt acts of a conspiracy need not be stated, provided that the overall purpose averred in the indictment was illegal.[23] In *Regina v. Kenrick,*[24] the indictment charged a conspiracy to defraud in the same general terms as in *Gill*. Lord Denman C.J. denied that the count was too general, it having been claimed that the count was "bad by reason of uncertainty, as giving no notice of the offence charged". The overt acts did not need to be stated, being no part of the crime. He allowed, however, that in conspiracy cases "there is danger of injustice from calling for a defence against so vague an accusation", endorsing the "expedient now employed in practice, of furnishing defendants with a particular of the acts charged upon them", considering that this was "probably effectual for preventing surprise and unfair advantage".[25] The problem of uncer-

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[20] 1 Leach 274, at 276, 168 E.R. 240, at 241 (C.C.R. 1783).

[21] 2 B. & Ald. 204, 106 E.R. 341 (K.B. 1818).

[22] *Id.* at 205, 106 E.R. at 342. *Semble* Bayley and Holroyd JJ., who viewed the offence of conspiracy as being complete upon agreement, even though the means may not have been agreed upon. In other words, the overt acts were irrelevant as being no part of the offence which was viewed with extreme simplicity as a simple agreement for one undivided, overall purpose which was also illegal.

[23] 1 Ad. & E. 706, at 714-15, 110 E.R. 1377, at 1380-81 (K.B. 1834).

[24] 5 Q.B. 49, 114 E.R. 1166 (1843).

[25] *Id.* at 61-62, 114 E.R. at 1170-71.

tainty was at least recognized at this stage, though obviously no sense of imperative was felt. He endorsed *Gill* in the later case of *Regina v. Gompertz*,[26] though sounding the same reservation.

The *Stapleton* case[27] revealed a change in judicial thinking. Mr. Justice Coleridge refused to order particulars of a conspiracy to defraud, but "on this ground only, that there was no affidavit that the defendants do not possess the knowledge which they are seeking for by this rule".[28]

English authority has scarcely shed its ambiguity following upon the enactment of the Indictments Act, 1915 (U.K.).[29] Section 3(1) provides that an "indictment shall contain and shall be sufficient if it contains, a statement of the specific offence ... with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge". An example of its application is found in the 1958 case of *Regina v. Hammersley*.[30] The appellant had been convicted of a count alleging an eight year conspiracy to bribe three named police officers to act contrary to their duty and thereby "to obstruct and defeat the course of public justice". The particulars included in the indictment had been in relatively general terms; the Crown itself, however, had supplied lengthy particulars stating "exactly" the matters to be alleged against the defendants.[31] These particulars were not included in the indictment but were given in supplementary form. The conviction was challenged, *inter alia*, on the ground that sufficient particulars of the offence had not been given. The complaint was evidently based upon section 3(1) of the Indictments Act, which was construed as providing that all of the "particulars" referred to as being necessary to support the charge (*i.e.*, details of overt acts) had to be literally within the count itself, and that therefore any particulars given in supplementary form could not be relied upon by the Crown in fulfilment of its duty under section 3(1). The Court of Criminal Appeal's response (voiced by Lord Goddard L.C.J.) was to fall back upon the old dogma that such an objection was necessarily founded upon a fallacy: "it does not distinguish between the conspiracy and the overt acts which may be given as evidence of the conspiracy".[32] As it happened, the court considered that the particulars given in the indictment did properly disclose the conspiracy with which the defendants were charged.[33]

Lord Goddard in fact expressly observed that the supplementary particulars stated "exactly the case" to be brought against the defen-

[26] 9 Q.B. 824, at 838, 115 E.R. 1491, at 1496-97 (1846).
[27] R. v. Stapleton (or Stapylton), 8 Cox. C.C. 69 (Q.B. 1857).
[28] *Id.* at 71-72.
[29] Indictments Act, 1915, 5 & 6 Geo. 5, c. 90.
[30] 42 Cr. App. R. 207 (C.C.A. 1958).
[31] *Id.* at 209.
[32] *Id.* at 213.
[33] *Id.* at 214.

dant, "and it is no objection to say that those were not a part of the indictment".[34] It is clear that the court felt obliged to maintain that the relatively sparse particulars given in the indictment itself were adequate only because of the idiosyncratic wording of the Indictments Act. The fact that the particulars in the charge itself were inadequate was made clear in the detail of the supplementary particulars; and in stressing their detail the court was obviously appealing to them at an informal level, by way of fortification of its specific finding as to the adequacy of the indictment.

Whatever the underlying suggestion in his remarks, unfortunately, their literal import was that a sparse statement of the conspiracy in the indictment satisfied the requirements of the Indictments Act; presumably therefore, a defendant is, at best, reliant upon any such general discretion as may remain in the court to order supplementary particulars.

It is unfortunate that in *Hammersley* a senior English court should have felt inhibited by the probably unintended rigidity of section 3(1) from making a clear statement as to the need for the particularization of conspiracy indictments. The matter subsequently came once more before the Court of Criminal Appeal in *Regina v. Addis*[35] in which the defendant had been convicted of a conspiracy to defraud stated in brief form, alleging the defrauding of certain persons by "false representation and other false and fraudulent devices". The trial judge had refused to order the Crown to give particulars, on the basis, apparently, that the defence would gather the Crown's case from a reading of the exhibits and depositions arising from committal proceedings.[36] The Court of Criminal Appeal upheld this conviction — such a count satisfied section 3(1) of the Indictments Act. The doctrinal heritage implicit in Lord Goddard's remarks in *Hammersley* had come to seed. In *Addis* an English court made a virtue out of a presumed necessity; the significance of a precise particularization of the overt acts (and so of the terms) of an alleged conspiracy was deprecated simply because it was too readily assumed that to satisfy the requirements of section 3(1) the necessarily terse statement of conspiracy in the indictment had to be accepted as being reasonably definitive of the nature of the offence itself. The possibility of the court nonetheless ordering supplementary particulars was left untraversed. And so it was that Mr. Justice Hinchcliffe felt able to go on and assert[37] that in stating the object of an alleged

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[34] *Id.* at 216.

