PRELIMINARY CRIMES: THE REFORM OF ATTEMPT AND CONSPIRACY IN PAPUA NEW GUINEA

MICHAEL NOONE*

If a Highlands man does his best to kill someone with an axe but succeeds only in cutting off an ear, then custom will demand compensation be paid for the loss of the ear, not for attempted murder. Generally speaking, attempts are not a separate category meriting punishment or leading to claims for compensation in Highlands systems of customary law.[1] Also, within each Highlands kin-group there is a mutual expectation of co-operation and aid and a mutual responsibility for decisions within the group. Kin-group solidarity is such that no compensatable "offence" equivalent to common law conspiracy has emerged.[2]

These tentative generalisations about New Guinea Highlands custom have nothing to do with the central purpose of the present article, which is to put forward certain proposals for the reform of Papua New Guinea law relating to attempt and conspiracy as found in the introduced Queensland Criminal Code.[3] For reasons explained below I am in favour of retaining

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* Senior Lecturer in Law, University of Papua New Guinea.

1 At least two exceptions to this generalization are necessary, *viz.* (a) attempted sorcery, see Strathern, M. *Official and Unofficial Courts*, New Guinea Research Bulletin No. 47, p. 31, case 2 "The poison suspects" and Strathern, M., *Women in Between*, (1972) p.175, and (b) attempted enticement of a wife away from her husband. The writer is indebted to Professor Andrew Strathern of the Anthropology Department, U.P.N.G. for this information.

2 Agreements made with outsiders to subvert the group (i.e. equivalent to common law treason) are regarded as serious customary "offences".

3 Criminal Code enacted in Queensland in 1899, adopted in Papua by the *Criminal Code Ordinance 1902* and in New Guinea from 9th May 1921 by the *Laws Adoption and Repeal Ordinance 1921*.

a category of preliminary crimes in Papua New Guinea, and I place these generalisations about Highlands custom at the beginning of this article simply as a reminder of the difficulties involved in applying even improved Code sections to the customary background in this country.

Attempt

(a) Should there be a preliminary offence of attempt in Papua New Guinea?

The best rationale for the law of attempt is that persons who threaten to commit acts forbidden by the substantive criminal law should be prevented and deterred, because they are, by reason of their intentions, a danger to society. The Anglo-Australian law of attempt, reflected in the Code, is a relatively modern invention, developed slowly in the 17th and 18th centuries to fill a serious gap in the criminal law.[4] Similarly, the efficient administration of criminal justice in Papua New Guinea in both urban and primitive areas requires a law of attempt.[5] And as already noted, even in an area where strict liability is the rule, the concept of liability for attempts is not completely foreign.[6]

Assuming then that we need some law of attempt, do we require a *general* law of attempt?[7] The alternative would

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4 Largely the invention of the Star Chamber. See Williams, G. *Criminal Law - The General Part*, (2d ed. 1961) pp.614 and 663 and Glazebrook, "Should we Have a Law of Attempted Crime?" 85 *L.Q.R.* 29 (1969).

5 In respect of urban areas, the writer admits that he bases the need for a law of attempt on his own observations in Port Moresby. Informal contact with Papua New Guineans in the suburb of Hohola, which has a fair economic range, indicates that these people strongly favour a law of attempt. In respect of the rural areas, it is interesting to note in this connection that in the *Report of the Committee Investigating Tribal Fighting in the Highlands* (1973), Recommendation 40 advocates a new preliminary offence of planning a tribal fight. The majority of members of this committee were indigenes.

6 See footnote 1 *supra*.

7 Recent controversy on this problem is found in Glazebrook, "Should we Have a Law of Attempted Crime?" 85 *L.Q.R.* 27 (1969).

entail the re-definition of most offences to include attempt to commit the offence. Of course, there are already provisions in several ordinances which provide for punishment of certain actions such as "being found in possession of housebreaking implements"[8] or "occupying the driver's seat of a car whilst intoxicated",[9] but these and similar minor offences are clearly not intended to cover all conduct that might amount to an attempt. They have been enacted to provide for the enforcement of law in situations where the general law of attempt is inadequate. The main problem with the present law of attempt is its excessive vagueness. A precise definition of all preparatory conduct that ought to be penalised would cure this difficulty and is the ideal, albeit highly complex solution.[10] The modest purpose of this section of the article is to suggest improvements to the general law of attempt, as defined in the Code and applied in the courts of Papua New Guinea.

(b) The Code and its interpretation

The first paragraph of section 4 of Papua New Guinea's Criminal Code attempts to define the crime of attempt:

> "When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence."

