REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A 28/2018

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

7 December 2018

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SIGNATURE

In the matter between:

NGOBESE, SIFISO QUINTON Appellant

and

THE STATE Respondent

JUDGMENT

SPILG J:

INTRODUCTION

1. The appellant had been charged with a main count of murder. It was alleged that he had intentionally and unlawfully killed the late Detective Major Moshe Segapo (refered to during the trial as "*Moses*"). He was also charged with defeating the

ends of justice and with the unlawful possession of a firearm and ammunition. At the end of the State case he was discharged on all these counts.

2. This left the alternative charge to the main count; namely, that of conspiracy to murder.

In regard to this charge the State alleged that during the period from January 2011 until the deceased was killed in December of that year, the appellant had conspired "*with other persons to aid or procure* the *commission of or to commit the offence of murder in respect of the deceased*" in contravention of s 18(2) of the Riotous Assemblies Act 17 of 1956.

3. Twala J convicted the appellant of this offence and sentenced him to 22 years imprisonment of which five years were suspended.

An application for leave to appeal was dismissed, but subsequently the Supreme Court of Appeal granted the appellant leave to appeal to this court under s 316(8) of the Criminal Procedure Act 51 of 1977 against both conviction and sentence. Unfortunately there is no indication from the SCA as to the considerations which prompted the granting of leave to appeal.

GROUNDS OF APPEAL

4. Mr van Schalkwyk, who is the appellant's attorney, argued that there was not a meeting of minds between the appellant and the person he allegedly approached, namely one Zungu, to kill the deceased. It was submitted that at no stage did

either Zungu or any of the persons who allegedly were approached to assassinate the deceased have the requisite intention to kill.

The submission is that the conviction of conspiracy cannot be supported by the evidence; only a finding of attempted conspiracy.

5. It was also argued that if the appeal against conviction was successful then the effective sentence of 15 years is shockingly inappropriate and that a significantly more lenient sentence should be imposed.

6. It is evident from the argument that the appellant does not strenuously challenge the trial court's factual findings. The issue is rather a legal one to determine when the crime of conspiracy is completed.

I will therefore first consider the elements of the offence and then deal with the factual findings.

ELEMENTS OF THE CONSPIRACY OFFENCE

7. The State relied on the statutory offence created by s 18(2) (a) of the Riotous Assemblies Act 17 of 1956. Although the title of the Act suggests that it is concerned with the gathering of persons for purposes of fermenting civil unrest it

is well established that the sub-section in question is wide enough to cover the offence of conspiracy to commit any crime including that of murder. [1]

8. Section 18 is headed: "*Attempt, conspiracy and inducing another person to commit offence*"

The salient provisions of subsection 2(a) for present purposes read:

> "*Any person who… conspires with any other person to aid or procure the commission of or to commit …. any offence, whether at common law or …., shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable*"
> (emphasis added)

By contrast s 18 (2)(b) provides that an offence is also committed and will be subject to the same sanction if a person;

> *"incites, instigates, commands, or procures any other person to commit …"* any such offence.

9. It is evident that ss (2)(a) deals with conspiracies while ss (2)(b) deals with incitement or procurement and the like.

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[1] *Criminal Law* (6th ed) Prof CR Snyman at 286. The common law offence of a conspiracy to commit a crime pre-dated the Riotous Assemblies Act; see *R v Leibrandt and others* 1944 AD 253 at 289

10. The broad wording of ss (2)(a) also makes it evident that aside from a person being culpable if he conspires with another to commit the offence alone, he will also commit the statutory offence of conspiracy if the unlawful agreement involves executing only a step in the plan, or is but one of a number of separately concluded agreements with others to attain the same unlawfully agreed objective.[2] It will also suffice if a preparatory step is taken towards achieving the unlawful objective agreed upon or in arranging that one of the conspirators will conclude another unlawful agreement with a third person who will actually do the deed.

11. The statutory offence finds its origins in the common law[3]. The Act did not purport to alter the ordinary requirements of *actus reus* and *mens rea* in common law offences.[4]

Accordingly the prosecution is required to prove beyond a reasonable doubt that the accused committed the unlawful act and that he is culpable for that act. Leaving aside criminal capacity, this effectively means that the State must prove that the accused intended "*to perpetrate the unlawful conduct or cause the unlawful consequence.*"[5]

12. The requirement of intention in respect of the offence of a conspiracy is satisfied provided the accused;

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[2] Referred to respectively as an umbrella spoke and a chain conspiracy.
[3] Ib. To this extent the statement in *S v Moumbaris and others* 1974 (1) SA 681 (T) at 686B and G that a statutory offence of conspiracy was created because there was no such common law crime, save for conspiracy to commit treason, existed requires qualification. See also *Harris* infra
[4] The common law exceptions are where *mens rea* is replaced by the lower culpability threshold of negligence. They are culpable homicide and contempt of court by a newspaper editor. See *Principles of Criminal Law* (5th ed) Prof J Burchell at 60
[5] Burchell *Principles of Criminal Law* at 60

a. has the intention to commit the crime or assist in its commission; and

b. intends to conspire with another person to attain that objective.[6]

Intention in the form of *dolus eventualis* is sufficient.[7]

13. However in dealing with the crime of conspiracy text book writers require not only that the offender must intend these consequences in order to satisfy the element of *mens rea* but, in order to satisfy the *actus reus* element of the offence, at least one of his co-conspirators must have subjectively agreed to engage in the conspiracy.[8]

In other words, the authors appear to require a subjective state of mind on the part of the co-conspirator in order to render the conduct of the accused unlawful.

Suffusing the *actus reus* with a subjective mental element in order to render the act unlawful is explained only on the basis that a conspiracy requires a meeting of the minds.

One should however bear in mind that with the crime of conspiracy, the unlawful act consists of concluding an *agreement* to commit a specific crime (or to assist in its commission). In other words not only must there be the *mens rea* to commit the crime in question but the *actus reus* must consist of an agreement, between at least the accused and one other person, to do so.

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[6] Compare Snyman *Criminal Law* at 289;
[7] Burchell *Principles of Criminal Law* at 543
[8] Snyman *Criminal Law* at 287 and 289; Burchell *Principles of Criminal Law* at 541 and 543

14. In our law of contract, an agreement requires "*consensus ad idem*"[9] or a "*concurrence of intention*"[10] which, as I attempt to demonstrate later, does not have regard to the inner workings of the mind, but rather their external manifestation, save in certain limited cases, such as mutual error or actionable misrepresentation.

15. As already mentioned, prior to the legislative enactment our common law recognised the crime of conspiracy. And since at least the full bench decision of R *v Harris (*1927) 48 NLR 330 it is considered that the offence can only be committed if there is "*actual*" agreement not an "*apparent*" agreement.

16. Burchell refers only to *Harris* in support of this proposition. Snyman adds the case of *S v Moumbaris and others* 1974 (1) SA 681 (T) at 687. I am unable to find this proposition being advanced in *Moumbaris*. On the contrary Boshoff J (at the time) considered that an "*agreement necessary for a contract .... would be sufficient, but, judging by the manner in which a conspiracy may be proved, it would appear that something less would be sufficient*". The common law as to what constitutes consensus or the necessary mental element for the purposes of concluding a binding agreement is considered later.

The court in *Harris* held that it was insufficient if the prosecution could only demonstrate the intention of the accused to procure the services of another to assist in committing a crime when the alleged co-conspirator was a police informer who feigned agreement. The court therefore felt compelled to reduce the

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[9] E.g. *Saambou-Nasionale Bouvereniging v Friedman* 1972(2) SA 827 (A) at 834D

[10] Prof AJ Kerr The Principles of the Law of Contract (6th ed) at 4 quoting from Pothier *Obligations* para 4

conviction to one of attempted conspiracy, although the sentence imposed was left intact.[11]

17. The authors consider that the position under statute is no different and at present our law, as stated in *Harris* and by our text-book writers, remains that the offence can only be committed when there is an "*actual concurrence of minds in an agreement to do the act in question*"[12]. It is also put that *"there must be a meeting of minds"* which is understood to mean that there must be subjective intent not only on the part of the accused (which is axiomatic as he must in any event have the necessary *mens rea*), but also his co-conspirator, to conspire to commit an offence.[13]

18. If regard is had to the present onslaught our society faces in relation to serious crime I consider it appropriate to express my reservations regarding the correctness of *Harris* and an interpretation of s18 (2) (a) which requires the prosecution to prove subjective intent on the part of any co-conspirator beyond a reasonable doubt, even if not all the alleged conspirators are before the court.

