THE MENTAL ELEMENT OF CONSPIRACY

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Section 310(1) of the Crimes Act 1961 codifies the offence of conspiracy to the extent that it provides for the punishment of "every one who conspires with any person to commit any offence". This effects a notable change to the common law in that it does not preserve the principle that in some cases there may be a criminal conspiracy although the object would not be an offence in one person acting alone, although that doctrine can still operate in the context of conspiracy to defraud.[1] The New Zealand code does not, however, attempt to define what is needed before a person can be held to "conspire" with another to commit an offence. It is clear that, as at common law, the essential question is whether the accused entered an agreement to effect the prohibited object, but there has long been a degree or obscurity as to exactly what is entailed in this, especially in relation to the mens rea required. The New Zealand Court of Appeal has given recent consideration to the question, as has the House of Lords in the context of a more detailed statutory definition of the offence. This note is an attempt to explore some of the issues raised by these judgments, the starting point being the decision in the New Zealand case.

In *R.* v *Gemmell*[2] it was alleged that G had conspired with H, J and S to commit aggravated robbery, by robbing employees of a post office while armed with a sawn-off shot gun.[3] The evidence was that G had driven H and J to the vicinity of the post office, where they had left him and joined S in another car. The police then apprehended H, J and S, the shot-gun being found in the second car. G admitted driving H and J to the meeting with S, but said that he was opposed to violence and had merely given them "a somewhat unwilling lift", that he did not agree to, or intend to be part of, an armed robbery, and, indeed, that he was not aware that such an offence was planned, although he knew the others "may have been up to something amiss". G was convicted but the Court of Appeal quashed this conviction and ordered a retrial.

I The Requirement Of Knowledge

In allowing the appeal in *Gemmell* the Court of Appeal held that the trial judge had wrongly directed the jury when he indicated that G would be guilty of conspiracy to commit aggravated (i.e. armed) robbery if he had agreed to simple robbery without knowing that his co-conspirators intended to use a firearm. This raises two questions as to the knowledge required for conspiracy.

In the first place, the judge's direction seems plainly wrong in principle in that a person can only truly "agree" to that which he knows of, so that an alleged conspirator must know of all the elements of the offence in question. This is sufficiently established by *Churchill* v *Walton*.[4] In that case the act

[1] Crimes Act 1961, s.257; see also s.136.

[2] (1985) 1 C.R.N.Z. 496.

[3] Crimes Act 1961, s. 235 (1) (c).

[4] [1967] 2 A.C. 224, at 236–237.

the accused agreed to would have been lawful in the absence of the facts of which he was ignorant, but the House of Lords did not confine the principle to such a case for it said that the rule for conspiracy is the same as that for aiding and abetting, so that the accused "must at least know the essential matters which constitute" the relevant offence.[5] It is presumably this which led the Court in *Gemmell*[6] to cite *Churchill* v *Walton* for the proposition that a conspirator must intend to agree to "the specific offence to which the conspiracy is directed", but this might go too far. In conspiracy, as in aiding and abetting, it will not suffice that a person agrees to assist another in the knowledge that "something illegal" is intended[7]. But it is also clear that a person may be held to have conspired although the details of the intended offence were not decided upon,[8] and it seems to be well established that for aiding and abetting it suffices that the accused knew the "type" of offence intended by the principal.[9] The House of Lords has further held that a person will be a secondary party if he assists the principal with the knowledge that one of a number of possible offences is intended, and one of the offences or, probably, types of offence, contemplated by him is in fact committed.[10] It is doubtful whether there is any good reason why conspiracy should require a greater degree of knowledge than this, although *Gemmell* establishes that, at least in the context of conspiracy, a foreseen offence will not be of the same "type" as that actually intended if it is clearly a less serious offence than the latter. It is likely that the same principle will be applied to aiding and abetting.

A second and related issue concerns the meaning of "knowledge" in this context. In *Gemmell* it was held to be essential that the accused knew that the use of a firearm was intended but the question may arise whether this means he must have been sure of this, or whether it might be enough if he realised that it was probable, or a real possibility. In *R.* v *Giorgianni*[11] three members of the High Court of Australia concluded that there would not be sufficient intent for aiding and abetting unless the accused knew or believed that the facts essential for the crime existed, and that mere awareness of the "possibility or even probability" of their existence was not enough. It was added, obiter, that the same was true for attempt and conspiracy and this is an inevitable conclusion if the rule for aiding and abetting was correctly stated. The rule for aiding and abetting is not, however, beyond doubt,[12] and in relation to conspiracy there is some authority which suggests

[5] *Johnson* v *Youden* [1950] 1 K.B. 554, at 546-547; in some cases a secondary party need not forsee essential consequences (Smith and Hogan, *Criminal Law* (5th ed.) 132), but in this respect the position should be different for conspiracy.

