

CLARIFYING IMPOSSIBLE ATTEMPTS AND CRIMINAL CONSPIRACIES

This article examines the conceptually difficult issue of impossibility in relation to the criminal law of attempt and conspiracy. It proposes a scheme to explain leading cases on attempting the impossible, and suggests the proper approach to be taken for cases involving impossible conspiracies.

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I. Introduction

1 Impossibility is sometimes pleaded in answer to a charge of attempt, with the accused contending that the facts were such that it was impossible for him or her to complete the offence no matter how hard he or she tried. Similarly, persons charged with criminally conspiring to commit an offence could plead that what they had agreed to do was impossible to achieve so that the charge should be dismissed. These pleas of impossibility are not strictly defences requiring proof by the accused, and this is confirmed by their absence from Chapter IV of the Penal Code which provides for the General Exceptions. Rather, such pleas seek to negate an offence element by contending that the impossibility rendered absent an “attempt” or “conspiracy” to commit an offence. Accordingly, the prosecution must prove beyond a reasonable doubt that the attempt or conspiracy was in fact not impossible to achieve if the plea was put in issue.

2 The ensuing discussion will commence with impossible attempts, followed by impossible criminal conspiracies. It may be helpful to declare at the outset my view concerning the concept of impossibility as a ground of exculpation. It is that a proper appreciation of the concept and its place in the law of attempt and conspiracy will lead to the conclusion that impossibility does not exculpate an accused of criminal liability for attempt or conspiracy.

II. Impossible attempts

3 The primary Penal Code provision on attempt is s 511. The provision does not itself cover the issue of impossibility, leaving it to the illustrations accompanying the provision to do so. The provision and illustrations read as follows:

Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence:

Provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence.

Illustrations

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

It is observed that s 511 does not clearly stipulate the requirements needed to make a situation one of impossibility, nor does the provision reveal whether there may be types of impossibility which would acquit rather than convict an accused of an attempted offence. The task has been left to our courts to clarify these matters. The dearth of local cases on impossible attempts necessitates reference to Indian case authorities.

A. *Historical and theoretical perspectives*

4 It is clear from the illustrations to s 511 that the Code framers regarded people who would have completed an offence but had failed due to some physical (that is, factual) impossibility, to be criminally liable for the attempted offence. The English common law takes the opposite view in providing for physical impossibility to exculpate an accused charged

with the attempted offence.¹ Accordingly, English common law authorities have no role to play in the discussion of impossible attempts under the Penal Code.

5 The issue of impossibility needs to be situated within the underlying rationale of punishing people for attempted offences. Attempts are inchoate (or embryonic) offences where no harm to society has been done but which society regards as necessary to deter people from trying to commit crimes which they would have achieved but for some extraneous or accidental reason. Since criminalising attempts impinges on the freedom of individuals who have not actually caused harm, the scope of criminal liability for attempts must be kept within narrow limits.² The relevance of this observation for impossible attempts is that stringent requirements are needed which attest to a high degree of blameworthiness on the accused's part before he or she should be convicted and punished for conduct which a court has determined to be impossible of causing harm.

B. Impossible, inept and incomplete attempts

6 The concept of impossibility has conventionally been categorised into physical and legal impossibility. In cases of physical impossibility, some extraneous factual circumstance makes it impossible for an accused to achieve the result, whatever means he or she adopts. The illustrations to s 511 are examples of this type of impossibility. The consequence of physical impossibility is that the accused is liable for the attempted offence. In cases of legal impossibility, the result the accused intends, if achieved, will not be the crime he or she believed would be committed. An example is where the accused had taken his own umbrella from a stand thinking that it belongs to another person.³ Whether the accused should be guilty of attempted theft is very much dictated by public policy.⁴ On one view, the accused should not be guilty because it would

1 See the leading House of Lords decision in *Haughton v Smith* [1975] AC 476 and case authorities cited there. For a critical appraisal of the English common law, see JC Smith, "Two problems in Criminal Attempts Re-examined – II" [1962] Crim LR 212; G Williams, "Criminal Attempts – A Reply" [1962] Crim LR 300.

2 See *Chua Kian Kok v PP* [1999] 2 SLR 542 at [30]–[31] which observation resulted in the Singapore High Court ruling that attempts require an accused to have "intended to commit the offence charged even though a lesser mental state would have sufficed for the completed offence".

