REDIRECTING THE COMMON LAW

THE QUEEN v. *DARBY*

An offence which derives its substantive features from both a statutory writ and the early common law, which has been variously both tortious and criminal, and which was accepted into the common law having been given its finished form by the Court of Star Chamber can be depended upon to provide common lawyers with numerous difficulties.

The common law offence of conspiracy is made of all these threads, and *The Queen* v. *Darby*[1] encapsulates the difficulties of dealing with them. The decision has "redirect(ed) the common law of Australia on to its true course",[2] but arguably by turning its back on the "wisdom of centuries".[3]

The Decision

John Edward Darby and Leonard Clifford Thomas were indicted and tried together in the Victorian County Court in a trial lasting ten days. The charge was that on February 17, 1978, they had unlawfully conspired to rob one Vladoslav Gregurek of money, whilst armed. On July 12, 1980, they were both found guilty by a jury, receiving terms of imprisonment.

Thomas subsequently appealed and was successful. On September 29, 1980, his conviction was quashed by the Full Court of the Supreme Court of Victoria sitting as a Court of Criminal Appeal. A verdict and judgment of acquittal were entered.

Darby then appealed on the ground that as the count proved against him had alleged a conspiracy with Thomas and no one else, the acquittal of Thomas must necessitate his own acquittal.

The Full Court[4] granted Darby's application to appeal, allowed his appeal, quashed his conviction and sentence and entered a verdict and judgment of acquittal. It was from this judgment that the Crown was granted special leave to appeal. By a majority of 4-1, the High Court[5] ruled:

> . . . that the conviction of a conspirator whether tried together with or separately from an alleged co-conspirator may stand notwithstanding that the latter is or may be acquitted, unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person.[6]

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[1] (1982) 56 A.L.J.R. 688.
[2] *Id.* 692F-G.
[3] *Id.* 696F.
[4] Young, C.J., Anderson and Jenkinson, JJ.
[5] Gibbs, C.J., Aickin, Wilson, Brennan, JJ; Murphy, J. dissenting.
[6] *Supra* n. 2.

The appeal was thus allowed, the judgment of the Full Court set aside, and Darby's conviction and sentence confirmed.

The High Court's judgment is highly derivative of recent English decisions (and to a lesser extent statute law), which in turn rest upon a reading of the evolution of the offence of conspiracy. As *The Queen* v. *Darby* is the result of this evolution, it will be logical to turn first to the history of the offence, and lastly to *Darby's Case* itself.

The Origin of the Offence

The modern English law of conspiracy began with the Three Ordinances of Edward I,[7] the first two of which,[8] while dealing with conspirators, failed to define what was meant by the term. The third statute in 1304[9] defined conspirators *inter alia* as:

> . . . they that do confeder or bind themselves by oath, convenant or other alliance that every of them shall aid and support the enterprise of each other falsely and maliciously to indict, or cause to be indicted, or falsely to acquit people or falsely to move or maintain pleas . . .

As would appear, the bulk of cases brought under the writ were combinations in abuse of legal procedure[10] with the remedy given being either an indictment of the defendants or an action against them for damages. Thus it was not clear if the remedy created by the writ was criminal or civil in nature.

The use to which the writ was put served to more precisely define its scope, which in time became increasingly narrow, a not uncommon fate for such a document. For present purposes, the most significant limitation was in finding the gist of the action in the act of conspiring, rather than the damage suffered (despite the dual remedy available).[11] From this it followed that conspiracy could not be alleged against one defendant only, that conspiracy could not be an independent offence. This element of the offence continues to be universally accepted[12] and was confirmed in *Darby* by both the majority[13] and minority.[14]

A contrary tendency at the time was the adaptive propensity of the common law which increasingly applied the action on the case to alleged conspiracies not falling within the parameters of the statutory writ.[15] As with any action on the case, damage suffered was the gist of the action, and

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[7] Sir William Holdsworth, *A History of English Law* (5th ed. 1966) Vol. III at 401/2.
[8] The first is of uncertain date, probably 1293; the second was in 1300, 28 Edward I, st. 3, c. 10.
[9] 33 Edward I, st. 2.
[10] Holdsworth, *op. cit. supra* n. 7 at 403; and Peter Gillies, *The Law of Criminal Conspiracy* (1981) at 1 ff.
[11] *Id.* Holdsworth 405.
[12] *Id.* Vol. VIII at 379; *Archbold, Pleading Evidence and Practice in Criminal Cases* (39th ed. 1976) at 1666, para. 4051(i); described as "undisputed" by Lord Hailsham, L.C. in *R.* v. *Kamara*[1974] A.C. 104 at 121.
[13] *Supra* n. 1 at 689F.
[14] *Id.* 693C.
[15] *Op. cit. supra* n. 7, Vol. III at 406.

it was thus possible to sue one conspirator alone. Sir William Holdsworth suggests that if left alone:

> . . . the old writ of conspiracy would have become obsolete and the offence would have become a tort pure and simple redressible by an action for damages.[16]

However the common law was not left alone; by the 16th century, the Court of Star Chamber had assumed jurisdiction over all cases of conspiracy.

Conspiracy and the Court of Star Chamber

The Royal prerogative of doing justice for all subjects, in cases where the common law could not, was part of the work of the Crown and as such was executed by the Council. An increasing distinction between the legislative, judicial and administrative functions of the Council led Henry VIII to separate the "Council at court", legislative in character, from the "King's Council in Star Chamber"[17] dealing with administrative and judicial work.

The volume of judicial work readily exceeded that of an administrative nature and the body gradually developed its own style and procedure. By the 16th century it was regarded as a distinct court, intimately related to the Privy Council.[18] As such it was particularly concerned with matters affecting the safety of the State, and equally was not bound by the rules of the common law, subject as they were to being superseded by the power of the Crown in cases of emergency:[19]

> . . . by the arm of sovereignty, it punisheth errors creeping into the Commonwealth which otherwise might prove dangerous and infectious diseases or it giveth life to execution of laws or the performance of such things as are necessary in the Commonwealth, yea, although no positive law or continued custom of common law giveth warrant to it.[20]

It is here that the elements of the crime which were subsequently to prove troublesome become apparent, with its extension to combinations to effect an action which was neither a crime nor a tort exposing the public policy element in the offence.[21]

In the *Poulterer's Case*,[22] the Court of Star Chamber established that the gist of the offence is the conspiracy itself, not acts done in furtherance of the conspiracy: ". . . a false conspiracy betwixt divers persons shall be punished although nothing be put in execution". However as direct

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[16] *Id.* 407.