19. I would suggest that the starting point, as with common law crimes (save where negligence will suffice) is that the *mens rea* element is satisfied if the accused subjectively intended to conspire with any other person to commit the crime in question. The requirement for there to come into existence an agreement with another person does not form part of the element of intention but is an element constituting the criminal conduct.

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[11] *R v Harris*(1927) 48 NLR 330
[12] *Swift's Law of Criminal Procedure* (2nd ed) Harcourt *et al* at 436
[13] *Criminal Law* at 287.

20. Criminal conduct, or the *actus reus,* is constituted by an act (or omission) and therefore is understood in our criminal law to be an objectively discernible phenomenon vitiated only by involuntary conduct on the part of the offender.[14]

21. The *actus reus* is also a juristic notion which can take a myriad forms; from a culpable act of commission to an omission to act when there was a legal duty to do so. The conduct must consist of some external manifestation of the accused's intention, for otherwise a person will be punished for his thoughts alone.[15]

22. While the *actus reus* for any particular crime is defined by reference to an act or omission, to constitute a punishable or unlawful act there must be, according to Burchell, a sufficient external manifestation "*of the evil mind*".[16]

Snyman structures the foundational principles of criminal liability somewhat differently. In doing so the author draws a distinction between the act, (which complies with the definitional element of the crime in question and includes whether the accused's thoughts have been transformed into an act or conduct [17]) and the separate enquiry as to whether the accused's conduct was also unlawful[18]. Snyman explains that: "*The fact that the act complies with the definition of the crime means no more than that .... it does not yet mean that the act is unlawful. Before an act can be described as unlawful, it must not only conform to the definitional element but it must also comply with the quite distinct criterion for determining unlawfulness.*"

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[14] *Criminal Law* at 54-58
[15] *Principles of Criminal Law* at 77
[16] Ib 77
[17] *Criminal Law* at 52-53
[18] *Criminal Law* at 52

23. Unlike most crimes which enquire only into the conduct of the offender a conspiracy requires an agreement concluded with another person. Nonetheless it remains against principle to determine the unlawful conduct of the accused by enquiring into the subjective workings of the co-conspirators mind when he signified assent.

24. The enquiry into *mens rea* and the *actus reus,* at least as a matter of principle, remain confined to the intention and actions of the accused himself. The question one asks is then: "What conduct on the part of the accused will constitute an unlawful conspiracy? "[19]

25. For sake of completeness there are some offences which require proof of causation and others not. Burchell adopts the conventional distinction between unlawful conduct which results in a consequence and that which consists of an unlawful circumstance[20]. Snyman adopts the terminology of materially defined crimes and formally defined crimes.[21]

In both instances the former refers to conduct which causes a specific result (such as death) although no specific conduct is prohibited. The latter refers to conduct which is prohibited irrespective of result. A conspiracy would fall under the latter and therefore no additional element is required to complete the offence.

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[19] If the conduct and the question of unlawfulness are to be split then the enquiry would go along the lines: "What conduct on the part of the accused suffices to constitute the definitional element of the offence and will it suffice to constitute unlawfulness or is there some addition act or omission on the part of the accused that would be required for his conduct to satisfy the requirement of unlawfulness?"

[20] *Principles of Criminal Law at 95*

[21] *Criminal Law* at 80

26. The conclusion of the agreement to engage in an unlawful activity therefore suffices to establish a conspiracy. No further act is required. The only bearing subsequent conduct may have is to provide the evidence necessary to prove *mens rea* and the unlawful conduct. See *S v Sibuyi* 1993 (1) SACR 235 (A) at 249E and particularly the statement by Boshoff J in *Moumbaris* at 687A that

> *"As far as proof goes, conspiracy is generally a matter of inference deduced from certain acts of the parties accused, done in pursuance of a criminal purpose in common between them."* [22]

27. If our law considers that an agreement suffices then surely, in cases where there was ostensibly agreement, but it cannot be said that there was a meeting of the minds for whatever reason, the subsequent conduct by the accused himself in furtherance of the conspiracy should satisfy the *actus reus*. And if it were otherwise then, as suggested earlier, it would impermissibly allow the co-conspirators' *mens rea* to intrude into a determination of whether the accused's subsequent actions, such as handing a loaded firearm and a picture of the victim to his co-conspirator, satisfy the requirements of unlawful conduct.

Moreover the proposition that a conspiracy cannot be committed by one person alone does not take the debate further. It either states the obvious, that an unexpressed criminal intent to act in concert without actually approaching anyone else cannot constitute a crime, or begs the question as to the nature of the unlawful act required where the accused has the intention to conspire with

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[22] In *Anderson (infra)* the House of Lords said at 964h expressed much the same sentiment:
"It is a matter of common experience that the terms of a criminal conspiracy re hardly ever susceptible to proof; the evidence "is almost invariably found in the conduct of the parties"

another to commit a crime and the other party has unequivocally signified his assent.

28. Accordingly, as a matter of general principle, it is not necessarily axiomatic that if the only other party to a conspiracy was a police informer that no crime of conspiracy has been proven, even if the accused took further steps in execution of the conspiracy. It appears that two considerations are involved. The first is the extent to which society considers it necessary to criminalise the unexecuted unlawful thoughts of a person when it is not manifested by any unlawful conduct, save for a discussion with someone he wishes to rope in so as to achieve his unlawful objective. It would include a consideration of the checks and balances that may be required (such as some subsequent act in furtherance of the agreement reached[23]). This is left to the legislature to determine if the law, properly understood, is inadequate.

The second consideration is the desirability of having a consistent approach in the application of criminal law principles and, in the present case, to the basic common law principles of offer and acceptance. Whether an agreement, or *consensus*, has been reached is a conclusion of law drawn from a finding that there was an offer by one party and that its essential terms were accepted by the other.

29. It therefore appears that the *actus reus* in respect of a conspiracy may be sufficiently established by the conclusion of the agreement to commit the crime

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[23] This is to be found in some of the State laws in the United States.

itself, but is not limited to that alone. The *actus reus* may be found in additional acts performed by one of the conspirators in furtherance of the purported agreement, and of which the accused was aware and did not disassociate from.

30. In order to consider whether the Act requires that both parties subjectively intend to agree to conspire it is necessary to consider the state of mind required of the parties before it can be said that they have concluded a binding agreement.

REQUIREMENTS FOR AN AGREEMENT UNDER COMMON LAW

31. Although our civil law of contract requires that the parties enter into the transaction "*seriously and deliberately and with the intention that a lawful obligation should be established*"[24], a contract comes into existence once an offer made by one person is accepted by the other; the manifestation of acceptance being by words or conduct.

Our law does not apply a subjective test of mutuality of assent to determine if a binding agreement has come into existence; apparent agreement is sufficient. This involves a two-stage enquiry in order to determine legal assent. If there was actual agreement then *caedit questio;* if not then one must still ask whether a reasonable person in the position of the first party believed, having regard to the words or conduct of the other party, that there was assent. There are circumstances where a court will enforce a contract even though the parties did

[24] Prof AJ Kerr *The Principles of the Law of Contract* (6th) at 41

not in fact agree. This is referred to as quasi-mutual assent or apparent agreement: In law it is as binding between the parties as actual assent.