[35] 49 Cr. App. R. 95 (C.C.A. 1964).

[36] *Id.* at 100. This stratagem was dismissed as indefensible by the Australian High Court in the earlier case of R. v. Weaver, 45 C.L.R. 321 (Aust. H.C. 1931).

[37] In reliance upon the bald statement of principle in ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES para. 4071 (39th ed. S. Mitchell 1976). The court referred to para. 4067 of the 35th edition, which corresponds to para. 4071 of the 39th edition.

conspiracy in the indictment the same certainty is not required as in an indictment for the offence conspired to be committed (*i.e.*, for the substantive offence), and that in particular, the overt acts need not be stated in a conspiracy indictment.

In England, therefore, modern authority apparently makes the full particularization of conspiracies in terms of their overt acts optional for the prosecution — at the very least such a particularization is not legally mandatory — though the power to order it is surely still within the general competence of the court, notwithstanding the ambivalent nature of section 3(1).

In Australia, similarly, the courts have not always required the Crown to supply particulars of overt acts, though later decisions reveal a changed emphasis. In the typically nineteenth century case of *Regina v. Nash*,[38] the Supreme Court of New South Wales upheld a count alleging a conspiracy "to defraud all who brought gold to them [the defendants], and one *P* in particular, by the use of false weights". Stephen C.J. observed that as "[t]he overt acts were merely illustrative of the nature and effect" of the conspiracy, it could be adequately set out in the indictment, if the object is stated clearly, without an exhaustive enumeration of such overt acts.[39] As in many of these cases, it was accepted that "conspiracy to defraud" was an offence *simpliciter* which could be made out against a defendant by a single representative overt act, the number of overt acts being immaterial to its further characterization or treatment by the trial court.[40]

The same court took an obviously modest view of the need for adequate particularization in conspiracy cases in *Regina v. Dean*,[41] in which the accused were convicted on a count of conspiring "together to pervert the course of justice". The court upheld the count by a majority of two to one, only Stephen J. considered it too vague.[42] Owen and Simpson JJ. allowed that an indictment might otherwise be bad for uncertainty, but that particulars could be supplied so as to remedy any injustice which might result from such vagueness. It should be noted, however, that the presumed conspiracy had continued over a considerable period of time, and fell into several distinct stages. In these circumstances, evidence as to overt acts was crucial to the very process of defining the terms of the conspiracy; they were not merely illustrative of its overall flavour. Practically speaking, the conspiracy did not exist

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[38] 2 Legge 905 (N.S.W. S.C. 1855).

[39] *Id.* at 906.

[40] Though Chief Justice Stephen did allow that "as the jury had found a general verdict of guilty in reference to this conspiracy, the Court could pass sentence in reference to the cheating which *was* distinctly made out, and make such a record of their having done so, so that the defendants might base upon it any ulterior appeal if they should find that any such appeal was available to them". *Id.* at 907-08.

[41] 17 N.S.W.R. 132, 12 W.N. (N.S.W.) 141 (S.C. 1896).

[42] *Id.* at 149, 12 W.N. (N.S.W.) at 146.

independently of them. The reasoning of the majority quite overlooked this distinction.[43]

More recent Australian authority indicates a rather more stringent policy regarding particularization. As noted previously, Mr. Justice Ferguson in *Rex v. Partridge*[44] clearly proposed that full particularization of the overt acts was a practical if not legal imperative upon the prosecution in the case of a conspiracy of any complexity, in that the trial might otherwise engender such a degree of confusion and potential injustice as to miscarry. It was precisely because a conspiracy charge usually involves "an enquiry wider in its range and more complicated in its nature, than ordinary proceedings", that the overt acts which show that he has conspired with others to commit an offence "should be specified with at least as much particularity as if the doing of them were itself the offence to which he [the defendant] is called upon to answer".[45]

Ferguson J.'s disapproval of the idea that the depositions taken during committal proceedings and the exhibits adduced therein represented a sufficient particularization of the conspiracy, was endorsed by the Australian High Court in *Rex v. Weaver* in the following year.[46] In this decision it was remarked of section 393 of the the New South Wales Crimes Act, 1900,[47] that while it did not make the provision of particulars mandatory in conspiracy cases, it was nonetheless the duty of the court trying an indictment for conspiracy to direct precise particularization of the acts relied upon by the Crown.[48]

As a result of these observations at the most senior level in Australia, it seems apparent that the Crown would be prudent to particularize precisely the overt acts of a conspiracy charged, at least if such acts are to be led in evidence.[49] If this is not done then strong authority exists to suggest that such should be ordered by the trial court. It is not sufficient

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[43] In contrast to such a process of particularization is the Australian High Court case of White v. The King, 4 C.L.R. 152, 7 N.S.W. St. R. 181 (Aust. H.C. 1906), in which the accused was indicted for three substantive offences of attempting to pervert the course of justice. Rather than seek to charge him in the one count for what was in fact a series of separate instances of such conduct, though all were directed to the same ultimate end (to have his conviction for stealing upset by means of false representations), the Crown presented three individual counts each of which covered an aspect of this train of misconduct, amply particularizing the circumstances of each alleged offence. This course was naturally dictated by the rule against duplicity. As it happened, one of these counts was disapproved by the court, as not making out an offence.

[44] *Supra* note 12.

[45] *Id.* at 174, 30 N.S.W. St. R. at 412.

[46] *Supra* note 36.

[47] Crimes Act 1900 (N.S.W.), s. 393. This section, which provides generally for the form of conspiracy indictments, specifies at the outset that "[i]n an indictment for conspiracy, it shall not be necessary to state any overt act".

[48] *See* R. v. Weaver, *supra* note 36, at 333 for the remarks of Gavan Duffy C.J., Starke and McTiernan JJ., and at 351 for the remarks of Evatt J.