[17] *The Ordinances* of 1526; the Council habitually sat in the Starred Chamber, a palace at Westminster.

[18] *Op. cit. supra* n. 7, Vol. I at 497 and 499.

[19] *Id.* Vol. V at 186.

[20] *Id.* Vol. I at 504.

[21] As articulated in *D.P.P.* v. *Withers* [1975] A.C. 842; judges may not now create a new offence, those available are those expressly or impliedly recognized in the past: J. Oxley-Oxland, *Students' Manual of Criminal Law in NSW* (1982) at 91.

[22] (1610) 9 Co. Rep. 55b; 77 E.R. 813.

evidence of the agreement is rarely available, the existence of the conspiracy must often be shown inferentially from acts done in furtherance of it. Then arises the familiar problem of circumstantial evidence cases: in proving the facts themselves, as well as the conclusion that such facts prove a conspiracy, the benefit of the doubt must be given twice.[23]

During the term of the Court of Star Chamber the fear was of combinations which threatened the State;[24] they were seen as occasions of emergency and met with extraordinary measures. The resort to torture was "habitual"[25] and difficulties of proof were thus reduced.

When the common law adopted the offence on the fall of the Court in 1641, it took the substantive, not the adjective law requirements, the use of torture having been anathema to the common law throughout the whole of the existence of the Court.[26] Thus a persistent theme in the attempts by the common law to deal with this unique offence was the difficulty of proving a conspiracy by means appropriate to an adverserial procedure.

By this stage the elements of the modern common law offence of conspiracy were discernible. The law of conspiracy derived from two sources, early statutes providing a writ of conspiracy, and the common law action on the case, both directed primarily to the abuse of legal process. The statutory writ, focusing on the combination itself, could be brought against two or more conspirators only; the common law action focused on the damage caused and would lie against one defendant alone. The Court of Star Chamber narrowed the essence of the offence to the act of combining then dilated its application to all those offences punishable by it or the common law courts. The only thread remaining of the antecedent common law was the rule derived from the statutory writ that the crime cannot be committed by one person only.

The Elements of the Offence

Like any other crime, conspiracy requires an *actus reus* and a *mens rea*. Unlike some other crimes it requires not only a basic *mens rea* but a specific *mens rea* as well.[27] This was succinctly put by the House of Lords in *Mulcahy* v. *The Queen*:[28]

> . . . a conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect,

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[23] W. A. Holman, K.C., "Evidence in Conspiracy Cases" (1930) 4 A.L.J. 247 at 248.

[24] "For all uniting of strength by private men, is, if for evill intent, unjust; if for intent unknown, dangerous to the Publique, and unjustly concealed". T. Hobbes, *Leviathan* (1651) pt. II, c. 22 at 124.

[25] *Op. cit. supra* n. 7, Vol. I at 505.

[26] Adhemar Esmein, *History of Continental Criminal Procedure* (1913) at 107; *op. cit. supra* n. 7, Vol. I at 185/6; R. P. Roulston, *Introduction to Criminal Law in N.S.W.* (1980) at 58, para. 525.

[27] Oxley-Oxland, *op. cit. supra* n. 21 at 86; dichotomized by Gillies, *op. cit. supra* n. 10 at 16 as primary and secondary elements; *Halsbury's Laws of England* (3rd ed. 1962), vol. 10 at 273 para. 507(b); *Archbold, supra op. cit.* n. 12 at para. 4051(c).

[28] [1868] L.R. 3 H.L. 306 at 317.

> the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum* . . .

It is the intent (specific *mens rea*) to do *inter alia* the unlawful thing and the foresight (basic *mens rea*) of this intent in another which when combined with a like intent and foresight in that other will constitute the agreement which is the conspiracy.

The Writ of Error Procedure

The High Court's decision in *Darby* hinges in part on the view that the writ of error procedure is a "technical rule"[29] supplanted partly in the U.K. by the mid-19th century[30] and wholly by the Criminal Appeal Act of 1907 (U.K.).[31] It will be helpful then to look briefly at the procedure and thus the necessity for the statutory changes mentioned.

The writ of error procedure was neatly summed up by Blackstone:

> . . . a writ of error lies for some supposed mistake in the proceedings of a court of record . . . the writ of error only lies upon matter of law arising upon the face of the proceeding; so that no evidence is required to substantiate or support it: there being no method of reversing an error in the determination of facts, but by an attaint, or a new trial to correct the mistakes of the former verdict.[32]

The quote highlights the advance signaled by the writ of error procedure: it enabled an appeal against judgment to be distinguished from a complaint against a judge or jury.[33]

It also shows the formalism of the procedure. The complaint required that the formal record of the case show some error on its face. The record would contain the arraingment, plea, the issue and verdict, but significantly it excluded both the evidence and the direction of the judge to the jury.[34]

This exclusion of the process of judicial determination rests in the rationale of the jury itself. As heir to the older methods of proof, for example battle, compurgation and ordeal, the jury inherited a role similar to these tests, yielding a decision as inscrutable and immutable as a judgment of God.[35] One therefore which could not be recorded.

As conspiracy is constituted by an agreement of minds, it follows that an indictment which showed one of two alleged co-conspirators as being guilty where the other was acquitted displayed an error on its face. The only means of correcting the error must be the quashing of the verdict of guilty

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[29] *Supra* n. 1 at 692D.

[30] The Crown Cases Act 1848, by which a point of law could be reserved by a lower court for consideration by the Court for the Consideration of Crown Cases Reserved.

[31] Vesting the above jurisdiction in the Court of Criminal Appeal and allowing appellate courts to review convictions by receiving both evidence and the trial judge's summing up.