It has been argued that section 7 of the Commonwealth Crimes

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8 *Police Offences Ordinance* (Papua) s.4(2) (h) and (i) and *Police Offences Ordinance* (New Guinea) s.70(1) (j).

9 *Motor Traffic Ordinance* (PNG) s.9(1).

10 *Law Commission (England & Wales) Working Paper* No.50 Second Programme, item XVIII, *Codification of the Criminal Law: Inchoate Offences*, (1973) p.46 para 64 - where the feasibility of such a reform is doubted. See also "Commentary on the Working Paper", (1973) *Criminal Law Rev.* pp. 656-690.

Act, 1914-1966[11] and not section 4 of the Criminal Code governs the law of attempt in Papua New Guinea.[12] The authorities give some support to this view in respect of Papua but not in respect of New Guinea.[13] In all attempt cases heard by the Supreme Court of Papua New Guinea, judgments have referred only to section 4.[14] In any case, the Court's interpretation of the section 4 definition makes the source of law question purely academic. Section 7 does not define attempt, the result being that common law tests apply; whereas section 4 provides a definition, which had it been interpreted imaginatively might have resulted in a definition superior to that of the common law. The Supreme Court has adopted the view that section 4 simply states the common law and consequently has applied the unsatisfactory common law definition of attempt, which I shall now review.

(c) The *Actus Reus* of Attempt

The problem can be stated thus: At what stage in the preparation of a crime should there be criminal liability?

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11 "S.7. Any person who attempts to commit any offence against any law of the Commonwealth or of a Territory, whether passed before or after the commencement of this Act, shall be guilty of an offence and shall be punishable as if the attempted offence had been committed."

12 *Administrative College of Papua New Guinea Notes on Attempting to Commit Offences.*

13 See *R. Bernasconi* (1915) 19 C.L.R. 629 *Booth* v. *Booth* (1934/5) 53 C.L.R. 1, *Murray* v. *Brown River Timber Co. Ltd.* [1964] P.N.G.L.R. 167, *Bursep* [1963] P.N.G.L.R. 181 and esp. *Ebulya* [1964] P.N.G.L.R. 200.

14 Unreported decisions of the Supreme Court of Papua New Guinea judgment Nos. 1, 17, 22, 75, 138, 225, 312 and 472 and

Muar-Enk [1965/6] P.N.G.L.R. 64
Kopi-kami [1965/6] P.N.G.L.R. 73
Joseph Kure [1965/6] P.N.G.L.R. 161
Bavoro Dame [1965/6] P.N.G.L.R. 201
Bena-Forepe [1965/6] P.N.G.L.R. 329

(i) The "proximity" test

Kopi-Kami[15] illustrates the difficulties. The Crown's case was that the D had been seen carrying a shotgun, loading it and later going towards his house about twenty yards away still carrying the gun. At this time his wife, with whom he had quarrelled earlier in the evening, was inside the house. When the accused was only a few yards from the house, although not yet within sight of his wife, a policeman disarmed him and took him into custody. He was charged with attempting unlawfully to kill his wife.[16]

Mann C.J. in his ruling that there was no case to answer, applied the common law "proximity" test, which is, that before there can be an attempt there must be a step towards the commission of an offence that is immediately, not merely remotely, connected with the commission of it:

> "If the proximity rule is applied as a question of degree, then the accused was on any view very close in point of time and distance to a situation in which he would be ready to carry out his intention effectively, yet he clearly had several separate things to do and decisions to make in relation to them".[17]

The proximity test adopted by His Honour is not required by the terms of section 4.[18] The usual objection to the proximity test is its imprecision. No abstract test has ever been evolved for determining whether an act is sufficiently proximate to the offence to be an attempt, and it is difficult to know with any precision when there is the required proximity. However, the fatal objection to the test has been delivered by Working Paper No.50 of the Law Commission of England and Wales: application of the test works as an actual impediment to law enforcement.[19] To illustrate their opinion the Working

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15 [1965/6] P.N.G.L.R. 73.

16 S.4 with s.306 *Criminal Code*.

17 [1965/6] P.N.G.L.R. at p.77. The Queensland Supreme Court has also generally applied this test: see *Williams* [1965] Qd. R.86.

18 Discussion of this in (c) (v) *infra* "The substantial step test."

19 *Working Paper*, p. 51-52, para 73.

