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Conspiring to do the impossible: The Queen v Barbouttis

Malcolm Barrett

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Commentary on an appeal to be heard against a judgment of the NSW Court of Criminal Appeal (reported in (1995) 37 NSWLR 256)

by Malcolm Barrett
Associate Lecturer, Faculty of Law
James Cook University of North Queensland

Criminal law - application by Crown - alleged conspiracy - whether offence of conspiracy where the object of the agreement is to commit an unlawful act, which unknown to the parties is physically impossible to commit - whether principles in`relation to the effect of physical impossibility on crime of attempt apply to crime of conspiracy - whether DPP v Knock [1978] AC 979 should be followed in Australia.

Headings in this case note:

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1. Introduction

{1} In the decision of *R v Barbouttis* (1995) 37 NSWLR 265 the Court of Criminal Appeal was asked to decide the relevance of impossibility to a charge of criminal conspiracy. The defence of impossibility as it applies to the 'auxiliary' crimes of conspiracy, attempt, and incitement has long been debated. Judges and commentators have developed two principal approaches to the defence of impossibility. The subjective approach states that it is criminal for a person to do an act or enter an agreement with the belief that a substantive offence will be committed. The fact that the substantive offence may be impossible to commit is irrelevant. Impossibility is a defence only if (in the language of conspiracy) the agreement is to do that which is not a crime. For example, if two people agree to commit adultery with the false belief that it is a crime, they cannot be convicted of conspiracy. In contrast, the objective approach states that if two or more people agree to commit a crime that is factually or legally impossible to achieve, they cannot be convicted of conspiracy.

{2} The objective approach came to prominence with the House of Lords decision of *Haughton v Smith* [1975] AC 476. Their Lordships held that factual impossibility is a defence to a charge of criminal attempt. In *DPP v Nock* [1978] AC 979, the House of Lords decided that the objective approach should also be applied to the law of conspiracy. In the 1970s and early 1980s the Australian State courts followed *Haughton v Smith* and applied the objective approach. *Nock* was also approved by a number of State courts and the Federal Court. Since 1987, State courts have refused to follow *Haughton v Smith* and have applied the subjective approach to the law of attempt. In recent decisions some Judges have indicated that the subjective approach should also be applied to the crime of conspiracy. In the decision of *R v Constantinos* [unreported, 31 August 1995 (CCA NSW)], the Court of Criminal Appeal in a joint judgment questioned whether *Nock* represents the common law of New South Wales:

"[I]t has been pointed out that Nock has been trenchantly criticised, and not followed in England ... It is at least doubtful that Nock represents the present law in this State ... ."

{3} In *Barbouttis*, the court was not able to deliver a unanimous decision. Gleeson CJ, dissenting, endorsed the subjective approach, Dunford J endorsed a narrow objective approach and Smart J endorsed a broad objective approach. The approaches adopted by the Court of Criminal Appeal are discussed below. It is submitted that many of the difficulties with the law of impossibility identified by judges and commentators can be resolved by the application of the approach of absolute impossibility, which will be outlined below.

2. Barbouttis: The facts

{4} In *R v Barbouttis* (1995) 37 NSWLR 265, the respondents entered into an agreement to purchase from an undercover police officer fifty boxes of cigarettes at $400 per box, approximately $1300 below the retail price for each box. The police officer represented to the respondents that the cigarettes were stolen. The officer showed the boxes of cigarettes to the respondents and they agreed to take delivery. A sum of money was paid for the goods. In fact the cigarettes had not been stolen. The respondents were charged with conspiring to commit the offence of receiving stolen property in contravention of s 188 of the *Crimes Act* 1900 (NSW). They were granted an order by a District Court judge quashing the indictment. The judge applied the decision of *DPP v Nock* [1978] AC 979 as approved by the New South Wales Court of Criminal Appeal in *R v Kingswell* (1984) 14 A Crim R 211. The court held that the crime of conspiracy is not committed when, unknown to the parties, it would be impossible to accomplish the criminal objective by the course of conduct agreed. As the cigarettes were not stolen, the crime of conspiring to receive stolen property was not committed. The Crown unsuccessfully appealed to the Court of Criminal Appeal. The three approaches adopted by the Judges in *Barbouttis* will now be considered.