[32] Sir William Blackstone, *Commentaries on the Laws of England* (1783) Vol. III at 407.

[33] "The idea of a complaint against a judgment which is not an accusation against a judge is not easily formed": Sir Frederick Pollock and Frederick William Maitland, *The History of English Law* (2nd ed. 1968) Vol. II at 668.

[34] Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883) Vol. I at 309.

[35] *Op. cit. supra* n. 7, Vol. I at 317.

against the convicted co-conspirator. That this was the case was early accepted by the common law[36] and has remained the law until very recent times, as shown by a consistent series of decisions.

The Cases

In the course of its judgment, the English Court of Appeal in *DPP* v. *Shannon* [1975] A.C. 717, set forth four propositions derived from the conspiracy cases prior to 1907[37] and two relevant to the succeeding period. These propositions were approved unreservedly by the House of Lords on appeal[38] and reproduced *verbatim* by the High Court majority in *Darby.*[39] I also propose to use them in order to give some cohesion to the numerous cases on the conspiracy topic.

I. If A and B alone (that is with no other person named or unnamed) are indicted and tried together for conspiracy together, the jury must be told that both must be convicted or both must be acquitted and if one is convicted and the other acquitted, the conviction must be quashed.

Marsh v. *Vauhan* (1599) Cro. Eliz. 701/78 E.R. 937. Two defendants, both pleading not guilty to conspiracy, were tried together. One was found guilty while the other was acquitted. The defendant found guilty was then acquitted, as "one cannot conspire alone".

Thody's Case (1674) 1 Vent. 234/86 E.R. 157. There is an *obiter dictum* of Lord Hale to the effect that "If one be acquitted in an action of conspiracy, the other cannot be guilty".

Rex v. *Grimes and Thompson* (1688) 3 Mod. Rep. 220/87 E.R. 142. Grimes and Thompson were common pawnbrokers. It was alleged that they detained goods "*per confederationem et astutiam*". Thompson was acquitted and Grimes found guilty. The conviction was quashed as "the acquittal of one is the acquittal of both upon this indictment".

None of the cases cited above is reported at any length nor in any degree of detail. Nevertheless the rule they set forth became well established as shown by *dicta* in *Rex* v. *Cooke,*[40] *Reg.* v. *Thompson*, *Tillotson* and *Maddock*[41] and *O'Connell* v. *The Queen.*[42]

These *dicta* were sufficient for Lord Coleridge, C.J. to resile from a direction given to a jury that on an indictment of two persons for conspiracy, they could find one guilty and the other not.[43] His Lordship was supported by the other members of the Court, albeit with "great reluctance" (Stephen, J.) and "considerable doubt" (Mathew, J.).

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[36] *Marsh* v. *Vauhan* (1599) Cro. Eliz. 701/78 E.R. 937: "One cannot conspire alone; and the one being acquitted, the other sole cannot be attainted"; and note: "An action upon the case, in nature of conspiracy, might have been brought in this case".

[37] Roskill and James, L.JJ. and Talbot, J.; at 733E-H and 734A-B.

[38] *Supra* at 745C-D; 762F; and 770B.

[39] *Supra* n. 1 at 690C-G; and 691A.

[40] (1826) 5B+C538 at 541, 544, 545; 108 E.R. 201 at 202, 203, 204.

[41] (1851) 16 Q.B. 832 at 844; 117 E.R. 1100 at 1105 *per* Lord Campbell, C.J.

[42] (1844) 11C+F155/8 E.R. 1061, where it is accepted as a rule of practice that a conspiracy count is complete and inseverable

[43] *Reg.* v. *Manning* (1883) 12 Q.B.D. 241.

The doubt which arose initially for Lord Coleridge was seeded by practice in the Divorce Court whereby the ecclesiastical joint offence of adultery could be proved against one of two alleged adulterers, on the basis of evidence against one not being admissible against the other:[44]

> ... where there is a joint offence which has to be proved against each person separately, the evidence which is sufficient to convict one person of the offence may not by any means be sufficient to convict the other.[45]

It is notable that the doubts and hesitancies overcome by the Justices of the Queen's Bench Division in this instance are to be similarly expressed but acceded to by both the House of Lords and the High Court one hundred years later.

II. If A and B alone (that is with no other person named or unnamed) are indicted but only A is tried, either because B is dead or has disappeared, and A is convicted of conspiracy with B, that conviction is in no way vitiated by B's death or absence.

III. If A and B alone (that is with no other person known or unknown) are indicted for conspiracy and only A is tried and convicted, and subsequently B is tried and acquitted, A's conviction must be quashed.

Thody's Case (*supra*). Thody was indicted with two others for conspiring to cheat by the use of false dice. Thody was found guilty, though neither of the other two appeared. It was argued for Thody that as the others, when they did appear, might be acquitted, judgment should not be entered against him. This was rejected by Lord Hale.

His Lordship accepted that an acquittal of one of two alleged co-conspirators must mean the acquittal of the other:

> ... but where one is found guilty and the other comes not in upon process, or if he dies hanging the suit, yet judgment shall be upon the verdict against the other.

However, judgment was deferred for several days in order to allow apprehension of the others.

Rex v. *Kinnersley and Moore* (1719) 1 Stra. 193/93 E.R. 467. The defendants were charged with conspiring to extort money. Only Kinnersley appeared and was found guilty; arguments were heard as to whether judgment should thereafter be arrested.

Serjeant Braithwayte argued for Kinnersley that as one cannot conspire alone, a subsequent acquittal of Moore must of necessity result in the acquittal of Kinnersley. He then argued that in such a case:

> ... one cannot be guilty of the conspiracy, though he may of the overt act, and yet the foundation (which is the conspiracy) being removed, the other part, which is only the consequence, falls of course.[46]

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[44] *Robinson* v. *Robinson and Lane* (1859) 1 Sw.+Tr. 362/164 E.R. 767; *Stone* v. *Stone and Appleton* (1864) 3 Sw.+Tr. 608/164 E.R. 1411.

[45] *Supra* n. 43 at 244/5.

[46] *Supra* at 193; at 468.