Party footnote three cases where the proximity test was applied. A precis of these cases makes the point:

> *Robinson*,[20] a jeweller, insured his stock against theft for £1500, concealed some on the premises, tied himself up with string and called for help. He told the police who broke in that he had been knocked down and his safe robbed. He confessed when the property was later found, but his conviction for attempting to obtain money by false pretences was quashed.
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> *Komaroni*[21] trailed a lorry for some 130 miles, even giving assistance to it when it broke down, awaiting a chance of stealing it and its £34,000 load; the court held that there was no attempt, only a continuous act of preparation.
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> In *Comer* v. *Bloomfield*,[22] the defendant drove his vehicle into a wood to hide it, and enquired of the insurers whether a claim would lie for its loss; the court decided that there was no attempt to obtain money by deception.

A test that permits acquittals in such cases is defective. The outcome in *Kopi-Kami*[23] is also disquietening. One of the main reasons for the law of attempt is to allow authorities to intervene in time to prevent commission of the substantive offence. But in this case, having quarrelled very seriously with his wife, having stated that he was going to kill her, D with a loaded shotgun and only a few yards to traverse before reaching his wife's house, was found not to have attempted an unlawful killing. How much further should D have gone to cross the line from preparation to attempt?

To conclude on the "proximity" test, I quote the acid

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20 [1915] 2 KB 342.

21 (1953) Law Journal Vol. 103 p. 97.

22 (1971) 55 Cr. App. R. 305

23 [1965/6] P.N.G.L.R. 73.

comment of Professor Howard on the inconsistencies resulting from its application:

> ". . . it is scarcely surprising that different courts come to different conclusions on similar facts. In both *Williams* (28) in Queensland and *Joseph-Kure* (29) in Papua New Guinea D was charged with attempted rape on the basis of a determined physical assault with the object of raping V. Each case came up in 1965 and in each exactly the same statutory definition of attempt had to be applied. The only factual difference of any note between the two cases was that in the course of the attack in *Williams* D had made an unsuccessful effort to remove his penis from his trousers, an action to which the court attached no particular significance in itself, whereas in *Joseph-Kure* D removed himself from V in order to take his trousers off. Yet in *Williams* D was convicted of attempted rape and in *Joseph-Kure* he was acquitted, being convicted of assault with intent to rape instead."[24]

(ii) The "last act" test

Section 4 of the Criminal Code states, ". . . it is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence." This clearly disposes of the "last act" or "final stage" test for which there is some authority in the English cases.[25] As its name suggests, this test would find that an attempt had taken place only when the defendant had performed the last act required of him towards completion of the offence.

The test is mentioned here because Mann C.J. in *Kopi-Kami*, implies that it may still be a useful aid in interpreting the

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24 Howard, C., *Australian Criminal Law* (2d. ed. 1971) p.297.

25 *Eagleton* (1859) 6 Cox C.C. 559 at p. 571. *Robinson* [1915] 2 KB 342. The writer dislikes all versions of this test for the reasons given in the text. It is not proposed to examine the subtle distinctions made between various "last act" tests.

Code.[26] In other cases the Supreme Court have condemned the test. In *Paita-Mireseika*[27] the accused was charged with attempt to have carnal knowledge of a bitch. The owner of the bitch and another gave evidence that the accused was kneeling, with his penis erect in near proximity to the rear of the bitch, which he was holding with his left hand under its back legs. Counsel for the accused argued that in the absence of evidence to show that the accused was trying to introduce his penis into the bitch's vagina, the case amounted at the most to evidence of preparation and not of attempt. This argument is equivalent to the last act test, and the Court rightly rejected it and convicted the accused. On a strict application of the last act test, attempted carnal knowledge or attempted rape would be impossible. Clearly the last-act test is over-restrictive and should not be re-introduced. It allows offenders to advance too far before intervention by the authorities can take place.

(iii) The "first stage" test

This test is inconsistent with the terms of section 4 of the Criminal Code, in that it seizes on the first overt act done towards the commission of the offence as the criterion. The German Penal Code offers a good example:

> "Anybody who manifests a decision to commit a felony or gross misdemeanour by acts constituting the commencement of the execution of such felony or gross misdemeanour, shall be punished for attempt if the intended felony or gross misdemeanour has not been completed."[28]

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26 [1965/6] P.N.G.L.R. 73 - by express reference at p. 76 and at p. 79 where His Honour says: "I must have regard to the consideration that there was yet time within which the accused might alter course, and that however firm his intention might have been several further decisions had to be made by him which would support that intention." In light of the facts of this case this statement comes close to the last act test in effect.

27 Unreported decision 1959, judgment No.138.

28 *German Penal Code* article 43(1) similar formulation in *French Penal Code* article 2.

The practical result of such a test is to reduce the *actus reus* element to almost nothing, placing the emphasis instead upon proof of intention. The danger of miscarriage of justice inherent in such an imbalance is obvious.