[6] Supra, at 500.

[7] *R.* v *Scott* (1978) 68 Cr. App. R. 164; *R.* v *Lessard* (1982) 10 C.C.C. (3d) 61; cf. *R.* v *Patel* [1970] Crim. L.R. 274.

[8] E.g. *R* v *Gill* (1818) 2 B. & Ald. 204.

[9] E.g. *R.* v *Bainbridge* [1960] 1 Q.B. 129.

[10] *R.* v *Maxwell* [1978] 1 W.L.R. 1350.

[11] (1985) 59 A.L.J.R. 461 at 475, per Wilson, Deane and Dawson J J.; and see p. 467 where Gibbs C. J distinguishes suspicion from "connivance or wilful blindness" which "virtually amounts to knowledge"; cf. the involved discussion in *R.* v *Crooks* [1981] 2 N.Z.L.R. 53.

[12] Although in *R* v *Pene*, unreported, 1 July 1980, C.A. 63/80, the Court of Appeal thought than an "intent" to encourage an offence is essential and mere knowledge that conduct is "likely" to encourage it is not enough.

that it suffices if an accused agrees to certain conduct knowing of the possible existence of circumstances which would make it unlawful.[13] Such a state of mind can be said to amount to a "conditional intent" to commit the offence.[14] In *Gemmell*[15] the Court did not think that it would have sufficed if the accused had been ignorant of the existence of the shot-gun but knew that the use of such a weapon was a "probable" consequence of the common purpose, but this is not quite the same as knowledge of the co-conspirators' intentions, and it involves a separate issue which will now be considered.

II Secondary Parties And Conspiracy

The direction in *Gemmell* that the accused could be convicted even if he was unaware that a firearm was to be used would have been wrong even if the accused had been alleged to be a secondary party to a completed aggravated robbery,[16] but the court does not discuss this and, indeed, appears to accept that the judge's directions were objectionable because they did not adequately distinguish conspiracy and aiding and abetting. Even when the substantive offence is committed there is no doubt that a person who is guilty as an aider and abettor is not necessarily a conspirator as well, for aiding and abetting does not require consensus or agreement between the accomplice and the principal.[17] But the Court of Appeal also cited two Canadian cases, *R.* v *Koury*[18] and *R.* v *Clark*[19], which seem to suggest that a person does not necessarily become a party to a conspiracy even if, knowing of the conspiracy and with the assent of a conspirator, he does acts designed to assist the agreed offence; this is not the same as intentional encouragement or assistance of the formation (or, presumably, the continuance) of the agreement, which is what would be needed for a person to be an accomplice to the conspiracy. This may be disputable. In *R.* v *McNamara (No.1)*[20] the Ontario Court of Appeal said that conspiracy requires an agreement between two or more to co-operate in attaining a criminal object, but added that if a person knows that others have entered such an agreement he becomes a party to it pursuant to the equivalent of section 66(1) of the Crimes Act 1961 if he "abetted or encouraged any of the conspirators to pursue its object".

In *Gemmell* the Court does not exclude the possibility of a party being guilty of conspiracy because of secondary participation within section 66(1), although it would apparently require such liability to be assessed strictly in terms of whether the *agreement* was knowingly (or, perhaps, intentionally) assisted or encouraged.[20a] On the other hand, the Court did conclude that

[13] *R.* v *Mawbey* (1796) 6 T.R. 619; cf. *R.* v *Weaver* (1931) 45 C.L.R. 321, at 358; *R.* v *Allsop* (1976) 64 Cr. App. R 29; and in *R.* v *Scott* (1978) 68 Cr. App. R. 164, at 166, an admission of suspicion was at least regarded as strong evidence of knowledge, although in *R.* v *Lessard* (1982) 10 C.C.C. (3d) 61 "recklessness" was thought insufficient.