This argument is significant as it seems to acknowledge that while one conspirator may be tried and convicted alone, the evidence against him being (as is generally the case) of overt acts presumed to be in furtherance of the conspiracy, he must be acquitted when it is subsequently shown that it cannot be proved that such an act was in fact done in furtherance of the conspiracy alleged. This argument charts a satisfactory path between procedural necessity and the substantive elements which go to make up the offence.

Reeve, for the Crown, accepted this argument, turning it to his own advantage:

> . . . as the matter now stands, Moore himself is found guilty, for the conspiracy is found as it is laid, and therefore judgment may be given against one before the trial of the other.[47]

The Court was unanimous in finding for the Crown; in the event, Moore was later tried and convicted.

Rex v. *Niccolls* (1745) 2 Stra. 1227/93 E.R. 1148. Elizabeth Niccolls was charged with conspiring with Edward Bygrave to unjustly charge William Frankland with robbery. In furtherance of the conspiracy Bygrave had gone before a Justice of the Peace in order to lay the charge. Niccolls was found guilty, but Bygrave died before he could be indicted. An objection to Niccoll's conviction was overruled. *Kinnersley's Case* was relied on. As in that case there had been a possibility of contradictory verdicts, whereas here there was none, *Kinnersley* was regarded as being stronger authority for the proposition than the case in hand.

Rex v. *Cook* (1826) 5B + C538/108 E.R. 201. The four defendants were indicted for conspiracy to obtain money by a false pretence. J. Cooke and Jenkinson pleaded not guilty, while Miles never appeared; R. Cooke pleaded in abatement to which the Crown demurred. The jury verdict was an acquittal of Jenkinson and a conviction of J. Cooke for conspiring "with his brother R. Cooke". J. Cooke obtained a rule *nisi* for staying the judgment, as a subsequent acquittal of R. Cooke would render any judgment against him erroneous.

On appeal the rule *nisi* was discharged; Abbott, C.J. noted that at the time J. Cooke had been convicted, there was no plea by R. Cooke on the record and thus no inconsistency. Further, the Court would not presume that R. Cooke would be acquitted and that the record would then display a repugnancy.

Bayley, J. relied on *Kinnersley* as being directly in point. He agreed with Abbott, C.J. that it could not be presumed that R. Cooke would be acquitted. Holroyd, J. concurred finding "the verdict . . . at the present time conclusive against him".[48]

Thus all members of the Court expressly or implicitly acknowledge that a subsequent acquittal of R. Cooke must result in the quashing of the

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[47] *Id.* 195; 469.
[48] *Supra* at 544; at 203.

verdict against J. Cooke. Only Littledale, J. was at all hesitant; for him the terms of the jury's finding had conformed with:

> . . . the rule of law that one cannot be guilty of a conspiracy. If the other defendant R. Cooke shall hereafter be acquitted perhaps this judgment may be reversed.[49]

Reg. v. *Ahearne* (1852) 6 Cox C.C. 6. This is an extreme instance of the current proposition. John Ahearne was charged with conspiring with others, both named and unnamed, to murder. The named defendants were in custody, but the Crown elected to try Ahearne separately before the others. He was convicted and sentenced to death. It was argued before the Court of Criminal Appeal that judgment be arrested, as an acquittal of the others would render bad the verdict against Ahearne.

The Court was unanimous in rejecting the argument.[50] Although hesitating in the face of the death penalty ordered, which if found to have been in error would, of course, be irreparable, this in the end was regarded as an "inconvenience . . . to which all human tribunals must be subject".[51] However the basis of the argument was acceptance of the proposition that a later acquittal of the other co-conspirators would have resulted in the quashing of Ahearne's conviction.

The proposition that a conspirator may properly be convicted in the absence of other alleged conspirators, named or unnamed, is thus well established. It is significant that of the propositions heretofor reviewed and those yet to be discussed, it is the only one which will be supported by the reasoning of the High Court majority in *Darby*.

Reg. v. *Thompson, Tillotson and Maddock* (1851) 16 Q.B.32/117 E.R. 1100. The defendants were charged with conspiring to evade the payment of customs duties by the fraudulent removal of goods from a bonded warehouse. A conspiracy was also charged with persons unknown, but no evidence was taken which applied to any but the named conspirators. The jury found that Thompson had conspired with either Tillotson or Maddock, but they could not determine which. A directed verdict of guilty was then given against Thompson.

On appeal his conviction was quashed. By a majority of 3-1[52] the Court agreed that a conspiracy may be proved between a named conspirator and others unnamed; but where, as here, the conspirators are all named, the acquittal of two predicates the acquittal of the third.

Erle, J. in dissent uses language which will find an echo in the majority judgment in *Darby*:

> . . . according to the rules of pleading, this charge, as to each individual, must be construed as if he were charged solely; and it follows that the acquittal of the other two becomes immaterial.[53]

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[49] *Id.* 545/6; 204.
[50] Lefroy, C.J., Monahan, C.J., Crampton, Moore, JJ., and Greene, B.
[51] *Supra* at 9.
[52] Lord Campbell, C.J., Patteson and Coleridge, JJ.; Erle, J. dissenting.
[53] *Supra* at 846; at 1106.

His Lordship goes on to interpret the jury's finding as one of a conspiracy by Thompson with one of two named conspirators, with no finding as to which. The verdict being therefore one of a conspiracy with others unknown.

IV. If A and B alone (that is with no other person known or unknown) are indicted for conspiracy together and A pleads guilty and B not guilty and B is tried and is acquitted, A's conviction must be quashed.

Rex v. *Plummer* [1902] 2 K.B. 339. It will be helpful to extract this case in some detail as it canvasses many of the arguments which appear in *Darby*; the decisions of the Courts differ however.

Plummer was charged with two others with *inter alia* a conspiracy to defraud. Plummer alone pleaded guilty and gave evidence for the Crown at the subsequent trial of the others, who were acquitted on all counts.

Counsel for Plummer argued that the acquittal of the two co-conspirators had negatived any conspiracy; a question was reserved for the Full Court for Consideration of Crown Cases Reserved[54] as to whether in the circumstances a conviction against Plummer could be sustained.

