

A Basic Introduction to the Crime of Conspiracy by Sarah Jane Lewis

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Conspiracy is derived from the phrase 'con spirare' which literally means 'to breathe together'. In most simple terms, conspiracy can be defined as "an agreement between two or more persons on course of conduct that will culminate in the commission of a criminal offence".^[1] Its ultimate *raison d'être*, therefore, is to try and deter, as much as possible, crimes from being commenced and then consummated. Although the intentions are rational, it is not a crime without controversy.^[2]

Despite its relatively recent entry into the criminal statute books one has to point out that the notion of conspiracy in our Criminal Code dates back several years but was merely limited to conspiracy against the safety of the Government. In 2002^[3] conspiracy was thus extended to all type of crimes except crimes under the Press Act.

Article 48A (1) states:-

(1) Whosoever in Malta conspires with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta liable to the punishment of imprisonment, not being a crime in Malta under the Press Act, shall be guilty of the offence of conspiracy to commit that offence.

The wording immediately suggests that the crime of conspiracy can only subsist insofar as an agreement between two or more persons (that is, a plurality of persons) to commit a crime exists. In fact, Article 48A (2) of the Criminal Code states that:-

(2) The conspiracy referred to in subarticle (1) shall subsist from the moment in which any mode of action whatsoever is planned or agreed

upon between such persons.

Because the Maltese concept of conspiracy is heavily derived from English jurisprudence it would be practical to make reference to English case-law on the matter. Indeed, one of the first cases to deal with conspiracy was the **Poulterers' Case** of 1611^[4] which emphasized the existence of an agreement between two or more persons as the essence of the crime of conspiracy.^[5] Whether the common plan between the conspirers succeeded or not was irrelevant. The agreement is therefore essential, for it is the 'actus reus' necessary for the consummation^[6] of the crime.^[7] However, as can be noted from Article 48A (2) cited above, unlike the English scenario, where a mere agreement to commit a criminal offence is sufficient, Maltese law demands something more, namely that there is an agreement as to 'any mode of action'.

Although the criminal law does not punish the intention alone, it does punish the intention which is manifested externally; in this case in an agreement. There is no need for the persons to meet physically. Correspondence by letters or by e-mail is sufficient. Furthermore as stated in the local judgment **Rex vs Carmelo Borg Pisani** of 1942 the parties do not need to know each other, it is only the agreement which is the defining factor. Neither is it required that the parties consent to the agreement at the same time. Thus, there can be instances of so-called chain conspiracy whereby person A may communicate with person B, who then communicates with person C and so on. Each person involved is legally accountable and responsible for the actions of everyone else in the chain, even if they never met each other. On the other hand, in a wheel conspiracy there is one central figure, the hub, who conspires with several others, the spokes. A prime example of a wheel conspiracy may be seen in **R v. Griffiths** of 1965^[8] where it was said that if any individual, though ignorant of the details of others concerned in the conspiracy, knows that there are others and that the activity in which he takes a part extends beyond his own dealings with the person at the centre of the conspiracy, then the evidence discloses one single conspiracy.

An agreement in the context of conspiracy is the mutual understanding on what is to be done; the acceptance that the parties will actually carry out a particular act or acts which is or are illegal. The parties must have reached a definite conclusion. The subject-matter of the agreement involves the details of the crime that is to be conducted; the time, place, corpus delicti, etc. In order for conspiracy to be punished the plan of the conspirators has to be complete and detailed such that next step would actually be the commission of the crime.

Article 48A(2) indeed has given a lot of problems to lawyers as the wording is a bit confusing. The words 'any mode of action' does not

mean that any detail in the plan would constitute conspiracy but it refers to the modus operandi, i.e. what illegal actions the parties are going to commit. It is irrelevant if the parties agree to commit something impossible - they would still be guilty of conspiracy as the actus reus is the agreement or plan. Besides, if the parties conspired to commit an offence which they did not know that it was illegal it cannot be held to excuse or absolve them for according to the salient Latin maxim, 'ignorantia legis neminem excusat'.

Besides the agreement and the mode of action another essential prerequisite in the Maltese Criminal Law is the common design of the conspirators that the offence be committed and the common result that they wish to achieve. Smith and Hogan make the argument that if two persons conspire and one of them has the intention to kill D and the other to rape D then the conspiracy would be punished on one offence.^[9] However, in Malta this is not applicable because if there is no common design or no common result than there is no conspiracy.

When dealing with Article 48A (1) one has to note that the notion of conspiracy under this article is not extra-territorial in nature. It starts by stating 'whoever in Malta conspires...'. In fact Minister Tonio Borg in Parliamentary Sitting No.96 argued that it is important to try to give penal law territorial application only. He continues by stating that it would be rather "far fetched" to punish two people who are in "New Zealand" who conspire to do an unlawful act in Malta. Thus, for the courts to be able to have jurisdiction over the offence there must exist:-

- 1 An agreement between two or more persons in Malta on a crime or crimes to be committed in Malta.
- 2 An agreement between a person or persons in Malta and a person or persons outside Malta on a crime or crimes to be committed in Malta.

However, the English Law is rather different in this approach. The U.K. Courts are deemed to have jurisdiction both when conspiracy in the U.K. is directed towards an offence in another country and also when conspiracy abroad is directed to U.K. Is it rather problematic however, that an act of conspiracy which takes place in Malta but directed to another country cannot be punished by the Maltese Courts.

The punishment for conspiracy is determined by Article 48A (3) which states that:-

(3) Any person found guilty of conspiracy under this article shall be liable to the punishment for the completed offence object of the conspiracy with a decrease of two or three degrees.

Therefore, if the conspirators agree to commit willful homicide they will be liable to punishment applicable to willful homicide, this being life imprisonment, but diminished by two or three degrees. However, in accordance with Article 48A (4), certain aggravating circumstances,

such as when one of the conspirators is a public official (e.g. a police officer), may increase the punishment.

[1] M. Molan, Sourcebook on Criminal Law, (2nd edn, Cavendish Publishing Limited, 2001) pg. 443.

[2] Reference is made to certain cases where persons were indicted under the offence of conspiracy for offences which do not exist (e.g. when an imported narcotic forming the subject-matter of the alleged offence is not prohibited by law). In this light has been alleged the principle "innocent until proven guilty" has been turned on its head into "guilty until proven innocent". See R. Vassilo, Conspiracy theory, www.maltatoday.com.mt, <<http://archive.maltatoday.com.mt/2009/12/27/t6.html>> accessed on 09/11/2010.

[3] Refer to Act III of 2002.

[4] Poulterers' Case, 77 Eng. Rep. 813 (K.B. 1611) (Coke).

[5] See also R v Chastny [1991] 1 WLR 1381 which held that "...the essence of conspiracy is the agreement to do an unlawful act".

[6] 'Consummation' in this respect refers to the act of completion or fruition.

[7] Under the Italian Law the mere agreement to commit an offence is not punishable, except in certain circumstances.

[8] R v Griffiths [1965] 2 All ER 448, [1966] 1 QB 589.

[9] D. Omerod & J. Smith, Smith and Hogan Criminal Law: Cases and Materials (Oxford University Press, 2009).