(iv) The "unequivocal act" test

This test requires that an act done by the defendant unequivocally demonstrate his intention to commit the relevant offence. The test was used in New Zealand from 1908 to 1961, but it was found to be too narrow in practice and was replaced by the proximity test.[29]

(v) The "substantial step" test

Section 4 of the Criminal Code requires not merely that the intention to commit an offence be manifest by some overt act, but also that *the intention itself be begun to be put into execution by a means adapted to its fulfilment*. An opportunity has been lost by the Queensland and Papua New Guinean courts in interpreting section 4 as a statement of the common law. The italicized words hold the key to a test superior to those

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29 *New Zealand Crimes Act* 1961, s.72:

> (1) Every one who, having an intent to commit and offence does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
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> (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.
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> (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

reviewed above. The Courts might have established general examples of acts which begin to put an offence "into execution by a means adapted to its fulfilment", such as:

- lying in wait for or searching out and following an intended victim;
- committing an assault for the purpose of the intended crime; or
- reconnoitring the place contemplated for the commission of the intended offence.

Numerous other situations could have been listed. Such a development of section 4 would have broadened the law of attempt along controllable lines and, at the same time, provided more precise guidance for inferior courts. This interpretation of section 4 would make the definition of attempt very similar to that in clause 52 of the Draft Criminal Code for the Australian Territories.

As presently interpreted, section 4 is imprecise on how far back from the completion of an offence one should extend liability. A completely precise test is doubtless unobtainable. However, repeal of section 4 and adoption of the test found in clause 52 of the Draft Criminal Code for the Australian Territories would be highly desirable:

> "Cl.52 When a person intending to commit an offence engages in conduct which is or which he believes to be a substantial step towards the commission of the offence, he is said to attempt to commit the offence".

The virtue of this test is illustrated by the examples set out in clause 53 of the Draft Code:

> "Cl.53. *Circumstances Constituting a Substantial Step.* Conduct constituting mere preparation for the commission of an offence may, according to the circumstances, amount to a substantial step within the meaning of section 52 of this Code and, without negativing the sufficiency of other conduct the following *may* be held sufficient in law to constitute a substantial step for the purposes of section 52 of this Code:
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> (a) lying in wait for, searching out or following the contemplated victim of the intended offence;

(b) enticing or seeking to entice the contemplated victim of the intended offence to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the intended offence;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the offence will be committed;

(e) possession of materials to be employed in the commission of the offence which are specially designed for such unlawful use, or which can serve no lawful purpose in the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the offence, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose in the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the offence."

It could be argued that clauses 52 and 53 give too broad a definition of attempt. However, the sets of circumstances are not mandatory but merely guides for the court, which would decide as a matter of law in each case whether the accused has taken a "substantial step". To further ensure that the test be sufficiently narrow and precise, I would suggest that the words, ". . . or which he believes to be . . ." in cl. 52, not be enacted in Papua New Guinea. The test of attempt should be entirely objective. In *Frank Etamu*[30] Bignold J. stated, ". . . [the question whether an overt act] could in law constitute an attempt is a question of law and consideration of the mental element involved only arises if that question of law has first been determined by the court in favour of the prosecution, because the mental element is a question of fact." I consider this the correct approach, and the reformed Code section should

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30 Unreported decision 1962, judgment No. 225.

specifically state that establishing the *actus reus* is a question of law, in terms similar to section 2(4) of the Tasmanian Criminal Code as this is not a settled point.[31]

(d) The *Mens rea* of Attempt

In *Joseph Kure*,[32] the accused, a domestic servant, entered the room of his employer a single woman, who at the time was sick and resting on the bed in her room. The accused, closing the door of the room, sprang at her, stabbing at her with a small pointed knife. A struggle ensued, in the course of which the knife was wrested from the accused, who then adopted a new tactic; he took up a position near the door and undid his trousers, which fell to his ankles. At this stage the screams of the accused's employer had caused a friend living in the same building to run up the stairs and call out that she would ring the police. The accused immediately opened the door and ran off. The accused was charged with indecent assault and in the alternative with attempted rape.

Counsel for the accused submitted that whilst it was clear that the accused wanted to have sexual intercourse with the complainant, he had formed no firm intention of having intercourse against her will, the requisite *mens rea* for rape. Frost J. accepted the principle that the mental element appropriate to the relevant substantive offence should apply to an attempt to commit it. This is a good general rule and should stand in any reformed definition of attempt.

More difficult problems have arisen in determining *mens rea*. In murder, for example, the mental element is defined in section 301 of the Criminal Code as "intending to cause death" and in section 302(1) as "intent to do . . . grievous bodily harm"; but in *Bena-Forepe*,[33] an attempted murder charge under

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31 Howard C., *Australian Criminal Law* (2d ed. 1971), p. 299. See also s.72 (2) *New Zealand Crimes Act*, footnote 29 *infra*.