Wright, J. began by accepting the proposition that at a joint trial of alleged co-conspirators judgment could not be given against one alone. However that situation was not directly in point on the facts of the present case, which his Lordship regarded as intermediate between wholly joint and wholly separate trials of alleged co-conspirators. But as there was one indictment and one arraignment, a writ of error would have shown inconsistent pleas and verdicts. For this reason he chose to regard the trial as joint.

For Wright, J. the cases presented the following proposition:

> . . . the mere possibility of the one defendant having been acquitted by reason of evidence not being forthcoming or admissible against him, which was forthcoming or admissible against the other who has been tried with him is not enough to cure the inconsistency apparent on the record.[55]

Clearly he was affected by the repugnancy argument, and accepts that differential evidence available against alleged co-conspirators cannot account for the inconsistency apparent in a verdict against one and in favour of the other of two accused.

At the same place his Lordship cites with favour a *dictum* of the Full Court of the Court for Divorce and Matrimonial Causes[56] in support of his conclusion. This same court found no logical inconsistency in a finding that one party had committed adultery with another, but not *vice versa*; evidence admissible against the wife was simply not admissible against the co-respondent.

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[54] Lord Alverstone, C.J., Wright, Bruce, Darling, Jelf, JJ.
[55] *Supra* at 344.
[56] *Robinson* v. *Robinson and Lane*, *supra* n. 44.

But as Wright, J. had rejected this argument as capable of curing the *prima facie* inconsistency of one of two co-conspirators being convicted, wherein lies the distinction?

Though not enunciated, it is submitted that the distinction lies in the nature of the offence of conspiracy itself; that it rests in a coming together of guilty minds, each with an intent to achieve the same unlawful end, and each with a foresight of the other's intent. As such, a failure to make out the elements of the offence against one will not exculpate that one alone. If one or the other cannot be shown to have had both the basic and specific *mens rea*, then the elements of the offence have not been made out as regards the two accused.

Bruce, J. concurred with Wright, J. in this argument that the *prima facie* inconsistency stems from:

> . . . the nature of the offence of conspiracy . . . if the record finds that A and B are acquitted on a charge of agreeing together with C, the same record cannot without inconsistency find that C agreed together with A and B.[57]

His Lordship then deals with the argument of the editor of *Russell on Crimes*[58] that a verdict of not guilty is not commensurate with one of innocence:[59] that the result may have been determined simply by a failure to prove guilt. Bruce, J. regarded this as a "very dangerous principle"[60] and proceeded to apply it to a trial of conspirators:

> . . . if it is to be applied at all, it would apply to persons tried at the same time and yet it is perfectly clear upon the authorities that, if two persons are tried together upon a charge of conspiring with one another, and one is acquitted by the jury and the other convicted, the conviction cannot stand, although perfectly clear that the verdict of acquittal may have been obtained simply upon the ground that there was a failure of evidence to establish the charge against the person who was acquitted.[61]

The other members of the Court concurred and Plummer's conviction was quashed.

In summary it should be emphasized that under the old writ of error procedure, only inconsistencies on the face of the record could be cured. Thus where conspirators were indicted and tried separately the acquittal of one or the other would show no inconsistency; this would be similar to the situation where only one of several co-conspirators stood trial, the others not for whatever reason being amenable to justice.

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[57] *Supra* at 347/8.

[58] *Russell on Crimes* (4th ed. by C. S. Greaves, 1865) Vol. III at 146.

[59] It is well established in Australia that a jury's function is not one of determining guilt or innocence: *Bartho* v. *The Queen* (1978) 19 A.L.R. 418; however the effect of a verdict of not guilty is properly another question.

[60] *Supra* at 349.

[61] *Ibid.*

The procedure was acknowledged to be both inadequate and clumsy[62] due to exclusion from the record of the most essential parts of the trial.

Change came to England in 1907, with the Criminal Appeal Act; writs of error were abolished and jurisdiction over law in criminal trials was vested in a Court of Criminal Appeal. The net result was to found on statute the whole of the appellate jurisdiction in criminal cases.

Following such a change, it would be likely for either of two arguments to be forthcoming with regard to the trying of alleged conspirators:

(1) An appeal court, able to review all aspects of a trial, can now safely determine that the conviction of one of two alleged co-conspirators is safe. The result may be the product of nothing more than the different quality of the evidence entered against each; or

(2) The statutory changes to the criminal appeals process do not affect the common law rules as regards conspiracy. The rules reflect the nature of the offence and remain valid. The ability prior to 1907, to convict one of two alleged co-conspirators where indicted separately reflected the failings inherent in the writ of error procedure. The common law rules should now apply to all alleged conspiracies.

Both arguments have met with success in the succeeding seventy-five years.

V. If A and B alone (that is with no other person named or unnamed) are indicted for conspiracy together and both plead not guilty and both are tried and convicted, either together or on separate occasions, and B's conviction is later quashed for any reason, whether for misdirection or insufficient evidence to justify conviction or (since 1966)[63] *because the verdict against B is unsafe and unsatisfactory, A's conviction must be quashed.*

VI. If A and B alone (that is with no other person named or unnamed) are indicted for conspiracy together and A pleads guilty, and B is tried either on the same occasion or on a later occasion and is convicted but B's conviction is later quashed for any reason, A's conviction must be quashed.

Dharmasena v. *The King* [1951] A.C. 1 P.C. Dharmasena was charged along with one Seneviratne with conspiring to murder. At their trial both were convicted by a unanimous verdict of the jury. On appeal to the Court of Criminal Appeal of Ceylon, Seneviratne's conviction was quashed and a new trial ordered. Dharmasena's appeal was dismissed, the Court ruling that the evidence against him was ample to establish his guilt.

At the end of the second trial, Seneviratne was acquitted. Dharmasena then appealed to the Privy Council. The Judicial Committee[64] confirmed that one alone cannot conspire and that the acquittal of one of two accused

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[62] *Supra* n. 7, Vol. I at 215.

[63] The Criminal Appeal Act 1966; transferring the jurisdiction of the Court of Criminal Appeal to the Court of Appeal and restating the grounds of appeal.