3. Subjective approach

{5} On appeal, Gleeson CJ (dissenting) refused to follow the House of Lords decision of *DPP v Nock* [1978] AC 979. His Honour held that the subjective approach should be applied. In *Nock* the defendants had agreed to produce cocaine by extracting it from a substance in their possession that they believed to be a mixture of cocaine and lignocaine. The substance

was in fact lignocaine hydrochloride from which it is impossible to extract cocaine. The defendants were tried and convicted of conspiring to produce a controlled drug in contravention of s 4 of the *Misuse of Drugs Act* 1974. The conviction was appealed on the basis that the limited agreement to produce cocaine from the substance was impossible to complete. Lord Scarman, who delivered the leading judgment, held that the *obiter* of *Haughton v Smith* [1975] AC 476 should also apply to the crime of conspiracy. In *Haughton v Smith* the court formulated a 'steps test': the crime of attempt is not committed when steps are taken, which are thereafter completed without the commission of a crime, or when steps are taken which if completed, would not be criminal. The agreement in *Nock* could not constitute the crime of conspiracy to produce a controlled drug, as in the circumstances the substantive offence was factually impossible to complete.

{6} In *R v Barbouttis* (1995) 37 NSWLR 265, Gleeson CJ also derived assistance from the law of attempts. The Chief Justice cited with approval the House of Lords' decision of *R v Shivpuri* [1987] 1 AC 1. In *Shivpuri*, Lord Bridge of Harwich, stated that:

"I am satisfied on further consideration that the concept of "objective innocence" is incapable of sensible application in relation to the law of criminal attempts. The reason for this is that any attempt to commit an offence which involves "an act which is more than merely preparatory to the commission of the offence" but for any reason fails, so that in the event no offence is committed, must ex hypothesi, from the point of view of the criminal law, be "objectively innocent." What turns what would otherwise, from the point of view of the criminal law be an innocent act into a crime is the intent of the actor to commit an offence. ... These considerations lead me to the conclusion that the distinction sought to be drawn ... between innocent and guilty acts considered "objectively" and independently of the state of mind of the actor cannot be sensibly maintained." (at 21-2)

{7} The Chief Justice noted that *Shivpuri* was followed by the Full Court of the Supreme Court of Victoria in *Britten v Alpogut* [1987] VR 929. In *Britten v Alpogut* the court held that the decision of *Haughton v Smith* did not state the common law of Victoria. Since the decision of *Britten v Alpogut*, Australian Supreme Courts have either declined to follow *Haughton v Smith*, or expressly approved the decision of *Shivpuri* (see for example *R v Lee* (1990) A Crim R 187; *R v English* (1993) 10 WAR 345; 68 A Crim R 96; *R v Prior* (1992) 65 A Crim R 1; *R v Kristo* (1989) 39 A Crim R 86; *Baldock v Barnes* (22 June 1993, unreported); and *R v Mai* (1992) 26 NSWLR 371). Gleeson CJ concluded that the Australian Supreme Courts' rejection of *Haughton v Smith* has impacted upon the persuasive value of *Nock* and *R v Kingswell* (1984) 14 Crim R 211.

{8} Although Gleeson CJ unequivocally rejected the objective approach, His Honour did not answer the criticisms of the subjective approach or analyse its application. In *Haughton v Smith*, Lord Reid stated that the application of the subjective approach to the law of attempts would reverse the role of the *actus reus* and *mens rea*. Where acts committed could not possibly be converted into a crime, people would be punished for their guilty intention alone. Lord Reid stated that:

"The theory is really an attempt to punish people for their guilty intention. ... [S]uch a radical change in the principles of our law should not be introduced in this way [by the courts] even if it were desirable."

{9} In *Barbouttis*, Smart J endorsed the statements of Lord Reid and held that they apply equally to the crime of conspiracy.