32 [1965/6] P.N.G.L.R. 161.

33 [1965/6] P.N.G.L.R. 329.

section 306 Criminal Code,[34] it was held that the Crown must prove an intent to kill and not merely the intent sufficient under section 302.

Another and unresolved problem concerns the mental element required for an attempt to commit the substantive offence of recklessness. The authorities suggest that the accused must, at least, intend the consequences that would occur before the substantial crime were committed, irrespective of the *mens rea* required -- or not required -- for the substantive crime.[35] Since the present law requires purposeful anti-social conduct on the part of the accused before he can be convicted of attempt, the law reformer has two alternatives: he may define a lesser degree of purposeful conduct; or, he may throw open the doors to attempt by omission in the style of the drafters of the United States Model Penal Code.[36] Although I favour

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34 S.306. Any person who -
(1) Attempts unlawfully to kill another; or
(2) With intent unlawfully to kill another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life; is guilty of a crime, and is liable to imprisonment with hard labour for life with or without solitary confinement.

35 *Gardner* v. *Ackeroyd* [1952] 24 Q.B. 743.

36 *The American Law Institute Model Penal Code*

S.01 Criminal Attempt

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, in an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

the first alternative, it appears impossible to draft a general provision. The degree of intention and purposeful conduct required for an attempt to commit crimes of recklessness should therefore be specifically defined in respect of every such offence. Attempts to commit such offences should be removed from the general law of attempt.

Conspiracy

Conspiracy at common law is the agreement of two or more persons to effect any unlawful purpose. Conspiracy in the Queensland Criminal Code reflects the common law; it is certainly no less ambiguous:

> "*Section 541.* Any person who conspires with another to commit any crime, or to do any act in any part of the world which if done in Queensland would be a crime, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a crime, and is liable, if no other punishment is provided, to imprisonment with hard labour for seven years; or, if the greatest punishment to which a person convicted of the crime in question is liable is less than imprisonment with hard labour for seven years, then to such lesser punishment.
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> *Section 542.* Any person who conspires with another to commit any offence which is not a crime, or to do any act in any part of the world which if done in Queensland would be an offence but not a crime, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.
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> *Section 543.* Any person who conspires with another to effect any of the purposes following, that is to say -
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> (1) To prevent or defeat the execution or enforcement of any Statute law;
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> (2) To cause any injury to the person or reputation of any person, or to depreciate the value of any property of any person; or
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> (3) To prevent or obstruct the free and lawful disposition of any property by the owner thereof for its fair value; or

(4) To injure any person in his trade or profession; or

(5) To prevent or obstruct, by means of any act or acts which if done by an individual person would constitute an offence on his part, the free and lawful exercise by any person of his trade profession, or occupation; or

(6) To effect any unlawful purpose; or

(7) To effect any lawful purpose by any unlawful means; is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years."

(a) Should there be an offence of conspiracy in Papua New Guinea?

There should no longer be a general offence of conspiracy. Except in special cases, outlined below, it is not desirable that criminal liability attach to persons who do not get beyond the stage of agreement.

The most important rationale for conspiracy is that it enables the criminal law to destroy evil combinations at an earlier stage than that allowed by the law of attempt. I agree that combinations of criminally-minded persons may pose a more serious threat to society than does the criminal purpose of an individual. I would also agree that the absence in Papua New Guinea of criminal activity organised in Capone or Kray Brothers complexity should not lull us into a false sense of security. The issue is essentially that of individual liberty versus law and order, and I would suggest that the broadening of attempt outlined above would provide sufficient protection.

The present law of conspiracy is vague, a danger in that it enables courts easily to subsume novel sets of facts under the head of conspiracy. It is fortunate that the courts in Australia and Papua New Guinea have resisted the recent, amazing growth of criminal conspiracy in the House of Lords.[37]

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37 *Shaw* v. *D.P.P.* [1962] A.C. 220.
Knuller v. *D.P.P.* [1972] 3 W.L.R. 143
Bhagwan [1972] AC 60.

Since the authority of House of Lords decisions in Papua New Guinea depends on the interpretation of the Reception Ordinances,[38] it is doubtful that any present or future Supreme Court would regard House of Lords decisions as binding.[39] However, this does not remove the danger of a future Supreme Court of Papua New Guinea following the same road as the House of Lords. The danger is increased if Papua New Guinea continues to have no jury trial, as the jury provides some safeguard against oppressive conspiracy prosecutions.