Accordingly, in the law of contract, provided acceptance is communicated by word or conduct and is clear, unambiguous and corresponds with the terms of the offer, any unexpressed residual apprehension by either party is of no consequence: this is adequately demonstrate by the rules regarding quasi-mutual assent or apparent agreement[25]. An overt statement of acceptance will suffice and it is unnecessary to establish whether subjectively that party intended to accept. [26]

32. This was succinctly addressed by Wessels in *The Law of Contract* (2nd ed 1951) at 62:

> *"Although the minds of the parties must come together, courts of law can only judge from external facts whether this has or has not occurred. In practice, therefore, it is the manifestation of their wills and not their unexpressed will which is of importance".*[27] (emphasis added)

Christie at 31 to 32 writes:

> *"There is a wealth of authority for regarding agreement by consent as the foundation of contract. This having been said it must immediately be added that the concept of agreement by consent, or true agreement, or a meeting of*

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[25] See especially the application of *Smith v Hughes* (1871) LR 6v QB 597 Prof Christie adopts the term '*quasi-mutual assent*' whereas Prof Kerr prefers "*apparent agreement*". See generally Prof Bradfield *Christie's Law of Contract in South Africa* (7th) at para 2.1.3 ("*Christie*") and Kerr *Principles of Contract* at 12to 13 and17.

[26] See generally Kerr *Principles of Contract* at 111, 129

[27] *Christie* at 30

the minds, or a coincidence of the wills, or consensus ad idem (these phrases being interchangeable) is more a philosophical than a legal concept. (emphasis added)

A lawyer needs proof before concluding that a particular state of affairs exist, and when the state of affairs in question is something as subjective as the state of mind of two or more parties on a particular occasion, or occasions, the lawyer will find that, in truth, the search is not for agreement by consent but for evidence of such agreement."

33. In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974(4) SA 164 (D) at 172 Howard J after confirming that "*our law follows a generally objective approach to the creation or existence of contracts (see National & Overseas Distributors Corporation (Pty) Ltd v Potato Board*[28]*)"* then continued, that one *"cannot accept that this approach is so uncompromising"* so as to preclude reliance on mutual error as to the subject matter.

34. For present purposes, where an express agreement and not a tacit one is contended for, seen from the perspective of a *bona fide* person seeking to uphold the contract, it may be said that where the other party expressly agreed to enter into a "*common design*"[29] with the intention of being bound by it (*animus*

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[28] 1958(2) SA 473(A)

[29] The term "*common design*" was used by Boshoff J in *Moumbaris at 687A*. It avoids drawing unnecessary parallels with the other ordinary requirements (ie beyond that of consensus) for a valid agreement in our law such as a general requirement of some form of consideration. Boshoff J observed at 687Bthat something less than an agreement, in the contractual sense, would suffice. I will however continue to refer to a conspiracy as an agreement with another person to commit an unlawful act.

contrahendi[30]) then he will be held to the offer he made or the acceptance he gave, save in those cases where the law allows a mutual error to vitiate a contract.

35. The statement by Watermeyer ACJ in *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1911 AD 61 at 70 appears most apposite for the purposes of a case which is focused on whether an agreement can be said to have been concluded by the person who makes the proposal;

> "*a binding contract is as a rule constituted by the acceptance of the offer*"

while acceptance in order to conclude a contract is constituted, at its most basic, by a simple act of communicating to the offeror such acceptance of the offer made. It is then said that the parties are, for the purposes of our law of contract, to be "*ad idem*".[31]

CONCLUSION OF AN AGREEMENT IN ORDER TO SATISFY THE *ACTUS REUS*

36. Cases in criminal law acknowledge that there need not be direct evidence of an actual agreement in order to sustain a conviction based on conspiracy, nor need the co-conspirator be arraigned in the same trial nor that every co-conspirator be capable of identification in an indictment[32].

Nonetheless our law still requires that the conduct of *both* the accused and alleged co-conspirator establish the conclusion of an agreement to commit the offence. Accordingly proof beyond a reasonable doubt of either a tacit or an

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[30] See *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 991G
[31] See generally *Christie* at para 2.3.8 pp82-83
[32] See *Moumbaris* and the cases dealt with below

implied agreement will suffice[33]. Of course if the offence of conspiracy requires *both* parties to subjectively intend to conclude a binding agreement then the direct evidence of an alleged co-conspirator that he was operating undercover as a police trap, by definition, would preclude a finding of conspiracy.

37. The ultimate objective of law enforcement must be to prevent crime. Practically speaking, the most effective and direct means of law enforcement in relation to serious crimes is to take preventative measures such as infiltrating criminal syndicates and apprehending the offenders prior to them committing an offence.

The case of *S v Bilankulu* which involved the infiltration by a game ranger, at great personal risk, of a rhino poaching syndicate demonstrates the difficulties facing law enforcement agencies in combatting crime by means of undercover operations.

In that case, if there had been no positive identification of the two accused at the moment the crime was committed, they might have received a slap on the wrist for attempting to conspire with the operative to kill rhino.

38. It must however be accepted that there is a natural aversion to treat an agreement to commit a crime as an offence without evidence of any other link between the accused and the actual perpetration of a crime. The facts in *Harris* posed no such difficulty; hence the sentence remaining unaltered.

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[33] See *S v Agliotti* 2011 (2) SACR 437 (GSJ) at para 9.4*R v S* 1959(1) SA 680 (C); *R v Heyes and others(1)* 1958(1) SA 607(W) and *R v Segale and others* 1959(1) SA 589(T) at 591

39. In my respectful view what requires consideration in the final analysis is the seriousness of the offender's commitment to carry out the crime or have a proxy do it for him and the presence of an overt unlawful act. Evidentially this ought to be satisfied by having regard to the intention of the accused demonstrated by his subjective belief that he had obtained the agreement of the other person to participate in the crime in question and by taking some step, or associating himself with the act of his alleged co-conspirator, in furtherance of that pact. Ordinarily this will be the case.

If an accused takes no further steps after the alleged conspiracy agreement is concluded then he is likely to successfully argue either that he lacked the necessary intent, or that it was idle talk, or that there was no such discussion. Unless a co-conspirator recanted immediately after the pact was made and informed the police who then acted swiftly to apprehend the accused, a trier of fact would look for evidence of some overt act of preparation on the part of the accused in furtherance of the alleged concluded agreement, even if in terms of *Sibuyi* it is not a specific legal requirement for the commission of the offence.

The actual extent of preparation, the number of attempts to solicit others to participate in the criminal enterprise and the purpose of the conspiracy, including what the accused would gain from it would, if regard is had to *Sibuyi,* be relevant when considering the triad of factors for purposes of imposing an appropriate sentence. At that stage the court takes care not to assume that the conspiracy had been successfully carried out, unless the case fits into the *Harris* mould.[34]

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[34] This again brings into question, although from a different perspective, whether the subjective intention of the accused's co-conspirator can be a requirement for a conviction.

40. If the accused's subjective intention to procure the active involvement of another person in order to commit a crime satisfies the element of *mens rea* then the *actus reus (* i.e. the physical or external act which constitutes its execution or implementation) comprises the voluntary conduct *of the accused*; even if it is only an act of association as with an accomplice on a charge of murder or robbery with aggravating circumstances who was outside standing look-out but was aware that one of his colleagues was carrying a weapon.[35]

41. Earlier I postulated some of the concerns that might be raised about adopting such an approach.

While it is axiomatic that the conduct under scrutiny in all common law crimes is that of the accused, the conclusion of an agreement to conspire is a bilateral act where invariably it will be the co-conspirator who accepts the proposal. This may have been one of the unarticulated reasons for requiring something more than just apparent assent.

Another concern is that, juridically, idle talk may become elevated to unlawful conduct, or that there is an unacceptably high risk of ordinary evidential safeguards being compromised if a conviction on a charge of conspiracy requires only the uncorroborated evidence of a police informer; the probative value of which is already questionable, if only because he has demonstrated, albeit in other circles, an ability to deceive.[36]

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[35] Boshoff J dealt with this comprehensively in *Moumbaris* at 685F and 687B-687E

[36] These concerns become heightened where the conspiracy may relate to committing crimes such as sedition and treason (if relevant- compare *Criminal Law* at 306). Prior to a significant number of its provisions being repealed, most of the Riotous Assemblies Act related to political gatherings.