3 This example is taken from *R v Collins* (1864) 9 Cox CC 497.

4 Koh Kheng Lian, "Trends in Singapore Criminal Law" in *Review of Judicial and Legal Reforms in Singapore* (Singapore Academy of Law, 1996), 318 at 354.

amount to punishing him for merely having a guilty intention. The opposing view is that the accused should be punished to promote deterrence. The former view is subscribed to by the English common law⁵ while the latter view has been adopted by the Singapore High Court.⁶ For completeness, there is a third type of case where the non-criminality of the intended offence prevents the accused from being convicted of any offence. An example is where a foreign tourist has sex with a 19-year-old Singaporean girl erroneously believing that it is a crime to do so on account of her youth.⁷

7 A person may also have failed to accomplish the completed offence because of his or her own ineptitude. An example is where a person tries to break open a safe with a jemmy which is too small for the task.⁸ Whether or not the accused is liable for the attempted offence will depend on the proximity⁹ of the accused's conduct to the completed offence. Liability will be made out if the accused's conduct was "immediately and not remotely connected with the crime"¹⁰ or was shown to have "embarked on the crime proper".¹¹ Cases involving ineptitude are not really cases of impossibility because there were means available to the accused to complete an offence recognised by law.¹² Thus, in the example given earlier, it was possible for the safe to be prised open with a larger or stronger jemmy, the use of explosives or by a safecracker.

8 It may be observed that cases of impossible attempts and inept attempts have in common the fact that they constitute "complete but imperfect attempts"¹³ in that the accused has done all that he or she had set out to do. This category of attempts is to be contrasted with "incomplete attempts"¹⁴ where the accused does some but not all the acts he or she had intended to do. For the purposes of this discussion, these

5 *R v Shivpuri* [1987] 1 AC 1.

6 *Chua Kian Kok v PP supra* n 2, at [44].

7 This example is taken from *Chua Kian Kok v PP supra* n 2, at [43]. See also *R v Taaffe* [1983] 2 All ER 625.

8 This example is taken from *Chua Kian Kok v PP, ibid.*

9 *PP v Zainal Abidin bin Ismail* [1987] 2 MLJ 741.

10 *Thiangiah v PP* [1977] 1 MLJ 79 at 81.

11 *Chua Kian Kok v PP, supra* n 2, at [36].

12 But see *Chua Kian Kok v PP supra* n 2, at [45] where Yong Pung How CJ regarded these cases as a type of impossible attempt. See also Koh Kheng Lian, C Clarkson and N Morgan, *Criminal Law in Malaysia and Singapore. Text and Materials*, (Malayan Law Journal, 1989), p 281.

13 See Chan Wing Cheong, M Hor and V Ramraj, *Fundamental Principles of Criminal Law. Text and Materials* (LexisNexis, 2005), p 653.

14 *Ibid.*

latter types of cases clearly do not involve the concept of impossibility and no more needs to be said of them.

C. *A proposed scheme*

9 An examination of the few available cases on impossible attempts shows that the law is in a highly unsatisfactory state with no less than three, perhaps more, distinct approaches to determining whether or not an accused should be held criminally liable. One approach is based on the distinction between physical impossibility (liable) and legal impossibility (not liable).¹⁵ Another makes liability dependent on whether the attempt failed because of a factor independent of the accused (liable) or whether it was due to the accused's own conduct (not liable).¹⁶ A third approach is to distinguish between conduct which would normally result in the intended offence (liable) and conduct which would not under any circumstances (not liable).¹⁷

10 At the risk of being criticised for creating yet another approach, it is submitted that clarity and coherence in the law will be achieved were our courts to adopt a particular form of definition of impossible attempts. Better still would be for legislature to enact a provision which embodies this proposed scheme. With this in mind, the scheme is cast in terms of a Code provision:

A person is guilty of attempting to commit an offence if all of the following conditions are met:

- (1) he or she intended to commit the offence;
- (2) he or she did everything that was required for the completion of the offence; and
- (3) the completion of the offence was made impossible by facts not known to him or her or because of circumstances beyond his or her control.

Explanation

The person's conduct must have been physically capable of completing the offence but for the impossibility stated in condition (3)

15 See *Munah binte Ali v PP* (1958) 24 MLJ 159 and *Queen Empress v Mangesh Jiva'ji* (1887) ILR 11 Bom 376 as interpreted by Koh Kheng Lian, Clarkson and Morgan, *supra* n 12, p 286.

16 *Munah binte Ali v PP*, *supra* n 15; *Asgarali Pradhania v Emperor* (1933) ILR 61 Cal 54.