If conspiracy is abolished as a general preliminary offence, then there should be created specific, closely defined statutory offences, relating to such matters as company frauds, where ten or more people have been involved in criminal activities at different times but pursuant to a common criminal agreement. The present Code sections 131, 132 and 430 should also be retained as special conspiracies. Cases such as *Iki Lida*[40] show that special and clearly defined

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38 See O'Regan, R.S., *The Common Law in Papua New Guinea* (1971) pp. 60-62.

39 The ruling on this point in *Parker* (1963) 111 C.L.R. 610 does not, of course apply to Papua New Guinea.

40 Unreported decision 1973, judgment No.764. This was a case where two persons wanted by the police in connection with tribal fighting agreed with two other persons that they should stand trial in their place. The substitutes received consideration, in the form of payment of council tax. The accused pleaded guilty to a charge of "conspiracy to defeat justice" under s.132. In passing a light sentence of 6 months, Wilson, A.J. said, "I take into account the fact that the traditional system of social control in New Guinea differs from the system of social control in Australia. Social relationships based on kinship and materialism have had for this defendant a greater importance than questions of universal moral duty. I accept that this defendant has had to think in terms of two radically different systems. I accept that he may have found it difficult to understand a legal system based on moral obligations and impartial justice emphasising the nature of the wrong rather than the sliding scale system according to the relationships involved. I must therefore be flexible and understanding. I must be sensitive of the fact that a British system of justice is being adapted to the conditions and modes of life of indigenous people. This defendant as an indigenous person should not be punished without the fullest consideration being given to all his circumstances including his native background, his mode of life and the customs applicable to him."

conspiracy sections are justified. To meet the special law and order needs of Papua New Guinea, it may be necessary to enact special conspiracy provisions to combat combinations based on tribal and clan loyalties where these pose a definite threat to the peace.[41]

(b) Reform of the present law

If a general preliminary offence of conspiracy is retained how should it be reformed?

Sections 541 and 542 limit the definition of conspiracy to the commission of a conspiracy to commit a criminal offence. Section 543 is much wider and in sub-sections 6 and 7, makes it an offence, "to conspire with another to . . . effect any unlawful purpose", or to . . . "effect any lawful purpose by any unlawful means". In light of the width and vagueness of sub-sections 6 and 7, sub-sections 1 to 5 appear redundant. I would advocate the repeal of section 543. If general conspiracy is to remain, it must be restricted to the commission of substantive criminal offences. It is ludicrous that persons can be punished for agreeing to do something which, if done, would attract no penal sanction whatsoever.

Problems Common to Attempt and Conspiracy

(a) Joinder of counts

In jurisdictions with juries it is often said that the practice of joining a count for conspiracy with counts charging substantive offences alleged to be the object of the conspiracy is unfair to the accused.[42] The joinder allows evidence to be given that is relevant to the conspiracy count, but which may have a prejudicial effect on the accused in relation to one or more of the substantial counts. This, of course would be a problem for Papua New Guinea only if jury trials were introduced. Another reason why such joinder of counts is obnoxious

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41 *Report of Committee Investigating Tribal Fighting in the Highlands* (1973) at paras 122-123.

42 See for examples: *Dawson* [1960] 1 W.L.R. 163 and *Griffiths* [1966] 1 Q.B. 589.

is well summed up by Minogue J. (as he then was) in the case of *Pointon and Constable*.[43] The accused were two dishonest employees of the Port Moresby Freezing Company. Over a period of several months they stole a large quantity of timber from their employers. They were both charged on two counts, with stealing and with conspiring together to steal timber. The elements of stealing were clearly made out and they were convicted on this charge. In respect of the conspiracy charge it is worth quoting Minogue, J. at length:

> ". . . this case has been so bedevilled and confused by an attempt by the Crown to prove some wider and larger conspiracy that I feel I should say something about it . . . Early in this trial I asked the learned Crown Prosecutor if he would indicate with more precision what the conspiracy was and he stated it to be to steal as much timber from P.M.F. as Pointon and Constable were able . . . It may be that the real agreement was that each would direct a blind eye to what the other was doing and there seems to be a lot of internal evidence in the admissions made to lead to the adoption of that view. At most based on each man's admissions there can be deduced an agreement to steal some timber and in some way share the proceeds but I would not be prepared to find in any detail how far that agreement extended or what timber is covered. I understand that each man is facing charges in relation to the timber admittedly sold by him and I am afraid that I still cannot see the point of spending a week in considering this charge of conspiracy."

These remarks are apposite. It is a favourite tactic of prosecutors to use conspiracy as a "catch-all" offence, which greatly adds to the length and complexity of trials. In such circumstances the judge should be compelled by statute to require the prosecution to elect the charge it wishes to proceed upon before the trial begins.