42. In my respectful view such concerns are not met by making inroads into the ordinary requirement that the *actus reus* comprises the unlawful conduct of the accused himself. As pointed out by Boshoff J in *Moumbaris*, and as appears from the reasoning of the then House of Lords in *Anderson* (see below), the evidence will invariably include, even in cases of feigned assent, some step taken by the accused or, if by the co-conspirator, one with which the accused has associated himself, in furtherance of the agreement.

Even in cases where the accused has not taken a step after the pact was concluded, say because his co-conspirator recanted shortly afterwards when appreciating the enormity of the crime to be committed, it is likely that there will be concrete evidence of *prior* preparation on the part of the accused that would have formed an integral part of the plan.

Considered in this light one also avoids the anomalous situation that arises where a conspiracy will not be completed if, say, an undercover operative was the first person approached by the accused to commit a crime (even if there is audio visual evidence of a clear design with the accused explaining in minute detail the manner in which a most horrendous crime is to be committed), but it will be completed if another person is present and has also agreed to participate in the conspiracy, even if that person's identity is not known. In the first case, must the operative continue with the plan until another conspirator is introduced by the accused, even if the risk of exposure is great or the operative is unsure whether he will be privy to agreements the accused may make with others to immediately execute the plan?

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43. A position which requires some further step to be taken in furtherance of the conspiracy after the agreement is concluded would however impinge on case law which holds that the offence is committed the moment the agreement is concluded. On analysis in each of these cases it appears that the court was influenced by the fact that some step was taken in furtherance of the agreement. This is to be found in the cases dealt with later.

THE LAW RELIED ON IN *HARRIS*

44. Our law relating to the elements of the crime of conspiracy is based on *Harris*. I am unaware of any critical assessment of the case. Save for *S v Alexander and others (2)* 1965(2) SA 818 (C), a cursory research of South African case law annotations to *Harris* and *Plummer* indicates that they have been applied only in respect of unrelated issues.[37]

45. *Harris* was concerned with an appellant who tried to bribe the prosecutor to go easy on someone who would be appearing in his court. The prosecutor reported the proposition to his superiors which resulted in him being asked to go along with the offer. This led to one of the charges laid against the appellant being that of conspiracy, and in respect of which he was convicted.

On appeal it was argued that the evidence did not support a conviction for conspiring with the prosecutor to defeat the course of justice because the prosecutor was not a co-conspirator. The full bench agreed that there could not

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[37] E.g. *R v van Schalkwyk* 1938AD 543 at 551 in relation to the protection a court affords an informer from disclosure; *S v Mazwi* 1982 (2) SA 344 (T) and *Attorney-General, Transvaal v Botha* 1994(1) SA 306 (A) [1993(2) SACR 587] at 331E-G relating to the withdrawal of a guilty plea

be a conspiracy unless two or more persons are *ad idem* as to their object[38]. The court held that:

> "*It is clear that whatever the appellant may have thought was the case, Lockwood was not in agreement with him as to the obtaining of monies ... to defeat the course of justice, but was entrapping him*".[39]

46. The court however had little hesitation in convicting Harris for attempting to commit the crime of conspiracy and declined to reduce the sentence imposed by the magistrate on the grounds that there was "*no reduction in the gravity of the offence*".[40]

47. The court in *Harris* relied on 9 *Halsbury's Laws of England* para 545 and *R v Plummer* [1902] 2 KB 339 for the proposition that "*there can be no conspiracy unless two or more persons are ad idem as to their objective, that is, have come to some agreement.*"[41]

48. Three accused were charged in *Plummer* with a number of offences including conspiracy to defraud. Plummer pleaded not guilty to the other charges but guilty to the charge of conspiracy. He was however not arraigned on the conspiracy count (to which he had already pleaded guilty[42]) prior to being called as a witness for the prosecution against his two alleged co-conspirators who had pleaded not guilty.

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[38] *Harris* at 347
[39] Ib
[40] *Harris* at 348
[41] Ib at 347
[42] See *R v Drew* [1985] 2 All ER 1061 (CA) at 1065e

On their acquittal it was contended that Plummer's plea of guilty should be withdrawn and that he could not be convicted as the only other parties to the alleged conspiracy had been acquitted which, it was argued, *per se* negated the existence of an agreement; "*for one alone cannot conspire*".[43]

49. Firstly the case was not about a police trap. The court was concerned with the effect of the acquittal of all but one of the alleged conspirators on the remaining accused.

In regard to the charge of conspiracy the court held that where two or more persons are charged in the same indictment with conspiracy and they are said to be the only conspirators then "*if all but one ... are acquitted, no valid judgment can be passed on the one remaining person, whether he has been convicted by the verdict of a jury or by his own confession*".[44]

Bruce J reasoned that since a conviction can only be pursuant to the terms of an indictment *"it would be inconsistent and contradictory and so bad on its face"*[45]to find the only remaining accused guilty of the offence.

The judge accepted that the acquittal of the others may have been solely due to a lack of evidence but maintained that it would result in an inconsistent record. However, since only one valid record could be drawn up this would negative

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[43] *per Harison v Errington* Popham 202, cited in *Plummer* at 343
[44] *Plummer* at 348
[45] Ib at 348

mutual consent to a common purpose by all- thereby precluding a valid record being drawn up of a conviction against the remaining accused.[46]

50. Both Bruce and Wright JJ saw the issue in this light and were concerned about the reach of their decision if co-conspirators were tried separately. However Wright J was prepared to regard the case before the court as *"intermediate between the case of a wholly joint trial and the case of separate trials of the alleged co-conspirators"*[47]. The reasoning was that as the co-conspirators were jointly indicted and all pleaded not guilty to the five principal counts; "*there was only one venire; they were all given in charge .... to the same jury*"[48].

If the appellant had been tried separately on the conspiracy charge and had been convicted then according to Wright J "*his conviction would have been good at the time*" and that it "*is, however, not clearly settled whether in such a case of separate trials a subsequent acquittal of the other would not avoid the effect of the previous conviction of the appellant*". [49]

Darling J concurred with the more cautious approach adopted by Wright J while the two remaining judges preferred to regard the issue as a technical one and concurred in the judgment of Wright J because " *we are unable to answer the very learned and able judgments which have been delivered by Wright and Bruce JJ. We concur in those judgments because we are unable to give satisfactory reasons for giving a contrary view*". They were at pains to indicating that, in

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[46] Ib
[47] Ib at 345
[48] Ib
[49] Ib at 344

concurring, they placed "*great reliance on the fact that there was a joint trial on one indictment charging the three defendants jointly with conspiring together, and not alleging any conspiracy with other or unknown persons*".[50]

51. The reasoning adopted by the court is unfamiliar to our legal system. It can be explained on the basis that in England until 1907 it was not possible to appeal a decision on the basis of going behind the record and arguing that the evidence did not justify the conviction. An appellant was confined to a "*writ of error*" which required a repugnancy on the record. This was dealt with in depth by the House of Lords in both *Shannon* and *Anderson* to which I will refer later.

52. It will be apparent that *Plummer* was not concerned with whether there had to be a subjective meeting of the minds between at least two of the alleged co-conspirators. The case focused solely on the ramifications to the fair administration of justice if a court found all but one of the conspirators not guilty of engaging in a conspiracy. The issue of whether the prosecution was required to demonstrate that each participant subjectively agreed to enter into a conspiracy or whether an external manifestation of assent sufficed was not considered by any member of the court. Nor, in my respectful view, when regard is had to the reasoning of each judge, is it possible to draw an inevitable conclusion from the outcome of that case that agreement must be subjectively established.

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[50] Ib at 350

53. Accordingly it would be incorrect to construe *Plummer* as authority for the proposition that the requirement of a concluded agreement to conspire requires a meeting of the minds of the accused and any other participant tested subjectively in respect to both of them.

54. More importantly *Plummer* was expressly overruled in *Shannon*. The crisp basis that A could not be convicted if B was acquitted, in terms of the *Shannon* judgment, was to do with the limited basis on which an appeal could be brought at the time when *Plummer* was decided.