[14] Smith and Hogan, *Criminal Law* (5th ed.) 235-237; cf. *R.* v *Simpson* [1978] 2 N.Z.L.R. 221, at 225.

[15] Supra, at 504

[16] cf. *Giorgianni* (1985) 59 A.L.J.R. 461; *R.* v *Samuels*, [1985] 1 N.Z.L.R. 350.

[17] Smith and Hogan, *Criminal Law* (5th ed.) 122–123

[18] (1964) 43 D.L.R. (2d) 637 at 650.

[19] [1951] O.R. 791 at 807.

[20] (1981) 56 C.C.C. (2d) 193, at 452-454; and see Wright, *The Law of Criminal Conspiracies and Agreements* (1887), 70–71;cf. *R* v *Henderson and Panagaris* (1984) 37 S.A.S.R. 82, at 91.

[20a] cf. *R* v *Anderson* (1984) 80 Cr. App. R. 64.

section 66(2) should not be available to establish liability on a conspiracy charge, "whatever academic arguments may be advanced to the contrary".[21] It was said that the application of section 66 (2) would be "inconsistent with the concept of conspiracy", because it is of the essence of conspiracy that "there must be a common design, a meeting of the minds directed to the crime which is to be committed", which implies "a state of knowledge" on the part of the accused at the time of the agreement. This is, with respect, unconvincing. In summarising the effect of section 66(2) the court implies that it provides for liability for an offence which was "the probable consequence of a common purpose" and fails to acknowledge that, since 1961, it has applied only if the offence was *known* to be a probable consequence of a common purpose to which the accused was a party.[22] In the result, the reasons given for exclusion of section 66(2) do not carry the point. The Court did then conclude that the jury might have applied the rule in section 66(2) because Crown counsel had suggested that the accused could be convicted if he "knew" that the use of a shot-gun was a probable consequence but it fails to explain adequately why that would not suffice to establish guilt.

The facts in *Gemmell* do not seem to have provided a sound basis for establishing guilt by applying section 66(2) (for it would be difficult to justify an inference that the aggravated conspiracy was, or was foreseen as, a consequence of a lesser conspiracy), and the judge's directions were clearly defective. It may be doubted, however, whether there is anything in the nature of conspiracy which should exclude the possibility of it being a foreseen consequential offence within section 66(2), although in all but the clearest cases the introduction of such a possibility should be avoided because of the risk of confusion. It may be added that the Court of Appeal also suggested that to apply section 66(2) would conflict with "the settled principle that the minds of the conspirators must go to the single conspiracy charged". This probably adds nothing to the court's earlier reasoning but it is perhaps misleadingly expressed in that if the evidence establishes the conspiracy charged it is not a ground of objection that it might also establish some other conspiracy as well.[23]

III The Essential Ingredients Of Conspiracy

In addition to discussing the relationship between secondary participation and conspiracy, the court in *Gemmell* also sought to analyse the essential ingredients of conspiracy. While acknowledging that the elements of actus reus and mens rea may be more difficult to distinguish in this offence than in others, it emphasised that there are two distinct elements which must be proved. After quoting a number of authorities the Court summarised its conclusions:[24]

> To return to the traditional nomenclature of the criminal law, the mens rea is the intention of the conspirator to achieve the common design and his mind must go with the apparent manifestation of his consent. The actus reus of the offence of conspiracy is the agreement which has a common design. The actus reus does not exist in mere formulation of an

[21] Supra, at 504.

[22] For a similar omission, see *R.* v *Currie* [1969] N.Z.L.R. 193, at 209; but the subjective nature of the test was an important factor affecting the interpretation of "probable" in *R.* v *Gush* [1980] 2 N.Z.L.R. 92.

[23] *R.* v *Greenfield* [1973] 3 All E.R. 1050, *R.* v *Coughlan* (1976) 63 Cr. App. R. 33.

[24] Supra, at 500.

intention in the minds of two or more persons to commit a crime; there must be an agreement into which that intention is translated.

These elements will now be considered in more detail.