[49] This is the clear implication in the Queensland case of R. v. Maria, [1957] St. R. Qd. 512 (C.C.A.), which is considered *infra*.

for the Crown to rely upon the exhibits or the depositions of proceedings during the committal hearing.

In Canada the situation is broadly governed by section 510 of the Criminal Code,[50] which provides for the form of criminal counts generally. Subsection (1) of section 510 provides that each count shall, in general, apply to a single transaction and shall contain in substance a statement that the accused committed an indictable offence therein specified. It is to be noted at once that such a provision does not make the specification of the overt acts of a conspiracy mandatory, for by definition these are not part of the crime itself.

An instance of this thinking is found in the conspiracy case of *Brodie v. The King*.[51] Mr. Justice Rinfret held that this provision in the Code required the specification of the "time, place and manner" of the offence charged, and that it was not sufficient to charge an indictable offence in the abstract; in particular, it was not enough for the count to simply aver the commission of "a seditious conspiracy" without further specification.[52] But he observed nonetheless that the overt acts of a conspiracy, not being a part of the crime, did not necessarily have to be particularized.[53] As against this, however, a conspiracy count had to contain "the specific transaction intended to be brought against the accused". The position contended in these remarks obviously parallels that typically evinced in the English decisions; some particularization is required, but not a complete one embracing all of the overt acts to be given in evidence in proof of the crime.

That some particularization is required was restated by the Saskatchewan Court of Appeal in *Shumiatcher v. Attorney-General for Saskatchewan*,[54] which held that although an indictment may satisfy the requirements of (what is now) section 510(1) of the Criminal Code, it may fail to meet the requirements of section 510(3). This may afford an accused some minimal protection beyond the ruling in *Brodie*.

In *Shumiatcher*, the information read in part as follows:

> The informant says that [the accused, in the Province of Saskatchewan] between the first day of July, A.D. 1954, and the 31st day of December, A.D. 1961, both inclusive, unlawfully did conspire and agree together to commit an indictable offence, to wit, unlawfully by deceit, falsehood or other fraudulent means, to defraud the public of property, money or valuable securities contrary to the Criminal Code of Canada.[55]

The court held that, the *Brodie* case notwithstanding, the information contained all the averments necessary to comply with section

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[50] R.S.C. 1970, c. C-34.
[51] [1936] S.C.R. 188, 65 C.C.C. 289, [1936] 3 D.L.R. 81.
[52] *Id.* at 193, 65 C.C.C. at 293, [1936] 3 D.L.R. at 85.
[53] *Citing* R. v. Hutchinson, 11 B.C.R. 24, 8 C.C.C. 486 (C.A. 1904).
[54] 39 W.W.R. 577, 133 C.C.C. 69, 38 C.R. 411 (Sask. C.A. 1962).
[55] *Id.* at 579, 133 C.C.C. at 71, 38 C.R. at 413.

510(1). Subsection (3), however, has two further requirements: (a) to give the accused "reasonable information with respect to the act or omission" and (b) "to reasonably identify the transaction referred to". These requirements were not adequately considered in *Brodie*. Also, the Ontario Court of Appeal decision in *Rex v. Adduono*[56] was distinguished formally on the facts, but implicitly because that court had not properly considered the second requirement.[57]

The information in *Shumiatcher* may have satisfied the first of these requirements. However, it did not meet the second. The information was found to be "completely lacking in any detail of the circumstances of the alleged offence to identify the transaction referred to"[58] and the proviso to the subsection failed to cure it.

This appears to extend the *Brodie* ruling. The Supreme Court of Canada in that case emphasized that "in stating the object of the conspiracy the same certainty may not be required as in an indictment for the offence conspired to be committed".[59] In *Shumiatcher*, however, Hall C.J.S. (as he then was), concurring with Culliton J.A. (as he then was), cited the Canadian Bill of Rights,[60] section 2(e) — which of course had not yet been enacted at the time of *Brodie* — and reminded the court: "It is a fundamental principle of criminal law that an accused person should be able to tell from the information or indictment the precise nature of the charge against him."[61] It is submitted that *Shumiatcher*, while not actually changing the principle, did change the emphasis.[62]

Shumiatcher was followed (as was *Brodie*) in *Regina v. Harrison*[63] in the British Columbia Supreme Court. The information before Aikins J. read: "[The accused] between September, A.D. 1958 and August, A.D. 1959, at or near 68 Mile House in the County and Province aforesaid, conspired ... to commit the indictable offence of arson."[64] Aikins J. stated:

> I think it so obvious as to defy exposition that the information against the applicants fails to give them reasonable information with respect to the act to be proved against them and fails to give sufficient detail of the circumstances of the alleged offence to identify the transaction referred to.[65]

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[56] [1940] O.R. 184, 73 C.C.C. 152, [1940] 1 D.L.R. 597 (C.A.).
[57] *Supra* note 54, at 585, 133 C.C.C. at 77, 38 C.R. at 419.
[58] *Id.* at 586, 133 C.C.C. at 77, 38 C.R. at 419, *per* Culliton J.A.
[59] *Supra* note 51, at 198, 65 C.C.C. at 297-98, [1936] 3 D.L.R. at 89.
[60] R.S.C. 1970, App. III.
[61] *Supra* note 54, at 578, 133 C.C.C. at 70, 38 C.R. at 412.
[62] As a matter of interest, the amended indictment appears in R. v. Shumiatcher, [1966] 2 C.C.C. 76, at 78-79 (Sask. C.A.).
[63] 49 W.W.R. 738, [1965] 1 C.C.C. 367, 45 C.R. 54 (B.C.S.C. Chambers 1964).
[64] *Id.* at 739, [1965] 1 C.C.C. at 368, 45 C.R. at 55.
[65] *Id.* at 747, [1965] 1 C.C.C. at 376-77, 45 C.R. at 63.