{10} A second criticism of the subjective approach is that it produces 'unfair' or 'unjust' results as can be illustrated by the following example. Two people on their return to Australia

from abroad agree to hide a number of gold necklaces in their luggage. They mistakenly believed that the necklaces had been made in Thailand and were thus dutiable. In fact the necklaces were made in Australia and were not dutiable. On the subjective approach the couple could be convicted of conspiring to smuggle (see s 233 *Customs Act* 1901 (Cth)). In contrast, if the couple had been correct and the necklaces had been made in Thailand but unknown to them Thai Gold products had just been removed from the duty list, they could not be convicted of the crime of conspiracy. In both situations the couple intended to do an act that they believed to be a crime, and in both cases they did not come close to the commission of a substantive offence. The legal difference between the two scenarios is that, in the first case, the couple made a mistake of fact, in the second they made a mistake of law (see the example of 'Lady Eldon' in H Gross, *A Theory of Criminal Justice* (1979) at 209).Yet it is difficult to identify any ethical distinction between the two scenarios. It is impossible to differentiate between the two cases on the basis that the subjective approach prevents criminal activity by punishing those with the propensity to commit actual offences. For example, in the second scenario, if the couple were engaged in a business venture to profit from the avoidance of duties, their failure to gain a competitive advantage may have forced them to change products from smuggling gold necklaces, to smuggling some other dutiable piece of jewellery. The subjective approach does not adequately explain why defendants should be punished when they have not come close to the commission of a substantive offence or to the infliction of 'social damage'. It is only when an agreement has a deleterious impact that 'social damage' is inflicted. In contrast, subjectivists such as Professor Williams argue that those who lack the requisite *mens rea* but cause actual 'social damage' should not be punished [see J Temkin, 'Impossible Attempts-Another View' (1976) 39 MLR 55].

{11} The abolition of the objective approach is justified on utilitarian grounds. Gleeson CJ postulates that the objective approach has a deleterious impact on the legitimate 'entrapment' operations of undercover police officers. His Honour stated that:

"In recent years, because drug trafficking has occupied so much of the attention of law enforcement agencies, and because of the methods used by police to detect offenders, this whole issue has taken on considerable practical importance. It is not uncommon for the importation, manufacture, or dealing in illegal drugs to take place under police surveillance, and with the involvement of undercover operatives. Nor is it uncommon for illegal drugs to be intercepted, and for other, harmless, substances to be substituted. Many cases now come before the courts where for example, persons handling what they believed to be heroin were in truth handling a substance such as plaster of Paris ... ." (at 262)

{12} It is settled law that if a person commits a crime he/she is guilty of an offence, even if they were induced to do so by the criminal activities of law enforcement officers (see *Ridgeway v The Queen* (1995) 184 CLR 19 at 28; 78 A Crim R 307 at 311-312). It is submitted, however, that issues of substantive law should not be decided in order to facilitate police involvement in such inducement activities.

4. Narrow objective approach

{13} The subjective and objective approaches are not clearly delineated and tend to overlap. Dunford J endorsed a narrow objective approach but agreed with the Chief Justice that *DPP v Nock* [1978] AC 979 had lost its persuasive authority. Dunford J stated that:

"[I]f the alleged conspiracy had been carried out, no substantive offence would have been committed because the goods had not been stolen even though the accused mistakenly believed they had been, and proof of the stolen character of the goods is fundamental to a conviction under the section: [s 188 of the *Crimes Act* 1900 NSW receiving stolen property] ... It follows that the conspiracy alleged in this case was not an agreement to do an unlawful act because the act agreed to be done, that is, receive the cigarettes, was not an unlawful act nor was it an agreement to do a lawful act by unlawful means: and so it was not, in my view, a criminal conspiracy." (at 278)

{14} The above statements are consistent with the 'legal impossibility' approach adopted by Scott J (dissenting) in *R v English* (1993) 10 WAR 345; 68 A Crim R 96. In *English* the respondent inspected and agreed to purchase a motor vehicle that he mistakenly believed to be stolen. The respondent was charged with attempting to receive a stolen motor vehicle in contravention of s 144 of the *Criminal Code* 1913 (WA). The trial judge held that there was no case to answer. The Crown successfully appealed to the Court of Criminal Appeal. Murray J, with whom Franklyn J agreed, rejected the objective approach and held that impossibility is irrelevant unless a person attempts to commit a 'crime' not known to the law. In contrast, Scott J stated that it is an element of the offence of receiving, that the property be obtained by an act that constitutes an indictable offence. His Honour held that as the motor vehicle was not stolen an element of the offence was absent and therefore it was 'legally impossible' for the respondent to have committed the offence of attempting to receive stolen property. A broad definition of 'legal impossibility' based on the absence of an element of the substantive offence is consistent with the House of Lords decision in *Haughton v Smith* [1975] AC 476 (see B Hogan, 'The Criminal Attempts Act Attempting the Impossible' [1984] Crim LR 584 and P Gillies, *Criminal Law* (3rd ed 1993) at 668, in support of a broad approach to 'legal impossibility'; see G Williams, 'The Lords and Impossible Attempts or *Quis Custodiet Ipsos Custodes*?' (1986) 45 Cambridge LJ 33 against the broad approach).