17 *Queen Empress v Mangesh Jiva'ji*, *supra* n 15.

Condition (1) merely adopts the current law regarding the fault element required of attempts generally.¹⁸ A proper understanding of condition (2) is critical to the operation of the scheme, justifying the inclusion of the explanation for further clarification and added emphasis. If condition (2) is not satisfied, the case falls outside the scope of the provision and is dealt with as a case of inept attempt.¹⁹ Assuming that condition (2) is satisfied, it is condition (3) concerning absence of knowledge or control which renders the case one of impossibility. This is because, if the accused had known of the facts or if the circumstances were within his or her control,²⁰ he or she would have been able to complete the offence²¹ thereby making the case no longer one of impossible attempt, or attempt generally for that matter.²² The reasons stated in condition (3) which prevents the accused from completing the offence are directly related to the degree of his or her blameworthiness. Such an accused deserves to be held criminally liable for the attempted offence since he or she came so close to completing the offence and was prevented from doing so only due to a lack of knowledge or circumstances independent of him or her. A person satisfying the three conditions of the proposed provision will have manifested such a high level of blameworthiness as to warrant criminal liability even when it was determined that the completed crime could not possibly be achieved, no matter what the accused did.²³ In passing, it is observed that the proposed scheme is wide enough to impose liability in cases of legal impossibility. Thus, in the example given earlier of taking one's own umbrella believing it to belong to another person, the accused would be guilty of attempted theft since all three conditions are met.

18 *Chua Kian Kok v PP*, *supra* n 2. See further *supra* n 2.

19 See para 7.

20 The clause "facts not known to him or her or because of circumstances beyond his or her control" under condition (3) is derived from the provision on attempt proposed by the Law Commission of India, 42nd Report, *The Indian Penal Code* (Government of India, 1971), para 5.54. The Commission's provision reads:

A person attempts to commit an offence punishable by this Code, when:

- (a) he, with the intention or knowledge requisite for committing it, does any act towards its commission;
- (b) the act so done is closely connected with, and proximate to, the commission of the offence; and
- (c) the act fails in its object because of facts not known to him or because of circumstances beyond his control.

This provision does not adequately distinguish cases of impossible attempts from other cases of attempts given the broad ambit of condition (b).

21 Since the accused would have satisfied condition (2).

22 This reasoning explains much more clearly the approach taken by some courts that the accused is liable if the impossibility was due to a factor independent of himself or herself: see para 9.

23 See para 5.

D. *Evaluating the cases*

11 The viability and attractiveness of the proposed scheme for impossible attempts may be tested by applying it to a number of actual cases and hypothetical cases. Assuming the correctness of the judicial conclusions²⁴ concerning liability for these real and hypothetical cases, the strength of the proposed scheme can be measured according to whether its conclusions are the same as those reached by the courts.

12 In the Calcutta High Court case of *Asagarali Pradhania v Emperor*,²⁵ the accused had given the complainant certain substances to procure a miscarriage. The miscarriage could not be accomplished because the substances were harmless. The court held that the accused was not liable for the offence of attempting to cause a woman to have a miscarriage under s 312 read with s 511 of the Penal Code. Applying the proposed scheme, condition (2) will not be satisfied because the accused had not done everything that was required for the completion of the offence. For that condition to be satisfied, the accused would have had to give the woman a substance which would have procured the miscarriage. Accordingly, the case was not one of impossible attempts but of inept attempts. Whether the accused should be guilty of attempt would be determined by the proximity of his conduct to the completed offence.²⁶ Conceivably, providing a woman with a harmless substance would not be sufficiently proximate so that the accused would be acquitted of the attempted offence. This accords with the conclusion of the court in *Asagarali Pradhania*.

13 The Malayan Court of Appeal case of *Munah binte Ali v PP*²⁷ involved the same charge as the one in *Asagarali Pradhania*. The accused had inserted an instrument into a woman's vagina in order to procure a miscarriage. However, the miscarriage could not be effected since the woman was not pregnant. The court held²⁸ the accused guilty as charged. My proposed scheme would arrive at the same conclusion since the accused had done everything required for the completed offence of miscarriage, satisfying condition (2). That the woman was not pregnant

24 These have been based primarily on judicial intuition as opposed to judicial reasoning which has been highly unsatisfactory: see para 9.

25 *Supra* n 16.

26 See para 7.

27 *Supra* n 15.