Brodie, *Shumiatcher* and *Harrison* were followed in *Regina v. Marcoux*,[66] which was found to be "indistinguishable in principle"[67] from those cases.

It is to be hoped that these recent cases are evidence of a more strict approach to conspiracy indictments than formerly taken. In the 1939 case of *Rex v. Imperial Tobacco Co. of Canada*[68] it was evidently sufficient to identify the "specific transaction" as a nine year long conspiracy "to restrain or injure trade or commerce in tobacco or tobacco products".[69] In *Rex v. McGavin Bakeries Ltd. (No. 2)*[70] a similar stand was taken.

In general, however, Canadian courts have a relatively modest view of the function of particulars. They are considered necessary to inform an accused of the case to be met, but they are not seen as significant in enabling the jury's verdict to be specified, that is to allow the role of an accused to be determined in terms of the precise number of specific illegal purposes actually engaged in by him.[71]

B. *The Degree of Particularization Required*

The extent of detail required in the particularization process may be evaluated from two standpoints: first, the formal requirements enunciated by the courts, and secondly, the practical need for full particularization having regard to the occasional quashing of appellate convictions by senior courts on grounds ultimately relevant to a lack of particularization, such as occurred in *Partridge*.

The formal imperatives bearing upon the prosecution in this area have already been traversed in part under the preceding heading. In modern English decisions (such as *Regina v. Hammersley*[72] and *Regina v. Addis*[73]) only a partial particularization is insisted upon, one so limited that it may be adequately comprehended in the indictment itself, without resort to annexure. In particular, there is no general requirement that overt acts be particularized in the case of the consummated conspiracy. However, Lord Goddard's remarks in *Hammersley* indicate that in practice *some* degree of particularization of overt acts is required;

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[66] [1973] 6 W.W.R. 201, 13 C.C.C. (2d) 222, 24 C.R.N.S. 193 (B.C.S.C.).

[67] *Id.* at 204, 13 C.C.C. (2d) at 225, 24 C.R.N.S. at 196, *per* McIntyre J.

[68] [1939] 3 W.W.R. 394, 72 C.C.C. 388, [1939] 4 D.L.R. 520 (Alta. S.C.), *appeal dismissed for want of jurisdiction* [1939] 3 W.W.R. 577, 73 C.C.C. 9, [1940] 1 D.L.R. 148 (Alta. C.A.).

[69] *Id.* at 401, 72 C.C.C. at 395, [1939] 4 D.L.R. at 526.

[70] 1 W.W.R. 129, 99 C.C.C. 330, 11 C.R. 227 (Alta. S.C. 1950).

[71] In particular, *see* R. v. Miron, 28 C.R.N.S. 261 (Ont. C.A. 1974); R. v. DePauw, [1965] 4 C.C.C. 335 (B.C.C.A.) (although in *DePauw*, the trial was before judge alone). *See also* Powell, *Conspiracy Prosecutions*, 13 CRIM. L.Q. 34, at 49 ff. (1970); and GOODE, *supra* note 11, ch. 5 and specifically at 221 ff. for the indictment of conspiracy in Canada.

[72] *Supra* note 30.

[73] *Supra* note 35.

certainly the court's upholding of the instant indictment was reinforced by the fact that lengthy supplementary particulars had been given independently of the indictment, stating exactly the case to be met by the defence. *Hammersley* was, after all, a case in which fulsome particulars had been given, though this was readily overlooked in *Addis* where the court absolved the prosecution from a failure to order their provision, with the somewhat feeble excuse that the committal hearing depositions functioned adequately in lieu of these.

In Australia, the pronouncements of the High Court in *Weaver's Case*[74] in 1931 would seem to make mandatory a particularization of all of the overt acts of a conspiracy which are proposed to be led in evidence by the Crown during trial. Logically, objections to the non-particularization of overt acts can be focused only upon those acts which are sought to be proved, for only in these circumstances do the overt acts become legally significant, as defining the content of the conspiracy and hence the issues of trial. It is always open to the prosecution to abstract only some of the alleged overt acts of a conspiracy and to make these the basis of the charge. The result, of course, is that the defendants will be tried for a more limited conspiracy than may have actually existed.

In Canada, the situation is not far removed from the English. According to *Shumiatcher v. Attorney-General for Saskatchewan*,[75] although the identity of the transaction referred to in the indictment must be revealed, the indictment need not extend to full particularization of all the overt acts to be led in evidence by the prosecution. Indeed, as regards conspiracy by fraudulent means, section 515 of the Criminal Code specifically allows that such an indictment need not "set out in detail the nature of the ... fraudulent means".[76]

A succession of modern English cases amply illustrates the Crown's risk of having conspiracy convictions quashed in circumstances where there has been an incomplete particularization of overt acts. A common thread in a number of them is that a multiple-object conspiracy is legally quite different to one for a single purpose, and that the multiple-object conspiracy must be defined with some precision in terms of its several discrete illegal purposes. In other words, such a conspiracy may not be charged and tried as an offence *simpliciter* and maintained against a defendant upon proof of any one overt act conforming with the overall illegal purpose alleged. Thus, if an indicted conspiracy consists of twenty discrete illegal purposes, and defendants *A* and *B* are responsible for all of them, defendant *C* being responsible for the tenth to twelfth, and defendant *D* for the twelfth to twentieth, each defendant must be charged in precisely these terms; the four of them may not be

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[74] *Supra* note 36.
[75] *Supra* note 54.
[76] CRIMINAL CODE, R.S.C. 1970, c. C-34, s. 515.

indicted in one common count. Such a discrimination of liability has not of course been universally recognized or even directly acknowledged by the courts, but it is certainly strongly present in several of these cases, in however tentative a form.