No such objection to joinder applies to attempt prosecutions. *Albert*[44] is a good example of a case where, though

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43 Unreported decision 1968, judgment No. 488A.

44 Unreported decision 1953, judgment No. 1.

not all the elements of the substantive offence had been made out, the accused was convicted of attempt. Eginton had purchased from the Commonwealth government rights to collect war-junk in the Port Moresby area. The accused was discovered with a large amount of scrap-metal collected from old munitions dumps. He was charged with stealing and with attempt to steal. It was held that he could not be guilty of stealing because there was no asportation. It was not possible to fix the exact moment when the accused conceived the intention to take away the property except from the moment he marked and sealed the containers for scrap, and these overt acts did not support a charge of stealing. Nevertheless, the fact that the accused had obtained customs clearance for the containers and their contents and had marked and arranged them for shipment was held to support a conviction for attempt to steal. If the prosecution were forced to elect between the substantive and preliminary offence in such cases, it would be faced by a real quandary.

(b) Attempting or Conspiring to do the Impossible

There should be no liability for a preliminary offence where there is no substantive crime except in the mind of the accused. Although this may seem obvious the rule was fully established only in March 1973 in the case of *Smith*.[45] In that case, a large quantity of corned beef was stolen from a wharehouse in Liverpool. Ten days later police discovered part of the proceeds of the theft in a lorry on its way to London. The police decided to set a trap. They let the lorry continue, with police officers on board and a police car trailing. The lorry was eventually met by the accused who was responsible for the transfer of the goods to other vehicles. After a time the police officers revealed their identity and arrested the accused. Although the accused did not know it, the corned beef had, by virtue of s.24(3) Theft Act 1968, ceased to be stolen goods at the time they had come into the custody of the police. Therefore the accused was charged with attempted handling of stolen goods instead of with the substantial offence. There was no doubt about the accused's moral guilt; he had planned and carried out a course of action in the belief that what he was doing was a criminal offence. Nevertheless his appeal from conviction was allowed on the grounds that there was no substantive crime with which he could have been charged. It is interesting to note that there is a recent United States

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45 *Smith (Roger Daniel)* [1973] 2 All ER 896.

case where, on identical facts, the accused was convicted.[46] *Smith*'s case is a new departure, but it provides the only logical solution to this problem.

Section 4 Criminal Code provides:

> ". . . it is immaterial, except so far as regards punishment, whether the complete fulfilment of his intention is prevented by circumstances independent of his will . . . it is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence . . ."

The sweep of these words seemingly exclude the defence of impossibility in all but *Smith*-type cases. It is a sound principle that the inadequacy of the means used by the accused (for example, D intending to kill V, administers a substance that D believes to be poison but which is in fact harmless) should not prevent his conviction for attempt. Similarly, if the object is unattainable (for example, D fires shots into something he believes to be V but it is in fact only a block of wood), it should make no difference.

The part of s.4 dealing with impossibility is vague. A more detailed and satisfactory drafting is to be found in Working Paper No. 50.[47] Whatever rule is adopted on the defence

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46 *People of the State of California* v. *Rojas* (1961) 10 Cal. Rptr. 465.

47 *Law Commission of England and Wales Working Paper* No.50 p.98: We propose that -

(i) A person may be guilty of an attempt to commit a crime notwithstanding that the means by which the crime is intended to be committed would in fact be inadequate for the commission of the crime.

(ii) A person may be guilty of an attempt to commit a crime notwithstanding that -

(a) the person in respect of whom the crime is intended to be committed is dead, does not exist or does not possess a characteristic which the person believes him to possess (necessary for the crime);

(b) the property in respect of which the crime is intended to be committed does not exist or does not possess a characteristic which the person believes it to possess (necessary for the crime).

of impossibility, it should be applied to all preliminary offences.

(c) Withdrawal from an attempt or a conspiracy

D decides to break into a store. He climbs onto the roof, puts an iron bar under a skylight, but then changes his mind and goes home.

At present s.4 allows no withdrawal defence in attempt prosecutions. At most, withdrawal may be taken into account in passing sentence.[48] Withdrawal should be an acceptable defence. The United States Model Penal Code provides a satisfactory example:

> *Section 5.01*
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> (4) *Renunciation of Criminal Purpose.* When the actor's conduct would otherwise constitute an attempt under Sub-section 1(b) or 1(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.
>
> Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if

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48 S.538. When a person is convicted of attempting to commit an offence, if it is proved that he desisted of his own motion from the further prosecution of his intention, without its fulfilment being prevented by circumstances independent of his will, he is liable to one-half only of the punishment to which he would otherwise be liable. If that punishment is imprisonment with hard labour for life, the greatest punishment to which he is liable is imprisonment with hard labour for seven years.

it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

Section 5.03

(6) *Renunciation of Criminal Purpose.* It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

It is sound public policy to encourage conspirators and attempters to withdraw -- and to inform on their partners in crime, but, at the moment, informants run the risk of prosecution.