[64] Lord Porter, Lord Oaksey, Lord Radcliffe, Sir John Beaumont, Sir Lionel Leach.

must result in acquittal of the other. Their Lordships extended the rule on joint trials to that of separate trials by holding that where two are convicted and one retried on appeal, both should be retried at the same time "so that both may be convicted or acquitted together".[65]

Thus the Board treated the acquittal of Seneviratne as disposing of the conspiracy charge and requiring the acquittal of Dharmasena.

D.P.P. v. *Shannon* [1975] A.C. 717. *Shannon* redirects the common law offence of conspiracy.

The decision is essential to an understanding of *Darby* and will be dealt with in detail.

David Charles Shannon was charged on March 22, 1973, on an indictment containing 22 counts. Among them was a charge of conspiring with Ronald Gordon Tracey (and no others named or unnamed) to dishonestly handle stolen goods. Shannon pleaded guilty to the count and was sentenced to three years' imprisonment.

Tracey pleaded not guilty and was tried separately. No evidence was offered by the Crown on the conspiracy count and there was a directed verdict of not guilty.

Shannon, despite his plea of guilty, then sought leave to appeal. The Criminal Division of the Court of Appeal allowed his appeal and quashed his conviction.

In a joint judgment, the Court exhaustively reviewed the authorities on the subject. Having developed the abovementioned series of propositions, their Lordships concluded that departure from them could only be justified if:

(a) the 1907 Statute had altered the law on the subject; and

(b) the decisions after 1907, which followed the earlier law, had thus been wrongly decided.

The Court acknowledged the argument that errors on the face of the record were no longer of importance, but went behind this argument to deal with the substantive requirements of the offence:

> . . . not merely that inconsistent results were recorded but that different results are recorded in respect of an offence which could not be committed by either without the other; in other words, the record showed on its face guilt of an offence the ingredients of which were not established.[66]

Their Lordships thus refused to view the dilemma as one of proof only, an argument pressed by the Crown, and drew from the cases the view that the principle enunciated derives rather "from the nature of the offence of conspiracy".[67]

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[65] *Supra* at 6.
[66] *Supra* at 734G.
[67] *Id.* 736A.

The Court was however attracted by the logic of other joint offences[68] which seemed to go against the decision they had reached, and thus allowed the appeal but "reluctantly". Their Lordships then certified a question of general public importance to the House of Lords:

> . . . if two persons alone (that is to say with no other persons named or unnamed) are indicted for conspiracy together and the first pleads guilty but the second pleads not guilty and is subsequently tried and acquitted must the conviction of the first upon his own confession be quashed?

Shannon in the House of Lords

Their Lordships[69] were unanimous in holding that there is no inconsistency in a finding of guilt against one only of two alleged co-conspirators where they are tried separately. In going beyond the question certified to them, their Lordships agreed this was so both where a confession was admissible against one only, and where the quality of evidence available differed as between the two.

A majority (Lord Morris, with whom Lord Reid agreed, and Lord Salmon) were of the opinion that where there is a joint trial the general common law rule should continue to apply: either both must be acquitted or both convicted.

For Lord Morris (Lord Reid concurring) this would be so even where the evidence against one was weak or lacking.[70] For Lord Salmon this would be so even where there was a confession admissible against one and only slight evidence against the other;[71] for his Lordship the general rule in this instance would apply due to the practical difficulty inherent in a jury reaching another conclusion.[72]

Viscount Dilhorne, on the other hand, doubted that on a joint trial a jury would find it difficult to convict one conspirator and also acquit the only other party with whom he is alleged to have conspired. A separate consideration of the evidence against each would, on the contrary, make it a nonsense to direct a jury to either acquit or convict both.[73] For his Lordship the rule is now utterly obsolete.

Lord Simon concurred in the argued obsolescence of the rule with regard to both joint and separate trials.[74] Where there is a difference in the evidence admissible against each alleged conspirator, the direction that the jury must consider the case against each separately will enable them to con-

[68] E.g. A can (in legal theory) be guilty of corruptly receiving a bribe while B can be acquitted of offering it; or A (in legal theory) can be guilty of adultery with B, but B not guilty of adultery with A; *supra*, 736B-C.

[69] Lord Reid, Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Simon of Glaisdale and Lord Salmon.

[70] *Supra* at 754H-755A-D.

[71] *Id.* 772F-G.

[72] It should be noted here that the High Court in *Darby* view Lord Salmon as advocating the abolition of the rule in all cases: *supra* n. 1 at 691C. It is submitted with respect that this is not the case.

[73] *Supra* at 761G-H.

[74] *Id.* 767B-C and F-G.

sider their verdicts separately. Greater confusion would result in a direction that both must then be found either guilty or not.[75]

All of their Lordships base the genesis of the old rule on the formalism of the writ of error procedure[76] and all accept that the gist of the offence is an agreement of minds so that two or more are required to conspire.[77] None discuss the other elements required to prove the offence.[78]

Viscount Dilhorne and Lord Simon (who agreed that the rule was abrogated with regard to both joint and separate trials) drew analogies between the conspiracy offence and the joint offences of adultery and the corrupt receiving of a bribe. In neither case was there found to be a legal inconsistency in the acquittal of one of the joint accused. Neither discussed the substantive elements of the two offences.

Only Lords Simon and Salmon dealt with the effect in law of an acquittal, Lord Salmon dealing with it at somewhat greater length.[79] A verdict of not guilty may represent either a finding of innocence, or a finding of guilt to any degree less than that provable beyond a reasonable doubt. The effect in law is immunity from further prosecution for the same offence; thus:

> . . . so far as the Crown is concerned, the accused is deemed in law, to be innocent. His acquittal cannot, however, affect anyone but himself and indeed would not be admissible in evidence on behalf of or against anyone else.[80]

However, as was seen, this did not prevent Lord Salmon from recognizing the realities of jury determinations and continuing to apply the old rule in the case of a joint trial.