One such case is *Rex v. West*,[77] where the defendants were indicted in one count for a continuous conspiracy over almost six years to breach war-time regulations relating to the manufacture and sale of specified goods. Because of two successive changes in these regulations it was evident that one overall conspiracy could not be charged; rather, three should have been charged. The count was therefore bad for duplicity. The Court of Criminal Appeal's remarks (*per* Lord Goddard C.J.) were, however, discerning — the "real vice" of the count, quite apart from the duplicity objection, was that this form of indictment represented a "vague and general form of charge extending over a period of years" with the result that each of the defendants "was precluded ... from obtaining acquittal on such part, if any, of the three unlawful agreements as the prosecution had failed to establish against him".[78] Similarly, because the jury's verdicts were unspecified, the trial judge was "deprived of the assistance to be derived from the verdict of a jury as to the *quantum* of blame to be attached ... to ... each of several defendants".[79] In the case of a conspiracy, no less than that of a substantive crime, the indictment ought to be so framed "as to enable the jury to put their fingers upon any specific part of the conspiracy as to which they are satisfied that the particular defendant is proved to have been implicated and to convict him of that offence only".[80] Plainly the court would still have voiced, and if appropriate have acted upon these sentiments had the count not been technically bad for duplicity.

A parallel instance of the repudiation of an extravagantly general count extending over many years is found in *Regina v. Davey*,[81] in which the defendants were convicted upon a count alleging a conspiracy to defraud the creditors of fourteen companies extending over eleven years. The hearing lasted forty-two days, involving 110 witnesses and 483 exhibits, and the judge's summing-up lasted four days. The jury was clearly overwhelmed by the volume and complexity of the evidence. The Court of Criminal Appeal quashed the convictions on the basis that the count was too general, since it charged what at best were (from the viewpoint of the Crown) several conspiracies, each involving various participants drawn from the ranks of the appellants, but in no one instance involving all of them. This was a case where the injustice

[77] [1948] 1 K.B. 709, [1948] 1 All E.R. 718.
[78] *Id.* at 719, [1948] 1 All E.R. at 722.
[79] *Id.*
[80] *Id.* at 720, [1948] 1 All E.R. at 723.
[81] [1960] 3 All E.R. 533, [1960] 1 W.L.R. 1287 (C.C.A.).

of alleging a general and lengthy conspiracy against all of the defendants jointly was manifest, although it might have been blandly classified as a "conspiracy to defraud" *simpliciter*. To discriminate between defendants would of course have required detailed particularization of each conspiracy count, making clear the ambit of their respective liabilities.

As it happened, the judges asserted that the Crown should have abstracted specific conspiracies in suitable terms from the overall facts and made these the basis of the charge against each defendant, as was appropriate. However, it was not indicated whether the particularization of *all* of the overt acts sought to be proved against each person to be so charged was mandatory.[82]

As in *West* and *Davey*, the Court of Criminal Appeal disapproved the convictions of the appellants in the conspiracy case of *Regina v. Dawson*,[83] on the same technical basis of duplicity. Again, their remarks raise more general implications, especially as to the unsatisfactory generality of the count (which embraced an absurdly varied number of misdeeds), the trial having taken nine weeks.

A similar conclusion was reached in *Regina v. Oswin*,[84] in which the appellant was charged with a single conspiracy "with persons unknown" to publish obscene articles contrary to the Obscene Publications Act 1959 (U.K.).[85] The only evidence was a mass of obscene articles found on his premises. The alleged "unknown" co-conspirators were the "suppliers or prospective purchasers" — no further particulars could be given. The count represented an audacious exploitation of conspiracy doctrine, and its endorsement by the trial judge was astonishingly lax. The Court of Criminal Appeal held the count bad for uncertainty, citing the principles in *West*'s case.[86]

A reversion to nineteenth century fundamentalism is evident in the briefly reported case of *Regina v. Williams*[87] in which, unbelievably, the defendants (a father and son) were convicted of a conspiracy to defraud a building society over a twenty year period, the particulars alleging "diverse false particulars and pretences and falsifications". The Court of Criminal Appeal refused to strike down the conspiracy count as bad either for duplicity or uncertainty. Presumably, therefore, a twenty year conspiracy could be established by proof of one or two overt acts,

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[82] The actual extent of the particularization of the common count is not indicated in the report of *Davey*.

[83] *Supra* note 6.

[84] [1964] CRIM. L. REV. 479.

[85] 7 & 8 Eliz. 2, c. 66, *currently cited* Obscene Publications Acts 1959 and 1964, U.K. 1974, c. 74.

[86] Doubtless too, the count was technically bad for duplicity, in that the defendant must have formed many separate agreements with different individuals for the supply to him or sale of the goods. *See contra* the Western Australian case of Rapley v. The King, 17 W.A.R. 36, at 44 (C.C.A. 1914), which was surely wrongly decided.

[87] *Supra* note 6.

even if another 200 are blithely suggested in evidence without, however, being proved. This reasoning made a mockery of the principles expressed in *West*.

Finally, the English Court of Criminal Appeal's decision in *Regina v. Griffiths*[88] may be noted, in which the nine appellants had been convicted of a wide-ranging conspiracy involving agricultural subsidy frauds. The convictions were quashed for a number of reasons, including duplicity and the failure of the prosecution to prove that all of the defendants had been knowledgeable of, much less privy to all of the frauds attributed to the conspiracy in the particulars or in the course of evidence. The jury had been overwhelmed by the evidence (the trial lasted twelve weeks). Because of the confusing state of evidence, compounded by the concurrent trial of twenty-four substantive counts and the uncertainty as to the precise issues raised by this conspiracy count, the court obviously felt that the trial had miscarried. The jurors could not have had a clear conception in their minds of all of the issues of fact, much less of the evidence applicable against each defendant on each count (several overlapping substantive offences were "rolled up"[89] in the indictment with the conspiracy count). Again a number of conspiracy convictions were upset on what in substance amounted to a ground of manifest injustice, in such terms as to demand a full particularization of the conspiracies charged.