As stated in *Shannon* at 1037:

> *"This rule appears to have been based on the ground that the conviction of only one of two charged with conspiring together or of only one of a number of persons charged with conspiring together in the same indictment meant that there was a repugnancy on the record which could only be corrected by quashing the conviction. In olden days it was not possible to go behind the record and to examine whether the evidence justified a finding that one conspirator alone was guilty. Proceedings by way of writ of error were taken to correct the record. Since the Criminal Appeal Act 1907, which abolished proceedings by writ of error, it has been possible for the appellate court to examine and to consider the evidence against each conspirator tried."*

And again at 1043:

"But the Criminal Appeal Act 1907 abolished the system of review by writ of error (based on some fault apparent on the face of the record), and substituted a system of review by way of examination of the evidence and of the summing-up. The court of review was no longer confined to scrutiny of the formal record only or what it could glean from the occasional case stated."

SUBSEQUENT SOUTH AFRICAN AND ENGLISH CASES AND AMERICAN LAW

55. In *Alexander* at 821H-822A van Heerden J (at the time) defined a conspiracy as:

".. an agreement between two or more persons to commit a crime. The parties to the agreement must be ad idem as to their object- Harris v R 1927 NPD 330- and in terms of decisions in English Courts the agreement must be such that, if lawful, it would be capable of being enforced. It is not necessary, to constitute a conspiracy, that anything should be done to put the criminal design into execution, for the conspiracy is complete as soon as the persons concerned have agreed together.

56. Two observations may be made regarding *Alexander.*

The first is that van Heerden J applied the principle that a conspiracy was completed the moment agreement is reached. It follows that if one of the

conspirators has a change of heart later it does not negate the commission of the offence.

The other is that the agreement is to be understood as one which, if lawful, can be enforced. This understanding of the offence could be interpreted to mean that an expressed acceptance by the co-conspirator, irrespective of his true subjective intention, should suffice.

57. A decade after *Alexander* was decided the House of Lords expressly overruled *Plummer* on the point of whether a conviction for conspiracy could stand if the only other alleged conspirators to the plot were acquitted. See *R v Shannon* [1974] 2 All ER 1009 ([1975] AC 717 See also *R v Drew* [1985] 2 All ER 1061 (CA) at 1065f.

58. The facts of *Shannon* were that the respondent, advised by his lawyers, pleaded guilty to the charge of conspiracy. It was evident that he fully appreciated and understood what he was doing by so pleading. He was sentenced to four years imprisonment.

His alleged co-conspirator pleaded not guilty to both the conspiracy charge and to a count charging him with handling stolen goods. The jury were unable to agree on their verdict and T was retried a few days later. T was found not guilty of handling stolen goods. The prosecution offered no evidence against him on the conspiracy charge and a formal verdict of not guilty was entered on that count.

The respondent appealed, contending that as T had been found not guilty of conspiring with him, his own conviction and sentence following on his plea of guilty to conspiring with T could not stand.

59. The Court of Appeal had overturned the conviction of the respondent on the grounds that it was not competent to find the appellant guilty where only two person were alleged to have conspired to dishonestly handle stolen goods and one had been acquitted for insufficiency of evidence, even if the appellant had pleaded guilty to the charge.

The court considered itself bound by a wealth of authority and with great reluctance held that:

a. It should follow the long line of cases which held that where all but one of those alleged to have conspired in the commission of an offence have been acquitted then the remaining person must also be acquitted. It held that where all persons involved in a conspiracy had been charged then at least two of them must be convicted or all must be acquitted even if one of them had admitted guilt. [51]

b. The question is "*not one of proof but of the nature in law of the offence of conspiracy*". The Court of Appeal was of the view that the question did not depend on the rules of criminal procedure that obtained at the time of the earlier judgments The convictions were repugnant because of a fundamental legal principle that "*there cannot be a conspiracy unless two*

[51] *Anderson* at 1024-5

or more persons are proved to be guilty of that conspiracy, once B is for any reason acquitted of conspiracy with A, A in law cannot be guilty of conspiracy with B even though, apart from B's acquittal, A was prepared to admit and did admit his guilt. B's acquittal is a finding of no conspiracy not merely a finding of no proof of conspiracy against B. The long line of cases shows that the principle derives from the nature of the offence of conspiracy."[52]

60. The Court of Appeal allowed an appeal and certified the following point of law to be of general public importance: *'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 thereupon be quashed?'*[53]

61. The matter came before the House of Lords. Lord Salmon explained at 1048-9 the genesis of the legal principle that there cannot be a conviction of only one person for conspiracy if every other alleged co-conspirator has been acquitted:

"By the beginning of the 19th century it was accepted by the courts as a firmly established legal principle that where A and B are indicted together for conspiring with each other and no one else, then, whether they are tried together or separately, the conviction of one cannot stand if the other is acquitted (R v Grimes and Thompson; R v Nichols; R v Cooke). The root of a conspiracy is an agreement between two or more persons to do an unlawful

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[52] *Ib* at 1024
[53] Ib at 1025

act or a lawful act by unlawful means. No man can conspire with himself. Accordingly, if in the case postulated, nothing is known save that A has been convicted and B acquitted, the result would appear to be inconsistent with and repugnant to justice. And so, sometimes, it may be even when all the true facts are known.

In the early days when there was no appeal in criminal cases, the sole method of challenging a conviction was by writ of error, which gave the courts power to intervene only if there was some apparent inconsistency or repugnancy on the face of the record. The courts could not look at the evidence, nor the summing-up: all that they could look at was the record. It was for this reason that the rule was established from very early times that, if the record disclosed an apparent inconsistency or repugnancy on its face, the court must intervene and quash the conviction. This rule, no doubt, had much to commend it when the court could look only at the record to discover whether any injustice had been done. The rule, which involved a strictly technical approach to the record, offered, in early times, the only means by which the injustice of a seemingly wrongful conviction could be remedied. This rule became so firmly established that even after all reason for its existence had long since disappeared, it continued to survive. Even after a case could be stated for the opinion of the court and, still later, after the Court of Criminal Appeal was set up and invested with its very wide powers and writs of error were abolished, the continued existence of the rule was assumed and has been accepted by our courts, without question, ever since. This appeal turns on whether this acceptance of the rule was justifiable.

My Lords, for my part, I am convinced, that although there was originally a sound reason for the existence of the rule, it had probably disappeared by the middle of the last century and certainly by 1907, when any convicted person was given an absolute right of appeal on any question of law and, by leave of the court, or on the certificate of the trial judge, a right of appeal on any question of fact or mixed fact and law or on any other ground which appeared to the court to be a sufficient ground of appeal.

(emphasis added)

62. Although the Court of Appeal saw the issue as one of substantive law the House of Lords nonetheless considered that its origin lay in procedural rules which had hardened into substantive law in order to achieve justice at a time when no form of recourse to an appeal lay other than to find a repugnancy *ex facie* the record. This appears clearly from the following passages of the concurring judgment by Lord Simon where the following is expressed at 1044:

"May I try to explain what I mean by adhesions, repercussions and reactions? Maitland was wont to observe how rules of substantive law have seemed to grow in the interstices of procedure. Not only can the substantive rule acquire a life of its own, but the rebuilding of its roothold is apt to endanger that life. Again, what I have called 'the procedural issue' in the instant case illustrates

how unfortunate consequence can ensue from what was proffered as beneficial reform." [54]

63. The second point of significance for present purposes is Lord Salmon's statement that the origin of the rule lay in the principle that: "*No man can conspire with himself*". This again demonstrates that the issue is not what the co-conspirator subjectively thought but whether as a reality the accused had engaged with another person to execute an unlawful plan.

The passage from Lord Simon which is set out at footnote 54 of this judgment demonstrates that where an accused has freely and voluntarily confessed to a conspiracy, the state of mind of his co-conspirator is irrelevant. Accordingly it should make no difference to his conviction if it turns out that his co-conspirator was a police operative who had no intention of seeing the conspiracy through to the actual commission of the offence.