1 *Actus Reus*

The simplest concept of actus reus is one which includes all the elements of an offence except any state of mind or degree of fault required on the part of the accused. A person can be held to have truly "agreed" to something only if he had a particular state of mind but, in relation to a particular accused, this should not be regarded as being part of the actus reus. It is submitted that the actus reus of conspiracy consists of: first, the manifestation by one person, communicated to another, of his decision, or acquiescence or consent to a decision, that a criminal object be pursued; and, second, a like manifestation by at least one other person. In addition, the long established rule that conspiracy requires at least two guilty parties means that as against any particular accused the actus reus will include the existence of the requisite "intent" on the part of at least one other person who has manifested agreement.[25] It is hoped that a definition along these lines promotes analysis and understanding of the nature of the offence by providing a description of its external elements which excludes all aspects of the accused's state of mind. Nevertheless, the actus reus remains somewhat amorphous. There is no requirement that conspirators be in direct communication with one another, and their agreement may be communicated by words or conduct, expressly or impliedly.[26] Moreover, it may be impossible to exclude entirely the accused's state of mind from the conception of the actus reus because the offence is a continuing one, and once the agreement has been formed and manifested it may be that it continues to exist only in the minds of the accused and his co-conspirators.

2 *Mens Rea*

In discussing the mens rea required of a conspirator the Court of Appeal appears to accept that two things are required. First, there must have been "an intention to agree", or "an intention to be a party to an agreement to commit the specific offence to which the conspiracy is directed". The knowledge of the intended crime that this will require has already been discussed, and in addition an "intention to agree" will presumably require that a conspirator intends to manifest his assent to the pursuit of the alleged object. Second, the court also held that "an apparent agreement which stops short of an intention to carry the offence through to completion is not enough", and that a conspirator must have an "intention . . . to achieve the common design". Here the court followed English and Canadian decisions where it has been held that an accused is not guilty of conspiracy when either he or the only other possible conspirator had merely "pretended" to agree, in the sense that he (or the other) manifested his agreement but did not in fact intend that the object be achieved, and did not intend to assist in furthering it.[27] The court did not consider whether such a person might be held to have aided and abetted the conspiracy but, assuming that section 66(1) is applicable

[25] Smith and Hogan, *Criminal Law* (5th ed.) 252

[26] E.g *R.* v *Jeffs* unreported, 28 April 1978, C.A. 114/77, at p. 67 of the judgment of the court.

[27] *R.* v *Thomson* (1965) 50 Cr App. R. 1; *R.* v *O'Brien* [1955] 2 D.L.R. 311; cf. *R.* v *Miller* (1984) 12 C.C.C. (3d) 54.

to conspiracy, it may be that that would require proof that the accused intended his ostensible agreement to encourage the others, and this might well be impossible to establish. The question then arises whether a person may be held to be a conspirator if he is indifferent as to whether or not the object is achieved, but intends to do an act which he knows will assist others in the pursuit of the object. Some of the language in *Gemmell* might suggest that a person will be a conspirator only if it is his object, purpose or "design" that he or a co-conspirator commits the agreed offence, but the actual decision on this part of the case is consistent with something less being enough.

The accused's defence seems to have combined the distinct propositions that he was unaware that either a robbery or an aggravated robbery was intended, and furthermore as he was opposed to violence he had not intended to be part of or to identify himself with such an offence, and had merely given the others a "somewhat unwilling" lift. The Court of Appeal concluded that although the judge's directions on the law had been less than full, nevertheless they had been adequate as to the essential elements of conspiracy. It said that the jury had been told that it was necessary that the accused had agreed to become a party to an aggravated robbery, and that it was for them to decide whether his conduct "was no more than a casual act of driving by a man who had declined to become a party to the agreement, or whether it was an act which demonstrated his intention to join the conspiracy and to play his part in carrying it through to its conclusion".[28] This is rather ambiguous but it is doubtful whether it should be interpreted as recognising that the accused would or might have a defence merely because he had been unwilling or "casual" in assisting as he did. In the context of substantive offences the courts have generally held that a person may be guilty as a secondary party if he intentionally provided assistance, even though this may have been done reluctantly and because of fear of another.[29] A contrary rule would be undesirably uncertain in its effect, especially if the idea is that it is for the jury to decide the effect of an actor's reluctance, and this is as true in the context of conspiracy as in other cases. It is submitted that the fact that an accused's motivations were such that he acted "unwillingly" or reluctantly will not negate participation in a conspiracy (unless the demands of a specific defence such as compulsion or necessity are met). It should suffice to establish guilt that a person, knowing that it is with the assent of another, deliberately does something which he believes assists in the furtherance of a criminal object of a kind known to him, provided the conduct would suffice to make him a secondary party should the offence be committed. In such a case an intention, purpose or desire that the object be achieved should not have to be proved. Moreover, acts should be allowed to speak louder than words, so that an expression of reluctance should not negate the required manifestation of agreement which may be found in conduct which belies the "dissent".