C. *Conclusions on Particularization*

The objections to the conspiracy indictment recognize the need for full particularization. It is unfortunate that the courts have never made insufficient particulars a formal ground of decision. Both duplicity, a vague and difficult concept in the conspiracy context, and the "miscarriage of justice" tend to skate around the more basic shortcomings in the conspiracy doctrine.

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[88] *Supra* note 8.

[89] The practice of preferring "roll-up" indictments has been criticized as an independent source of difficulty in conspiracy trials. This practice has grown out of the fact that a conspiracy for a crime does not merge in the consummation of this crime, *i.e.*, in such circumstance the prosecution can charge both the conspiracy and the overlapping substantive offences in separate counts in the one indictment, and thus secure the accused's concurrent trial on these different charges. Specific criticisms of the effect of "roll-up" charges have been made in the BRITISH LAW COMMISSION, REPORT ON CONSPIRACY AND CRIMINAL LAW REFORM, *supra* note 2, at 27-28. *See also* HAZELL, *supra* note 11, at 73-78, 119; Powell, *supra* note 71, at 54 ff.; GOODE, *supra* note 11. Relevant cases include R. v. Luberg, 135 L.T. 414, 38 Cox C. C. 264, 19 Cr. App. R. 133 (C.C.A. 1926); R. v. Newbery, 23 Cr. App. R. 105 (C.C.A. 1931); R. v. Cooper, [1947] 2 All E.R. 701, 63 T.L.R. 561, 32 Cr. App. R. 102 (C.C.A.); R. v. Sweetland, 42 Cr. App. R. 62 (C.C.A. 1957); R. v. Dawson, *supra* note 6; R. v. Griffiths, *supra* note 8; Verrier v. D.P.P., [1967] 2 A.C. 195, at 223-24, [1966] 3 All E.R. 568, at 575, [1966] 3 W.L.R. 924, at 934 (H.L.); R. v. Simmonds, *supra* note 5, at 690-91, [1967] 2 All E.R. at 401-02, [1967] 3 W.L.R. at 371; R. v. Gunn, 47 W.N. (N.S.W.) 157, at 160, 30 N.S.W. St. R. 336, at 346 (C.C.A.); R. v. Partridge, *supra* note 12, at 175-76, 30 N.S.W. St. R. at 414-15.

The solution to the problem is to be found in an exacting theory of "agreement" capable of discriminating individual involvements in multiple-object schemes. Such a modification of the conspiracy doctrine would initially raise the problem: how far should the net of liability be extended in the circumstances of a multiple-object conspiracy? *Regina v. Griffiths*[90] held that mere knowledge that co-conspirators were pursuing a further unlawful object is sufficient to make an accused liable for the anterior object. This test of agreement may be unsatisfactorily close to a doctrine of "guilt by mere association", though it represents a more stringent view of the law than was apparent in *Rex v. Meyrick*.[91] That decision allowed the test of agreement to permit broad inferences to be drawn from circumstantial evidence by a jury, uninstructed in even rudimentary terms as to what the concept of agreement in conspiracy might possibly involve. At another extreme, it has been proposed that a defendant be required to have had a material interest in the unlawful purpose in order to be made liable for agreement.

It is felt that the appropriate test for agreement lies somewhere between these propositions.[92] A positive agreement to facilitate the unlawful purpose should be required, that is, a not insignificant community of interest with those who have proposed the commission of the illegal object. Mere knowledge should not enrol the accused in any scheme comprehending purposes independent from those of the combination to which he is actually a party.

Many of the difficulties in this area would be mitigated if it were recognized that a scheme, which may appear unified and under the control of one or more principals, is in fact comprised of a number of minor schemes, each separate from the point of view of the minor conspirators. In such circumstances, it is proper and indeed imperative to distinguish each criminal consensus from the larger conspiracy. Major and minor participants may, without contradiction, be charged with one of two agreements which, though overlapping, are sharply differentiated in scope.[93]

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[90] *Supra* note 8.

[91] *Supra* note 7.

[92] Discussions of the concept of agreement in conspiracy include: Fridman, *Mens Rea in Conspiracy*, 19 MODERN L. REV. 276 (1956); Orchard, *"Agreement" in Criminal Conspiracy (1) and (2)*, [1974] CRIM. L. REV. 297, 335; GOODE, *supra* note 11, at 6-46; Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624 (1941); *Developments in the Law, Criminal Conspiracy*, 72 HARV. L. REV. 920, at 925 ff. (1959); Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy (Part Two)*, 61 COLUM. L. REV. 957, at 963 ff. (1961).

[93] The smaller agreement would, of course, be totally comprehended by the larger which would, however, range beyond it. In either agreement, there would need to be an element of continuing consensus between the defendant and at least one other person, even as a third or more persons may drop in and out of the continuing consensus. Thus a solitary principal who engaged in a number of separate though identical illegalities with a succession of unrelated individuals could not be indicted for one scheme embracing all of

D. *Multiple-Object Conspiracies*

A concept of conspiratorial agreement which adequately isolates the ambit of an individual's criminal agreement, and which in turn provides for its precise particularization, would placate many of the present objections to the existing indictments policy pursued by the courts. The accused would be fully forewarned of the case to be met in the same detail as he would enjoy in respect of a substantive offence, and the court and jury would be afforded a more certain basis for the reception and scrutiny of the evidence against each defendant. Still, a number of basic problems would remain.

In respect of multiple-object conspiracies, the jury will still be unable to indicate precisely the extent of the function, that is, to indicate precisely the extent of the defendant's culpability. To illustrate: if a defendant is charged with a fully particularized conspiracy alleged to involve ten distinct illegal purposes, what course should the jury take if satisfied as to his complicity in only one or a handful of these? In fairness, it might be thought, he ought to be acquitted. To convict would have the effect of exaggerating his culpability, and exposing him to a greater punishment than may actually be justified.