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[54] At 1045 Lord Simon continued:

The instant seems to me very much a borderline case. The rule with which your Lordships are concerned is so deeply embedded as to have compelled the obviously reluctant adherence of the Court of Appeal. It has continued to be acted on after 1907 and was taken for granted by the Privy Council in Dharmasena v The King. On the other hand, your Lordships are concerned here with 'lawyers' law'. The technical foundation of the rule is apparent, and so is the purpose which it served for so many years. But its irrationality and practical inexpediency are also apparent; and so is the fact that it is no longer needed to serve its former purpose. On the contrary, the present case illustrates its absurdity, inconvenience and injustice. The respondent pleaded guilty, fully understanding the situation and professionally advised. His conviction was not relevant to (and therefore not admissible evidence to prove) Tracey's guilt: why should Tracey's acquittal be relevant to the respondent's conviction? B's trial might take place years after A was convicted, and much of the evidence of the conspiracy might no longer be available. If B cannot be brought to trial he is presumed to be innocent, and yet A's conviction stands. A may have made a full written confession which is evidence against himself but not against B; and yet, according to the rule as heretofore applied, B's acquittal exculpates A too. Such absurdities bring the law into discredit, and mean that rogues escape society's sanctions. This is only to be borne if necessary to ensure that no one is unsafely or unsatisfactorily convicted; but the rule is no longer required for that purpose.

64. Another decade passed before the House of Lords put a final nail into the *Plummer* coffin. This was in the case of *R v Anderson* [1985] 2 All ER 961 ([1986] AC 27).

In *Anderson* the appellant had allegedly conspired with his three co-accused and other unknown persons to effect the escape of a convicted felon. The appellant's co-accused were all acquitted. However the appellant initially elected to make an unsworn dock statement in his defence in which he claimed that while awaiting a bail application in an unrelated case he was approached by one of the co-accused, Mr Andaloussi, to participate in a scheme to effect the latter's escape and for which he would be paid . The appellant's role was to acquire material and implements needed for the escape such as diamond wire and a tool to cut through burglar bars as well as a rope and ladder.

After the appellant was released on bail, he received 10% of his agreed fee. The appellant's involvement in the conspiracy ended shortly after when he was injured in a motor accident. His claimed intention was to obtain the diamond wire and hand it over in exchange for receiving half of the agreed fee for his participation. On the evidence before it, the trial court accepted that on receipt of this further amount the appellant intended to play no further part in the planned escape but leave England and settle in Spain.

The appellant argued that he lacked the mental element to sustain a conviction for conspiracy "*since he never intended the escape plan, in which, according to what had been agreed, he was to play a major part, should be carried into effect*

nor.... did he believe that, in the circumstances, the plan to enable Andaloussi to escape could possibly succeed."[55]

65. It is unnecessary to deal with the procedure that was then followed by the trial judge save that it resulted in a ruling and a consequent re-arraignment at which the appellant pleaded guilty.

The House of Lords concerned itself with whether in law a conviction on the merits of the defence initially raised by the accused could be sustained.

66. The Court of Appeal dismissed the appeal but certified that its decision raised a point of law of general pubic importance which involved *inter alia* the question of whether a person who "*agrees*" with two or more other people; *"who themselves intend to pursue a course of conduct which will necessarily involve the commission of an offence, and who has a secret intention himself to participate in part only of that course of conduct, is guilty himself of conspiracy to commit that offence...?"*[56]

67. In order to appreciate the *ratio* of the decision regarding the elements of the offence of conspiracy in English law it is necessary to point out that shortly after the House of Lords decision in *Shannon* the common law offence of a conspiracy to commit a crime had been abolished and replaced by a statutory offence under s 1 of the Criminal Law Act of 1977 which, prior to its amendment in 1981[57] read:

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[55] *Anderson* at 963f-g
[56] Ib at 963h
[57] Ib at 963j-964a

> *"... if a person agrees with another person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question"*

68. By way of an introduction to the case: The House of Lords considered that the first element of the statutory offence required no more than an agreement between at least two people that "*a course of conduct shall be pursued*" and continued that it was important to *"resist the temptation to introduce into this simple concept ideas derived from the civil law of contract. Any number of persons may agree that a course of conduct shall be pursued without undertaking any contractual liability"*[58]. This resonates with the view expressed by Boshoff J in *Moumbaris* regarding the interpretation of s 18(2)(a) of our Act to which I referred earlier.

The second element also posed little difficulty. The House of Lords said that it is "*necessary that any party to the conspiracy shall have assented to play his part in the agreed course of conduct, however innocent in itself, knowing that the part to be played by one or more of the others will amount to or involve the commission of an offence".*[59]

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[58] Ib at 964d
[59] Ib at 964e

The court explained that it was however unnecessary that more than one of the participants in the agreed course of conduct was to commit the substantive offence to which the conspiracy related.[60]

Once again English law expresses the same understanding of the basic nature of a conspiracy as was given to our law in *Moumbaris* where the court said at 686G-687A:

> *"In regard to such an offence it is necessary to observe that, although the common design is the root of a conspiracy, it is not necessary to prove that the conspirators came together and actually agreed in terms to have the common design and to pursue it by common means and so to carry it into execution. If they pursued by their acts the same object, often by the same means, some performing one part of an act and others another part of the same act so as to complete it with a view to the attainment of the object which they were pursuing, the conclusion may be justified that they have been engaged in a conspiracy to effect that object. The question to be answered is, had they a common design and did they pursue it by these common means"*

69. The House of Lords then considered how to interpret the third requirement of the offence. The appellant argued that an accused should not only have agreed to pursue a course of conduct which will necessarily amount to or involve the commission of that offence by himself or one of the co-conspirators but it must be

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[60] Ib

proved that the accused "*himself .. intended that the offence should be committed*". *In casu* the appellant relied on the finding that he never intended to assist in Andaloussi's escape from prison.

70. The court therefore needed to consider the meaning to be given to the term "*intends*".

In asking the question whether the accused in fact intended to pursue to its end the substantive crime to which the conspiracy related, the House of Lords enquired into what constituted the *mens rea* of the offence.[61]

71. The court immediately recognised the situation where a person engaged in law enforcement feigned agreement to participate in the conspiracy in order to expose or frustrate the criminals. The court considered that there had to be a *mens rea* element which would exculpate such a person.[62]

I understand these passages to deal with the *mens rea* of an accused who happens to be a law enforcement agent.

72. In grappling with this postulation of the problem the House of Lords was of the view that beyond the mere fact of agreement, "*the necessary mens rea is established if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in*

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[61] Ib at 965d

[62] Ib at 965 d-g. The court was careful to add that it strongly disapproved the engagement of informers or agents provocateurs for purposes of entrapment

furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required".[63]

73. The House of Lords found that the fact that the appellant had no intention of participating further in assisting with the escape plan or that he believed that escape was impossible did not provide a defence. It sufficed that the appellant had agreed that a course of conduct be pursued which, if successful, would necessarily involve the offence of enabling a convicted offender to escape from lawful custody. He clearly intended, by providing the diamond wire, which was to be smuggled into the prison, to play a part in "*the agreed course of conduct in furtherance of that criminal objective".*[64]

74. To sum up. It is evident that a conspiracy is an inchoate crime which requires something more than soliciting (i.e. making an offer to) someone to assist in the commission of a substantive crime. One would therefore expect something more than the making of an offer to another person to participate in a criminal enterprise. Our law however is clear; no further overt act is required after the conclusion of the agreement. Accordingly it must be in the conclusion of the agreement itself that one is to find the unlawful conduct. However evidence sufficient to support that conclusion is not to be found in the internal workings of the co-conspirator's mind but in the conduct of the accused both prior to (e.g. the extent to which his design expressly required obtaining the participation of others) and post the conclusion of the alleged agreement to conspire.

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[63] Ib at 965h

[64] Ib at 965j. See generally *Halsbury's Laws of England* (5th ed 2016) vol 25, Criminal Law

75. The English cases of *Shannon* and *Anderson* also recognise that criminal activity by organised groups poses a significant threat as they are likely to be engaged in more serious crimes against persons or property and generally involve careful planning so avoid detection. Both cases recognise the need for undercover operations, within the bounds of law, and to effect arrests and successful convictions before the plan is consummated or repeated.