Some support for such a conclusion may be found in the decision of the House of Lords in *R.* v *Anderson*.[30] In this case D had entered an agreement

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[28] Supra, at 501.

[29] *R.* v *Joyce* [1968] N.Z.L.R. 1070; *R.* v *Pollock* [1973] 2 N.Z.L.R. 491, at 494; *R.* v *Lynch* [1975] A.C. 653, [1975] N.I. 35; cf. *R.* v *Frickleton* [1984] 2 N.Z.L.R. 670; but *R.* v *Paquette* (1977) 70 D.L.R. (3d) 129 suggests that s.66 (2) might not apply in such a case; and see *Pene*, unreported, supra.

[30] [1985] 2 All E.R. 961.

with three others to provide equipment which (as D knew) the others intended should be used to effect an escape from prison. D claimed that although he intended to provide this equipment he did not intend to provide other assistance which he had purported to agree to, and did not intend that the escape (which he did not believe could succeed) should in fact eventuate. The question was whether on these facts D had the mens rea necessary for conspiracy contrary to section 1(1) of the Criminal Law Act 1977 (U.K.), which requires that a person agrees that a course of conduct "shall be pursued" which will involve an offence by one or more of the parties to the agreement "if the agreement is carried out in accordance with their intentions". In affirming D's conviction, the House of Lords concluded that in addition to the fact of agreement the prosecution had to prove an intention on the part of the accused, but that this did not have to be an intention that the agreed crime should in fact be committed, it being sufficient that he had intended to provide assistance. Lord Bridge summarised the decision by declaring that:[31]

> . . . beyond the mere fact of agreement, the necessary mens rea of the crime is, in my opinion, 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 furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required.

Their Lordships expressly held that a person could be guilty of conspiracy even though he did not have an "intention" that the criminal object should in fact be carried out. If may be thought, however, that under the English statute it will be necessary for at least one conspirator to have such an intention, at least in relation to acts necessary for the offence, for otherwise it is doubtful whether there could be an agreement that a criminal course of conduct "shall be pursued". This may also be the case at common law, and in New Zealand.

In *Anderson* it was said that the decision turned on the interpretation of the statutory definition of conspiracy, so it may be objected that it is of no authority in New Zealand, where there is no similar definition. But it is clear that the House would not have accepted that the common law imposed a more demanding requirement of intention for it rejected the accused's argument on the basis that, in view of the diversity of roles parties commonly agree to play in criminal conspiracies, Parliament could not have intended that those who agree to assist, but who are indifferent to the outcome, should escape liability. It may be added that it has long been the case that where there exists a single conspiracy having a number of crimes as its object, a person may sometimes be held to have joined that multiple object conspiracy even though he does no more than participate in one or more of the offences, knowing that he is thereby furthering the wider plan.[32]

The conclusion in *Anderson* that a conspirator must at least have intended "to play some part" in conduct in furtherance of the agreed criminal purpose calls for some further comment. First, it is difficult to see how the terms of the English legislation justify the proposition that a conspirator must *always*

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[31] Ibid., 965, the Court of Appeal had reached a similar view and alternatively thought D could be convicted as an aider and abettor of conspiracy. (1984) 80 Cr. App. R. 64; *quaere* whether it would suffice if the intention existed only after manifestation of the agreement, but before it was terminated: cf *Fagan* v *M.P.C.* [1969] 1 Q.B. 439.

[32] [1974] Crim. L.R. at 338-342; but the precise requirements for adherence to such a conspiracy remain rather obscure: e.g., *R.* v *Longworth* (1982) 67 C.C.C. (2d) 554.