In general, the courts have not dealt with the situation of multiple-object conspiracy charges in this way. The jury is simply not instructed as to what it ought to do if dissatisfied as to the weight of prosecution evidence in respect of all of the averments of illegal purpose. The courts' attitude has been one of tacit compromise. The jury may convict on the basis of a representative number, and sometimes on the basis of only one, of the illegal purposes being proved. (This view conforms with the common conception of conspiracy noted earlier, *i.e.*, as an undivided offence which may be made out against a person charged by the proof of any single distinct illegal purpose.)

For the courts to do otherwise would frequently render a conspiracy prosecution unworkable, for there must be many instances where a jury is not necessarily satisfied as to the defendant's involvement in *every* one of the illegal purposes either directly particularized as being part of the conspiracy charge, or otherwise attributed to it in the course of evidence. Yet at the other extreme, there is clearly a significant potential for injustice to the defendant in the continuing willingness of the courts to be satisfied with something less than full proof of the offence charged.

A modern case illustrating an aspect of this overall issue (and in which a court did impose a stringent requirement upon the prosecution)

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these illegalities. Rather, he would have to be charged in several counts, each alleging one of these minor schemes. The fallacy that these circumstances disclosed one unified scheme was the basis of decision in the Western Australian case of Rapley v. The King, *supra* note 86.

is the Queensland case of *Regina v. Maria*,[94] though it is by no means conclusive on all of the possibilites. The formal *ratio* of *Maria* is indeed somewhat limited, though the philosophy of indictments represented in it is of much broader implication.

In *Maria*, the Queensland Supreme Court of Appeal struck down the conviction of the appellant for a conspiracy to defraud a certain Dr. Park and a company known as Vanguard Insurance Company Ltd. The evidence established merely a conspiracy to defraud Park; no evidence as to the second purpose was offered. The trial judge refused a request by defence counsel for a direction to the jury that they ought to acquit the appellant unless they found the conspiracy was to obtain money from both Vanguard and Park.[95]

The Court of Appeal held that this direction ought to have been given. The court justified its decision partly on the basis that to allow the prosecution to allege a general conspiracy consisting of a plurality of illegal objects and to then disregard a proportion of these averments during trial as being otiose would seriously detract from the purpose and value of a policy of particularization, and indeed would mislead and frustrate the defence in the preparation of its case. It was only if the prosecution were to be confined to particulars that accused persons, from one case to the next, could know the case to be answered. As Mr. Justice Stanley stated: "The Crown must prove what it alleges in the indictment, if for no other reason than that is what the accused was prepared to meet."[96]

For the court to have tolerated the situation disclosed in *Maria* would have been to endorse a practice by the prosecution of preferring general speculative counts against defendants. To allow a jury to return a general verdict of guilty on a count containing surplus averments, even though privately satisfied as to the proof of only some of these, would obscure their actual finding as to the true degree of the defendant's complicity in a given conspiracy, or even of the extent of the scheme to which he has been connected by their verdict. *Maria* therefore requires that if such a count alleges otiose objects not capable of proof, then the prosecution fails and the jury must be directed to acquit, failing an amendment of the indictment by leave of the court (commonly provided for by statute in the various jurisdictions). Such a doctrine, then, imposes a clear brake upon the prosecution's attempts to fasten a liability on an accused conspirator which is wider than the terms of his actual agreement.

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[94] *Supra* note 49.

[95] The foreman of the jury confirmed upon being questioned by the judge that the jurors had found Maria guilty of conspiracy to defraud Park only.

[96] *Supra* note 77, at 523.

Maria was concerned with otiose averments, and in doing so it followed a number of older English decisions;[97] the reasoning of the decision is, however, equally applicable to those situations in which the prosecution seeks to give evidence of objects not particularized. It, along with its handful of antecedents, represents a case where it was felt to be practical to impugn a conviction in circumstances in which the jury clearly was not satisfied with the prosecution's case as it related to each of the prosecution's averments of illegal purpose. But its instructive value, as implemented, is not universal. The invocation of the *Maria* doctrine (in response either to objections by defence to surplus averments in a conspiracy count, or to applications by the prosecution to strike out surplusage) is really only workable in the circumstances of a relatively simple charge. Only two illegal purposes were alleged in the *Maria* conspiracy; one of them was clearly otiose, no evidence having been offered in relation to it. In the case of a more extensive multiple-object conspiracy, the mechanism of the *Maria* doctrine, *i.e.*, the determination of whether the weight of evidence relating to each and every averment of illegal purpose is sufficient to establish it against the defendant, would be dependent upon immediate inferences derived from the minute-by-minute flow of evidence, something which would be difficult in practice. In the end, it is felt, there would still be great uncertainty as to precisely which of the averments were fit to be left with the jury, and then as to which of these a guilty verdict could be taken to include.

Maria is therefore apt to be unworkable in more complex conspiracy cases, yet the justice of the doctrine embodied in it is unarguable. A further possible solution (perhaps the only logical one), suggests itself: the rule against duplicity in criminal counts, one only nominally applied in the conspiracy context, ought to be applied with the same rigour in this latter context as it is in the realm of substantive crime, so that a scheme involving twenty different illegal criminal acts ought no longer to be permitted to be prosecuted in one swollen count. This is especially true because, to reiterate, as a matter of history almost all conspiracies charged have been for a plurality of criminal or fraudulent acts which have actually been transacted. Thus, the prosecuting authorities ought to be required to prosecute these twenty illegal consensual purposes as twenty discrete conspiracies, which they are in the sense that each purpose is independently capable

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[97] *See* R. v. Seward, *supra* note 23; O'Connell v. The Queen, 11 Cl. & Fin. 155, 8 E.R. 1061 (1844); R. v. King, 7 Q.B. 782, 115 E.R. 683 (1844); R. v. Thompson, 16 Q.B. 832, 117 E.R. 1100 (1851). Note the contrary suggestions in the earlier Australian case of R. v. Ongley, 57 W.N. (N.S.W.) 116 (C.C.A. 1940), in which the New South Wales Court of Criminal Appeal indicated their view that "[t]he jury may find...the accused are guilty of conspiracy to effect some only of the improper purposes alleged" (*per* Jordan C.J., at 117).

of founding a conspiracy indictment, though they may in fact be related. In this way the jury would be able to consider separately the guilt of each defendant in respect of each individual wrongdoing; conspiracy verdicts would cease to be ambivalent.