76. The case of *Harris* did not engage in an in-depth enquiry into whether there had to be a subjective intention by at least two of the participants to conclude the unlawful agreement.

The *ratio* of the court was that; "*there can be no conspiracy unless two or more persons are ad idem as to their object, that is, have come to some agreement*". Only the then edition of Halsbury was relied on with its reference to *Plummer*. The court continued; "*whatever the appellant thought was the case, Lockwood was not in agreement with him as to obtaining money ... to defeat the course of justice, but was entrapping him.*"[65]

77. *Harris* relied on English authority which this judgment attempts to show has since been overruled by their highest court on the grounds that it was premised on English procedural rules introduced to avoid unfairness; not on substantive law (*per Shannon*).

78. In my respectful view there is no reason for the offence of conspiracy to go beyond the ordinary characterisation of an *actus reus* where the overt manifestation of assent by the co-conspirator should suffice. If this were not so

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[65] *Harris* at 347.

then absurdities arise as illustrated in *Shannon*. One may also add the situation where a conviction for conspiracy will be sound if based on a finding of an agreement evidenced entirely by the accused's conduct prior to and after an allegedly meeting with his co-conspirators. In addition the very reason for statutorily criminalising a conspiracy to commit a crime would be defeated.

79. In this context other comparative law is not inconsistent. The compilers of the *Corpus Juris Secundum (2002)* vol 15A under the title *Conspiracy* at para 98 mention that since the offence is "*designed to criminalize a person's behaviour before the substantive crime is completed; ... liability ... attaches at a much earlier stage than does liability for attempt, and consequently particular caution is required in establishing liability for conspiracy*".[66]

Later the authors consider whether various State legislation also requires the co-conspirator to have the subjective intention of entering into a conspiracy. At para 119 the following is said:

> "*Under the unilateral theory of conspiracy, a crime is committed when a person agrees to proceed in a prohibited manner, and there is no requirement that two or more persons have agreed. Under the bilateral formulation, the crime is committed when two or more persons agree in a prohibited manner.*"

Under the unilateral theory, a court assesses the subjective individual behaviour of the accused (and therefore feigned agreement by one of the participants is

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[66] Ib at para 101

irrelevant), while under "*the traditional bilateral approach*", there must be at least two *"guilty"* persons[67]

80. While the analysis in *CJS* turns on whether a particular statute is to be interpreted as adopting a unitary or bilateral theory of conspiracy, our underlying common law in relation to what constitutes *consensus*, which would prevail in the interpretation of s 18(2)(a), looks at the external manifestations of an unequivocal commitment to be bound adopting an objective approach save where there is mutual error.

Furthermore, since the *actus reus* element of the offence is concerned with conduct and since the conclusion of an agreement to conspire is relevant only to that element, there appears to be no reason why the subjective intention of the person with whom the accused conspired should enter the equation. There are sufficient checks and balances that caution a court in relation to the evidence of an accomplice, informer or person who is part of an entrapment operation, so as not to unnecessarily interfere with the ordinary principles relating to satisfying the requirements of *mens rea* and the *actus reus*.

It should also be borne in mind that the State must prove each element of the offence beyond reasonable doubt. This I believe would inevitably require satisfactory evidence of the conclusion of the agreement by proof of some active step taken by the accused, either prior to or after the conclusion of the pact with a

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[67] Ib at para 119

co-conspirator, or acquiescence by him in a step taken by the co-conspirator, which furthers the unlawful objective to which the agreement relates.

81. This issue has been dealt with extensively because it is necessary to demonstrate that *Harris* cannot be relied. In my respectful view its underlying premise is clearly wrong, *inter alia*, because the authority it relied upon has been expressly overruled and because it does not accord with the way in which our criminal law determines whether the elements of *mens rea* and the a*ctus reus* are satisfied, or for that matter when a binding agreement comes into existence for purposes of contract law; assuming that something less will not suffice (*contra Moumbaris*, the *ratio* of which appears to have been fully endorsed by our then highest court in *Sibuyi*)

THE FACTS

82. In either 2010 or 2011 Mr Zungu was detained at Johannesburg Central as an awaiting trial prisoner. He shared a cell with a number of prisoners including a Mr Dlamini[68]. A month later the appellant joined them in the same cell. When the accused discovered that Zungu lived in Kliptown he was asked if he knew a policeman by the name of Moses whose features were then described. It turned out that Zungu knew Moses. By this time Zungu knew that the appellant owned a number of taxis. He claimed it was only during the proceedings when he discovered that the appellant was also employed as an accountant at Rand Water Board.

[68] It was not disputed that Dlamini had since died.

83. Some five months later Zungu was released from prison and he maintained contact with the appellant. The appellant was released some two months later. The appellant and Zungu then met at a garage in Kliptown from where they went to Zungu's home. Zungu informed the appellant that Moses regularly arrived between 19h00 to 20h00 and parked his vehicle at the gate of the Kliptown Court from where he walked to his girlfriend's house. At about 19h00 they then proceeded to the area and saw the deceased approaching. On the way back to Zungu's home the appellant said that Moses must die because he was a big fish in the appellant's case.

84. Two days later the accused contacted Zungu for a meetimg.at another location. The accused was in the company of another man. He was introduced as the person who would accompany Zungu to kill Moses. At some stage the appellant had said to Zungu that he will see him "*right*" by which it was understood that he would be paid something.

85. They then went to a vantage spot where they were able to see Moses as he walked towards them. When they were about to cross each other's path Zungu became scared and ran back to his home. He ran back because he did not want to see Moses being killed before his eyes. It is apparent that Zungu's task was to point out Moses to the assassin. The appellant contacted Zungu later that evening to inform him that the other person had failed to kill Moses.

86. Another two days passed before the appellant again contacted Zungu. A meeting was arranged at a crèche in Kliptown. This time the appellant was in a Mini Cooper car with a person named Godfrey. Godfrey had shared a cell with them

when both were detained. The appellant said that Zungu should accompany Godfrey to kill the deceased. However Godfrey said that they should postpone the killing to the following day. On the following day Zungu received a call from the appellant to advise that Godfrey was not answering his phone.

87. A week went by before Zungu received another call from the appellant. He was asked to meet the appellant in the afternoon at a particular street. The appellant was driving a bakkie and after Zungu entered the car the appellant produced a black CZ 9mm firearm. He gave the firearm to Zungu with an instruction to kill the deceased. Zungu refused. The appellant allegedly insisted that Zungu kills Moses otherwise he will be next. Zungu took the firearm. At home he dismantled the weapon and placed it in a plastic bag which he buried. That evening the appellant phoned Zungu to find out if he had killed Moses. Zungu replied that Moses had not arrived that evening at his usual place.

88. A week later the appellant collected the firearm from Zungu and accused him of failing to kill Moses.

89. Two days later Zungu then approached the deceased and informed him of the appellant's plot to kill him, advising Moses that he should no longer come to Kliptown. The following day Moses came with the second State witness, known to him as Uncle. Moses told Zungu that he was not afraid of the appellant.

90. About two months later while at home Zungu heard about four gunshots. He went out to investigate and was told that Moses had been killed. He did not report what he knew to the police because he was afraid that, having no compunction about killing a police officer, the appellant would kill him.

91. Zungu's version that he met Uncle in the company of Moses was confirmed when Uncle took the stand. He is Mr Mokomane. The meeting was in August 2011. However at the meeting Zungu did not implicate himself in the plan to murder Moses nor did he mention the firearm he had been given or the threat he had received.

92. The appellant on the other hand claimed that he had visited Zungu on numerous occasions. He claimed that Zungu had approached him for a job in the taxi industry and at Rand Water Board. The appellant confirmed that they had exchanged contact numbers, that on being released from prison he had contacted Zungu and that they had met.

He confirmed that the second meeting had also occurred but according to the appellant it was to discuss Zungu obtaining a job at Rand Water Board or in the taxi industry. It was during this conversation that Zungu showed him a Mandrax tablet and said that he needed money to stock up with tablets. He said that Zungu had asked for a loan which would be paid back; this version had not been put to Zungu. The appellant claimed that the meeting was cut short because he had to attend a traditional healer. After testifying the appellant called Mr Mfelang who he claimed had asked him to take his clothes to a traditional healer for cleansing.