28 Whyatt CJ and Good J; with Thomson CJ dissenting.

was a fact unknown to him which was what made the circumstances one of impossibility, satisfying condition (3).

14 In the Bombay High Court case of *Queen Empress v Mangesh Jiva'ji*,²⁹ the accused had sent a fabricated petition to the Divisional Revenue Commissioner threatening to kill a certain forest officer if that officer were not transferred. The accused was charged with the offence of criminal intimidation under s 507 of the Penal Code, the relevant part of which states that “[w]hoever threatens another with any injury to ... the person ... of anyone in whom that person is interested, with intent to cause alarm to that person” shall be guilty of the said offence. The trial judge convicted the accused of attempted criminal intimidation after finding that the Commissioner was not so interested in the particular forest officer that a threat against the latter was likely to cause the Commissioner alarm. The accused appealed to the High Court which quashed the conviction. The court’s reasoning was that the facts were distinguishable from the illustration accompanying s 511 of attempting to steal from an empty pocket. Pockets usually contained something so that the pickpocket’s conduct normally resulted in the offence of theft. In contrast, since the Commissioner in the present case was incapable of being alarmed, the offence of criminal intimidation would not occur under any circumstances. With respect, this distinction is too fine and difficult to accept. The court’s reasoning is doubted as soon as one considers the possibility that the particular person holding the position of Commissioner might be replaced by someone who could be alarmed by the death threat to the forest officer. If the court could contemplate that pockets were normally full although this particular pocket was empty, why could it not also contemplate that some Commissioners might be alarmed by death threats to one of their officers although this particular Commissioner was not? It is submitted that the correct conclusion was reached by the Singapore High Court in *PP v Ketmuang Banphanuk*.³⁰ The court disagreed with the conclusion reached by the Bombay High Court in *Mangesh Jiva'ji*, opining instead that when the accused “issued the threat to the Commissioner, he attempted to commit intimidation. That the threat had no effect on him is no more significant than the fact that the ... pocket [was] empty”.³¹ My proposed scheme would have arrived at this same conclusion as the accused had done everything needed for the completed offence of criminal intimidation, thereby satisfying

29 *Supra* n 15.

30 [1995] SGHC 46; [1995] 1 CLAS News 338.

31 *Ibid*, per Kan Ting Chiu J.

condition (2). The reason why the completed offence failed to be accomplished was due to the fact, not known to him or beyond his control, that the particular Commissioner was not so interested in the forest officer as to be alarmed over the latter's personal safety.

15 The proposed scheme could be tested against two of the hypothetical cases appearing in the judgment of Lort-Williams J in *Asgarali Pradhania*. The first is of a person who, believing in witchcraft, places a spell on another or burns an effigy with the intention of causing him hurt.³² Lort-Williams J's conclusion that the person was not liable for attempted hurt would also be that reached by the proposed scheme. Condition (2) would not be satisfied since the accused's conduct was not physically capable of completing the offence. Consequently, the case would be dealt with as an inept attempt, with the very likely result that the accused's conduct would be found insufficiently proximate to the completed offence to warrant convicting him of the attempted offence. The second hypothetical is of A who, with intent to hurt B, prepares a glass filled with poison.³³ Unnoticed by A, C pours away the poison and refills the glass with water which A, in ignorance of what C has done, serves to B. Lort-Williams J opined that A was liable for attempting to cause hurt by administering poison. My proposed scheme would arrive at this same result since A had done everything physically capable of completing the offence but was thwarted by circumstances beyond his control in the form of C's harm-avoiding conduct.

III. Impossible criminal conspiracies

16 Criminal conspiracy is defined in s 120A of the Penal Code. The definition does not refer at all to the issue of impossibility, unlike the provision on attempt under s 511. It will be contended below that s 120A is correct in not affording any special significance to impossible conspiracies. So long as the parties had agreed to commit a crime, they are liable for criminal conspiracy irrespective of whether it was physically impossible for the crime to be completed by their chosen means of commission. Section 120A reads:

- 120A. When two or more persons agree to do, or cause to be done —
- (a) an illegal act; or

³² *Supra* n 16, at 60.

³³ *Ibid.*

(b) an act, which is not illegal, by illegal means,

such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation

It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Besides the above definitional provision, there is s 120B which is the punishment provision for criminal conspiracy.