If the Crown were to be compelled to prosecute each wrongdoing as an individual conspiracy, however, the obvious question would arise: why not prosecute the wrongdoing directly as a substantive crime,[98] rather than hiding behind the fictitious veneer of a conspiracy charge? Rather, it might be advantageous to adopt a doctrine of merger in relation to criminal conspiracy, so that where a conspiracy for a crime has been transacted, only the substantive crime itself and not the conspiracy may be prosecuted.[99]

The major result would be that conspiracy could be charged in only two situations: (a) the uncommon and essentially anomalous occasion of prosecutions for combinations to effect agreements for acts not themselves criminal, such as in the case of a small minority of conspiracy to defraud counts (any significant reform of conspiracy would in any event have to end this idiosyncratic feature of the crime, by confining its scope to purposes criminal in themselves);[100] (b) where the criminal agreement has not been consummated, which again would be extremely rare.[101] Thus, conspiracy would be returned to its elemental conception as an inchoate crime, a status which, as noted, is at the present time largely fictional. Such a reform may be felt to be too sweeping, though it is submitted that there is substantially nothing to be achieved by resort to the doctrine of criminal conspiracy that cannot be achieved by recourse to the principles of criminal complicity.[102] In particular, the co-conspirator's rule of evidence is equally available during the trial of a jointly committed substantive crime if it is committed pursuant to a conspiracy or "common design".[103]

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[98] It is appreciated that this reasoning is not applicable to conspiracy to defraud, the unlawful doings of which may not be themselves criminal *per se*, though most conspiracies to defraud for which charges have been laid have been for purposes independently criminal. The enactment of a general offence of fraud, as the British Law Commission has proposed in its REPORT ON CONSPIRACY AND CRIMINAL LAW REFORM, *supra* note 2, would assimilate the head of conspiracy to defraud to that of conspiracy for a crime, and make it amenable to the same reasoning. Moreover, the punishment of frauds which merit penalty would no longer be dependent upon the chance interposition of an element of consensus. In practice there are no other heads of criminal conspiracy not involving purposes criminal in themselves, which are invoked in the jurisdictions either preserving common law conspiracy directly, or retaining the substance of it in a codified form. *See* notes 2 and 3, *supra*.

[99] Of course, a similar rule of merger governs the prosecution of criminal attempts.

[100] *See* notes 2 and 3, *supra*.

[101] *See* note 4, *supra*.

[102] *I.e.*, liability as a principal in the second degree (aider and abettor), accessory before the fact or accessory after the fact.

[103] *See* Paradis v. The King, [1934] S.C.R. 165, 61 C.C.C. 184, [1934] 2 D.L.R. 88, as to the requirement that the substantive offence be committed pursuant to a conspiracy;

III. Conclusion

It may seem unusual that a discussion initially directed at an ostensibly procedural aspect of one of the criminal offences ought ultimately to raise an argument for the severest curtailment of this offence. But such is the nature of criminal conspiracy. It is a crime in which substantive and procedural principles are fully integrated with one another. This has happened because of the unique feature of conspiracy in the criminal law: the practice of generalizing many offences in one count (subject only to the presence of the element of consensus), as well as the concomitant range and factual complexity of the subject matter of so many of its individual counts. So peculiar is this basic feature that it has necessitated the evolution of a separate procedural tradition for the crime itself. This hallmark, that of an organic unit between its substantive and procedural phases, is the major aspect of its almost thoughtless, or accidental genius, as well as representing the core of its solitary perversity in the common law of crimes. It explains why its reform must be rooted in procedural questions, and, of course, it explains why a reform of its basic procedural principles cannot be separated from its substantive modification.

Such, then, is the general nature of conspiracy. Of the specific topic of this paper it may be said that, at its most limited, any criticism of the conspiracy indictment must be a trenchant one; the doctrine is far removed in its tenor from the protective provisions enshrined in the indictments policy pursued by the courts in respect of all other crimes. The conspiracy indictment is defective first in its ambiguous attitude to particularization and its violation of the principles of certainty in indictments; it is ultimately obnoxious in its clear violation of that most basic of the indictments' safeguards — the rule against duplicity. It may be modified in the two former respects, but if not altered in respect of the latter, the risk of significant injustice must attend very many conspiracy trials.

It is in these latter terms that the procedural issue merges with the larger issue of the overall form of the crime. For if the indictments doctrine is modified in this latter respect, the crime itself must inevitably end up being drastically modified. There should be no shrinking from such a step. In the form in which it is presently applied, and in the

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Koufis v. The King, [1941] S.C.R. 481, at 488, 76 C.C.C. 161, at 168, [1941] 3 D.L.R. 657, at 663, in which Taschereau J. states that "[i]t is well settled law that any acts done or words spoken in furtherance of the common design may be given in evidence against all. This rule applies to all indictments for crime, and not only when the indictment is for conspiracy"; and Tass v. The King, [1947] S.C.R. 103, 87 C.C.C. 97, 2 C.R. 503, [1947] 1 D.L.R. 497, where the existence of a "common design" to which accused was a party was a factor. *See also* A. Popple, Canadian Criminal Evidence 468 (2d ed. 1954) and P. McWilliams, Canadian Criminal Evidence 345 (1974).

expansive procedural concessions it confers upon the prosecution, criminal conspiracy is convincingly anachronistic. The prosecution has for too long enjoyed a position of marked procedural convenience at the cost of the imposition of a potentially severe and wholly unjustified procedural disability upon the conspiracy defendant. To redress this imbalance in a way more favourable to the defendant will require that the stringent procedural doctrine traditionally characteristic of the common law of crime be restored and applied to the crime of conspiracy.