Summary

Their Lordships unanimously abrogated the old common law rule with regard to separate trials of two only alleged conspirators. The subsequent acquittal or quashing of the conviction against one is not grounds in itself for quashing the conviction of the other. The application of the old rule to joint trials was however approved *obiter dicta* by the majority.

It is express in the judgments that the 1907 legislation in England did affect the common law rule. In terms of the four propositions pre-1907, *supra*, the first and second have been supported by the verdict in *Shannon.* The overturning of the third and fourth, and of necessity the fifth and sixth, has necessarily led their Lordships to overrule much authority, though only *Plummer*, *Dharmasena* and *Thompson* were expressed to have been wrongly decided.[81]

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[75] *Id.* 768F-G.
[76] *Id.* 749B, 753H-754A-C; 758B-D, 761B; 764F-G; 770E-F.
[77] *Id.* 748E-F, 751C; 757G-H; 762F-G; 770D-E.
[78] "I need not refer to the other elements which compose the crime of conspiracy" *per* Lord Morris at 748F.
[79] *Id.* 764E; 772B-D.
[80] *Id.* 772C-D.
[81] *Id.* 761A; 762C; 769A; 771H; 773B.

Their Lordships were expressly reluctant to go beyond the question put to them by the Court of Appeal[82] and have done so with an understandable lack of unanimity in light of the venerability of the law with which they were dealing. Their reluctance to directly deal with the substantive elements of the offence, or to expressly overrule such extensive authority tempts one to the conclusion that we are dealing with an instance of judicial law-making, a "bold innovation in the law", which Lord Simon recognizes at length,[83] perhaps due to being, in the end, bolder than the rest.

The question in England was rendered mute by the Criminal Law Act 1977:

> S. 5(8): The fact that the person or persons who so far as appears from the indictment on which any person has been convicted of conspiracy were the only other parties to the agreement on which his conviction was based have been acquitted of conspiracy by reference to that agreement (whether after being tried with the person convicted or separately) shall not be a ground for quashing his conviction unless under all the circumstances of the case his conviction is inconsistent with the acquittal of the other person or persons in question.

The Queen* v. *Darby

The decision of the majority of the High Court in *Darby* is readily discussed in the terms outlined in *Shannon*, as well as the statute law cited immediately above.

The Writ of Error Procedure

The majority acknowledge that the offence of conspiracy is an agreement of minds.[84] An error on the face of the record would therefore result when one only of two alleged conspirators was found guilty.

The reality that the inconsistency might be explicable by the relative sufficiency of evidence against the two could not be the subject of review until the 1907 legislation. The majority acknowledge that the rule regarding joint verdicts survived the statute and approved the formulation of the Court of Appeal in *Shannon's Case*.[85]

The Effect of an Acquittal

The majority also dealt with the contention put to them (as arrived at by the Court of Appeal in *Shannon*) that the question is not one of procedure or weight of evidence but that of the nature of the offence;[86] there is arguably a fundamental inconsistency in finding A guilty of conspiring with B when B is acquitted of conspiring with A. Their Honours regarded the contention as plausible but mistaken, and proceeded to elaborate the true effect of an acquittal.[87]

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[82] *Id.* 762A; 767D-E.
[83] *Id.* 765F and following; 766G-H.
[84] *Supra* at 689F.
[85] *Id.* 690A-D.
[86] *Id.* 692B.
[87] *Id.* 692C.

The majority extracted with approval the speech of Lord Salmon on the subject in *Shannon.* They then agreed with the expression by Lord Simon and Viscount Dilhorne of the practical effect of directing a jury in a joint trial. There will be an incongruity in directing a jury to both consider evidence against the defendants separately and then to arrive at a judgment which is joint.

As an acquittal of one cannot be admitted against the other, and the sufficiency of evidence may vary, the differing verdicts will present no logical difficulties. The Court acknowledges however the practical difficulties of such a direction to a jury and therefore encourages the practice of separate trials[88] where evidence against the accused differs significantly.

Where there is no such material difference in evidential quality, a direction may still be given to return a joint verdict, "not because of any technical rule but because of the circumstances of the case".[89]

The Ratio

The appeal by the Crown was from the decision of the Victorian Court of Criminal Appeal which had expressed itself to be bound by the Privy Council decision in *Dharmasena* v. *The King.*[90] Thus it was for the High Court to determine whether on a joint trial of a count of conspiracy the conviction of both and subsequent acquittal of one necessitates the acquittal of the other. The High Court refused to follow *Dharmasena* and held that the acquittal of one does not necessitate the acquittal of the other.

The majority also stated this to be the case in separate trials,[91] but as this was not the question before the Court, it must be regarded as *obiter.*

The result in both cases will be as stated "unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person".[92]

The Minority Judgment

Mr. Justice Murphy has focused on the essence of the decision of the majority, the effect of an acquittal, and has dealt with both its aspects in a lone and vigorous dissent.

His Honour begins by reiterating that the offence is not an independent one, that its essence is an agreement of minds.[93] In adverting, along with the majority, to *Shannon*, Murphy, J. highlights the two aspects of the *dicta* of Lord Salmon above:

(a) an acquittal of one is not admissible as evidence against or in favour of another; and

[88] Approving the Canadian case of *Guimond* v. *The Queen* (1979) 44 C.C.C. 2d. 481; *supra* at 692C. For a reasoned argument as to why such cases should, on the contrary, be rare: *R.* v. *Miller and Ors* [1952] Crim. App. Rep. 169 at 174 *per* Devlin, J.

[89] *Supra* n. 1 at 692D.

[90] [1951] A.C. 1.

[91] *Id.* 692G.

[92] *Ibid.*

[93] *Id.* 693C-D.

(b) an acquittal may reflect the belief of the jury that the accused is innocent; or that the evidence has aroused a suspicion only, one not proved beyond a reasonable doubt.