intend to play an active role, and it seems unlikely that there is any such rule at common law. A person may express agreement to the pursuit of a criminal object, intending that it be achieved but not intending to do anything to further it (beyond his expression of agreement). It is thought that this is sufficient to make that person a conspirator.[33] Second, the House of Lords thought it was necessary that there be a requirement that the accused intended to play a part in furthering the conspiracy in order that the law should recognise the innocence of a person who enters such an agreement without intending to further it, "but rather with the purpose of exposing and frustrating the criminal purpose of the other parties to the agreement." But if this is the reason for the invention of the requirement that the accused "intended to play some part", there are at least two objections. First, the rule goes beyond the rationale, for it exempts those who do not intend to act but who are indifferent to what happens, as well as those who intend betrayal.[34] Second, the rule does not seem to be capable of achieving anything like its full object, for it does not exonerate a person who intends to play some part in furthering the criminal object, but who also intends to effect the betrayal and apprehension of the other parties, either before or after an agreed crime has been committed. There is some authority which suggests that, at least in relation to offences involving no irreparable damage, such a person is not liable to conviction as a secondary party or a conspirator, provided he participated only after the principal had formed an intention to commit the offence or, perhaps, was at least willing and available to commit it.[35] Another view is that such a person is technically guilty of an offence but should not normally be prosecuted or punished, and is not an "accomplice" for the purposes of the corroboration rule.[36] Undercover agents and informers will often have to be actively involved if they are to be effective, and if there is to be a reasonable and useful defence of the kind contemplated in *Anderson* it is submitted that it cannot be based on a supposed absence of intent, but should be recognised notwithstanding that such a person may have intended that the offence be committed, or that an intending offender be assisted.

IV Conclusions

Doubts remain as to the mens rea required for conspiracy. Multiple object conspiracies raise special and unresolved problems of definition. Apart from these, it is submitted that (assuming there is at least one other guilty party and that there is no question of impossibility or any other special defence) a person will be guilty of conspiracy if he intentionally manifests agreement with one or more other persons that an offence should be committed, and either intends that it be committed, or (at least when one of the other parties intends it) intends to do something which he knows or believes will further

[33] *R.* v *O'Connor* (1843) 4 St. Tr (NS) 935, at 1206; *R.* v *Gurney* (1869) 11 Cox 414, at 436–438. See [1974] Crim. L.R. at 338; some Canadian dicta suggest that D must "agree to do something": *R.* v *McNamara (No.1)*. supra, at 452–453; *R.* v *Randall and Weir* (1983) 1 D.L.R. (4th) 722, at 734; but see *Henderson and Panagaris*, supra, at 91.

[34] cf. *Thomson*, supra; but *quaere* whether such a person could be an abettor.

[35] E.g. *R.* v *Clarke* [1985] Crim. L R. 209; *R.* v *Mullins* (1848) 3 Cox 526; cf. *R.* v *Smith* [1960] 2 Q.B. 423.

[36] cf. *R.* v *Phillips* [1963] N.Z.L.R. 855; and for statutory protection of police officers from prosecution, see the Misuse of Drugs Act 1975, s.34A, and the Gaming and Lotteries Act 1977, s.125.

its commission. Also, it is submitted that it should suffice that such a person knew the "type" of offence which was the object of the conspiracy, or actually adverted to a number of types of offence and believed that one of these was intended, although it may be that a mere realisation that conduct is likely to assist the commission of a foreseen type of offence will not suffice for secondary liability or conspiracy.

There is a related point on which there is some uncertainty. Section 310(1) provides that it is an offence for anyone to conspire with another "to commit any offence", but it clearly suffices if one of the conspirators is to be the principal offender and the accused a secondary party. The position is not so clear when the agreement is to do something which the conspirators intend will assist someone who is not a party to the agreement to commit an offence. In England it may be that the modern legislation is such that such an agreement is not within the scope of the offence of conspiracy.[37] In *R.* v *Nirta*[38] one view of the facts was that the parties had agreed to prepare soil in order that it might later be made available to another for the cultivation of cannabis. The Federal Court of Australia left open the question whether this would be criminal conspiracy at common law or pursuant to legislation which is similar to section 310(1), but on the assumption that it was, and for reasons which are perhaps not clear, it regarded the distinction between such an agreement and one to which the intended cultivator was a party as one of substance. It may be doubted whether an agreement between A and B to abet or assist the commission of an offence by C involves an agreement to "commit" an offence, which section 310(1) requires, unless it can be regarded as conspiracy to commit the offence of incitement, contrary to section 311(2). Such an indictment might be possible, [39] although in New Zealand the terms of section 311(2) invite the argument that a party could not agree to such incitement unless he contemplated that the substantive offence would not in fact be committed. There may also be an objection in principle to such a charge. The offence of attempting to attempt is not recognised,[40] and a charge of conspiracy to conspire would be scouted. More generally, the definitions of the various inchoate offences have been developed independently in order to describe the potential range of "preliminary" guilt, and it might be thought wrong to combine them to extend further the scope of such liability.[41] In Canada an argument to this effect has been used to support the conclusion that there is no offence of attempting to conspire.[42] If accepted it might even be extended to support a rule that the usual principles of secondary liability should not apply to conspiracy, although such a principle has not been applied in respect of attempts.[43]