{15} Although the approach adopted by Dunford J is in application consistent with that adopted by Scott J in *English*, His Honour refused to apply the law of impossibility to the facts of the appeal. Dunford J developed what will be referred to as the 'deeming the impossible possible steps' (DIPS) test. His Honour stated that:

"If the alleged conspirators in *Director of Public Prosecution v Nock* had succeeded in carrying out their agreement to produce cocaine from the mixture they had (which was impossible), they would have committed a substantive criminal offence and similarly, to borrow the example referred to by the Chief Justice, if the two robbers had succeeded in robbing the country branch of the bank (which was impossible because the branch had previously closed down) they also would have committed a substantive criminal offence; but on the other hand, if the appellants in the present case had succeeded in carrying out their agreement by acquiring the cigarettes which were in the back of the truck (which was in fact possible), they would not have committed any substantive criminal offence because the goods were not stolen." (at 279)

{16} According to Dunford J, both the object of the agreement and the steps taken (or those intended to be taken) must be objectively innocent.

{17} The DIPS test is subject to criticism on a number of grounds. First, the decision recognises arbitrary distinctions based on the words used to describe the agreement reached. If the object of the respondents' agreement is described as one to purchase cigarettes as stolen property (which was in fact impossible) the parties to the agreement would have committed the offence of conspiring to receive stolen property. His Honour fails to provide guidance on the classification of agreements: should an agreement to kill X, who is already dead, be treated as an agreement to kill X or as an agreement to kill X's corpse. Though both such agreements are impossible to complete the former classification would render the

conspirators liable to punishment, while the DIPS test does not expressly provide for the latter classification.

{18} Second, it is self-contradictory to suggest that individuals can carry out their agreement if, in fact, the agreement is impossible to perform.

{19} Third, the DIPS test focuses on whether a substantive offence would be committed if certain impossible steps are taken. The approach is inconsistent with the general principles of the law of conspiracy as the commission of the offence is dependent on whether an unlawful agreement is reached, not upon whether steps are taken to complete the substantive crime.

5. Broad objective impossibility approach

{20} Smart J held that there could be no crime of conspiracy despite the respondents' mistaken belief that the specific cigarettes were stolen. It follows from Smart J's approval of the judgment of Lord Reid in *Haughton v Smith* [1975] AC 476 that His Honour endorses a broad objective approach. Smart J stated that:

"Lord Reid could not accept that a person took steps towards committing a crime where there was no crime to commit. He did not regard taking steps in the belief that a crime was going to be committed as sufficient. He was not prepared to regard such steps as going beyond the intent stage although he recognised that the person had a wicked intent and had taken steps designed to result in the commission of a crime. In Lord Reid's opinion acts going nowhere, that is, where no substantive offence could be committed, should not result in or lead to criminal responsibility. For him [Lord Reid] the acts had to be capable of leading to the commission of a crime." (at 272)

{21} Since the decision of *R v Shivpuri* [1987] 1 AC 1, however, most Australian State courts have rejected the objective approach to the law of attempt and have refused or declined to follow *Haughton v Smith*, leading Smart J reluctantly to hold that the law of attempt and conspiracy need not be treated as analogous.

{22} The endorsement of the objective approach is based on the desire to avoid prosecutions in situations when common sense would regard conduct as trivial. Commonly cited examples include: the lustful youth who has sexual intercourse with a girl over sixteen with the belief that she is under that age, the person who takes their own umbrella with the belief that it is someone else's, and the art dealer who sells a painting as an original with the belief that it is a fake, when in fact it is genuine. These examples can be applied to the law of conspiracy with the inclusion of a second person and an agreement. Smart J rejects the argument advanced by the Law Commission (UK) (Report No 102 *Criminal Law, Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement*, 1980) that where trivial agreements are reached, prosecutors will act in the public interest and exercise their discretion not to proceed. His Honour said:

"I interpolate that I would not be content to rely on prosecutional discretion not to prosecute in extreme and exceptional circumstances." (at 275)