(d) Penalties

(i) Attempts

The Criminal Code provides:

S.536. *Punishment of attempts to commit crimes.* Any person who attempts to commit a crime of such a kind that a person convicted of it is liable to the punishment of death or of imprisonment with hard labour for a term of fourteen years or upwards, with or without any other punishment, is liable, if no other punishment is provided, to imprisonment with hard labour for seven years.

Any person who attempts to commit a crime of any other kind is liable, if no other punishment is provided, to a punishment equal to one-half of the greatest punishment to which an offender convicted of the crime which he attempted to commit is liable.[49]

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49 The Criminal Code in Papua and in New Guinea has never been amended to remove the death penalty as was done in Queensland in 1922.

> S.537. *Punishment of attempts to commit misdemeanours.* Any person who attempts to commit a misdemeanour is liable, if no other punishment is provided, to a punishment equal to one-half of the greatest punishment to which an offender convicted of the offence which he attempted to commit is liable.

This constitutes a considerable change from the common law where it was possible for the punishment for attempt to exceed the maximum for the substantive offence. The injustice of the common law on this point was recognized by Lord Goddard C.J. in *Pearce*,[50] where his Lordship ruled that in future, if an Act of Parliament prescribes a definite term of imprisonment as the punishment for an offence, courts could not impose a longer sentence on a person convicted only of attempt to commit that offence. The Criminal Law Act 1967 (U.K.) has given statutory force to this decision.

The "one-half maximum" rule that presently applies in Papua New Guinea fails to take into account situations like an attempt frustrated at the last moment. Such attempts are almost as dangerous to society as the completed offence. It would be more realistic if the courts were given power to impose *two-thirds* of the greatest punishment for which an offender, convicted of the substantive crime or misdemeanour, would be liable.

(ii) Conspiracy

So long as conspiracy remains an offense, there seems no reason to change the present Code penalty for conspiracy to commit a crime:

> "Imprisonment with hard labour for seven years; or if the greatest punishment to which a person convicted of the crime in question is liable is less than imprisonment with hard labour for seven years then to such lesser punishment."[51]

The common law at this point is very different. An illustrative case is that of *Morris*[52] where the prisoner was indicted for

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50 [1953] 1 QB 30.

51 S.541.

52 [1951] 1 KB 394, see also *Blamires* [1964] 1 QB 278.

conspiracy to smuggle goods; a sentence of 4 years imprisonment was upheld for conspiracy to contravene the customs laws, although two years was the maximum imprisonment provided for the contravention of these laws. The 100 percent bonus punishment was, to say the least, unfair. Maximum penalties are set by the legislature to cover the very worst manifestations of substantive offences. They should therefore suffice for conspiracies to commit the same offences.

Summary of Proposals

1. There should be a preliminary offence of attempt in Papua New Guinea.

2. The *actus reus* of attempt should be defined as conduct that is a substantial step towards the commission of the substantive offence.

3. The ordinance should list a series of model "situations" or substantial steps for the guidance of courts in applying the test in paragraph 2 above.

4. The *mens rea* of attempt should be identical with the intention appropriate to the relevant substantive offence.

5. In respect of the offence of attempted murder, the Crown should be required to prove intent to kill and not merely an intent sufficient to render a person responsible for murder as defined by section 302 of the Criminal Code.

6. The degree of *mens rea* and *actus reus* required for an attempt to commit crimes of recklessness should be defined specifically for each such offence. Attempts to commit such offences should be removed from the general law of attempt.

7. The general law of conspiracy in Papua New Guinea should be abolished.

8. Certain closely defined special conspiracy offences should be retained.

9. If retained, then general conspiracy should be confined to agreement to commit a criminal offence. Section 543 of the Criminal Code should be repealed.

10. The practice of joining a count for conspiracy with counts for the substantive offences alleged to be the object of the conspiracy should be prohibited.

11. The defence of impossibility should be available in respect of preliminary offences only where the accused is mistaken as to law.

12. Withdrawal from an attempt or a conspiracy should be an absolute defence.

13. The maximum penalty for attempt should be raised from one-half to two-thirds of the greatest punishment for which an offender convicted of the substantive offence is liable.