[37] Smith and Hogan, *Criminal Law* (5th ed) 234–235; *R.* v *Hollinshead* [1985] 2 W.L.R. 761 C A.; this point was left open in the House of Lords, where it was (without explanation) explained that there was no evidence of an agreement to abet or procure future offenders: [1985] 3 W.L.R. 159, at 168; cf. [1985] Crim. L.R. 302.

[38] (1983) 51 A.L.R. 53.

[39] See [1978] Crim. L.R. 218 and [1979] Crim. L.R. 178

[40] *R.* v *Thompson* (1911) 30 N.Z.L.R. 690.

[41] [1978] N.Z L.J. at 412.

[42] *R.* v *Dungey* (1979) 51 C.C.C. (2d) 86; cf. *R* v *May* (1984) 13 C.C.C (3d) 257; *R.* v *Katyszyn* (1949) 95 C.C.C. 261; *R.* v *Harris* (1927) 48 N.L.R. 330 (SA) allows such a charge, and in *R.* v *De Kromme* (1892) 66 L.T. 301, D was convicted of incitement to conspire.

[43] E.g. *R.* v *Baker* (1909) 28 N.Z.L.R. 536; and in *R.* v *Anderson* (1984) 80 Cr. App. R.

Finally, mention should be made of a procedural point which arose in *Gemmell*, but which the Court of Appeal found unnecessary to resolve. The trial judge had ruled that, the only count being for conspiracy to commit aggravated robbery, the accused could not be convicted of conspiracy to commit simple robbery, even if such an offence was proved. This involved a ruling that conspiracy to commit aggravated robbery is not a crime which "includes the commission of" conspiracy to commit simple robbery, within the meaning of section 339(1) of the Crimes Act 1961. This view was based on *R.* v *Barnard*[44] where D had been convicted of conspiracy to steal after trial on a charge of conspiracy to rob. His conviction was quashed after it was found that the jury had been misdirected as to the evidence admissible against him but, although in England (as in New Zealand) robbery includes theft, the court also expressed the view that the English statutory provision as to included offences was inapplicable. It said that it was wrong to think "that a conspiracy to steal is merely a lesser form of a conspiracy to rob. It is a different agreement. There has to be another agreement if a conspiracy to steal is to become a conspiracy to rob." This last sentence is doubtless correct but, with respect, it seems beyond argument that as a matter of definition every conspiracy to rob includes a conspiracy to steal, and every conspiracy to commit aggravated robbery includes a conspiracy to commit simple robbery (and to steal). It is submitted that section 339(1) should clearly apply upon proof of an agreement to commit the lesser offence. This is consistent with the established rule that an accused may be convicted of a conspiracy which is smaller in scope than that charged, because the jury acquits one or more of the alleged co-conspirators.[45] It is also supported by authorities to the effect that the accused may be convicted on a count which alleged a conspiracy with a greater number of objects than those proved.[46] The contrary view merely invites the prosecutor to clutter the indictment with alternative counts or to seek amendments in the course of the trial.[47]

64 the Court of Appeal held that a person could be convicted of conspiracy on the basis that he aided and abetted it

[44] (1980) 70 Cr. App. R. 28, [1980] Crim. L.R. 235.

[45] E.g. *R.* v *Quinn* (1898) 19 Cox 78; *R* v *O'Connell* (1844) 11 Cl. & F 155, at 236.

[46] *R.* v *Rankin* (1848) 7 St. Tr. (NS) 712, at 786; *O'Connell*, supra, at 258, 413; *R.* v *Ongley* (1940) 57 WN (NSW) 116; *R.* v *Graham* (1954) 108 C.C.C. 153; contra *R.* v *Maria* [1957] St. R Qd. 512. When more than two people were involved it may be a question of degree: see *R.* v *Gerakiteys* (1984) 153 C.L.R. 317.

[47] *Gemmell*, supra, at 502.