{23} Smart J does not clearly define the scope of the impossibility defence. His Honour made no reference to the exceptions to the objective approach. Since the decision of *R v Donnelly* [1970] NZLR 980, the courts consistently have held that impossibility is no defence if caused

by the interference of an outside agency, or because of inadequacy of means (see, for example, *Collingridge v R* (1976) 16 SASR 117; *R v Gulyas* (1985) 2 NSWLR 260; 15 A Crim R 475; *R v Kristo* (1989) 39 A Crim R 371; *Yooyen v R* (1991) 57 A Crim R 226). The objective approach has been criticised because the distinction between factual impossibility and impossibility caused by inadequacy of means is difficult to maintain. For example, in *DPP v Nock* [1978] AC 979 the failure of the defendant to extract cocaine from the specific substance could have come within the inadequacy of the means exception.

{24} Smart J does not answer the criticisms of the objective approach made by judges such as Lord Bridges in *Shivpuri* and Murphy J in *Britten v Alpogut* [1987] VR 929. His Honour fails to explain why a chance event, that renders the conspirators' objective impossible, should provide the accused with a defence. For example, in accordance with the objective approach there is no liability if two people agree to receive stolen property but unknown to the 'conspirators', just prior to their agreement, the stolen goods are detected by police and returned to lawful custody. By contrast if the goods are detected just after the parties reach an agreement they would be liable to be punished.

6. Classification of the Crime of Conspiracy

{25} In the Court of Appeal both Gleeson CJ and Dunford J question the legitimacy of Lord Scarman's premise, in *DPP v Nock* [1978] AC 979, that the crimes of conspiracy and attempt are 'auxiliary' crimes and therefore should be treated alike. As noted above, Smart J albeit reluctantly held that the conclusion of the premise is not correct. The decision of *R v Sew Hoy* [1994] 1 NZLR 257 was referred to by both Gleeson CJ and Dunford J. In *Sew Hoy* the court stated that:

"[T]here is much force in the view that conspiracy is properly to be seen as an act inherently culpable." (at 264)

{26} The charge in *Sew Hoy* was one of conspiracy to defraud revenue. It is prudent that any distinction in the classification of the crime of conspiracy enunciated in *Sew Hoy* be treated with caution. There is good justification for not classifying conspiracy to defraud as an 'auxiliary' offence. At common law there is no general substantive offence of fraud. The crime of conspiracy to defraud, therefore, does not require an intent to commit a substantive crime.

{27} The term 'auxiliary' crime was not defined by Gleeson CJ and Dunford J, nor do their Honours provide an alternative to the classification of the crime of conspiracy with that of attempt. The House of Lords in *Nock* relied on the classification of conspiracy as an 'auxiliary' offence in reaching its decision that the law of impossibility applied equally to conspiracy as it did to attempt. If conspiracy is not to be treated as an 'auxiliary' offence then the law of impossibility, as applied to conspiracy, is left without adequate justification. The rejection of conspiracy as an 'auxiliary' offence requires that the application of impossibility to the law of conspiracy be justified independently of the law of attempts. Conversely, rejection of the defence of impossibility should be justified with limited reference to the law of attempt, which is contrary to the approach adopted by Gleeson CJ and Dunford J.

{28} It is submitted that the term 'auxiliary' crime, also referred to as 'inchoate' crime or 'preliminary' crime, provides a convenient and useful classification of the offences of

conspiracy, attempt and incitement. The offences make punishable conduct that is not an end in itself, but which is culpable because of what is intended to be achieved. 'Auxiliary' crimes require an intention to commit a separate specific crime. The crime of conspiracy is complete upon agreement, but the substantive crime may remain incomplete [*Russell On Crime* (12th ed Vol 1 1964) at 172-173]. The justification for the crime of conspiracy is that it enables the law to intervene and prevent the commission of a substantive offence. It is the inchoate crime intended for completion that makes an agreement culpable. In contrast, as stated above, the court in *Sew Hoy* stated the view, that the crime of conspiracy is inherently culpable (see also I Dennis, 'The Rationale of Criminal Conspiracy'(1977) 93 LQR 39). Such an approach is inconsistent with that adopted by the Model Criminal Code Officers Committee (MCCOC) in its final report titled *General Principles of Criminal Responsibility* (1992). Section 11.5(2)(c) of the *Criminal Code Act* 1995 (Cth) which adopted the recommendations of MCCOC states that:

"(2) For a person to be guilty of conspiracy ...
(c) the person of at least one other party to the agreement must have committed an overt act pursuant to the agreement."