A. *Historical and theoretical perspectives*

17 Section 120A was introduced into the Straits Settlements Penal Code, the predecessor of the Penal Codes of Malaysia and Singapore, in 1941.³⁴ That provision was borrowed from the Indian Penal Code which provision³⁵ had adopted the English common law definition of criminal conspiracy.³⁶ Given its common law origins, it will be appropriate to consider English cases on the issue of impossible conspiracies.³⁷

18 Conspiracy, like attempt, is an inchoate offence. While no harm has actually occurred, society through the criminal law is desirous of preventing harm by deterring people from agreeing to commit a crime, an illegal act or a legal act by illegal means. Under s 120A, the legal basis for police intervention before the harm materialises is nothing more than the relevant agreement insofar as conspiracies to commit a crime are concerned. For conspiracies to commit an illegal act or to do a legal act by illegal means, some act in furtherance of the agreement must also have been committed. The agreement remains the crux for criminalising conspiracies of this nature.

19 The controversy surrounding the issue of physical impossibility boils down to what the law regards as constituting an agreement. Confining our discussion initially to conspiracies to commit a crime or

34 Penal Code (Amendment) Ordinance, 1941 (Ordinance 12 of 1941).

35 Section 120A which was introduced by the Indian Criminal Law Amendment Act 1913 (Act No VIII of 1913).

36 *Mulcahy v R* (1868) LR 3 HL 306 at 317; *Quinn v Leatham* (1901) AC 495 at 528.

37 Discussed in para 22.

an illegal act, there are two opposing views concerning the composition of an agreement. The first regards the agreement as simply the common design of two or more persons to commit a crime or an illegal act. The second regards the agreement as also including the means to be used to accomplish the crime or illegal act. Under the first view, it is immaterial that the method agreed upon by the parties could not possibly accomplish the crime or illegal act, while the latter view regards this fact as material to criminal liability. It is submitted that the first view is to be preferred as the potential of the harm materialising is high as soon as parties agree to commit a crime or illegal act, without them having to agree further on the means to be used to accomplish the crime or illegal act. Additionally, the first view accords with the judicial ruling that it is unnecessary for the co-conspirators to “be equally informed as to the details”.³⁸ Similarly, the Supreme Court of India has stated that “[t]here must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators”.³⁹

20 In relation to conspiracies to do or cause to be done a legal act by illegal means, s 120A expressly requires the agreement to include the method (or means) to be used to accomplish the act. If the means agreed upon cannot possibly accomplish the legal act, it is inconceivable that those means will be illegal.⁴⁰ Consequently, impossibility of the means under s 120A(b) will exculpate the parties to the alleged conspiracy.

B. Evaluating the cases

21 The Bombay High Court decision in *Emperor v Shankaraya Gurushidhayya Hiremath*⁴¹ appears to be the only case where the issue of impossible criminal conspiracies arose in relation to ss 120A and 120B of the Penal Code. The accused were charged with conspiracy to murder by way of witchcraft. In defence, the accused claimed that they had agreed to cause the death of V by means of *bhanumati* (a form of witchcraft which could not possibly kill) and by no other means. Nevertheless, Beaumont CJ held them liable for conspiracy on the following basis:

It is plain that an agreement to commit murder being an agreement to commit an offence, falls within s 120B, and nonetheless so, in my

38 *Nomura Taiji v PP* [1998] 2 SLR 173 at [110] per Yong Pung How CJ.

39 *Yash Pal Mital v State of Punjab* AIR 1977 SC 2433 at [9] per Goswami J.

40 Examples are difficult to imagine due to the wide meaning given to the term “illegal” by s 43 of the Penal Code resulting in s 120A(b) being made virtually redundant.

41 AIR 1940 Bom 365.

opinion, because the means by which the murder is to be perpetrated are not agreed upon, or the means which are agreed upon are such as are not likely to prove, and do not in fact prove, effective. If once there is a conspiracy to commit murder, the case falls within s 120B, the offence under that section being the conspiracy, and not the acts by which the subject matter of the conspiracy is to be carried into effect.⁴²

Hence, Beaumont CJ was subscribing to the first view, described previously,⁴³ of what constitutes an agreement for the purposes of criminal conspiracy.⁴⁴ It is observed that his Lordship went further than what was called for in the case at hand to opine that criminal conspiracy is made out even when the parties had not agreed upon the means to be used to accomplish the crime they had agreed to commit. Be that as it may, Beaumont CJ was correct to have convicted the accused of conspiracy to murder.