93. It is evident from the judgment that Twala J warned himself in regard to treating the evidence of a single witness with caution. The court weighed the fact that Zungu could not have known the name of the investigating officer in the appellant's case unless the appellant had informed him, yet the appellant had denied doing so. The court referred to the appellant claiming that the purpose for

going all the way to Zungu's house was to discuss offering him a job yet when he arrived there was no such discussion; not even on the subsequent occasions when they met.

The court also took the following into account. It was evident from the appellant's version that Zungu never initiated the .meetings- it was always the appellant who did. Moreover the appellant was employed as a financial manager at Rand Water Board and held a post graduate qualification in management accounting yet, instead of offering Zungu a job over the phone or asking him to attend an interview, it was always the appellant who pursued Zungu for a business proposal which he claims not to have enquired about beforehand. There was also no explanation as to why Zungu would make a statement three years later to the police if he was angry at the time with the appellant; it was common cause that they had no contact with one another since the last time mentioned by Zungu, which was some two months before Moses was shot dead.

94. It is unnecessary to deal with the inconsistencies raised by the trial judge in relation to the appellant's version. Suffice it that one cannot fault the learned judge's finding that the appellant kept tailoring his evidence as the case progressed. The person called by the appellant to corroborate his version that he had arranged for the appellant to visit a traditional healer was also blown out the water when that person did not even know the traditional healer's name or where he could be found.

95. Twala J found that Zungu was a satisfactory witness whose role in the conspiracy was clear; because he could identify Moses, he was to accompany the killer and point him out. The fact that no payment was agreed does not mean that an agreement to participate in the killing of Moses was not concluded.

DEFENCE THAT EVIDENCE DOES NOT SUPPORT A CONSPIRACY

96. Much of *Mr van Schalkwyk's* argument on behalf of the appellant relied on *Harris* and on the commentary mentioned earlier of Profs Snyman and Burchell for the proposition that there cannot be a conspiracy if the only other person with whom an accused is said to have conspired did not subjectively intend to participate in the execution of the conspiracy.

97. There are a number of reasons why the argument cannot be sustained.

98. The first is that *Alexander* remains authority for the proposition that a conspiracy is concluded the moment there is agreement. There is nothing to suggest that Zungu was not committed at that moment to participating in a conspiracy to kill Moses. He knew the purpose of their unlawful pact and his role in it. The appellant certainly believed that Zungu was committed to the venture since he approached Zungu on two further occasions to carry out the killing of Moses. If the murder had been committed at the time then Zungu would have been convicted as an accomplice.

99. The second is that once the agreement is concluded our law is not concerned if the only other conspirator subsequently gets cold feet. It would be absurd to

suggest that the act of this other person should absolve the person who initiated the conspiracy from criminal liability. The purpose of criminalising a conspiracy is precisely to ensure that the offence is nipped in the bud and that the offender does not have the opportunity to find another willing accomplice.

100. The third reason is that a conspiracy remains a conspiracy precisely because the substantive crime was not committed or because there is insufficient evidence to link the accused to the crime itself. See *Moumbaris* , *Shannon* and *Anderson*.

In the present case, not only was the agreement concluded but the appellant then located a gunman on two separate occasions and produced the firearm that was to be used in the commission of the substantive offence. If a diamond wire sufficed to establish a link in *Anderson* the present matter must be an *a fortiori* case.

101. Finally, even if Zungu never intended to go along with the plan to kill Moses and even if the gunmen who appellant introduced to Zungu on two separate occasions had no intention of carrying out the plan then in my view the subjective state of mind of the co-conspirators is irrelevant to the question of whether the appellant had the necessary *mens rea* and whether there was unlawful conduct on his part sufficient to satisfy the *actus reus* requirement. For sake of completeness I deal with each element in turn.

102. The evidence reveals that the appellant had the necessary intention to kill: He expressly said so and throughout it is evidenced by his actions, including those of supplying the firearm and procuring the gunmen.

103. The unlawful conduct on the part of the appellant, as I comprehend the law, is demonstrated by the conclusion of the conspiracy with Zungu, but even if I am wrong on the facts and the law, then it is demonstrated by the pact made at the meeting between the appellant and each gunman on the two separate occasions at which Zungu was present (the charge sheet did not limit the co-conspirator to Zungu alone). The unlawful conduct necessary to demonstrate a conspiracy is also evidenced by the appellant's conduct which included handing over the firearm to at least one other co-conspirator for the purposes of killing Moses, procuring the gunmen and introducing each of them to Zungu so that Zungu could point Moses out in order to kill the correct person..

104. In my view it is irrelevant that none of the co-conspirators had an intention to carry out their part of the bargain. Firstly, it could not affect Zungu who had committed himself to pointing Moses out to the gunman. The fact that the gunman got cold feet, or the opportunity did not present itself at that moment to carry out the pact, is irrelevant.

105. Even if Zungu was not committed to his role of identifying Moses then, as I have considered earlier, in order to maintain legal consistency only the external manifestations of assent are required for a binding contract. This approximates more to the unitary theory of conspiracy and certainly negatives the bilateral approach of requiring that both parties subjectively intend to execute their pact.

It is only if the appellant claims that there was no concluded pact, because at the time he did not seriously believe that the other person was committed, that this may become relevant. But then the enquiry is not into the co-conspirator's state of mind but the external manifestations of assent evidenced by the accused's

subsequent conduct. Once again reference may be had to *Moumbaris* and *Anderson.*

106. Since the offence of conspiracy does not require that the essential terms of a contract be agreed upon, it was only necessary for the accused to agree with Zungu to undertake the unlawful activity; namely that Zungu participates in the murder of a police officer for the benefit of the appellant, initially by identifying the officer to the gunman hired by the appellant and, on the last occasion, by being given the firearm to do the deed himself.

It is also evident that on two separate occasions the terms of the conspiracy were repeated in front of a would-be gunman and then agreed to by taking some step towards carrying out the killing. Once again, the fact that subsequently the gunman got cold feet despite taking the firearm in order to kill Moses is irrelevant if regard is had to *Moumbaris* and *Alexander.*

107. I am therefore satisfied that the trial court did not err on the facts and that there was a concluded agreement between the appellant and Zungu or at least the gunmen who were present with him, to commit the crime of murder.

SENTENCE

108. In *Harris,* Tatham J reduced the offence to an attempt to commit the crime of conspiracy. At 347-8 the court said that the circumstances of the case did not justify a reduction in sentence.

109. In the present case the appellant's persistence in engaging a gunman to kill Moses and his persistence in engaging Zungu to point out Moses to the gunman accompanying him, despite at least one abortive attempt to assassinate Moses, considerably heightens rather than reduces the appellant's moral blameworthiness. His intention was fixed and clear despite the first two setbacks with the gunmen to whom he had introduced Zungu.

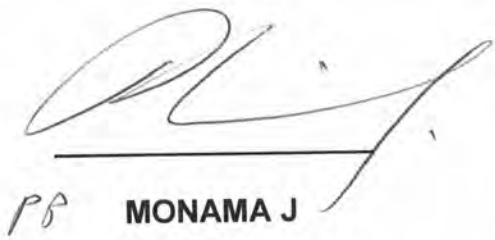
110. The sentence imposed by Twala J of twenty-two years imprisonment of which five years was suspended (i.e. an effective seventeen years) does not induce a sense of shock nor was there a failure either to take into account all relevant circumstances or to have weighed them incorrectly. Accordingly there is no basis to warrant this court's interference.

ORDER

111. The appeal against conviction and sentence is dismissed.

SPILG J

We agree



MONAMA J

SENYATSI AJ

DATE OF HEARING:	23 July 2018
JUDGMENT:	7 December 2018
FOR APPELLANT:	Att. JO van Schalkwyk BDK Attorneys
FOR THE STATE:	Adv P Marasela National Director of Public Prosecutions