{29} It is clear from s 11.5(2)(c) of the *Criminal Code Act* 1995 (Cth) and MCCOC's final report (at 101) that a simple agreement is not regarded as inherently culpable.

{30} The challenge to the status of conspiracy as an 'auxiliary' crime is justified by reference to the differences between the crime of conspiracy and the crime of attempt. The crime of conspiracy punishes those who enter into an unlawful agreement. The crime of attempt punishes individuals who not only intend to commit a crime, but take steps that are more than preparatory towards the commission of that crime. It is submitted that the differences between the crimes of attempt and conspiracy do not undermine their classification as 'auxiliary' offences. It follows that if an objective approach is to be applied to the crime of conspiracy, the law of attempts as stated in recent Australian decisions will need to be reconsidered (but see GF Orchard, 'Impossibility and the Inchoate Crimes' [1978] NZLJ 403 at 411 for an argument that the crimes of attempt and conspiracy can be classified as 'auxiliary' offences but treated differently for the purpose of the law of impossibility).

7. Terms of the agreement

{31} It is submitted that Lord Scarman's failure to clearly define the test of impossibility has caused the decision of *DPP v Nock* [1978] AC 979 to be misunderstood. His Lordship did not expressly singularise the 'steps test' in its application to the law of conspiracy. Liability for conspiracy is determined not by steps taken, but by the single step of reaching an agreement. It is clear, however, that the House of Lords in *Nock* held that the applicability of the defence of impossibility is determined by the terms of the agreement. Lord Russell of Killowen stated that:

"The important point to note is that the agreement that is said to have been an unlawful conspiracy was not an agreement in general terms to produce cocaine, but an agreement in specific terms to produce cocaine from a particular powder which in fact, however treated, would never yield cocaine. In order to see whether there is a criminal conspiracy it is necessary to consider the whole agreement. The specific limits of the agreement cannot be discarded, leaving a general agreement to produce cocaine, for that would be to find an agreement other than that which was made: and that is not a permissible approach to any agreement, conspiracy or other." (at 993)

{32} In *R v Barbouttis* (1995) 37 NSWLR 256, the Crown alleged that the respondents entered into a specific agreement to purchase particular cigarettes that they mistakenly believed to be stolen. Gleeson CJ rejected the distinction between general and specific agreements on the basis that it simply states the 'motivation theory'. The 'motivation theory' accepts that parties to a conspiracy can be judged objectively if their mistaken belief is incidental and not central to their agreement. For example, if the desire is to obtain specific goods, parties to an agreement should not be punished if they mistakenly believe that the property is stolen. If the desire is to obtain stolen goods, the legal status of the property is central to their conspiracy and the parties should be punished. When the crime is impossible to commit, the motivation of the conspirators determines liability. The Chief Justice rejects the 'motivation theory' for the same reasons that Professor Glanville Williams criticises its application to the law of attempts [see 'The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes*?' (1986) 45 Cambridge LJ 33 at 77-80]. His Honour concluded that:

"I find it impossible to regard the (alleged) belief on the part of the parties to the agreement that the cigarettes were stolen as a merely incidental matter. ... If a person intends to receive goods which he knows or believes are stolen, then he intends to receive stolen goods." (at 266)

{33} The process of identifying the terms of an agreement may reveal the parties' motivations. It is submitted, however, that an approach that emphasises the precise terms of an alleged conspiracy, does not necessitate an enquiry as to the participants' motivations.

{34} It was central to Dunford J's decision that the terms of the agreement were to receive specific. As stated above, the DIPS test makes it difficult to determine which terms should be used to describe an agreement. The broad objective approach adopted by Smart J focuses on whether it is possible to commit the crime. It is, of course, true that the broader the terms of the agreement the more likely it is that a crime could be committed.