22 The House of Lords in *DPP v Nock*⁴⁵ endorsed the second view of an agreement, described previously, which makes liability for criminal conspiracy dependent on the efficacy of the means agreed upon to accomplish the substantive crime. The accused were charged with conspiring to produce a controlled drug, namely, cocaine. They contended that they had agreed to do so by using a particular powder which, unknown to them, was of such a nature as to be impossible to obtain cocaine from it. The court held the accused not liable on the ground that there was no evidence of an agreement in general terms to produce cocaine (if there was such agreement, they would be liable), but only a limited agreement to produce cocaine by one method only which turned out to be impossible to achieve.⁴⁶

23 The criticism against this ruling is that it attaches undue weight to the means used to accomplish the substantive crime of producing cocaine, with the negative result of playing down the blameworthiness of the parties in agreeing to commit the substantive crime. Surely, society would want to deter people from entering into such an agreement

42 *Ibid*, at 366.

43 See para 19.

44 Regrettably, his Lordship's reference in his judgment to *bhanumati* as the "first means" or "first instance" of trying to kill the intended victim, suggests that he was attaching some significance to the method agreed upon by the parties. However, his primary ruling quoted in para 21 of the main text was unequivocal in its declaration that the inefficacy of the means agreed upon was not a bar to liability for criminal conspiracy.

45 [1978] AC 979.

46 *Ibid*, at 998 *per* Lord Scarman.

without making criminal liability dependent on the efficacy of the means agreed upon to produce the cocaine. Attaching weight to the means is also apt to create unduly fine distinctions, as happened in the English Court of Appeal case of *R v Harris*.⁴⁷ The accused were charged with conspiring to produce a controlled drug. They had the correct formula but an ingredient was wrong and they did not know the proper production process. The court held the accused liable and sought to explain *Nock* in the following way:

[In *Nock*] a distinction was drawn between an agreement which is inherently impossible, and therefore, could never give rise to criminal act and, on the other hand, an agreement which was not inherently impossible, although it might turn out to be impractical so far as its fulfilment was concerned by those who were involved in the agreement.⁴⁸

As one commentator has rightly queried, “[a]re *Nock* and this case so readily distinguished on the facts?”⁴⁹

IV. Reforming the law

24 The current law pertaining to impossible attempts is poorly articulated and in a confusing state. The scheme proposed in this article,⁵⁰ if adopted by the courts or legislature, will bring much needed clarity and coherence to this area of the law. A major attraction of the scheme is its insistence on there being a high degree of blameworthiness before a person can be convicted and punished for conduct which cannot possibly accomplish the substantive crime. The attractiveness of the scheme is further enhanced by the fact that it arrives at the same conclusions reached by the judges in the reported cases and hypothetical situations raised therein.

25 The law governing impossible criminal conspiracies requires no revision if the Bombay High Court’s ruling in *Hiremath* was to be followed locally.⁵¹ The ruling declares that the impossibility of accomplishing the crime or illegal act, by the means agreed upon, does not exculpate the parties of liability for criminal conspiracy. However, this ruling does not apply to conspiracies to do or cause to be done a legal act

47 (1979) 69 Cr App R 122.

48 *Ibid*, at 124 *per* Shaw LJ.

49 Gillies, *Criminal Law* (Law Book Co, 4th Ed, 1997), p 709.

50 See para 10.

51 See para 21.

by illegal means. In such cases, the impossibility of those means to accomplish the act will deprive those means of their illegal character.⁵²

26 In essence then, so long as the parties had agreed to commit a crime, an illegal act or a legal act by illegal means, they are liable for criminal conspiracy irrespective of whether it was physically impossible for their conspirational object to be completed by their chosen means of commission. To bring added clarity to the law, legislation could be introduced declaring that a conspirator is still culpable if the reason why the offence was incapable of being committed was due to facts not known to him or her.⁵³ Such a provision would prevent the accused in *Hiremath* and *Nock* from escaping liability for criminal conspiracy. The proposed s 120A(2) in Singapore's Penal Code (Amendment) Bill 2006 goes some way to embody this position. It reads:

A person may be a party to a criminal conspiracy notwithstanding the existence of facts of which he is unaware which make the commission of the illegal act, or the act, which is not illegal, by illegal means, impossible.

However, this provision does not go far enough as it only covers agreements to commit illegal acts or legal acts by illegal means, but not agreements to commit an offence.

⁵² See para 20.

⁵³ For the equivalent rule in respect of cases of attempting the impossible, see condition (3) discussed in para 10.