His Honour thus contrasts the manner "by which an acquittal might be reached and its effect".[94]

As to the first arm, Murphy, J. acknowledges that where there are separate trials, differential verdicts would "appear to (be) justif(ied)".[95]

Although not expressed, this is supported by the second of the propositions in *Shannon*, the common law rule that one conspirator alone may be tried in the absence of the other named conspirators, or with having conspired with those unnamed. This proposition is, however, the most anomalous of them all, and the tension between individual guilt or innocence and the collective nature of the offence was resolved *via* the other common law rules. The majority in *Darby* have supported the second proposition alone; it is explicit in Murphy, J.'s dissent that in doing so they have ignored the unique nature of the offence:

> . . . although they must be considered separately, they must also, because conspiracy is a joint offence be considered jointly . . . the only way to reconcile individual justice with collective guilt is to apply the traditional rule.[96]

Once it is accepted, given that agreement is necessary to make out the offence, that one co-conspirator may properly be convicted and the other not, it is then necessary to show that the acquittal of the one was not commensurate with a verdict of innocence. To hold otherwise would obviously negative the existence of any agreement. This may be done by either of the means above: deny the admission of a verdict of acquittal of one as evidence in relation to the other; or hold that an acquittal has not in fact negatived the existence of such an agreement, merely shown that its existence cannot be proved beyond a reasonable doubt.

It was the latter which was emphasized by the majority[97] and with regard to which Murphy, J. dissents most vigorously.

Consistent with his judgment in *Bartho*,[98] his Honour dichotomizes the conduct of a trial and the effect of a verdict of acquittal. Though the jury function is not one of determining guilt or innocence, a verdict of not guilty is "decisive of innocence".[99] To hold otherwise would leave an accused in a worse position following acquittal than before, when at least his innocence was presumed:

> . . . in Australia there are no degrees of acquittal. As between the State

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[94] *Id.* 694D-E.
[95] *Id.* 694E-F.
[96] *Id.* 694F-G.
[97] *Id.* 692.
[98] *Supra* n. 59.
[99] *Supra* 694D. For his Honour, the rebuttable presumption of innocence "become(s) irrebuttable". He does not elaborate how this occurs, and it is, with respect, a questionable formulation.

and the accused, either every judgment of acquittal is conclusive of innocence or none is.[100]

It is doubtless true that a not guilty verdict may be variously explained. It is equally obvious and indubitably "irrelevant that persons may hold private reservations about the acquitted person's innocence".[101] However, for the State to hold that an acquittal is not equivalent to a verdict of innocence will, given the *sui generis* nature of the conspiracy offence, cause the full rigour of the criminal law to attach to an accused against whom the offence has not been fully made out:

> If adopted by the Court and allowed to stand, it will be the greatest setback to human rights and individual freedom in the history of this Court . . . . Either there was a conspiracy between them or there was not.[102]

Conclusion

(1) The origins of the criminal offence of conspiracy make it unique among common law offences generally and joint criminal offences particularly. It is thus of little benefit to draw direct comparisons between conspiracy and for example adultery or the corrupt receiving of a bribe. Though with all three there are logical difficulties with finding one only guilty of the offence, it is only with conspiracy that there is a legal difficulty in so finding.

Adultery may be quickly dispensed with: it has never, in England, been a criminal offence, other than during the years of the Commonwealth.[103]

Bribery, too, is readily distinguished: as a criminal offence, it requires a *mens rea*; one accused may possess it and the other not. This can readily be seen where there is a conviction for accepting a bribe offered by a "decoy"; there can be no conspiracy where alleged to have occurred with a "decoy" conspirator.[104]

It is significant that those most willing to accept the logical and legal consistency between conspiracy and other joint offences are also those most willing to abrogate the common law rules which evolved to deal uniquely with the offence.[105]

(2) The common law rules relevant to conspiracy evolved over four centuries and when adhered to made the offence one of value to the interests of society as a whole.[106] The logic of the offence as well as its legal constituents allowed the conviction of one only alleged conspirator, the Courts

[100] *Id.* 695A.
[101] *Id.* 695A-B.
[102] *Id.* 696B-E.
[103] (1649-1653); Lord MacKenzie, *Studies in Roman Law* (1911) at 418.
[104] Gillies, *op. cit. supra* n. 10 at 17.
[105] Lord Simon and Viscount Dilhorne in *Shannon*; and the High Court majority in *Darby*.
[106] See generally the *Criminal Law and Penal Methods Reform Committee of South Australia*, 4th report, "The Substantive Criminal Law" (1977) at 309 ff.

not being willing to presume the outcome of an action against another conspirator where named but not available for trial.

They also however required the quashing of the verdict against the first when shown conclusively that the conspiracy could not be proved.

The House of Lords were the first to depart from this, doing so very gradually, leaving the rule intact in relation to joint trials.

(3) Thus it is submitted that the departure of the High Court in *Darby* is devoid of authority to sustain it. Though resting on *Shannon*, the case is insubstantial authority for a "redirection" of such an extent.

On the least favourable interpretation, all the opinions expressed in *Shannon* were *obiter dicta* as their Lordships were unanimous in holding that the Court of Appeal had no jurisdiction to quash Shannon's conviction at all.[107]

Alternatively, the question certified to the House of Lords was relevant to separate trials; on joint trials their Lordships were, by a majority, of the opinion that the rule still applies.

(4) It is thus difficult to evade the conclusion that the High Court in *Darby* have not merely redirected the common law for Australia, they have redefined the nature of the offence itself. It will suffice to look to the facts of the cases themselves.

In *Shannon* there was a conviction despite no evidence being entered against the named alleged co-conspirator.

In *Darby* the jury was unable to determine what crime it was that Thomas conspired to commit. This would seem to show that the Crown was unable to prove a specific *mens rea* on his part. Darby thus was convicted of a conspiracy, the elements of which were not proved, on the basis of his admitted intention to steal. While there may have been an attempted conspiracy,[108] it is submitted that the common law conspiracy offence ought not to have been made out.

(5) Australia has now an offence of conspiracy which conforms with the English statutory offence. The transition in the common law definition of the offence has been abrupt. Those rules did reflect the wisdom of centuries. It is submitted with respect that they should have been retained.

L. J. JACKSON, B.A. – Second Year Student

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[107] Under S. 2(1) of the Criminal Appeal Act 1968 (U.K.).
[108] See Colin Howard, *Criminal Law* (4th ed. 1982) at 281.