8. Absolute impossibility

{35} The Court of Criminal Appeal in *R v Barbouttis* (1995) 37 NSWLR 265 did not consider the developments in the law of impossibility since the decision of *DPP v Nock* [1978] AC 979. The scope of the test applied in Nock was clarified by the decision of *R v Bennett* (1978) 68 Cr App R 168. The English Court of Appeal confined the defence to cases of absolute impossibility. The Court stated that:

"It seems to us that in that case [*DPP v Nock*] the House of Lords was using "impossible" to mean something which at the time of the agreement and at all times thereafter made it physically impossible for the agreement to be carried out in any circumstance or to result in the commission of the criminal offence in question. ... In our opinion, there is a fundamental distinction between an agreement which when made, could never, if carried out, result in the commission of the criminal offence alleged, because the result is physically or legally impossible (*DPP v Nock* (supra) and *Haughton v Smith* (supra)) and an agreement which would, if carried out in accordance with the intention of the parties, result in the commission of the criminal offence alleged ... ." (at 177-178)

{36} The approach of objective absolutism was referred to with approval in *R v Kingswell* (1984) 14 A Crim R 211 and *R v Wilk* (1982) 32 SASR 12 (see also *R v Gulyas* (1985) 2 NSWLR 260 at 263 and *R v English* (1993) 10 WAR 355 at 370-371; 68 A Crim R 96 at 110-111, for the application of absolute impossibility to the law of attempt).

{37} The reasoning that underlines *Nock* can be rationalised by reference to the concept of absolute impossibility as explained in *Bennett*, provided that due consideration is given to the explicit terms of the agreement. It may be absolutely impossible to commit a crime if the terms of the agreement are specific. By contrast, the defence of absolute impossibility will have no application if the terms of an agreement are 'at large': An agreement is at large if it is framed in broad terms, or if a single transaction is merely an example of criminal proclivity or tendency. For example:

1. It is absolutely impossible to commit an offence if the agreement is to receive a specific car that is not stolen. It is irrelevant that the parties to an agreement mistakenly believe that the vehicle is stolen. On the other hand an agreement to receive a stolen car is possible to achieve and the fact that the car produced is not stolen is irrelevant (see the facts of *R v English* (1993) 10 WAR 355; 68 A Crim R 96, for an analogy in the law of attempt).
2. The defence of absolute impossibility would apply to an agreement to import a specific substance with the mistaken belief that it is cocaine. The defence would have no application if the agreement to import the harmless substance is part of a larger enterprise to enter the 'business' of drug importation and supply.
3. It is absolutely impossible to commit an offence if the agreement is to have consensual sexual intercourse with a girl who is over the age of 16 years. It is irrelevant that the parties to the agreement mistakenly believe that the girl was under 16 years (s 66C *Crimes Act* 1900 (NSW)). The defence would not apply if the agreement was to have sex with girls who are under 16 years. The fact that the first and only 'victim' (due to the intervention by police) is over 16 years is irrelevant.
4. It is absolutely impossible to commit an offence if the agreement is to poison a healthy person by giving her/him a glass of water with a small dose of fluoride. It is irrelevant that the parties to the agreement mistakenly believe that a glass of water with small quantities of fluoride can poison. The defence would have no application if the agreement is to poison someone.
5. The defence of absolute impossibility would apply to an agreement to commit adultery. The fact that the parties mistakenly believe that adultery is a crime is irrelevant.

{38} There are significant advantages to an approach based on absolute impossibility. First, the approach is consistent with the general principles of the law of conspiracy. Liability is dependent upon the terms of the agreement. Second, it simplifies the law of impossibility and avoids unnecessary distinctions. It abolishes the need to distinguish between legal and factual mistakes and between general factual impossibility and impossibility caused by inadequacy of means as the only question that has to be answered is whether the agreement is absolutely impossible to complete. As stated above, these distinctions are not easily maintained and in practice can produce arbitrary outcomes. Third, the approach is consistent with the *raison d' être* of the crime of conspiracy. The offence of conspiracy provides for the early intervention by the law to prevent the commission of substantive crimes. The police could continue to collect evidence by surveillance and involvement in undercover operations. As in *Barbouttis*, if the evidence is of a single transaction, the Crown must prove that the terms of the agreement are 'at large'. For example, on a charge of conspiring to receive stolen property, evidence that the quantity of goods involved is substantial and the defendants have established distribution channels may prove that they are in the 'business' of dealing in stolen property. In situations where the police act as an 'agent provocateur', lack of evidence of general criminal intent would entitle the accused to the defence of impossibility. Fourthly,

prosecutions will be avoided in situations where the accused's behaviour can be described as trivial. As Glanville Williams argues, in certain circumstances the offence of receiving stolen property (for example) is not a serious offence (see 'The Lords and Impossible Attempts or *Quis Custodiet Ipsos Custodes*?' (1986) 45 Cambridge LJ 33):

"Buying the occasional stolen article is not a very serious crime, whatever the law says. When the thing is stolen the owner loses it and it passes into the possession of criminals. The owner may not be worse off because someone buys it from the thief. If it turns out that the thing was not stolen or cannot be proved to be, the whole affair becomes too minor to justify a prosecution ... ." (at 39)

{39} The absolute impossibility approach presents some hazards for the prosecution. Evidence that an alleged conspiracy is 'at large' may support a finding that the terms of agreement are not sufficiently certain to constitute a crime. In *R v Reid* (1992) 1 Tas R 149, the respondents entered an agreement to steal money from a club or business premises. They tried to obtain guns and a police radio to aid them in their pursuit. The respondents surveyed two premises to determine their suitability, but no decision was reached as to which would be robbed, or when the crime would be committed. Wright J, who delivered the leading judgment for the Court of Criminal Appeal, stated that to prove the crime of conspiracy it is necessary to show that the parties had 'a conscious understanding of a common design' (*R v Orton* (1922) VLR 469 at 473). Wright J held that the crime of conspiracy was not committed as the agreement was incomplete:

"[T]he deficiencies in the alleged agreement of the conspirators were, in my opinion, plainly fundamental to the offence alleged. Whilst the two respondents had discussed a "short list" of potential victims, there was no agreement as to which, if any would be the actual target of their anticipated criminal activity." (at 158)

{40} Despite its cogency, it must be conceded that the 'absolute' impossibility approach is inconsistent with recent legislative trends. The House of Lords in *R v Shivpuri* [1987] 1 AC 1 held that s 1 of the *Criminal Attempts Act* 1981 (UK) adopts the "subjective" approach. In Victoria the *Crimes (Amendment) Act* 1985 (Vic) reflects the provisions of the *Criminal Attempts Act* 1981 (UK). The Model Criminal Code Officers Committee (MCCOC) in its final report titled *General Principles of Criminal Responsibility* has followed the Victorian approach. Section 11.5(3) of the *Criminal Code Act* 1995 (Cth) which adopted the recommendations of MCCOC states that:

"A person may be found guilty of conspiracy to commit an offence even if:
(a) committing the offence is impossible; ..."

{41} It is submitted that the MCCOC rejection of the defence of impossibility is inconsistent with the committee's general approach. In its final report (titled *General Principles of Criminal Responsibility* at 96-103) the MCCOC stated that it had seriously debated whether the crime of conspiracy should be retained. The majority of MCCOC's recommendations are designed to restrict the application of the crime of conspiracy. It is therefore unusual that in the area of impossibility, the MCCOC has decided to extend liability for the crime of conspiracy.

9. Conclusion

{42} It is possible to find absurdities in the application of the law of impossibility whichever approach is adopted. What is important is that the line is drawn to exclude cases where it would be 'unfair' to prosecute while at the same time covering those cases that should be inculpated (see G. Williams, 'The Lords and Impossible Attempts or *Quis Custodiet Ipsos Custodes*?' (1986) 45 Cambridge LJ 33). The majority in *R v Barbouttis* (1995) 37 NSWLR 256 adopted an objective approach to the offence of conspiracy to receive stolen property. It is not possible, however, to identify the scope of the approach adopted by the court, or to extrapolate its application to different situations, because Smart J and Dunford J embraced substantially different tests.

{43} It has been argued that the preferred approach is one of absolute impossibility, as explained in *R v Bennett* (1978) 68 Cr App R 168, provided that consideration is given to the precise terms of the agreement. It is conceded that the approach of absolute impossibility is not consistent with modern Australian cases on the law of attempts and with recent legislative trends. It is also conceded that in *Barbouttis*, Dunford J rejected the defence of impossibility, and Gleeson CJ rejected any distinction based on breadth of the terms of an agreement. However, the benefits of an approach of absolute impossibility are compelling: it is consistent with the general principles of conspiracy; it avoids difficult to maintain distinctions that have characterised the traditional subjective and objective approaches; it does not unduly infringe upon the undercover operations of the police; and, most importantly, it avoids conviction in situations where ordinary people succumb to the temptation and agree to do an 'illegal' act in circumstances where their agreement is innocuous.